



Waitakere City Council
Te Taiao o Waitakere

NOTICE OF MEETING

PLANNING AND REGULATORY COMMITTEE

I hereby give notice that a Meeting of the Planning and Regulatory Committee will be held on:-

DATE: **Tuesday, 8 November 2005** **TIME:** **9.30 am**

VENUE: **Civic Centre, 6 Waipareira Avenue, Lincoln, Waitakere City**

to consider the business as set out herein and to take any necessary action connected therewith.

2 November 2005

Audrey Chan
COMMITTEE SECRETARY

Telephone (09) 836 8000 extn 8864

MEMBERSHIP:

Councillors	VS	Neeson, JP (Chairperson)
	RP	Dallow, QPM, JP (Deputy Chairperson)
	DQ	Battersby, JP
	PJ	Booth, OBE
	MFP	Chan, JP
	JM	Clews, QSO, JP
	RI	Clow
	LA	Cooper
	AK	Corban, OBE, JP
	WW	Flaunty, QSM, JP
	DE	Gilmour
	PA	Hulse
	JP	Lawley
	CA	Stone

Mayor, RA Harvey, QSO, JP (ex officio)

(Quorum 5 members)

★★★★★★★★★★

(The reports and recommendations contained in all agendas are reports and recommendations only and are not to be construed, in any way, as Council policy until adopted.)

**AGENDA FOR A MEETING OF THE PLANNING AND REGULATORY COMMITTEE TO BE
HELD IN THE CIVIC CENTRE, 6 WAIPAREIRA AVENUE, LINCOLN, WAITAKERE
CITY, ON TUESDAY, 8 NOVEMBER 2005, COMMENCING AT 9.30 AM.**

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AGENDA FOR A MEETING OF THE PLANNING AND REGULATORY COMMITTEE TO BE HELD IN THE CIVIC CENTRE, 6 WAIPAREIRA AVENUE, LINCOLN, WAITAKERE CITY, ON TUESDAY, 8 NOVEMBER 2005, COMMENCING AT 9.30 AM.

PART A - OPENING OF MEETING

1 APOLOGIES



2 URGENT BUSINESS

Section 46A(7) of the Local Government Official Information and Meetings Act 1987 provides that where an item of business is not on the agenda, it may only be dealt with at the meeting if:

- (i) the Committee by resolution so decides; and
- (ii) the Chairperson has explained at the beginning of the meeting (when open to the public) that the item will be raised for discussion and decision, why the item is not on the agenda, and why it cannot be delayed until a subsequent meeting.

The Committee may make a decision on a matter determined to be urgent.

NOTE: Urgent Business need not be dealt with now and may be delayed until later in the meeting.



3 CONFIRMATION OF MINUTES

Meeting Minutes - Tuesday, 11 October 2005

RECOMMENDATION

That the minutes of the Meeting of the Planning and Regulatory Committee held on Tuesday, 11 October 2005, as circulated including the Public Excluded Minutes, be taken as read and now be confirmed.



4 DEPUTATION

Pursuant to Standing Order 37.1 the Chairperson has agreed to receive a Deputation from Marion and Steve Buckland and supported by Ross and Christine Isles, Julie and Ian Mosheim and Trevor Lees, property owners of 69, 71, 73, 75, 77, 79 and 81 Woodfern Crescent Titirangi.

A1-A23

The deputation is in relation to a zoning change that occurred in 1995 that only came to the property owners' attention in 2004. The property owners are seeking re-identification of their properties from Bush Living Environment to Living 2 Environment. Correspondence from the deputation presenters is attached at pages A1 to A 23.

For the guidance of Councillors, Standing Orders have the following provisions in regard to deputations:

1. Unless the meeting determines otherwise in any particular case, a limit of 10 minutes is placed on a speaker making a presentation, or five minutes each if there are two members of the deputation addressing the meeting.
2. Except with the approval of the local authority or committee, not more than two members of a deputation may address the meeting.
3. After a presentation is received members may put to the deputation any question pertinent to the subject heard, but no member shall express an opinion upon or discuss the subject until the deputation has completed making its submissions and answering questions.
4. The Chairperson may terminate a presentation in progress which is disrespectful or offensive, or where the Chairperson has reason to believe that statements have been made with malice.



PART B - ENVIRONMENTAL MANAGEMENT

5 WOODFERN CRESCENT – REQUESTED CHANGE TO HUMAN ENVIRONMENT

PURPOSE OF THE REPORT

The purpose of this report is to provide the Planning and Regulatory Committee with information and a recommendation relating to a request to change the Human Environment identification of seven properties in Woodfern Crescent, Titirangi.

BACKGROUND

The request has been made by the owners of the properties in question. Those owners are intending to make a presentation in support of their request at the Committee meeting.

The Council was approached by one of the property owners in January 2005 to discuss the Human Environment identification of the seven properties in Woodfern Crescent. These properties are numbered 69, 71, 73, 75, 77, 79, and 81 Woodfern Crescent. The enquiry had been prompted by the receipt of the Council's information about the Waitakere Ranges and Foothills Protection Project, which identifies the seven properties as being within the area that would be subject to the Waitakere Ranges Heritage Area legislation.

The owners did not realise that the seven properties were identified as 'Bush Living Environment' under the District Plan. The properties were previously zoned as 'Residential 2' under the old Waitemata District Scheme, and the owners had assumed that they became 'Living 2' when the current District Plan was notified in 1995. None of the seven property owners had made submissions in opposition to the Bush Living Environment when the opportunity was available to them.

A24-A29

The owners consider that the Council had made an error in 1995 by not individually informing them that the Human Environment identification of their properties was changing. They also believe that the characteristics of their properties are such that they cannot be readily distinguished from the other properties in Woodfern Crescent and, as such, their land should share the same zoning as those other properties. For these reasons, the seven property owners have requested that the Council re-identify their properties from Bush Living Environment to Living 2 Environment. A copy of the owners' letter of 16 September 2005, which sets out their request and the reasons for it, is attached at pages A24 to A29.

STRATEGIC CONTEXT

The Long Term Council Community Plan seeks, as one of five priorities, to ensure that Waitakere City is a model for sustainable development. Within this priority, Council has an objective of ensuring that decisions are life supporting and reflect eco-system capacity and environmental limits. The Long Term Council Community Plan notes that this can be achieved by continuing Green Network and Ranges protection work as key priorities, and by reviewing the District Plan to ensure sustainable options are supported.

The Green Network strategic platform signals the Council's desire to protect and enhance the City's important landforms, landscapes, range of native plants, wildlife and eco-systems.

ISSUES

Woodfern Crescent is located on the fringe of the urban area of the City, north of Titirangi Village. The southern portion of the Crescent is adjacent to and forms part of the edge of the forested Waitakere Ranges. Significant areas of the seven properties are identified as falling within the Managed Natural Area under the District Plan. This identification reflects the quality of the vegetation that exists on those properties.

The description in the 'Rules Introduction' Section of the District Plan states that the Managed Natural Area covers areas which are characterised by significant native vegetation, wildlife habitats and water systems and that the area is also an important landscape feature. While it primarily covers the Waitakere Ranges, it also includes sizeable portions in the rural areas and eastern lowlands. The preamble to the District Plan's Objectives, Policies and Methods describes the Managed Natural Area as land that:

"Includes all areas of significant and outstanding native fauna habitat, and those areas of vegetation that have been identified as significant using the criteria developed by the Council. The management approach recognises the need to provide a level of protection that is compatible with the capacity of the area to absorb impacts. However it also recognises that some settlement may occur. The areas of significant and outstanding fauna habitat and significant vegetation are identified in Part 3.5."

Consequently the Bush Living Environment has been applied to these properties. Bush Living is described in the preamble to the District Plan's Objectives, Policies and Methods as land that:

"Includes those intensively settled areas within the Waitakere Ranges, where natural features dominate, but settlement has substantially fragmented the bush. A partly residential but, nonetheless, "non-urban" character predominates as a result. It incorporates the bush living local area identified in Part 3.7."

The seven properties are currently included within the Waitakere Ranges Heritage Area, the boundary of which follows the Bush Living Environment boundary in this locality. The extent of the Waitakere Ranges Heritage Area is defined in the Waitakere Ranges Heritage Area Bill. This Bill has been approved by the Council, in conjunction with the Auckland Regional Council and Rodney District Council. The Bill is scheduled to be introduced to Parliament before the end of December 2005.

In order to determine whether to accept the property owners' request, the Committee need to consider whether the current Bush Living Environment identification of the properties in question is more (or less) appropriate than the alternative Living 2 Environment that is being suggested.

There are a number of issues that have been raised by the request that should be considered by the Committee in reaching a determination on this matter. These issues are addressed in the following paragraphs:

Process Issues

The property owners consider that they were not adequately informed of the change in the zoning of their land that occurred as part of the District Plan review process, which commenced in 1995.

The consultation process surrounding the District Plan review was extensive, and involved over 200 meetings with residents, landowners and community groups. In addition, letters were sent to every property owner in Waitakere City encouraging them to consider the impact of the proposed District Plan on their property and become a participant in the process if they felt it necessary.

It is considered that the Council more than met its statutory obligations under the Resource Management Act in this regard. It is incumbent on landowners to make their own enquiries regarding the impact of the District Plan on their interests. Given the number of property owners in the City, it would be impractical for the Council to undertake such investigations on behalf of every individual property owner.

In any event, this issue is not relevant to the Committee's task of determining the appropriate zoning for the seven properties. Even if the consultation process was flawed, that should have no bearing on any decision regarding the zoning. The decision needs to be based on the physical characteristics of the land and any existing development.

Rating Issues

The request has alerted Council to the fact that the properties have been rated as if they were in the Living Environment since 1995, as the rating records were never updated with the new zoning information. On discovering this error, Council's rating staff have arranged for the properties to be re-valued on the basis of their current Bush Living Environment identification. This exercise has led to a slight reduction in land value and a consequential adjustment in the rates that are set for each property. It is understood that the property owners will receive a refund of money that has been inadvertently overcharged.

The property owners have suggested that this situation lends support to their contention that the properties should be identified as Living 2 Environment. However, it is considered that this is simply an error in the rating information and is not relevant to determining the most appropriate Human Environment identification for the properties in question. The rating issue is being addressed separately.

Zoning Issues

Documentation supporting the property owners' request suggests that the Bush Living Environment was applied to the properties in error and, if the Committee accepts the request, it would merely be remedying a mistake. This argument is not accepted.

It is apparent from a review of the District Plan's Human Environment and Natural Area maps that the boundary of the Bush Living Environment corresponds to the Managed Natural Area identification on the land. There is a coherent logic for the existing zoning pattern that is clearly more than coincidence. The Bush Living Environment boundary with the Living Environment needs to be determined on a rational basis, and the current boundary has been adopted because it generally coincides with the edge of the Managed Natural Area.

As such, the focus of the Committee's consideration should be on whether the Managed Natural Area has been correctly identified on the subject properties. In order to obtain some information on this issue, the Council's ecologist (Jenny Fuller) has reviewed the extent of the Managed Natural Area in this area. Her conclusion is that the seven properties all contain vegetation that is appropriately identified as Managed Natural Area, and that the Bush Living Environment is the correct Human Environment identification.

It is noted that there do not appear to be significant advantages to the landowners from a re-identification of the land to Living 2 Environment. This is because the Managed Natural Area that applies to the properties would impose development limitations even if the Human Environment were to be changed.

For example, the minimum lot size that can be created by subdivision in the Living 2 Environment is generally 450m². However, where 50% or more of a site falls within the Managed Natural Area (as is the case for all of the seven properties) then the minimum lot size becomes 1000m². As such, only one of the properties in question would be large enough to be subdivided (77 Woodfern Crescent) but that property has already been developed with three residential units and does not retain any residual development potential.

In terms of the redevelopment of existing buildings, the main differences between the development controls of the Bush Living Environment and the Living 2 Environment relate to rules that govern building coverage, and yard setbacks from boundaries. However, the Managed Natural Area would again impose restrictions on the development of the land that would ensure that development outcomes would not differ greatly under the two Human Environments.

Waitakere Ranges Heritage Area

The Waitakere Ranges Heritage Area Bill has progressed to the stage where any plan change that was initiated now would not result in a change to the Heritage Area boundary. Given the nature of the properties in question, it is anticipated that the Bill would have little if any effect on these properties. As a result, there are few or no advantages to the owners to have their properties excluded from the Heritage Area.

RESOURCES

It is possible to initiate a plan change to amend the Bush Living Human Environment identification for the seven properties in Woodfern Crescent. A plan change would be likely to require technical assessments of the seven properties from people with expertise in ecology, landscape and stormwater (and possibly other assessments from other technical disciplines), as the effects of any additional development potential on the seven properties would be an important component to decision making on this matter.

If a plan change was initiated, there is a chance that the proposed plan change could be challenged, possibly all the way to the Environment Court. It is therefore not a given that a plan change would successfully change the Human Environment identification of the seven properties. This is particularly so in light of the contentious nature of current debates surrounding development of land in the Waitakere Ranges and the foothills of the Ranges. If a plan change were contested through the Court, it would require significant resources to support Council's decision in this matter.

The Council does not currently have the resources available to undertake the policy and analysis work required to prepare and progress a plan change through the statutory process. Council staff are largely engaged in progressing plan changes 13-18, related to the Council's Growth and Transportation Integration programme. This is expected to continue on through at least the 2006 calendar year. If the Committee resolved to proceed with a plan change, it may be required to obtain external advice to progress this matter, or there may be a significant delay in progressing the plan change if staff resources are utilised.

If the Council considered that the plan change was not a matter that it would give priority, the seven property owners could progress this matter as a privately initiated plan change. This would then proceed through the statutory process at their cost.

CONCLUSION

The Bush Living Environment identification that applies to the seven Woodfern Crescent properties coincides with the extent of the Managed Natural Area in this location. This provides a coherent basis for the particular Human Environment that has been assigned to the properties in question.

Council's ecologist has reviewed the extent and quality of the Managed Natural Area on the properties and has concluded that they have been correctly identified. As such, it is considered that the Bush Living Environment is the most appropriate Human Environment identification for the seven properties and it should remain unchanged. It is recommended that no further action be taken in respect of the residents' requested plan change.

RECOMMENDATIONS

1. That the Woodfern Crescent – Requested Change to Human Environment report be received.
2. That the seven properties at 69, 71, 73, 75, 77, 79 and 81 Woodfern Crescent, Titirangi remain identified as Bush Living Environment under the District Plan.

Report prepared by: Philip Brown, Group Manager: Planning and Community Services



PART C - REGULATORY / ENFORCEMENT

6 LEGAL UPDATE (AS AT 28 OCTOBER 2005)

INTRODUCTION

The following is a list of legal actions in respect of matters which are currently before the Courts and which are ongoing or have been commenced since the date of the preceding report. The list does not include references to Council's District Plan, minor prosecutions for dogs, swimming pools, health, parking, and litter although advice on any particular such prosecution can be provided to the Planning and Regulatory Committee if it wishes.

ENVIRONMENT COURT

(New) Auckland Regional Council v Waitakere City Council (October 2005)

An appeal by the Auckland Regional Council against a decision of Waitakere City Council to grant consent to a proposed college and associated facilities. The Auckland Regional Council opposed the consent application alleging that granting consent to a new school outside of the Metropolitan Urban Limits ("MUL") would undermine the Auckland Regional Policy Statement, the Metropolitan Urban Limits and would create negative precedent effects. A notice of reply is to be filed shortly.

(New) Denver Holdings Limited & J Baran v Waitakere City Council (October 2005)

An appeal by the applicant (Denver Holdings Limited) against certain conditions imposed on a resource consent for a medium density housing development at 23 Denver Avenue, Sunnyvale. There is a related appeal by Mr J Baran against the Council's decision to grant the consent. Notices of reply will be filed shortly.

(New) R Britten – 19 Church Street, Swanson (October 2005)

An application by the Council for interim and final enforcement orders in respect of a land slip that occurred at the Brittens property in Church Street, Swanson. The Council seeks interim orders requiring the cessation of all vehicular use of the access road that was affected by the slip/instability and prohibiting any earthworks in the vicinity of the slip. We are seeking final orders to require that the Brittens undertake appropriate remedial works to stabilise the affected area and to pay the costs incurred by the Council in its initial remedial operation undertaken in July/August.

The application and supporting evidence has been filed and served and a judicial conference will be held on 1 November 2005. The Brittens have advised, through their lawyer, that vehicular use of the access road has ceased. They are seeking independent engineering advice.

**(Changed) Selak v Waitakere City Council (7 March 2002)
Collett & Nye v Waitakere City Council (8 March 2002)**

Appeals filed by the applicant Mr Selak and his neighbours, Mr Collett and Ms Nye. Both appeals relate to the operation of a go-kart track on Mr Selak's property at Kennedy's Road, Whenuapai. Mr Selak has appealed a condition disallowing use of the track on Sundays and public holidays. Mr Collett and Ms Nye have appealed Council's decision to allow the go-kart track. Mr Selak has put forward a new proposal, involving additional mitigation of the noise impact of the go-kart track, which was considered by all parties at a Court assisted mediation held on 8 June 2005. The parties are preparing consent documentation in accordance with the agreement reached at mediation. The Council has granted consent for a noise mitigation fence. Consent documentation is to be finalised and filed with the Court shortly.

(Unchanged) Abacus Developments Ltd & Mawhinney v Waitakere City Council (February 2000)

This case has been placed in the 'on hold' list by the Environment Court, until the Dilworth structure plan proceedings (Resource Management Act 886/98) has been concluded.

(Changed) Juderon Family Trusts v Waitakere City Council (December 2003)

An appeal against the Council's decision confirming consent conditions regarding financial contributions payable in respect of a proposed subdivision. The parties attended a Court assisted mediation on 7 September 2004 but no resolution was reached. An agreed evidence exchange timetable has been set. The matter has been set down for hearing in the week commencing 21 November 2005.

(Changed) Te Atatu Residents' & Ratepayers' Association Inc v Waitakere City Council (January 2004)

This matter relates to a reference against the Council's decision approving Plan Change 2. It makes changes to the zoning of land in Harbourview on the Te Atatu Peninsula. The Plan changes the Living Environment and Harbourview South Special Area to 'Open Space Environment' and 'Marae Special Area' respectively. A Court assisted mediation took place on 16 July 2004 and 20 October 2004. The Council has recently resolved to proceed with this plan change. Preparation of evidence is underway and a hearing date is to be allocated shortly (likely to be in the week of 5 December 2005).

(Unchanged) I & Z Farac v Waitakere City Council

A site-specific reference has been filed by Mr and Mrs Farac, relating to their property at 172A Don Buck Road, Massey. It seeks to rezone all (or part) of the property as 'Living 2 Environment'. Discussions are to take place on the relief being sought. Settlement discussions are taking place in an attempt to refine the issues in dispute.

(Changed) Auckland Regional Council v Waitakere City Council (February 2005)

This is an appeal by the Auckland Regional Council against the Council's decision granting consent to Shefco Limited to establish a food processing facility at 76-78 State Highway 16. The Auckland Regional Council opposed the consent application alleging that granting consent to an urban manufacturing business would undermine the Auckland Regional Policy Statement, the Metropolitan Urban Limits and would create negative precedent effects.

This appeal was heard on 12 and 13 September 2005. Unusually the Court reached a decision the day after the hearing finished, upholding Council's decision and dismissing the Auckland Regional Council's appeal. The Court has now released its full decision which includes additional conditions of consent which limit opportunities to use the site for other urban activities.

In allowing this proposal the Court has recognised the importance of the Metropolitan Urban Limits and plan change 6 to the Regional Policy Statement. Nevertheless, the restrictions on development outside the Metropolitan Urban Limits are likely to become more stringent.

(Unchanged) Waitakere City Council v Minister of Defence (February 2005)

Council filed a notice of appeal in relation to a proposal by the Ministry of Defence ("Defence") to remove St Mark's Chapel from the Hobsonville Air Base to its Papakura base. The Chapel is listed as a heritage building and is protected under the Waitakere City District Plan ("District Plan"). The Minister of Defence has rejected the Council's recommendation that the Chapel remain at Hobsonville. Defence is of the opinion that the Chapel is to be used by defence personnel and this use is best served at Papakura where the Chapel will be more appropriately preserved.

The Council has also filed an application for a declaration in respect of the ambit of Defence's designation and whether the proposed removal of the chapel is a "public work". The matter was set down to be heard commencing 7 November 2005. A decision is likely to be available sometime next year.

(Unchanged) South Kaipara Nominees Limited v Waitakere City Council (February 2005)

An appeal by the appellant company (director: Peter Mawhinney) in respect of a decision by the Council to decline to grant a certificate of compliance regarding a proposed subdivision at Anzac Valley Road, for want of jurisdiction. The application sought to cancel an amalgamation condition that was imposed under subdivision consent; this could not be described as a permitted activity and accordingly did not meet the preconditions of the Resource Management Act 1991.

On 22 April 2005 the Council filed an application to strike out the appeal on the grounds that there was no jurisdiction to grant the relief sought or any right of appeal in respect of the Council's decision. Mr Mawhinney withdrew his appeal and the Council has been awarded costs of \$5,700. Council has since filed an application to liquidate the Company, was called in the High Court on 10 November 2005.

(Unchanged) T Whimp v Waitakere City Council (April 2005)

An appeal against an abatement notice issued by the Council in respect of a breach of the Transport Environment rules. The appellant was using the carriageway, footpath and grass berm throughout the City for residential purposes. The Council has reported to the Environment Court seeking to withdraw the abatement notice as the offence is no longer taking place.

**(Unchanged) Auckland Regional Council v Waitakere City Council (May 2005)
Waitakere Ranges Protection Society Inc v Waitakere City Council (May 2005)**

An appeal by the Auckland Regional Council and Waitakere Ranges Protection Society Inc ("WRPS") against a decision of the Council to grant consent to a subdivision by M and K Duncan, relating to the property at 46 Christian Road, Swanson. Both Auckland Regional Council and Waitakere Ranges Protection Society Inc oppose the consent on the basis of the density of the proposed subdivision and alleged precedent effect. A judicial conference was held on 5 September 2005 to consider issues including whether these appeals should be heard following resolution of the appeals on the Swanson Structure Plan. The Court has directed that these appeals should be put on hold to await the resolution of the structure plan appeals.

(Changed) South Kaipara Nominees Limited and Others v Waitakere City Council (June 2005)

A further appeal by South Kaipara Nominees Limited/Peter Mawhinney in relation to a refusal by Council to issue Certificates of Compliance for boundary changes to 27 separate Certificates of Title. There are two alternative proposals; (a) to widen access lots of the subdivision and make various other consequential changes to the surrounding lots; and (b) a sequenced series of 10% boundary adjustments. Council has filed a notice of reply to the appeal opposing the relief sought and indicating that such boundary adjustments would require discretionary or non-complying consents. An application to strike out South Kaipara's appeal has been lodged with the Court and a hearing date is scheduled for 14 November 2005. Submissions on behalf on the Council have been lodged and Mr Mawhinney is in the process of responding.

(Unchanged) M and C Brickell, W Ashton and L Schwab v Waitakere City Council (June 2005)

This is an appeal by the applicants M and C Brickell, W Ashton and L Schwab under s 121 of the Resource Management Act 1991 against a decision of the Council to refuse to grant consent to a 7 lot subdivision at 54-56 Christian Road, Swanson. The Auckland Regional Council and Waitakere Ranges Protection Society Inc have lodged applications with the Court in support of the Council as s 274 parties. A judicial conference took place on 5 September 2005 at which time the Court directed that this appeal be put 'on hold' to await the resolution of the Swanson Structure Plan appeals.

HIGH COURT

(Changed) Waste Management v Waitakere City Council, North Shore City Council, Rodney District Council and Christchurch City Council (August 2005)

This is an action for judicial review by Waste Management seeking a declaration that the Local Government Acts 1974 and 2002 do not provide for that part of Councils' newly passed waste bylaws which make provision for imposing levies on waste for the purpose of providing economic incentives and disincentives under section 544 of the Local Government Act 1974. A timetable has been set for the matter. The Court has recently notified the parties that it can hear the matter in February 2006. The matter has been set down to be heard during the week of 13 February 2006. All four Councils have retained Kensington Swan as solicitors and David Kirkpatrick as barrister.

(Changed) Carter Holt Harvey v Waitakere City Council, North Shore City Council and Rodney District Council (August 2005)

This is an action for judicial review by Carter Holt Harvey alleging that the Local Government Acts 1974 and 2002 do not permit a waste bylaw which requires it to be licensed for paper recycling activities where that is a private relationship and to impose a levy on waste. There has been some consolidation of this proceeding with the Waste Management proceeding. The Court has recently notified the parties that it can hear the matter in February 2006. The matter has been set down to be heard during the week of 13 February 2006. All three Councils have retained Kensington Swan as solicitors and David Kirkpatrick as barrister.

(Changed) Waitakere City Council v Peter William Mawhinney (July 2005)

The Council took enforcement action against Mr Mawhinney to require payment in respect of an costs awards. Bankruptcy notices were served on Mr Mawhinney who has applied to have these set aside. The matter was heard on 28 September 2005. Mr Mawhinney was given 21 days to pay \$101,592.30. This includes approximately \$89,000 owed to Waitakere with the remainder being owed to the Auckland Regional Council. Mr Mawhinney was required to pay interest on this amount until paid. Mr Mawhinney paid a bank cheque by the 19 October deadline but there were complications with this which required further directions from the Court. Payment of the full amount and interest was received by the amended deadline of Friday 21 October 2005.

Mr Mawhinney was also served with a bankruptcy notice on 21 October 2005 in relation to \$5,063.16. This is a costs award due to Council for it winning the security for costs application made in relation to Mr Mawhinney's civil damages claim. The notice requires Mr Mawhinney to pay this sum or apply to the Court to set aside the bankruptcy notice by or before 4 November 2005. We will report on the outcome of this matter in the next legal update.

(Unchanged) P W Mawhinney (substituted plaintiff) v Waitakere City Council (February 2002) (Civil Proceedings)

This claim is currently on hold pending the payment of security for Waitakere City Council's costs of \$60,000 ordered by Associated Judge Sargisson on 2 May 2005. Mr Mawhinney must pay the security sum within six months (or no later than 16 November 2005) or Council is able to apply to strike out the claim.

(Unchanged) Waitakere City Council v Estate Homes Limited (28 March 2002) (Ranui Station Road))

An appeal by Council to the High Court (from an Environment Court decision) regarding a decision by Council relating to a requirement to construct and vest Marinich Drive, an arterial road that passes through Estate's subdivision in Ranui Station Road. The appeal was heard before Justice Venning on 29 June 2004. A decision was received from the Court on 30 July 2004 in Council's favour. The decision reversed the decision of the Environment Court. Estate Homes was granted leave to appeal to the Court of Appeal (on two issues, out of an original seven pursued). A hearing took place in the Court of Appeal on 1 September 2005. The Court reserved its decision.

DISTRICT COURT

(New) Graham W Gordon - 159A Scenic Drive, Titirangi (October 2005)

This matter relates to breaches of the Resource Management Act and Building Act. The matter was set down and heard at the Auckland District Court on 7 October 2005. Mr Gordon entered not guilty pleas to all charges and confirmed his election of trial by jury in relation to the Resource Management charges. The matter is set for a pre-depositions hearing on 24 November 2005. In relation to the Building Act charges, a judicial conference is being held on 15 November 2005. Order was made for the Council to file a summary of facts in relation to all charges. It is likely that the Building Act charges will be adjourned pending the outcome of Resource Management Act hearing.

(New) G M and B K Wheeler – 21 Kirby Street, Glendene (October 2005)

Charges laid under the Building Act for unauthorised building work undertaken to remove an existing deck from the second story of the house and replace it with a new 2.4 metre high one. The new deck does not meet the standards of the building code and is considered to be unsafe. The matter is set down for a first call on 16 December 2005.

(New) M F and A S Khan – 18 Patts Avenue, Glendene (October 2005)

Charges were laid under the Building Act for unauthorised building work undertaken to convert and alter the downstairs area of the house into a separate dwelling. The Khan's have admitted to having undertaken the works. The matter is set down for a first call on 16 December 2005.

(Changed) McGuigan Syme Chilcott Limited, R McGuigan, G Chilcott, T Donald, G Pitts, M and J Engle, R Foster, D Owens Limited, D Owens – 71 Riverlea Road, Whenuapai (August 2005)

Charges laid under the Building Act for unauthorised building work undertaken to construct concrete foundations and timber framing as well as failing to stop work after the direction of an authorised officer. A building consent was lodged, but work commenced prior to the consent being granted. The matter was adjourned on 21 October to 16 December.

(Changed) P and D Clark, R Hawkins, R Johnston – 97 Shaw Road, Oratia (August 2005)

Charges laid under the Building Act for unauthorised building work. The nature of the work has been extensive extensions to create new rooms and move kitchen facilities. The matter was adjourned on 21 October to 16 December.

(Unchanged) Restaurant Brands Limited: KFC New Lynn – 3052 Great North Road, New Lynn (June 2005)

The Council filed a notice of prosecution alleging contravention of 7 provisions of the Food Hygiene Regulations and 2 provisions of the Food Safety bylaw. These were filed against Restaurant Brands Limited which is the owner of KFC New Lynn. Restaurant Brands have pleaded guilty to all charges and have asked that their current "A" grade certificate be taken into account as a mitigating factor in the Judge's sentencing decision, which is to be made by a District Court Judge sitting alone in chambers. We are still awaiting a decision.

(Unchanged) G Nicola, P Freeman, A Casey, and Eurovision Building Removals Limited – 4 Bowers Road (June 2005)

Charges laid under the Building Act for unauthorised building work undertaken to construct pile foundations to support a relocated house which was relocated onto the foundations. No building consent was obtained for the construction of the foundation or the relocation. The matter was adjourned called on 23 September. The defendants chose not to enter a plea and sought a further adjournment to clarify the legal positions. The Court granted the adjournment. The matter is set down for a second call on 18 November.

(Unchanged) A Mackinnon – 5 Armour Road, Parau (June 2005)

Charges were laid under the Resource Management Act for the clearance of at least 80 native trees including mānuka, kanuka, kahikatea, mahoe, and cabbage trees from a Protected Natural Area without resource consent. The matter was called on 23 September where the defendant entered a guilty plea. The matter was transferred to the Auckland District Court before an Environment warranted Judge for a call over on 4 November. The matter is yet to be allocated a date for sentencing.

(Unchanged) R and P Chand – 16 Archibald Road, Kelston (June 2005)

Charges laid under the Building Act for unauthorised building work to create a residential unit by converting a downstairs garage, and under the Resource Management Act for the use of the unit in breach of the residential rules of the District Plan. The matter was called on 23 September where the defendant sought a further adjournment to undertake mitigation works. The defendants have now obtained building consent and are removing the unauthorised building works. The matter was transferred to the Auckland District Court before an Environment warranted Judge for a call over on 4 November. The matter is yet to be allocated a date for sentencing.

(Unchanged) Sher Mohammad and Abdul Hafeez – 73 Huia Road, Titirangi (May 2005)

Charges were laid under the Building Act for unauthorised building work (construction of a dwelling without consent) and under the Resource Management Act in respect of District Plan rule breaches relating to unauthorised vegetation clearance, and earthworks. The matter was called on 23 September where no plea was entered by Mr Hafeez and Mr Mohammad was not represented. Mr Hafeez sought a defended hearing for himself and on behalf of Mr Mohammad. The matter is tentatively set down for a two day hearing on 12-13 December with an Environment Judge at the Auckland District Court.

(Unchanged) John Steed – Public Places Bylaw (March 2005)

An application for an order pursuant to section 162 of the Local Government Act 2002, requiring Mr Steed to cease breaching the Council's Public Places bylaw (Bylaw No. 4, Ch 2, cl 233.1(b)). Mr Steed has been living in his caravan on roadsides and road reserves in various locations in the City in breach of the bylaw and has refused to comply with Council officers' requests to cease doing so, has contravened an abatement notice, and is generally causing a nuisance in the locations where he resides in the caravan (e.g. by burning his household rubbish on the roadside and emptying wastewater from the caravan into the stormwater drainage system). Council officers have tried to assist him with alternative accommodation but he refuses to consider such options. The Court has granted an interim order restraining Mr Steed from breaching the bylaw. The final order is to be considered when the matter is next called in January in February 2006 (date yet to be allocated), depending on whether Mr Steed is located before that date.

(Unchanged) D Thompson & Others – 10 Pohutukawa Road, Whenuapai (March 2005)

Charges laid under the Building Act for unauthorised building work undertaken to create two residential units within an existing warehouse building, and under the Resource Management Act for the use of those units in breach of the residential rules of the District Plan. This matter was transferred to the Auckland District Court to be allocated to an Environment Judge, for call over on 4 November 2005.

(Changed) M K Kasprzak – 27 Bedford Street, Te Atatu South (March 2005)

Charges were laid under the Building Act and Resource Management Act in respect of a second minor household unit constructed without the requisite building and resource consents. Mr Kasprzak has entered not guilty pleas and the matter has been set down for a defended hearing on 12 December 2005.

(Unchanged) Lance Olsen – Dovey Place, Massey (February 2004)

Charges were laid against the building contractor who undertook work on five houses without building consent. A pre-trial issue has been raised by Mr Olsen regarding the validity of information as his company has been struck off the register – the Council seeks to have the charges amended so that Mr Olsen is personally liable for the alleged offences. This matter is set down for hearing on 21 November 2005.

(Changed) Contract Sealing Limited, Action Plumbing Gas & Drainage Limited & Others – 547 West Coast Road, Oratia (March 2004)

Charges have been laid alleging unauthorised building works. The defendants have entered not guilty pleas. A defended hearing took place on 2 November 2005.

(Unchanged) I R Stanic – 11 Orchid Place, Henderson (May 2004)

Charges were laid under the Resource Management Act 1991 ("RMA") regarding the contravention of District Plan Rules (as the property is being used to store vehicle wrecks and undertake vehicle repairs, without the requisite resource consent) and for contravention of an abatement notice. Mr Stanic pleaded guilty. A restorative justice conference was held on 13 May 2005, at which time the Council, affected neighbours and Mr Stanic discussed the situation. An agreement was reached that Council would assist the defendant to remove the vehicles from the property and that no further vehicle repair work would be undertaken at the property. The Council will seek an enforcement order to ensure that this occurs. Sentencing was scheduled for 7 June 2005 but Mr Stanic failed to appear. A new date is yet to be set.

(New) WEATHERTIGHTNESS RESOLUTIONS

Kelleway v Insar & Others, Weathertightness Homes Resolution Services 00134, 29 September 2003, (John Green, Adjudicator)

It is not usual practice to report on leaky building matters as part of this report, and Councillors may find some interest in this report.

You may recall that the Kellaway case was the first case that was heard under the Weathertightness Homes Resolution Services Act 2002 by an adjudicator appointed under that Act. In a lengthy decision, which analysed relevant case law extensively, the adjudicator found that the face fixed monolithic cladding to the building was defective and that a major contributor to the leaking problem which resulted was the failure by Council's building inspectors to adequately inspect the work during construction. It was as a consequence of this decision that all local authorities in New Zealand altered their inspection procedures and refused to accept building consent applications for buildings with monolithic cladding unless installed with a cavity. This was the case where the Council was the only potential defendant still available and it was required to pay the full amount of the estimated repair costs. Those costs had been estimated following an inspection of the building but without destructive testing.

A30 There has been an interesting sequel to this decision. Attached at page A30 is a copy of a publication detailing what happened after settlement of the claim. You will see that the cause of leaking was found to be a defective stormwater system, the defect in which was not reasonably discoverable on examination of the building either at the time of its construction or subsequently without destructive testing. The Council's insurers have some time (and before this discovery) been requiring that destructive testing be undertaken as a matter of course in all leaky building claims cases.

RECOMMENDATIONS

That the Legal Update (As At 28 October 2005) be received.

Report prepared by Setareh Masoud-Ansari, Contract Solicitor.

