Mischief mismanaged? Auckland Council's proposed remedy to its incorrect application of the Auckland Unitary Plan

Over the last couple of days, the media has been covering what has been dubbed Auckland Council's "botch-up" whereby some 430 consents were granted by the Council for works on properties located within the Single House Zone (*SHZ*) and Special Character Areas Overlay (*SCA Overlay*) in accordance with what the Environment Court has held to be an incorrect application of the Auckland Unitary Plan (*AUP*). Reports state that the Council is now requiring these consent holders to cease works and apply for replacement consents, to be paid for, and assessed by, Council in accordance with the correct application of the AUP as determined by the Environment Court. For the reasons set out below, we consider that the Council's proposed solution, as reported, may be problematic from a legal perspective.

Origin of Council's current action

The Council's current action has been triggered by a series of three decisions issued by the Environment Court between December 2017 and March this year in the case of *Auckland Council v Budden*. Auckland Council sought declarations from the Environment Court confirming that the way it had been applying the AUP rules was correct. In that regard, where restricted discretionary consent was required for works on a property located within both the SHZ and SCA Overlay, the Council had been assessing the consent application against the Overlay provisions only, as if they replaced the SHZ standards. The Environment Court held that this approach was incorrect, declaring that:

Where a proposed activity:

1. *is on a site located within both the Residential – Single House zone ("SHZ") and the Special Character Areas Overlay – Residential ("SCAR") of the partly operative Auckland Unitary Plan ("AUP"); and*
2. *is classed as a restricted discretionary activity either under Activity Table*

D18.4.1 or, due to its non-compliance with a SHZ or SCAR development standard, under Rule C1.9(2) –

then ***the relevant SHZ, SCAR and General Rules (and any relevant objectives and policies) apply****, in the processing and determination of any resource consent application for the proposed activity,* ***without the SCAR rules prevailing over or cancelling out other rules****.*

Status of consents granted

While Council has now changed its approach to assessing applications for restricted discretionary activities in both the SHZ and SCA Overlay so that it considers both sets of standards, it is apparent that some 430 consents were granted under its previous, now deemed to be incorrect, application of the AUP. Importantly however, as a matter of law, **the decision of the Environment Court did not overturn these consents**. It is a general principle of administrative law that all things are presumed to be correctly done. This presumption of validity provides that a decision should be treated as valid unless set aside by a court of competent jurisdiction.

Council's proposed remedy

There is no authority for the Council to require consent holders to cease the exercise of their resource consents where such consents have not been overturned or found to be invalid. While the decisions made by the Council, in accordance with its incorrect application of the AUP, are open to challenge by judicial review (for example, by aggrieved neighbours or community groups), unless and until a determination on them is made, consent holders are entitled to exercise their consent. While it is pragmatic of the Council to reduce both its risk (as the consent authority that granted the consents in accordance with an incorrect application of the AUP) and the consent holder's risk (as the holder of a consent granted using an incorrect approach), by requesting consent holders apply for new consents, we do not consider that there is any authority for the Council to require consent holders to do so, or to require them to stop works while their replacement consent application is determined.

If a consent holder does not apply for a replacement consent, they can continue to rely on their existing consent, recognising that there is the potential for it to be challenged on judicial review on the basis of the Environment Court's declaration. Even on a successful judicial review on a point of law, practically the consent holder may not be required to alter/remove its consented works as, in our experience, the Courts are less likely to meddle in granted consents where construction has been completed (depending of course on the scale of alterations/development undertaken in accordance with the consent).

The Auckland Council has indicated that consent holders should seek their own advice and we concur with that, however we accept it is somewhat inequitable to require that of consent holders who have relied on Auckland Council getting it right in the first place. We expect to hear much more about this matter in the weeks to come.