The devil in the details: planning provisions and their importance for infrastructure

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INTRODUCTION

Recent case law has emphasised the importance that specific wording of planning provisions has for delivering infrastructure projects. *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390 and *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201 are both recent cases from the High Court that deal with plan interpretation and environmental bottom lines in the context of consenting large infrastructure projects (respectively, for roading and transmission lines in these cases). While both are based on different planning frameworks, the contrasting outcomes illustrate the challenges to obtain consent for major infrastructure and reinforces the need for careful crafting of planning provisions – the devil in the detail really does matter. This case note will explore the two cases and highlight some of the key issues that should be considered for infrastructure projects or plan review processes.

DECISION ON THE EAST WEST LINK

Waka Kotahi New Zealand Transport Agency lodged a notice of requirement for a designation and applications for resource consent to construct, operate and maintain a new four-lane arterial road to connect State Highway 20 in Onehunga with State Highway 1 in Penrose/Mt Wellington, Auckland – commonly known as the East West Link project (EWL). An independent Board of Inquiry (Board) was appointed to preside over the decision making and ultimately approved the notice of requirement and resource consents subject to certain modifications and conditions. A number of appeals on points of law were lodged by parties including by Forest and Bird and Ngāti Whātua Ōrākei Whai Maia Ltd that are a focus in this article.

In March 2021, the High Court dismissed the two appeals by Forest and Bird and Ngāti Whātua Ōrākei Whai Maia Ltd relating to the Board's decision. The appellants had argued that the Board had erred in law in determining to approve the EWL because it:

- should not have considered the EWL on its merits because it was contrary to the objectives and policies of the Auckland Unitary Plan (Operative in Part) (AUP) – some of which created mandatory

environmental bottom lines – and therefore did not meet the non-complying threshold test in s 104C(1)(b) of the Resource Management Act 1991 (RMA); and

- had failed to have (particular) regard to the New Zealand Coastal Policy Statement (NZCPS).

Non-complying threshold test

The parties agreed the meaning of contrary is to be "… opposed in nature, different to or opposite… repugnant and antagonistic" in terms of *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 (HC) at [11]. But they diverged on whether the decision of the Supreme Court in *Environment Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 changed the approach to the non-complying threshold test in existing Court of Appeal case law – which required "a fair appraisal of the objectives and policies read as a whole" when determining whether an activity is contrary to a plan for the purposes of the non-complying threshold test. Forest and Bird argued that *EDS v King Salmon* changed this approach given the Supreme Court's warning at [131] against "the danger in the 'overall judgment' approach" by appraising the objectives and policies of the relevant plan as a whole, rather than attempting to reconcile them.

The High Court found that *EDS v King Salmon* did not require a substantively different approach to the non-complying threshold test. Powell J specified at [30] that "the relevant plan provisions must all be comprehensively and, where possible, appropriately reconciled." An analysis of the relevant objectives and policies of the AUP was undertaken and Powell J concluded at [69] that the infrastructure chapter in the AUP clearly signalled that even where infrastructure projects, like the EWL, has adverse effects that are more than minor they cannot be by definition contrary to the objectives and policies of the AUP. This is because the infrastructure chapter in the AUP contemplates the approval of significant infrastructure when other activities giving rise to more than minor adverse effects would instead be precluded as contrary to the objectives and policies of the AUP. This ground of appeal therefore failed.

NZCPS

Relating to the NZCPS part of the appeal, counsel for the appellants considered that the Board had applied the wrong legal test by taking a "particularisation" approach to assessment of the relevant polices in the NZCPS – in that the Board did not independently assess the EWL against the relevant provisions of the NZCPS and instead focussed on the coastal provisions of the AUP.

The High Court acknowledged that the NZCPS was not required to be "given effect to" (as is the case for plan changes) – the Board under ss 104 and 171 of the RMA only needed to "have (particular) regard to" the NZCPS. The Court considered that the Board had particular regard to the NZCPS in this instance. In reaching this view, at [84], the Court considered the Board did not just assume that the AUP had "given effect to" the NZCPS. The Board instead considered the relevant parts of the NZCPS and the AUP and to the extent there were differences, preferred the formulation in the AUP.

DECISION ON TRANSMISSION LINES IN TAURANGA

In order to maintain the supply of electricity from the National Grid to Mount Maunganui and Papamoa, Transpower New Zealand Limited (Transpower) applied for resource consents (including under the National Policy Statement for Electricity Transmission (NPSET)) from the Tauranga City Council and Bay of Plenty Regional Council to replace and realign an existing 110kV electricity transmission line traversing the Tauranga Harbour at Rangataua Bay. This included placing a new pole in front of the Maungatapu Marae. These consents were granted and were appealed by the Tauranga Environmental Protection Society (TEPS) to the Environment Court – which confirmed the grant of resource consents. TEPS then appealed the Environment Court's decision to the High Court on several points of law which, as summarised in the High Court decision, related to whether the Environment Court had erred in:

- bundling the effects of removing transmission lines and constructing new lines together;
- its findings on adverse cultural effects of the application to Ngāti Hē;
- its approach to assessing the application "subject to Part 2" of the RMA and whether it applied an "overall judgment" approach to the proposal;

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- interpreting and applying the relevant planning instruments; and
- its assessment of alternatives to the proposal.

In May 2021, the High Court upheld the TEPS appeal against the Environment Court's decision to confirm the grant of resource consents to Transpower. Overall, the High Court found that the Environment Court had not erred in law when undertaking a bundled approach to effects (as removing old infrastructure and constructing new infrastructure is integrally related) but found that the Environment Court had erred in law for the other four grounds described above. On the Court's approach, the central issue was the Court's assessment of significant adverse cultural effects, which had cascading consequences on the other grounds of appeal as we describe below.

Cultural effects

The Environment Court found that Transpower's proposed realignment did not have cumulative adverse cultural effects on Ngāti Hē. On appeal, Palmer J found that the Environment Court's conclusion was contradictory to the evidence before it – where Ngāti Hē strongly favoured the status quo over any removal and realignment of the lines. Palmer J determined that the "Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē. But when the considered, consistent and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Maori values of the [Outstanding Natural Features and Landscape], it is not open to the Court to decide it would not". The High Court found that the Environment Court's conclusion on cumulative adverse cultural effects was so unsupportable that it had erred in law in finding otherwise. This finding on cultural values was highly relevant to the other grounds of appeal.

Part 2 and "overall judgment" approach

As readers will be familiar, *RJ Davidson Family Trust v Marlborough District Council* confirmed that in determining resource consent applications under s 104, decision-makers must have regard to pt 2 when it is appropriate or necessary to do so (e.g. where the relevant plan(s) have not been competently prepared). With reference to *RJ Davidson*, the Environment Court considered that the Bay of Plenty Regional Coastal Environment Plan (RCEP) "is comprehensive, has been tested through hearing and appeal processes and provides a clear policy framework and consenting pathway for these applications." The Environment Court therefore focussed on the relevant policies of the RCEP and did not specifically consider pt 2.

On this point of appeal, and applying *EDS v King Salmon* and *RJ Davidson*, Palmer J found that higher order planning instruments and pt 2 should be referred to if careful purposive interpretation and application of the relevant policies requires that. In this instance, the High Court considered the Environment Court should have carefully interpreted the relevant planning provisions and then had recourse to higher order planning instruments, including the NZCPS and pt 2, where the text of the planning provisions was insufficient to determine the proposal before the Court – as the Environment Court had found the provisions insufficient (given a number of competing concerns). Further, the High Court found the Environment Court had effectively made an overall judgement approach in reaching its decision on the proposal as it determined that the proposal was "more appropriate overall" than the status quo. The High Court considered the Environment Court's approach was an error of law. However, whether this had specific bearing on the appeal turned on the Environment Court's interpretation of the relevant planning instruments.

Interpretation of planning instruments

The High Court did not agree with the Environment Court that the NZCPS and NPSET conflict in their application to this proposal. The Court considered the RCEP (and Tauranga City Plan) gives effect to the NZCPS and NPSET and appropriately reconciles them. However, Palmer J considered the Environment Court did not sufficiently analyse or engage with the meaning of the provisions of the planning framework or apply them to the proposal – he considered the Environment Court needed to do this and interpret the provisions in light of the higher order planning instruments (including the NZCPS, NPSET and pt 2).

Given the findings on cultural effects, a number of provisions were engaged in the relevant planning documents which the Court considered could create cultural bottom lines – for instance, a policy required adverse effects on an "area of spiritual, historical or cultural significance to tāngata whenua" to be avoided "where practicable". Other policies required avoidance of certain adverse cultural effects where "practicable, practical, or possible". Whether these policies were engaged depended on whether the "practicable,

practical, or possible" thresholds were met – i.e. if there is another practicable, practical or possible alternative then the avoidance policies would create bottom lines and the proposal must not proceed. This tied directly into the assessment of alternatives for the proposal.

Assessment of alternatives

Related to the above, the High Court considered that alternatives were legally required to be examined by the Environment Court given the wording of specific policies in the planning framework requiring consideration of whether it is "practicable" and "possible" to avoid adverse effects and whether alternative locations are "practical". The High Court determined that the Environment Court had to satisfy itself that the alternatives are not "practicable, practical and possible" in order to consider granting consent for the proposal. Palmer J considered the Environment Court had not considered the alternatives with the specific planning framework in mind and misdirected itself that it was a matter of preferring the proposal to the status quo. The High Court found this constituted an error of law.

In further discussing the assessment of "practicable, practical and possible", the High Court considered that the cost of network infrastructure is relevant to consideration of "practicability or practicality" (as the cost is eventually felt by all electricity consumers and the Crown). But whether the cost is too high to be practicable or practical is a matter of fact and degree to be assessed in the circumstances – particularly given the inherent difficulties putting a price on culture. However, for whether it was "possible" to avoid adverse effects on values and attributes of the Outstanding Natural Features and Landscape, Palmer J considered cost would not come within the analysis of this planning provision in this instance – as the plain meaning of possible suggests that if an alternative is technically feasible it is possible.

The High Court also considered the Environment Court should have focussed on the alternatives for where the adverse effects occurred (i.e. at the pole to be placed in front of the Marae) – specifically, whether the pole could have been placed in a location which did not have those adverse cultural effects but did not have the cost implications of the alternatives that Transpower considered. This did not occur in the Environment Court's decision.

THE DEVIL IN THE DETAILS

These two cases emphasise the importance of the language used in any planning framework. A key theme emerging from the Supreme Court's decision in *EDS v King Salmon* was that plans should "say what they mean and mean what they say". These cases demonstrate the different outcomes that those subtle differences of language can make for resource consent or notice of requirement applications.

Both cases have since been appealed to higher courts. These appeals will likely have a number of key implications for environment and planning case law in New Zealand and may also provide interesting insight for the RMA reform currently underway.