NewsLink Case-notes for May 2024 Prepared 26 April 2024.

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Legal Case-notes May 2024

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Summaries of cases from Thomson Reuter's "Your Environment".

This month we report on six court decisions covering diverse situations associated with subdivision, development and land use activities from around the country:

- Consent order on an appeal against a zoning decision by Waikato District Council
- Sentencing of A H Construction Services Ltd ("AHCS") and its director, A Singh who had pleaded guilty to several charges from land disturbance activities.
- Costs matter concerning an unsuccessful appeal against a granting of resource consent to a party known as the Blacklers for a two-lot subdivision and associated activities.
- A consent order relating to an appeal against a decision of Auckland Council ("the council") to refuse an application for resource consent for a 24-lot subdivision.
- A successful appeal by two individuals against a number of convictions entered against them in the District Court ("DC") for alleged breaches of the RMA 1991.
- A successful application for enforcement orders by a consent holder against Queenstown Lakes District Council ("the council") requiring the council to issue a s224(c) RMA 1991 certificate.

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Hughes Developments Ltd v Waikato District Council [2024] NZEnvC 18

Keywords: consent order; zoning; soil high value

This consent order concerned an appeal against a zoning decision by Waikato District Council ("the council") in the proposed Waikato District Plan ("PDP"). The appellant's land was zoned Rural Zone in the operative district plan and was proposed to be included in the General Residential Zone ("GRZ") in the notified PDP as a natural extension to the existing Tuakau urban area. However, in the decisions version, an independent hearings panel had decided to adopt a submission made by Horticulture New Zealand that the land, which contained high class soils, remain Rural Zone. In its appeal, the appellant sought GRZ zoning for its land. Following discussions, the parties had now reached agreement that it would be appropriate to live zone the land to GRZ. A s 32AA evaluation had been provided by the appellant.

The Court had requested that the parties also address whether the provisions of the National Policy Statement for Highly Productive Land ("NPS-HPL") were relevant to their agreement. The parties submitted, and the Court accepted, that the land was excluded from the definition of "highly productive land" under cl 3.5(7)(b)(i) of the NPS-HPL because it had been "identified for future urban development", having been identified as such in the Tuakau Structure Plan adopted by the council. It was also excluded under cl 3.5(7)(b)(ii) because, having been rezoned from the Rural Zone in the operative plan to GRZ in the notified PDP, it was subject to "a council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle". The Court cited prior authority that a notified PDP was a "council-initiated notified plan change". Pursuant to s 279(1)(b) of the RMA 1991 the Court ordered, by consent, that the planning maps be amended as agreed by the parties. There was no order as to costs.

Decision Date 19.02.2024 - YourEnvironment 14 March 2024
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R v A H Construction Services Ltd (in liq) [2024] NZDC 3837

Keywords: prosecution; earthworks; contaminant; discharge to land; hazardous substance

This was the sentencing of A H Construction Services Ltd ("AHCS") and its director, A Singh ("S"), who had pleaded guilty to several charges from land disturbance activities and the discharge of contaminants at a business/heavy industry-zoned site in Te Papapa. AHCS had been engaged to perform earthworks at the site. Charges had also been filed against three other parties - the site owner, a company alleged to have been managing the site, and a director - but they had pleaded not guilty and had not yet been tried. The prosecutor acknowledged that the culpability of AHCS and S was less than that of the other three defendants yet to be tried, as AHCS and S had been acting under the direction of those co-defendants.

The site was a former landfill that had included material contaminated with asbestos within the scope of the Hazardous Activities and Industries List (HAIL). The site was located in a sediment control protection area, being land within a hundred metres of the coastal marine area, and there was a creek and wetland adjacent to the site. In 2021, Auckland Council ("the council") observed non-compliant earthworks at the site and found that that 30,986
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m2 of land had been disturbed by earthworks, with 29,853 m^2 occurring within the sediment control protection area. Soil contaminated with asbestos had been disturbed. The Court heard that workers on site, users of a nearby cycleway and other members of the public had been exposed to the contaminants, including asbestos. Mangroves had been removed and there was concrete dust polluting a creek. Abatement notices were issued to the other defendants. Subsequently, because the site's sediment controls had been inadequate, a heavy rainfall event in March 2022 led to sediment-laden water flowing from the exposed earthworks over land and to a nearby inlet. For their role in the offending, the present defendants were charged with the following offences relating to unauthorised land use or discharge of contaminants: for AHCS, one charge under s 15(2A) of the RMA 1991, one charge under s 9(1), two charges under s 9(2) and one charge under s 9(3); and for S, one charge under s 15(2A) and one charge under s 9(1).

AHCS and S explained to the council that they had been assured by another defendant that there was no issue with resource consents and had relied on that advice. However, the Court found that they should have double-checked that all necessary resource consents had been obtained and that all required infrastructure works had been put in place. This was especially because in 2008, AHCS and others had been prosecuted for similar earthworks offending at the site. In this case, AHCS and S had been highly careless.
The Court agreed that a global starting penalty was appropriate here given the relationship between AHCS and S. A global penalty of $110,000 was appropriate, to be apportioned $80,000 to AHCS and $30,000 to S. AHCS's penalty was uplifted by five per cent to account for previous offending and discounted by 20 per cent for relatively early guilty pleas. S received discounts of 20 per cent for the guilty pleas, five per cent for good character and a further 10 per cent for remorse, in light of S agreeing to act as a Crown witness with respect to the other defendants yet to be tried. The resulting penalties were divided equally between each defendant's charges. AHCS and S were convicted of all charges. AHCS was fined a total of $68,000 divided equally between five charges and S was fined a total of $19,500 divided equally between two charges. Both defendants were ordered to pay court and solicitor's costs. Ninety per cent of the fines were to be paid to the council.

Decision Date 26.02.2024 – Your Environment 19 March 2024

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Todd v Queenstown Lakes District Council [2023] NZEnvC 266

Keywords: costs

This costs matter concerned an unsuccessful appeal against a granting of resource consent to a party known as the Blacklers for a two-lot subdivision and associated activities at a site in rural Queenstown. The appeal was determined in two stages because of the COVID-19 pandemic; first, the Court issued an interim decision confined to "community-scale" issues, finding that none of those counted against the grant of consent; and second, the Court issued a final decision (determined on the papers) addressing remaining matters and finally confirming the grant of consent (see *Brial v Queenstown Lakes District Council* [2023] NZEnvC 57). While two groups of appellants, the Todds and the Brials, were involved in the first tranche of proceedings, the Todds then withdrew their appeal
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after the interim decision. The Blacklers now sought total costs of $56,913, or 30 per cent of their actual legal and expert costs, arguing that both groups of appellants had made no effort to narrow the issues or suggest changes to the proposal to resolve matters. For the period up to and including the Court's interim decision, the Blacklers claimed to have incurred costs of $189,710, comprising legal costs of $117,184 and expert witness costs of $72,526. For the second decision, they claimed actual costs of just $7,176. Because the Todds had withdrawn before the second decision, the Blacklers sought a slightly higher overall contribution from the Brials.

The Court acknowledged that at first glance, the legal costs appeared high for a two-lot subdivision appeal involving two hearing days. However, the Blacklers had faced a number of complications in order to properly respond to the issues in the appeals. Relevant matters had needed to be tested at both a community and an individual amenity value scale, which fairly led the Blacklers to seek assistance from landscape assessment, traffic, surveying and planning experts. This had also entailed complex legal advice. The matter had also involved new proposed plan provisions where the Court's findings had materially differed from those of the first instance commissioners. The Court concluded that the legal and expert assistance that the Blacklers had sought had been appropriate and proportionate to defend their position.

The Court agreed that there had been an element of a test case involved, particularly as to the relative weighting and intentions of proposed district plan provisions. This had entailed additional costs for all parties. The Court also gave some credit to the Todds and Brials for cooperating and avoiding duplication and wastage. It determined that, globally, the appellants should contribute in the order of 20 per cent of actual costs. This was to be split equally in relation to the first tranche of costs, and the Brials were to bear the burden of the second. The Brials were ordered to pay costs of $20,400, and the Todds were ordered to pay costs of $19,000.

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Silver Hill Ltd v Auckland Council [2023] NZEnvC 269

Keywords: consent order; subdivision

This consent order concerned an appeal against a decision of Auckland Council ("the council") to refuse an application for resource consent for a 24-lot subdivision at Snells Beach and associated works. The council had been concerned about effects on landscape character and amenity. The parties had now filed a consent memorandum outlining their agreement to resolve the appeal. This involved reducing the number of lots and including requirements related to setbacks, hedge planting, vehicular access, colour of roofing materials, location of minor and principal dwellings, and roading. Pursuant to s 279(1)(b) of the RMA 1991 the Court ordered, by consent, that the council grant resource consent subject to the conditions agreed by the parties. There was no order as to costs.

Decision Date 12.12.2023 – Your Environment 23.01.2024

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Page v Greater Wellington Regional Council [2024] NZCA 51

Keywords: Court of Appeal; prosecution; appeal; evidence; wetland

This was a successful appeal by two individuals against a number of convictions entered against them in the District Court ("DC") for alleged breaches of the RMA 1991. The key issue in these proceedings was the strength of evidence relied upon by Greater Wellington Regional Council ("the council") in asserting, to the criminal standard of proof, the existence of a "wetland" or "natural wetland" pursuant to those definitions under the RMA 1991 and the council's proposed Natural Resources Plan ("PNRP").

A Page ("P") and his spouse J Crosbie ("C") (together "the appellants") had been found guilty of 35 charges relating to various activities undertaken at C's property in the Nikau Valley of Paraparaumu. The majority of these charges were premised on the existence of a "natural wetland" or a "significant natural wetland" under the PNRP, while for three charges the requirement was only to prove the existence of a "wetland" as defined in the RMA 1991. P was sentenced to three months' imprisonment and C was fined $118,750. In 2022, their appeal to the High Court ("HC") was unsuccessful (see *Page v Greater Wellington Regional Council* [2022] NZHC 762). The appellants had been unrepresented before the DC and HC and had not called any expert evidence. In these proceedings, they were now represented by counsel. This Court had also granted the appellants leave to admit additional evidence from a senior ecologist and a senior hydrologist, with this Court having concluded that the absence of any expert evidence at trial had raised a real risk of a miscarriage of justice (see the Court's leave decision in *Page v Greater Wellington Regional Council* [2023] NZCA 20). In response, the council also filed further expert evidence, and the experts for both sides were cross-examined before the Court. As a result, this Court now had the benefit of much more comprehensive expert assessments than were available in the DC, where the only relevant expert evidence had been from a senior environmental monitoring officer employed by the council. Of the 35 charges, 29 were now challenged.

The Court found, ultimately, that all of the contested convictions were to be set aside. A decisive issue for a large number of the charges was the council's failure to establish beyond a reasonable doubt the existence of fauna adapted to wet conditions. The Court noted that the definition of "wetland" (in the RMA 1991) and "natural wetland" (in the PNRP) required the council to establish the existence of a natural ecosystem of plants *and* animals adapted to wet conditions. The council had used the so-called "Clarkson Method", a plant-based categorisation tool, to identify the alleged wetlands. It was common ground that no analysis of animal species had been undertaken by the council. In assessing a potential miscarriage of justice, the Court took into account additional evidence that had subsequently been admitted in these proceedings (even if this had allowed the council to "backfill" its prosecution). However, even with this additional evidence, it did not consider that the council had established beyond reasonable doubt the existence of fauna adapted to wet conditions in any of the alleged wetlands, other than in one location known as "Area 2".

Although it was not necessary to consider most of the appellants' alternative arguments, the Court made some observations about other difficulties with the wetlands identification, which reinforced the Court's conclusion that a miscarriage had occurred. The Court considered both the methodology of the Clarkson Method and a US Army Corps of

Engineers Wetlands Delineation Manual on which the Clarkson Method was based. It noted at the outset what it regarded as several limitations inherent in the Clarkson Method. Leaving aside the fauna matter, the Clarkson Method was a vegetation-focused tool that did not always require detailed examination of hydrology and soils. The Court expressed concern about whether that could ever satisfy the criminal standard of proof, and noted that the US Army Corps manual itself acknowledged that a more comprehensive approach was required in the context of pending or likely litigation. Turning to the analysis that had been performed in this case, the Court repeated these general concerns, and also found that the Clarkson Method itself had not always been applied correctly. For example, certain areas had qualified as "atypical" and should therefore have undergone more comprehensive analysis (eg of hydrology and soils). The council's method of plot selection for analysis was also problematic.

Additionally, the Court had doubts as to whether the council had discharged its onus of disproving the application of a "damp gully head" exclusion in the PNRP from the definition of "natural wetland". It noted that this was a problematic exclusion because it was often difficult to define the demarcation between "damp" and "wet" (and damp areas could periodically become wet). On the council's own expert evidence, there could be a wetland dominated by facultative wet plants within an area described, in totality, as a damp gully head and therefore excluded as a "wetland". In the Court's view, this was an unsatisfactory basis for any criminal prosecution.

The Court also considered the appellants' argument that a certain area met the PNRP exclusion for areas "specifically designed, installed and maintained" for water-storage ponds for stock watering or as treatment ponds for stormwater or sediment control. There was some evidence that the pond in question had been constructed for one or both of these purposes, and the key question was whether it had since been "maintained" as such even though the property had not been farmed for some time. The Court found that "to maintain" it for stock watering required only that it did not leak. Although the property had not been actively farmed for over a decade, the Court was not persuaded that the exemption could not apply because stock had not *used* it in that period. If it was maintained in the sense that it continued to hold water on a property which could lawfully be used for farming purposes and to which stock could be introduced at any time, the council would not have disproven the application of the exclusion beyond reasonable doubt. Likewise, to the extent that the pond was designed to attenuate stormwater flows or control sediment discharge, all that was necessary was that the bund remain in place, which had been the case for at least 30 years. For this reason, and because of the Court's concerns about the Clarkson Method used, "Area 2" (for which the presence of fauna had been proven) had also involved a miscarriage of justice. Accordingly, all 29 contested charges were to be set aside and judgments of acquittal were to be entered.

The Court noted a number of sentencing difficulties given that six uncontested convictions still stood. This required analysis of how the DC had approached sentencing for the various offences when it imposed the term of imprisonment (which had now, in fact, already been served) and the fine, and which of the enforcement orders already made against the appellants were still appropriate. Further submissions on the sentencing implications were invited.

Decision Date 11.03.2024 – Your Environment 25.03.2024

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Hensman v Queenstown Lakes District Council [2024] NZEnvC 37

Keywords: subdivision; conditions; access; traffic safety

This was a successful application for enforcement orders by a consent holder against Queenstown Lakes District Council ("the council") requiring the council to issue a s 224(c) RMA 1991 certificate for a subdivision. G, L and P Hensman ("the applicants") had applied for and been granted resource consent for a three-lot subdivision at land in Queenstown. The council had decided that the vehicle crossing to proposed Lot 3 should be constructed as part of this subdivision due to its proximity to a shallow stormwater drain within the road reserve. The application had therefore included provision for a vehicle crossing to Lot 3. The accessway within Lot 3 was also depicted on the application plans and the information recorded that the accessway was compliant with district plan rules. After the grant of consent but prior to works commencing, an engineering approval ("EA") was obtained in accordance with consent conditions. Once the applicants had then completed the engineering works required in the conditions, they applied to the council for certification under s 224(c) that the council had approved the survey plan and that the conditions of the subdivision consent had been complied with to its satisfaction. However, the council refused to provide certification. It advised that certain additional engineering works had to be addressed before the certificate could issue. The appellants now sought an enforcement order requiring the council to issue the certificate, arguing that the council had no basis for requesting the additional works.

The Court firstly confirmed a jurisdictional issue, namely that it had jurisdiction to make an enforcement order against a local authority if necessary to address any breach of an RMA 1991 duty pertaining to the local authority's functions in the administration of resource consents. This had recently been addressed, in principle, in *Northlake Investments Ltd v Queenstown Lakes District Council* [2022] NZEnvC 5. While it was for the council to undertake the factual assessment of whether a consent holder had complied with the consent conditions, it was implicit that the council must act on reasonable grounds when certifying a subdivision under s 224(c) or when refusing to certify. If the Court was satisfied that relevant conditions had been complied with, the certificate under s 224(c) should then issue.
In asserting that additional works were required, the council relied on a "general engineering" condition of consent (Condition 8) that provided, "[a]ll engineering works ... shall be carried out in accordance with the QLDC's policies and standards, being QLDC's Land Development and Subdivision Code of Practice ["SCOP"] ...". The council cited particular SCOP provisions as supporting its requested works. However, the Court found that the engineering works referred to in Condition 8 were necessarily limited to works within the scope of the consent. More specifically, Condition 11 of the consent listed the particular engineering works for which the EA was required after the grant of consent. Relevantly, Condition 19 also stated that the works required to be completed before the issue of the s 224(c) certificate were the specific works listed in Condition 11.

The Court considered whether the reference to the SCOP in Condition 8 meant that the SCOP provisions could have some residual legal effect, as contended by the council. In terms of the EA that had been issued prior to commencement, the Court found that the EA process had not provided any opportunity to revisit conditions or exercise any discretion in relation to aspects of the subdivision evaluated and already approved through the consenting process. The Court also considered which parts of the SCOP had been legally

incorporated into the district plan via pt 3 of sch 1 of the RMA 1991. Several provisions had not been incorporated, but two provisions had been: one addressing steepness (ie gradient), and one that would require the provision of a safety barrier in certain circumstances. However, the Court noted that resource consent had not been required for the accessway, meaning it had not been "authorised" through the consenting process. Because the accessway was beyond the scope of the consent, these SCOP clauses had no application to the certification process under s 224(c). Any non-compliances associated with the constructed accessway would fall to be considered by the council's enforcement armoury under the RMA 1991. (Out of an abundance of caution, the Court addressed the council's argument about steepness as this was a contentious issue. The evidence showed that this had been discussed and resolved in the consent process, and a steeper gradient applied, based on other district plan rules, than the council presently understood to be the case.)

The Court also found that all other relevant conditions required to be complied with had in fact been complied with. While it was for the council to be satisfied that the consent conditions had been met, Condition 8 could not be relied upon to trigger further SCOP provisions not accounted for during the resource consent process. As the council had presented no valid legal or evidential basis for refusing to sign the s 224(c) certificate, the Court ordered pursuant to s 314(1)(b)(i) that the council must sign a certificate. Costs were reserved.

Decision Date 15.03.2024 – Your Environment 05.04.2024

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This month’s cases were selected by Roger Low, rlow@lowcom.co.nz, and Hazim Ali, hazim.ali@aucklandcouncil.govt.nz.

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OTHER NEWS ITEMS

Government to make high-density housing rules optional

Building and Construction, Land, Local Government 29 January 2024 NZ

Newshub reports that the new Government plans to make the Medium-Density Residential Standards (MDRS) optional for all councils. The MDRS rules allow for three homes to be ...

...optional Building and Construction Land Local Government News New Zealand 20240129020000 240128CA-3256 2024-01-27-00:00 240128CA-3256 Government...

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Dunedin council looks at selling company with forecasted debt of $576m

Company and Securities, Local Government, YourEnvironment 20 March 2024 NZ

Stuff reports that the Dunedin City Council is investigating whether or not to sell lines company Aurora Energy, which has a forecasted debt of $576 million by mid-2025. ...

...$576m Company and Securities Local Government YourEnvironment News New Zealand 20240320020000 240319CA-4201 2024-03-18-00:00 240319CA-4201 Dunedin...

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Auckland Council urged to uphold promise to protect golf course

Local Government, YourEnvironment 17 February 2024 NZ

Radio New Zealand reports that a community group on Auckland's Whangaparāoa Peninsula is calling on Auckland Council to protect the Whangaparāoa Peninsula golf course, which ...

...to protect golf course Local Government YourEnvironment News New Zealand 20240217000000 240219CA-1016 2024-02-17-00:00 240219CA-1016 Auckland...

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Canterbury council does U-turn on water diversion after loss of creek's aquatic life

Local Government, YourEnvironment 25 March 2024 NZ

RNZ reports that Canterbury District Council has made a U-Turn decision and is allowing farmers to divert water from O'Shea Creek to Greenstreet Creek, which has dried up ...

...of creek's aquatic life Local Government YourEnvironment News New Zealand 20240325042000 240325CA-8814 2024-03-22-00:00 240325CA-8814 Canterbury...

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[Meridian Energy seeks consent to build massive solar farm in Ruakākā](#)

Local Government, YourEnvironment 28 March 2024 NZ

The New Zealand Herald reports that Meridian Energy has applied to Northland Regional Council for resource consent to build a large solar farm on 200 hectares of land at ...

...solar farm in Ruakākā Local Government YourEnvironment News New Zealand 20240328040000 240328CA-9969 2024-03-27-00:00 240328CA-9969 Meridian...

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[Fisheries (Amateur Fishing) Amendment Regulations 2024 (SL 2024/27)](#)

Legislation and Government, YourEnvironment 1 April 2024 NZ

These regulations, which come into force on 25/04/2024, amend the Fisheries (Amateur Fishing) Regulations 2013 (the principal regulations) mainly— to further regulate amateur ...

...SL 2024/27) Legislation and Government YourEnvironment Legislation New Zealand 20240401195400 240401CA-5321 240401CA-5321 Fisheries (Amateur Fishing) Amendment Regulations 2024...

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[Beehive: Project applications for Fast Track open](#)

Building and Construction, Land, Local Government, YourEnvironment 4 April 2024 NZ

RMA Reform Minister Chris Bishop and Regional Development Minister Shane Jones have announced that applications are now open for projects to be included in the Government's ...

...Building and Construction Land Local Government YourEnvironment News New Zealand 20240404043000 240404CA-3669 2024-04-03-00:00 240404CA-3669 Beehive...

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[Beehive: NZ-NASA research partnerships announced](#)

Commercial, YourEnvironment 4 April 2024 NZ

Science, Innovation and Technology and Space Minister Judith Collins has announced that twelve New Zealand research teams will conduct joint six-month feasibility studies ...

...NZ-NASA research partnerships announced Commercial YourEnvironment News New Zealand 20240404043000 240404CA-3697 2024-04-03-00:00 240404CA-3697 Beehive...

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[Nelson trials kerbside collection of soft plastics](#)

Local Government, YourEnvironment 5 April 2024 NZ

RNZ reports that Nelson is the first region in New Zealand to test kerbside pickup for the recycling of soft plastics. Soft Plastic Recycling Scheme manager Lyn Mayes said the ...

...collection of soft plastics Local Government YourEnvironment News New Zealand 20240405054000 240405CA-8044 2024-04-04-00:00 240405CA-8044 Nelson...

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Environmentalists warn 'Fast Track' legislation could breach free trade agreements

Building and Construction, Commercial, Local Government, YourEnvironment 5 April 2024 NZ

RNZ reports that Forest & Bird says the Government's "Fast Track" legislation to speed up consents and approvals for major projects could put New Zealand in breach of UK and ...

...Building and Construction Commercial Local Government YourEnvironment News New Zealand 20240405020000 240404CA-3900 2024-03-31-00:00 240404CA-3900 Environmentalists...

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3. Beehive: Natural hydrogen resource should be free of Treaty claims entanglement

Land, Local Government, YourEnvironment 8 April 2024 NZ

Natural hydrogen could be a game-changing new source of energy for New Zealand but it is essential it is treated as a critical development that benefits all New Zealanders, ...

...Treaty claims entanglement Land Local Government YourEnvironment News New Zealand 20240408040000 240408CA-2983 2024-04-07-00:00 240408CA-2983 Beehive...

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2. Beehive: Prime Minister launches Government Targets

Criminal, Employment, Family, Land, YourEnvironment 9 April 2024 NZ

Prime Minister Christopher Luxon has launched nine ambitious Government Targets to help improve the lives of New Zealanders. "Our Government has a plan that is focused on ...

...Government Targets Criminal Employment Family Land YourEnvironment News New Zealand 20240409033000 240409CA-6203 2024-04-08-00:00 240409CA-6203 Beehive...

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8. Whanganui proposes to unload $16m in assets to keep rates lower

Local Government, YourEnvironment 10 April 2024 NZ

RNZ reports that the Whanganui District Council is looking to unload $16 million in assets, which could include land, buildings and reserves, in order to hold its rates ...

...to keep rates lower Local Government YourEnvironment News New Zealand 20240410020000 240409CA-6686 2024-04-05-00:00 240409CA-6686 Whanganui...