AHM News

INTRODUCTION

Spring has sprung in the usual way – bouts of sunshine just long enough to instil hope of an early summer before turning on the taps of torrential rain. As daylight savings brings the clocks forward this month it marks an end to winter sports and the beginning of the tourism shoulder season for early-bird travellers.

Jacinda is back in office and (regardless of the external temperatures) things are heating back up in resource management arena.

In this issue we:

- Summarise the key takeaways from the Court of Appeal decision in *RJ Davidson*
- Provide an overview of the National Planning Standards purpose and process
- Update you on the status of the proposed Zero Carbon Bill
- Explain how resource consent costs may be depreciable or deductible
- Outline the recent decision of the Supreme Court concerning the fluoridation of water supplies.

We hope you enjoy the read.

R J DAVIDSON FAMILY TRUST v MARLBOROUGH DISTRICT COUNCIL [2018] NZCA 316

The Court of Appeal's eagerly awaited decision in *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 has recently been released. The decision concerned whether the Environment Court erred in finding that *King Salmon* precluded consideration of Part 2 of the RMA for resource consent applications.

The R J Davidson Family Trust had sought resource consent to establish a 7.37 hectare mussel farm in Beatrix Bay, in Pelorus Sound. The proposed mussel farm was to be located within a King Shag 'Area of Significant Ecological Value' in the Marlborough Environment Plan. The application was declined by the Environment Court because it was inconsistent with provisions in the NZCPS and Marlborough Sounds Resource Management Plan seeking to protect the habitat of King Shags.

The Court of Appeal found that recourse to Part 2 was not precluded by *King Salmon*. The words "subject to Part 2", near the outset and preceding the list of matters to which the consent authority is required to have regard under s 104, clearly show that a consent authority must have regard to the provisions of Part 2 when it is appropriate to do so.

If a plan has been competently prepared under the RMA there may be no need to refer to Part 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to assess an application against Part 2.

However, this decision should not be seen as a return to the "overall broad judgment" approach as such. The Court found that:

> *[82] … **it would be inconsistent with the scheme of the Act to allow regional or district plans to be "rendered ineffective" by general recourse to pt 2 in deciding resource consent applications**, providing the plans have been properly prepared in accordance with pt 2. We do not consider however that King Salmon prevents recourse to pt 2 in the case of applications for resource consent. Its implications in this context are rather that genuine consideration and application of relevant plan considerations may leave little room for pt 2 to influence the outcome.*

The decision emphasises the importance of precision in plan drafting so that the environmental outcomes sought are properly specified. Scope remains for recourse to the purpose and principles of the Act where that is not properly reflected in the relevant plan.

In the result, the Court of Appeal found that the Environment Court's lack of reference to Part 2 was immaterial to the ultimate resource consent decision. So while the Trust was successful on the question of law, its appeal was dismissed.

DRAFT NATIONAL PLANNING STANDARDS

The purpose of the draft National Planning Standards is to improve consistency in plan and policy statement structure, format and content. Minister Parker stated that "the aim is to make plans simpler and more efficient to prepare, and easier to understand and comply with".

All of the draft Standards contain mandatory directions. The only exception is the zone framework component of the Area Specific Matters Standard which contains discretionary directions.

Implementation of the Standards will require councils to redraft their plans and policy statements. Minister Parker has proposed a five-year implementation period for most plans and a further two years for councils (such as Auckland and Canterbury) that have recently completed a major plan review process.

Minister Parker has acknowledged that the cost of each council redrafting their plans to meet the new Standards will be significant but maintains that it "will be vastly exceeded by the cost savings to those who use them."

The Standards were open for public submission from late May until mid-August this year. While no hearings on submissions will be held, the Ministry is obliged to consider the submissions, and then prepare a report and recommendations to the Minister as to how the Standards should be amended.

After considering the report on the submissions, the Minister will determine the final form of the Standards and will give notice in the national Gazette. This notice is required to be given in April 2019 and the Standards will come into effect as from the date of the notice.

ZERO CARBON BILL

Late last year, the Minister for Climate Change, James Shaw, announced proposals for a Zero Carbon Bill that would see New Zealand put a bold new climate change target into law and establish an independent Climate Change Commission.

The Bill would commit New Zealand to becoming 'zero carbon' by 2050 or sooner, set a legally binding pathway to this target, and require the Government to make a plan in support of this target. Its aim would be to ensure that New Zealand is in the best position to adapt to changes in the climate. It would also support New Zealand's commitments under the Paris Agreement.

The Bill draws from the concepts in the United Kingdom's 2008 Climate Change Act. Much like that

Act, this Bill is already receiving bi-partisan support in some key areas even before being introduced. It sets out legally-mandated outcomes and process, without prescribing specific policies and combines long-term clarity on policy direction with flexibility in its delivery. In preparation for the introduction of the Bill, on 17 April this year Minister Shaw announced the membership of an Interim Climate Change Committee, which will begin work on how New Zealand transitions to a net zero emissions economy by 2050.

When the Zero Carbon Bill receives Royal assent, the Interim Committee will be superseded by a (permanent) Climate Change Commission whose two main functions will be: providing expert advice on targets, policies and climate risks; and holding the Government to account.

More than 14,000 submissions were received on the Bill during a six-week consultation period in June and July this year. The government is currently working through the submissions and looking to introduce a draft Bill in late October .

INLAND REVENUE ON RESOURCE CONSENTING COSTS

Inland Revenue has released a draft interpretation statement concerning taxes applicable to the costs of resource consents. Resource consents have been divided into 'environmental consents' and 'land consents' – with different income tax treatments determined by the type of consent, its duration and the type of costs incurred.

'Environmental consents' will generally be granted for a fixed term of 5 to 35 years and are granted in relation to the use of the coastal marine area, the beds of lakes and rivers, water, and the discharge of contaminants. For income tax purposes, these consents can be depreciated using the straight-line method, spreading their costs over the life of the consent. The cost of these consents include expenditure on the application, administrative and legal fees, hearing costs, and costs to prepare an assessment of environmental effects.

'Land consents' will usually be granted for an unlimited period and are related to the use and/or subdivision of land. These consents cannot be directly depreciated. However, they may be deductible or depreciated to the extent that the cost of the consent can be capitalised and added to the cost of an item of depreciable property related to the grant of the consent. This is provided that the depreciable property is not land or a building.

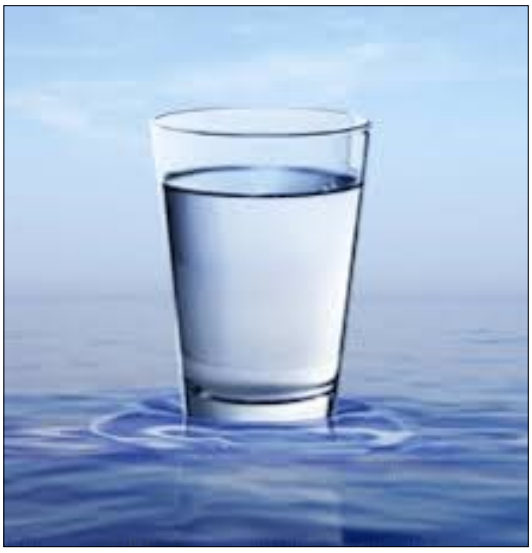
Determination of the appropriate tax treatment is factual and completed on a case by case basis.

SUPREME COURT FLUORIDE DECISION

After lengthy litigation, the Supreme Court has decided that local authorities are able to fluoridate water supplies, and that such fluoridation does not constitute a breach of human rights.

In 2012, following public consultation, South Taranaki District Council made the decision to fluoridate the drinking water supplied to the towns of Patea and Waverly for the purposes of improving poor dental health. New Health challenged the decision of the Council in the High Court, claiming that the act was in breach of a person's right to refuse to undergo medical treatment and outside the powers of local authorities.

After the claim was dismissed by the High Court, New Health exhausted all appeals leading to the Supreme Court which upheld the decision of the High Court and confirmed fluoridation to water to be within the powers of local authorities.



After reviewing various sections of the Local Government Act 2002, the Supreme Court found that Parliament had intended the fluoridation of water by local authorities to be a permitted action when interpreted in light of broader public health concerns.

The Court then examined the right to refuse to undergo medical treatment. It was found that fluoridating the water was both a medical treatment and a forced medical treatment in that it was impractical to avoid for people who lived or worked in the towns. Justice William Young disagreed; he considered the process no more a medical treatment than the iodisation of salt. While he maintained that fluoridated water is not medicine and those administering the water were not medical professionals, the majority of the Court still found the process to be a forced medical treatment.

The right to refuse treatment is subject to limits prescribed by law. Because the Court had already found that the process *was* prescribed by law, it found that the power to fluoridate water was a reasonable limit to the right to refuse medical treatment.

This assessment considered the positive view of fluoridation by the World Health Organisation and the Ministry of Health. It also noted that the process is common in many free and democratic nations. The Court also agreed with the lower courts that the reduction of dental decay was a sufficiently significant reason to allow local authorities to administer fluoride to the drinking water.

Chief Justice Sian Elias opposed this conclusion, finding instead that the Local Government Act 2002 did not allow local authorities to administer any medical treatment, including fluoride, without the consent of those it was administered to. This finding is based on her reluctance to interpret Parliament as authorizing the use of fluoride without more "explicit acknowledgement and empowerment". As a minority dissenting judgment, Elias CJ maintained that 'broader public health concerns' did not allow forced medical treatment.

The majority of the Supreme Court confirmed that there is a clear legal authority for local authorities to fluoridate water supplies and that fluoridation is a justified breach of the right to refuse to undergo medical treatment. So pending any legislative change, local authorities can rest easily knowing that fluoridation of drinking water is a lawful action.

Questions, comments and further information

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

Vicki Morrison-Shaw	PH 09 304 0422	Email vicki.morrison-shaw@ahmlaw.nz
Rowan Ashton	PH 09 304 0425	Email rowan.ashton@ahmlaw.nz
Nicole Buxeda	PH 09 304 0429	Email nicole.buxeda@ahmlaw.nz

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