

RESOURCE MANAGEMENT LAW ASSOCIATION OF NEW ZEALAND INC.

RM NEWSLETTER

OCTOBER 2008

ISSN No. 1178-7791

RMLA CONFERENCE AND AWARDS 2008

For a full version of the 2008 Awards and Conference Reports, plus photos, please see the RMLA website, and the forthcoming edition of November RMJ.

"Southerly Change" was the front that hit Dunedin with some force in September this year. It was the 2008 RMLA Conference and passed through Dunedin leaving in its wake delegates with fresh ideas for implementing environmental law in a changing world, and a new appreciation for Dunedin's southern hospitality. The following awards were presented at the Conference dinner:

Outstanding Person Award 2008

Derek Nolan was awarded the Outstanding Person Award of 2008 for his leadership and commitment to excellence in resource management practice, his support for the RMLA, and his editorship of Environment and resource management law.

Documentation Award 2008

Queenstown Lakes District Council, Arrow Resource Management, Mount Cardrona Station Ltd, Brown & Pemberton Planning Group Ltd and Anderson Lloyd Caudwell, were awarded the documentation award. The award was for the development of the Mount Cardrona Station Plan Change – a joint venture to change the Queenstown Lakes district Plan to enable the community vision for the best practice development of a new alpine village.

Project Award 2008

Transit NZ, Beca, Chapman Tripp and Zomac Planning Solutions Ltd was the project award winner for best practice in the investigation and

reporting stage of the Victoria Park Tunnel Project, Auckland.

In particular the project demonstrates how the Resource Management Act (RMA) consenting processes can accommodate the timeframes, and design innovation and flexibility required for a major infrastructure provision in New Zealand.

Dave Brash, Awards Convenor

REGIONAL NEWS

The following are excerpts from the Annual Reports provided to the 2008 AGM

Auckland – Bal Matheson

The Year of the Rat has seen much scurrying around by the Auckland Branch, with a large number of events organised. Despite the incredibly wet winter (and no mention will be made of Aucklanders feeling like drowned rats), the functions were very successful with excellent turn outs. A quick summary of 2008:

March – an End of Summer Celebration – a totally social event held at the Loaded Hog;

April - a provocative presentation by the Parliamentary Commissioner for the Environment, Dr Jan Wright. This included a discussion about what sort of issues were currently on the PCE's radar, and also provided some useful insights into the recent stance taken on the Biofuel Bill;

May - Salmon Lecture, presented by a distinguished visiting academic, Professor Dinah Shelton of George Washington University, Washington DC, and was entitled "Human Rights and the Environment";

July - presentation by the Minister for the Environment, the Hon Trevor Mallard, on the current environmental challenges and how he felt was the best way to tackle those; and

September - we heard from the Hon Dr Nick Smith about what steps a National government would take in order to try and streamline further the Resource Management Act.

Coming up for the remainder of the year, we are due to hear from Travis Hughes of ERM's Melbourne office about his experience in assessing greenhouse gas emissions as part of an environmental impact assessment, in November Helen Atkins is going to update us on the goings on at the Environmental Risk Management Authority, while in late November we hope to hear from one or more of those directly involved in the recent successful application to install tidal power generators in the Kaipara Harbour. To finish a busy year, we will be hosting our annual end of year Christmas soiree sometime in early to mid December. Details will be finalised shortly.

In addition to the above, the Young RMLA initiative, introduced in last year's report, is also gathering steam. This initiative is targeted at those with about 5 years or less experience. Two specific functions have been held this year - a "Meet the Judiciary" event on 8 April, and more recently on 26 August 2008 a panel discussion on "The Great (Or not so Great) OE". Both were very successful, and provided a useful means of enabling some of our younger practitioners to get together to socialise and discuss matters of particular interest to them, and hopefully encourage more to join and take an active part in the Association. The Auckland Branch does have a Young RMLA rep on the Committee, and so if you do have any suggestions for events then please let me know and I will pass them on.

If you have any ideas for topics, or suggestions for the Auckland Branch, then please feel free to ring me (09) 367 8228 or email bal.matheson@russellmceveagh.com.

Waikato/BOP – Dr Joan Forret

The Waikato Bay of Plenty Branch has had another active year with good support from members who have attended the various

Branch functions. Sincere thanks go to Phil Lang who has chaired the Branch since 2003, ensuring that the enthusiasm for RMLA events and issues has continued and grown within the region. This year Phil expressed a desire to step down from the chair and I have happily inherited a very well organised and efficient branch system.

The Branch is in good heart having an active and interested small organising committee with members including planners, lawyers, and independent commissioners and reflecting both public and private sector interests. It is also encouraging to see members from the Bay of Plenty and South Waikato attending functions and participating in the organising committee.

Since last year's conference, the Branch has hosted all of the RMLA national road show events, with particularly strong attendance at Chris Fowler's presentation, *Defining the Environment* and also to hear the Parliamentary Commissioner for the Environment.

The Branch recently hosted a pre-election seminar attended by Dr Nick Smith (National), Sue Moroney (Labour) and David Clendon (Green). The seminar was held after work so as to facilitate candidate attendance, but that time does not seem to work as well for branch members who seem to prefer the regular breakfast sessions. Those who attended the seminar were rewarded by an interesting presentation from the candidates and an extended opportunity to question Dr Smith and Mr Clendon who had (rather spookily) a considerable number of proposals in common. It was unfortunate that Ms Moroney had to depart early and that other candidates were unable to attend.

Preparation is well under way for the next event which is to be a breakfast meeting to consider the topic *Ministerial Call Ins – The Way of the Future?* This seminar is to be presented by branch members who have been involved in call-ins from a range of perspectives and will fit well with the February national road show planned to cover National Policy Statements, National Environmental Standards, Call Ins and any

legislative changes proposed by the incoming government.

Joan can be contacted at Harkness Henry where her email address is Joan.Forret@harkness.co.nz.

Taranaki – Lauren Wallace

The Taranaki Branch of the RMLA opened its doors in mid-February 2008 and the branch held its first committee meeting on 27 February 2008.

Thanks to the committee members for agreeing to volunteer their time and for the work they have put into establishing the branch and encouraging new membership.

Our first event was held at Govett Quilliam on 17 April 2008 and was well attended with about 50 people present. Thanks to Chris Fowler for his excellent presentation “Defining the Environment” and to Karol Helmink for her assistance in organising the event.

The committee met again in June 2008 to plan the events for the rest of the year. Unfortunately it has proved difficult to get some of the roadshows to Taranaki, however we are currently working with Blair Dickie to get the Local Responses to New Zealand's National Energy Directions seminar here in mid-October. Thanks to Blair for his help with this.

The Taranaki branch is currently working on its next event. If you have any suggestions you would like to put forward, please contact me.

Email: Lauren.Wallace@gqlaw.co.nz
Phone: (06) 768 3700

Wellington – David Allen

It has been a busy year for the Wellington Branch. Thanks to the committee members for all of their hard work.

We have a number of new committee members who have added many new ideas. In particular, thank you to Louise Sinclair for organising our highly successful mid-winter party.

The committee is well placed for a busy year building up to the RMLA's annual conference in Wellington next year - something we are really looking forward to.

As ever, the pre-election seminar was very well attended and enjoyed by all. With the election coming up it will be a busy next 6 months (at least) in Wellington as policy is determined and debated, with environmental issues in the spot light.

David.Allen@buddlefindlay.com

Phone (04) 499 4242

Canterbury – David Collins

Once again I am pleased to report that the Resource Management Law Association continues to be in good heart in Canterbury. We have over 100 paid-up members; about half from the legal profession and the other half providing good representation from practitioners with a range of skills relevant to resource management. I believe we are providing a useful forum for the exchange of ideas and information relevant to resource management in our region.

The Canterbury Committee consists of:

David Collins – Chairperson

Chris Fowler – Secretary

Phil Maw – Treasurer

David Caldwell – Committee member, and

Bob Batty – NZ Planning Institute liaison person.

Over the last year we have again enjoyed the support of the National RMLA organisation in the form of the travelling road shows. These have all been very worthwhile and certainly make life easier for the regional committees.

In addition to the travelling road shows we have hosted two other seminars so far this year. One was a talk from the Christchurch City Council's Investigations and Compliance Manager, Stuart Gray, and the other was a presentation by a team of local acoustic experts. By popular demand our secretary Chris Fowler also represented his seminar on “Defining the Environment Beyond the Application Site” as

circumstances had conspired against his first presentation and not many were able to attend.

Our other function since my last report was our end of year session at the Twisted Hop brewery/bar/restaurant. Not quite as educational as the other sessions.

By the time of the Association's AGM we will also have hosted the pre-election road show and heard some views about resource management from representatives of the political parties. I hope they will not try to fob us off with platitudes – resource management is far too important for that.

I would like to acknowledge and thank the Canterbury Branch Committee, particularly Phil Maw who keeps the books and Chris Fowler who has had to lead several sessions when I have been out of town.

Email: david@collins-consulting.co.nz
Phone: (03) 365 4082

Otago/Southland – Michael Garbett

Committee Members are:
Chairperson - Michael Garbett
Secretary - Chris Thomsen
Treasurer - Maree Baker
Committee Members - Phil Page Ceri Warnock, Nicola Wheen, Robert MakGill.

The clear focus of the Committee this year has been to organise the conference. The Committee co-opted new members to assist to organise the logistics for the conference. The new members have been of immense assistance to the Committee and on behalf of the Branch we thank the Conference Organising Committee for doing a fabulous job. Feedback on the programme has been very encouraging.

We have formally involved Robert MakGill our Queenstown Committee member this year. He has organised the first Queenstown function for many years which was very well supported and is sure to be repeated. The philosophy of the Branch Committee has been to run functions at no or modest cost to members. Our branch bank account has remained steady with a

current balance of \$3,143.

Nelson/Marlborough – Nigel McFadden

Another year has rolled by and we must confess it has not been a busy year for this branch.

Try as we might, securing an increase in membership of the Association has been unsuccessful. We have however a group of stalwarts who keep the flags flying. During the year we have engaged with both the Nelson City Council and with the Iwi Resource Management Komiti. In the case of the Nelson City Council with a view to a meeting being held with the staff of the Council to smooth what had become at times an extremely protracted and difficult resource management process. That meeting has not been had but the whole process at the Nelson City Council has now been reviewed and the Council is establishing a new way of doing things. Hopefully our correspondence with the Council helped towards that. In the case of the Iwi Komiti as was reported in the newsletter we corresponded with a view to assisting with training to enable the Komiti to manage the resource management and other statutory processes. We are yet to hear back formally from Iwi on their needs but once we do so we will follow that up.

Socially we have had a gathering to welcome Environment Court Judge Dwyer on his first session at Nelson, which was well attended, and a joint Christmas function with the New Zealand Planning Institute (Nelson Branch). Discussion has been had between the two bodies with a view to increasing interaction between the two groups and jointly hosting particular events of value to both.

Our finances are sound, we have \$204.16 in the bank account and nothing (presently) on which to spend it.

With the pressures on practitioners generally and the other commitments that they have, we, as is the case of every other branch, will continue to face the challenge of making the association attractive. I am sure that as further road shows come along

there will be amongst the available presentations some which will garner considerable interest and we look forward to that. I said in a previous report that we expected in the future to be knocking on Head Office's door to extract some money out of the fund for advancement of this Association in Nelson/Marlborough. We haven't got to that yet, but I can assure you the time will come.

RECENT CASES

By James Gardner-Hopkins, Associate, and Daniel Sadlier, Solicitor, Russell McVeagh

A QUESTION OF INTEGRITY - AUCKLAND REGIONAL COUNCIL v LIVING EARTH LIMITED

Introduction

The Court of Appeal recently dealt with *Auckland Regional Council v Living Earth Limited* [2008] NZCA 349, which concerned Auckland Regional Council's ("**ARC**") appeal against the grant of resource consent to Living Earth Limited ("**LEL**") for a composting operation on Puketutu Island. Puketutu island is a rural area, lying outside the Metropolitan Urban Limits ("**MUL**") defined in the Auckland Regional Policy Statement ("**RPS**").

LEL's proposal was a non-complying activity. Consent was refused at the Council level, but LEL's appeal to the Environment Court was allowed. The ARC was the only appellant of the Environment Court's decision.

Questions for the Court of Appeal

ARC put three questions of law to the Court of Appeal for determination. These were whether:

- 1) the integrity of regional planning and district planning instruments should be separately evaluated under s 104(1) of the Act;
- 2) it is sufficient to address "themes" rather than specific wording of material provisions of regional planning instruments; and
- 3) the High Court correctly applied the statutory baseline test.

We deal with each of these questions in turn.

1) Integrity of the RPS

The Environment Court's decision dealt in detail with the RPS and in particular the fact that LEL was proposing a industrial activity in a rural location, outside of the MUL. The Environment Court recognised the potential inconsistency, and that the granting of consent might have some precedential effect. It also noted that the integrity of the RPS was relevant and might be affected by grant of consent but concluded that the proposal would not undermine the integrity of the district plan. However, while it made further references to the RPS, it did not provide an express, specific evaluation of the proposal on the "integrity" of the RPS.

ARC argued that the Environment Court was required to undertake separate and express assessments of whether LEL's proposal would undermine the "integrity" of RPS and district plan. The High Court disposed of this argument by reference to the RMA requirement that the district plan must be consistent with the RPS. As no one was suggesting the district plan was inconsistent with the RPS, the High Court concluded that no specific reference to the integrity of the RPS was required.

The Court of Appeal, referring to the High Court's decision in *Rodney District Council v Gould* [2006] NZRMA 217 noted that the word "integrity" (as well as other similar concepts such as "precedent" or "consistent administration of plans") does not appear anywhere in the RMA, but appears to have be formulated by Courts to assist in assessments under s104(1)(d) or s104D(1)(b).

The Court of Appeal also acknowledged that where granting consent would undermine the integrity of the relevant plan, s104D(1)(b) will not usually be satisfied. It found that the Environment Court's took an orthodox approach to a unique proposal involving an industrial activity with a number of rural characteristics, which represented an exception to the general rule that industrial activities should locate within the MUL. It found that:

- Questions of "integrity" are best directed at the planning instrument directly controlling the activity, in this case the district plan. LEL's proposal was not directly controlled by the ARPS, and therefore did not directly derogate from it. In light of this, it is unsurprising the "integrity" of the ARPS was not dealt with separately.
- The inconsistency of the proposal with the ARPS had been identified and allowed for, including any precedent effect. It was not necessary to mention the word "integrity" in its decision.

- There were no specific, material considerations in the ARPS that the Environment Court had not taken into account in its decision.
- The RMA requires that district plans be consistent with the RPS. It was not contended that the district plan was inconsistent with the ARPS.

The decision is likely to be welcomed by planners, whose statutory assessments in respect of non-complying activities could potentially be reduced where there is no inconsistency between district plans and regional policy statements.

2) The use of themes

The Environment Court had identified the important themes of the regional and district instruments rather than setting all allegedly relevant sections of the ARPS out in full.

The Court of Appeal upheld the High Court in finding that, while this thematic approach necessarily provides no more than a summary of the relevant planning documents, there can be no suggestion that it was in any respect materially in error. Indeed it held that dealing with planning instruments on a thematic basis was entirely sensible and desirable. Given the ballooning numbers of objectives and policies in many plans this approach may be widely welcomed.

3) The permitted baseline

In assessing the effects of LEL's proposal, the Environment Court chose to apply the permitted baseline assessment in s104(2). It compared the potential effects associated with the proposal (primarily odour, noise, earthworks) with activities permitted on the site, such as pig-keeping etc. In doing so it recognised that the effects of the proposal would not be identical in terms of intensity, frequency, duration and character. It found, however, that this would be the case in almost any application of the permitted baseline and disregarded noise, odour and earthworks effects of the proposal.

The ARC primarily challenged the Environment Court's decision to disregard adverse effects that are not "the same as" permitted effects. In the High Court, Frater J referred to the definition of "effect" as being defined by what it includes rather than what it is. It held that questions of scale, intensity, duration and frequency were irrelevant. As long as a reasonable basis for

comparison was established, the baseline could be applied.

The Court of Appeal upheld the decisions of the lower Courts. It noted that the Environment Court did not expressly justify its conclusion that differences in intensity, frequency, duration and character were not controlling considerations. In deciding that there was no error of law, however, it concluded that a precise correspondence between permitted effects and the effects of the proposal was not required. As an example, it said that if the annoyance caused by odour emitted from a permitted pig-keeping operation were broadly similar to that of the composting operation, it was open to the Court to disregard the latter effects.

This new gloss on the permitted baseline provides for the pragmatic application of the permitted baseline which seems more consistent with its purpose. While issues of intensity, frequency, duration and character will continue to be relevant, overly technical arguments about different characteristics of an effect can be avoided, provided that a broad similarity between effects can be shown.

More recent cases will follow in the RMLA Journal.

FORTHCOMING EVENTS

CONTINUING PROFESSIONAL DEVELOPMENT

Please see the RMLA Website (www.rmla.org.nz) for all Forthcoming and Future Events – including details of CPD qualifying events.

CHANGE OF ADDRESS?	
To: RMLA, C/- Karol Helmink, 4 Shaw Way, Hillsborough, Auckland	
Please note my new contact details as follows:	
Name:	_____
Firm:	_____
Address:	_____

Ph:	Fax: _____
Email:	_____