IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-234
CIV-2018-404-236
[2021] NZHC 390

IN THE MATTER	Of an appeal under s 149V of the Resource Management Act 1991 (RMA)
AND IN THE MATTER	Of the East West Link Proposal
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Appellant
	NGĀTI WHĀTUA ŌRĀKEI WHAI MAIA LTD Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent
	CONTINUED OVERLEAF

Hearing: 15 – 18 June 2020

Appearances: S Gepp and P Anderson for Royal Forest and Bird Protection Society of New Zealand Incorporated
R Enright for Ngāti Whātua Ōrākei Whai Maia Ltd and Te Kawerau Iwi Tribunal
P H Mulligan, V S Evitt and J W E Parker for the New Zealand Transport Authority
G C Lanning and O M C Zambuto for Auckland Council
K Ketu for Ngāti Maru Runanga Trust, Te Ākitai Waiohu Waka Trust and Ngāti Tamaoho Trust

Judgment: 5 March 2021

JUDGMENT OF POWELL J

AND	AUCKLAND COUNCIL
	NGĀTI MARU RUNANGA
	TE ĀKITAI WAIOHUA WAKA TAUA INCORPORATED
	TE KAWERAU IWI TRIBAL AUTHORITY
	NGĀI TAI KI TĀMAKI TRUST
	NGĀTI TAMAOHO TRUST
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
	NGĀTI WHĀTUA ORĀKEI WHAIA MAIA LIMITED
	Section 301 parties

This judgment was delivered by me on 5 March 2021 at 4 pm pursuant to R 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] The East West Link is a proposal from the New Zealand Transport Agency ("NZTA") for the construction, operation, and maintenance of a new four-lane arterial road and associated works to connect State Highway 20 in Onehunga with State Highway 1 in Penrose/Mt Wellington ("the proposed EWL").[1]

[2] The proposed EWL is intended to run from Māngere Bridge in the west, along the northern shore of the Manukau harbour (through an area known as the Māngere Inlet), before altering course in a north easterly direction to meet up with State Highway 1 and the existing Auckland motorway network at Penrose. The design of the road also incorporates stormwater treatment for an adjacent 611 hectares of developed urban catchment in the Onehunga-Penrose area, as well as leachate management from adjacent landfills.[2]

[3] To achieve this outcome the following works are required:[3]

(a) A new four-lane arterial road between the existing SH20 Neilson Street Interchange in Onehunga and SH1 at Mt Wellington; and connection of the new arterial road to SH1 via two new ramps south of Mt Wellington Interchange;

(b) The widening of SH1 and an upgrade of the Princes Street Interchange;

(c) Reconfiguration of the Neilson Street Interchange and surrounding roads including a trench on the southern side of the Interchange, with a local bridge connecting Onehunga Harbour Road to Onehunga Wharf;

(d) New commuter and recreational cycle paths along the EWL connecting into the local Onehunga, Penrose and Sylvia Park communities; and a new pedestrian and cycle connection across Ōtāhuhu Creek;

---

1 *Final Report and Decision of the Board of Inquiry into the East West Link Proposal* (21 December 2017) ("Board Decision") at [5].
2 Board Decision at [9].
3 Board Decision at [6].

(e) New local road connections to and from the EWL Main Alignment; and local road improvements including extensions to Galway Street, Captain Springs Road and Hugo Johnston Drive;

(f) A new grade-separated intersection at Great South Road / Sylvia Park Road;

(g) Reclamation of a total of 18.3 hectares within the Coastal Marine Area along the northern foreshore of Māngere Inlet to construct parts of the EWL Main Alignment, and to construct stormwater treatment areas, headlands to form a naturalised coastal edge, and recreational space.

[4] Although the northern shore of the Manukau has already been heavily modified both the Māngere inlet and the adjacent land subject to the proposed EWL nonetheless remain ecologically significant, particularly as a habitat for sea birds, and are recognised as such in the Auckland Unitary Plan ("AUP") by way of overlay classifications.[4] As a result, and given the extensive reclamation required by the proposal, from the outset the proposed EWL has been controversial.

[5] As the Ministers for the Environment and Conservation noted, the proposed EWL:[5]

> (a) Involves significant use of natural and physical resources (including approximately 18.3 hectares of reclamation of the Māngere Inlet), to construct much of the proposed four-lane arterial road linking State Highways 1 and 20.
>
> (b) Is likely to result in and contribute to irreversible changes to the environment, in particular the loss of bird feeding areas in the Māngere Inlet; changes to coastal processes by re-contouring, and addressing legacy groundwater contamination issues by effectively 'bunding' the northern shoreline of the Māngere Inlet.
>
> (c) Includes relocating regionally and nationally important infrastructure, including electricity, gas, and crossing over bulk water supply.
>
> (d) Has, and is likely to continue to, aroused widespread public concern or interest regarding actual or likely effects on the environment.

---

4 See [16] below.
5 Board Decision at [43].

(e) Relates to an area that may be of national interest to Māori and a number of sites in and around the proposal area are classified as outstanding natural features within the Auckland Unitary Plan.

(f) Would assist the Crown in fulfilling its public health, welfare, security and safety obligations or functions.

(g) Relates to a network utility operation (the State Highway network) that when viewed in its wider geographic context extends to more than one district or region.

[6] The Ministers established a board of inquiry ("the Board") to consider the proposal pursuant to s 149J of the Resource Management Act 1991 ("the RMA"), and in particular to determine the 24 applications for resource consent[6] together with the two notices of requirement ("NoR")[7] necessary for the project to proceed.

[7] The proposed EWL was formally notified in February 2017. Some 685 submissions were received of which 582 (85 per cent) opposed the proposal either in full or in part, with 94 in support and nine neutral.[8] The Board commenced substantive hearings in June 2017. After some 49 sitting days the hearings concluded in September 2017, with the Board issuing its Final Report and Decision on 21 December 2017 ("Board Decision").

[8] In broad terms the Board approved the resource consent applications and NoR sought by the NZTA, thereby enabling the proposed EWL to proceed. Overall, the Board concluded:

(a) While the proposed EWL was not able to comply with a number of specific policies and its effects on the environment were clearly more than minor,

---

6 One land use consent for activities on new land created by the proposed reclamations under s 89 of the RMA; seven land use consents relating to works on contaminated soils, earthworks, vegetation alteration and removal, new network infrastructure and construction of new impervious surfaces for roads; one further land use consent for the operation of a temporary concrete batching plant during the construction of the proposed East West Link; four coastal permits for the road construction activities plus related construction activities including reclamations, deposition of material in the coastal marine area ("CMA"), disposal of waste and other matter in the CMA and temporary and permanent occupation of the CMA by structures; six water permits for works in water courses and associated drainage and diversion activities and five discharge permits for discharge of contaminants into air or on to land or water, both during construction and subsequently: Board Decision at [31].

7 One NoR was for the construction, operation and maintenance of a state Highway, while the other altered the present designation as it relates to State Highway 1: Board Decision at [30].

8 Board Decision at [57].

the proposal was not contrary to the objectives and policies of the AUP, and therefore met the threshold for non-complying activities set out in s 104D(1)(b) of the RMA.

(b) Assessing the merits of the proposal pursuant to ss 104 (in relation to the resource consent applications) and 171 (with regard to the NoR) of the RMA, the Board concluded that while the proposed EWL would create adverse effects both during construction and in operation, these could be avoided, remedied or mitigated.[9] As a result, the Board unanimously concluded that the NoR should be confirmed and the various consent applications granted with the exception of the coastal permit for dredging, which was granted in part.[10]

[9] The Royal Forest and Bird Protection Society of New Zealand Incorporated ("Forest and Bird") and Ngāti Whātua Ōrākei Whai Maia Limited ("Ngāti Whātua") have both, with the support of Te Kawerau Iwi Tribal Authority ("Te Kawerau"), appealed the Board Decision pursuant to s 149V of the RMA. This section does not permit any general right of appeal against the Board's decision but limits the right of appeal to questions of law.[11] Two questions of law are the subjects of this judgment:

(a) Forest and Bird argues that the Board had no jurisdiction to consider the merits of the proposed EWL because the particular policies it could not comply with meant it was contrary to the objectives and policies of the AUP and therefore did not meet the threshold test in s 104D(1)(b) of the RMA.

(b) In the alternative, and if Forest and Bird was unsuccessful in its primary argument it, along with Ngāti Whātua and Te Kawerau, argue that the Board, in any event, failed to have regard/particular regard to the New Zealand Coastal Policy Statement ("NZCPS") as required by ss 104 and

---

9 Board Decision at [1391].
10 At [1398].
11 Resource Management Act 1991, s 149V(1).

171 of the RMA when it considered the resource consent applications and NoR.

[10] There is no dispute as to the approach to be taken on these appeals. As helpfully summarised by Mr Mulligan on behalf of the NZTA:

(a) The High Court will interfere with the Board's decision only if it is satisfied that the Board committed one (or more) of the following errors of law (identified by the full High Court bench in *Countdown Properties (Northlands) Ltd v Dunedin City Council*):[12]

(i) applied a wrong legal test; or

(ii) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or

(iii) took into account matters which it should not have taken into account; or

(iv) failed to take into account matters which it should have taken into account.

(b) The weight to be afforded to relevant considerations is a question for the Board and is not a matter available for reconsideration by the High Court as a question of law;[13]

(c) The High Court will not engage in a re-examination of the merits of the case under the guise of a question of law;[14] and

---

12 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153. There are multiple cases referring to these principles including, for example, the Supreme Court in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50] – [55] and *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24] – [28].

13 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at 438, noting that the High Court was referring to a decision of the Environment Court.

14 This principle has been noted in a number of cases. Examples include *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363; *Murphy v Takapuna County Council* HC Auckland M456/88; 7 August 1989 and *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [28].

(d) The High Court will not grant relief where there has been an error of law unless it has been established that the error materially affected the result of the Decision.[15]

The s 104D issue

[11] As noted, the primary issue raised by Forest and Bird is that the Board erred in reaching the conclusion that the proposed EWL was not contrary to the objectives and policies of the AUP for the purposes of s 104D(1)(b) of the RMA.

[12] There is no dispute that the proposal was appropriately categorised as a non-complying activity under the RMA.[16] As such, and because it was accepted by all parties that the environmental effects of the proposed EWL would be more than minor, before the Board could consider the merits of the proposed EWL it had to be satisfied in terms of s 104D that the EWL was not contrary to the objectives and policies of the relevant plan, in this case the AUP.[17]

[13] Therefore, it was only if the Board was satisfied that the proposal met the s 104D(1) threshold that it was then required to consider the merits of the proposal in terms of:

(a) section 104 of the RMA (in relation to the resource consents); and

(b) section 171 of the RMA (in considering the NoR).

[14] The Board's overall approach to the analysis required by s 104D(1)(b) was set out in the following terms:[18]

> [T]he Board focuses its initial s 104D(1)(b) assessment on the provisions most relevant to the non-complying coastal activities, … They comprise

---

15 *Countdown* at 153, citing *Royal Forest and Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81-82. See also *BP Oil NZ Ltd v Waitakere City Council* [1996] NZRMA 67 (HC) at [69].

16 Board Decision at [32].

17 Resource Management Act 1991, s 104D(1)(b). It is noted that at the time the Board considered the proposed EWL there were parts of the then Auckland Regional Plan: Coastal remaining operative. The Board placed limited weight on these provisions in its analysis and the AUP is now for the purposes of the appeal, fully operative.

18 Board Decision at [618].

> infringements under Chapter F2 of the [AUP] associated with the formation of reclamations and structures within the SEA-M1 and SEA-M2, ONFs and Historic Heritage Extent of Place overlays within the Māngere Inlet, including associated vegetation removal, damming or impounding water, and other construction activities. The Board considers that that approach will provide the most conservative assessment, minimising the risk of artificially weighting any conclusion with supportive provisions in favour of the Proposal.
>
> (citations omitted)

[15] Chapter F2 of the AUP referred to by the Board is the Coastal – General Coastal Marine Zone of the AUP ("General Coastal Marine Zone"). The initial focus of the Board was on F2.2 of that chapter, headed "Drainage, reclamation and declamation", which sets out the policies for drainage, reclamation and declamation activities within the General Coastal Marine Zone. With the exception of F2.2.3(2), the Board concluded that the policies were consistent with the proposed EWL, achieved or were otherwise not relevant.[19] With regard to F2.2.3(2), the Board noted that this policy required "consideration of the overlay policies that are relevant to the area of the proposed reclamation".[20] It therefore proceeded to analyse what it described as the relevant provisions of chapters D9 (Significant Ecological Areas Overlay), D10 (Outstanding Natural Features Overlay and Outstanding Natural Landscapes Overlay) and D17 (Historic Heritage Overlay), of which only D9 is relevant for the purposes of the present appeal.

[16] Specifically, chapter D9 sets out the objectives and policies for the Significant Ecological Areas Overlay. The different types of significant ecological area ("SEA") are defined in D9.1, being those applying on land (SEA-T), the "T" denoting terrestrial,[21] and those located in the coastal marine area (SEA-M).[22] The SEA-M are further sub-divided into M1 (being the SEA that are most vulnerable) and M2 (where the habitat is more robust). A "W" after the M1 and M2 signifies that the habitats are important to wading birds. Within the area directly affected by the proposed EWL are

---

19 At [620], [628] and [630]-[641].
20 At [629].
21 D9.1.1.
22 D9.1.2.

areas of SEA-T,[23] SEA-M1[24] and SEA-M2,[25] all specifically identified in the schedules to the AUP.

[17] Working its way through the D9 policies, the Board commenced its analysis by considering D9.3(1)(a), which directs avoidance of adverse effects on indigenous biodiversity in the coastal environment to the extent stated in policies D9.3(9) and (10).[26] It then turned its attention to D9.3(9) and (10). It noted actual or potential inconsistencies between the proposed EWL and policies D9.3(9)(a)(ii), (iii) and (iv)[27] and D9.3(9)(b) and (c),[28] before concluding that the proposed EWL was "consistent in part, and not contrary to Policy D9.3(10)."[29]

[18] Overall, with regard to the D9 policies the Board noted:[30]

> Careful consideration has been given to all other relevant coastal policies of Chapter F2 (and the extent that it engages the biodiversity provisions in D9) of the [AUP]. On the basis of the Board's finding that there is no "practicable alternative" to the proposed alignment, and that the [proposed EWL] will not result in significant adverse effects on populations or ecosystems, the Board finds that the [proposed EWL] is not contrary to those other provisions. Nor is the [proposed EWL] contrary to the broadly worded objectives F2.2.2(1), (2) and (3).

[19] The Board then briefly analysed the remaining policies in the General Coastal Marine Zone contained in chapter F2 that it considered relevant to the proposed EWL, in particular:

(a) F 2.3 (Depositing and Disposal of Material);[31]

(b) F 2.4 (Dredging);[32]

(c) F 2.5 (Disturbance of the Foreshore and Seabed);[33]

---

23 See AUP, Schedule 3.
24 Schedule 4
25 Schedule 4.
26 Board Decision at [643].
27 At [647].
28 At [645]-[646].
29 At [649].
30 At [654].
31 At [655].
32 At [656].
33 At [657].

(d) F 2.7 (Mangrove removal);[34]

(e) F 2.10 (Damming and impounding water);[35]

(f) F 2.11 (Discharges);[36]

(g) F 2.14 (Structures, public amenities, artwork and associated use and occupation);[37]

[20] From there, the Board set out its overall approach to and conclusions in relation to the s 104D issue:[38]

> The Board is persuaded by Mr Mulligan's submission that the approach taken by the Environment Court in *Akaroa Civic Trust v Christchurch City Council* is appropriate to adopt. Further discussion about the relevance and force of *Akaroa* is contained in chapter 12.5 of this Report. In some consent applications a provision may be so central to a proposal that it sways the s104D decision, but generally the s104D assessment will be made across the objectives and policies of the plan as a whole and not determined by individual provisions. The Board finds that the latter applies in this case, notwithstanding that there are indeed some inconsistencies between the NZTA Proposal and relevant objectives and policies, particularly in the areas of reclamation and biodiversity. In doing so, the Board has given measured weight to the word "avoid", which is clearly not a direction to be ignored.
>
> On balance, the Board finds that the Proposal is not contrary to the objectives and policies of the [AUP] when considered as a whole. Its consideration has given particular focus to the provisions most directly relevant to the activities with non-complying status but has also recognised the broader planning assessments of Ms Rickard and Mr Gouge. The Board is left in no doubt that its conclusion would be strengthened if it were to look in detail at every relevant objective and policy (of which there are many), rather than those provisions of most relevance, as it has done.
>
> While the Proposal is concluded to be contrary to a small number of policies or subclauses of policies, the Board does not consider those individually or cumulatively as reason to conclude that the[EWL] is repugnant to the policy direction of the [AUP] with respect to the resource consents sought. The Board's conclusion is that where the [EWL] infringes policies, neither individually nor cumulatively do those infringements tilt the balance for s 104D purposes against the Proposal as a whole.
>
> (citations omitted)

---

34 At [658].
35 At [658].
36 At [658].
37 At [658].
38 At [662]-[664].

The s 104D issue - the case for Forest and Bird

[21] Forest and Bird argues that the Board erred in concluding the proposed EWL was not contrary to the objectives and policies of the AUP in terms of s 104D(1)(b). Forest and Bird relies upon the mandatory nature of chapter D9, and in particular policies D9.3(9) and (10), which require avoidance of the type of adverse effects within the overlay zone the Board acknowledged that the proposed EWL would have if it was permitted to proceed. More broadly, Forest and Bird submitted that the Board:

(a) failed to consider the D9 objective;

(b) failed to consider policy D9.3(11);

(c) incorrectly interpreted Policy F2.2.3(2); and

(d) otherwise erred in its approach to s 104D(1)(b).

[22] Ms Gepp, as counsel for Forest and Bird, submitted that when the provisions of the AUP are properly reconciled in the manner required by the Supreme Court decision in *Environmental Defence Society Incorporated v New Zealand King Salmon Ltd* ("*King Salmon*"),[39] the overlay policies, including those set out in D9.3(9) and (10) in particular, trump not only the reclamation policies in F2.2 but all other objectives and policies in the AUP relevant to the proposed EWL. In Ms Gepp's submission, as the overlay policies were the result of a long and prescriptive planning process, any non-complying activity that was unable to avoid adverse effects in the significant ecological areas that were the subject of D9.3 was, by definition, contrary to the objectives and policies of the AUP and the merits of the proposed EWL could not therefore be considered. Put another way, in Forest and Bird's submission the D9 overlay policies, and D9.3(9) and (10) in particular, created "environmental bottom lines" which by their mandatory nature meant that the Board was not able to conclude other than that the proposed EWL was contrary to the objectives and policies of the AUP for the purposes of s 104D(1)(b). In Ms Gepp's submission, to conclude

[39] *Environmental Defence Society Incorporated v New Zealand King Salmon Limited* [2014] NZSC 38, [2014] 1 NZLR 593.

otherwise would convert those environmental bottom lines into no more than "meaningless platitudes".

[23] It followed that if Ms Gepp was correct in her interpretation of the relevant plan provisions, the Board had no choice but to conclude the proposed EWL did not meet the threshold for non-complying activities under s 104D(1)(b). As a result, this meant consent could not be granted for the proposed EWL notwithstanding no full evaluation of the proposal pursuant to ss 104 and 171 of the RMA had occurred.

The approach to the s 104D issue

[24] I begin my analysis by considering the approach the Board was required to take in considering whether the EWL was contrary to the objectives and policies of the AUP in terms of s 104D(1)(b). First, there is no dispute that to be "contrary" for the purposes of s 104D(1)(b) means that it must be "…opposed in nature, different to or opposite … repugnant and antagonistic" in terms of *New Zealand Rail v Marlborough District Council*.[40]

[25] As to what must be considered, as both Mr Mulligan for the NZTA and Mr Lanning for the Auckland Council have pointed out, the principles were discussed at length in two related decisions of the Court of Appeal: *Arrigato Investments Ltd v Auckland Regional Council*[41] and *Dye v Auckland Regional Council*.[42] In *Dye*, the Court discussed the appropriate approach to be taken in relation to the precursor to s 104D(1)(b):[43]

> In summary, the Environment Court was fully mindful of the basic thrust of the relevant objectives and policies which was to confine rural residential activities to the designated areas. The Court considered that the objectives and policies allowed for the possibility, albeit limited, that such activities might nevertheless appropriately be allowed to occur outside the designated areas and in the general rural part of the district. Whether a particular application which would necessarily be for a non-complying activity was appropriate, would obviously depend on its particular combination of circumstances. It is implicit in its approach that the Environment Court did not see the relevant objectives and policies as precluding altogether developments not falling within a designated area. The objectives and policies themselves recognised that some wider

---

40 *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 (HC) at [11].
41 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).
42 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).
43 At [25].

> development might be appropriate. If the Court found a particular proposal to be appropriate, it could not be said to be contrary to the objectives and policies on the basis that it was outside the particular controls which were designed to implement them. We are unable to conclude that in approaching the matter in that way the Environment Court misunderstood or misinterpreted the objectives and policies. **The view which the Court took was open to it on a fair appraisal of the objectives and policies read as a whole and, in reaching its view, the Court committed no error of law**.
>
> (emphasis added)

[26] Although this approach has been applied in numerous subsequent cases,[44] as Ms Gepp noted, the Supreme Court in *King Salmon* recently warned against what it described as the "danger of the 'overall judgment' approach". The Court observed in particular "that decision makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thorough going attempt to find a way to reconcile them".[45]

[27] As however both NZTA and Auckland Council submitted in the present case, the Supreme Court's observations were made in the context of a plan change, and there is no suggestion that the Court was intending to change the overall approach set out in *Dye,* but rather to ensure that the analysis undertaken was thorough.

[28] This was in fact the conclusion reached by the Court of Appeal in *R J Davidson Family Trust v Marlborough District Council*, a decision post-dating *King Salmon.*[46] In that case, the Court noted the particular context of the Supreme Court's decision in *King Salmon*.[47] It confirmed that when a consent authority is required to assess the merits of an application against the relevant objectives and policies in a plan:[48]

> What is required is what Tipping J referred to [in *Dye*] as "a fair appraisal of the objectives and policies read as a whole".

[29] Having considered the relevant authorities, I agree with Mr Lanning's submission on behalf of the Auckland Council that it is difficult to see that there is in

---

44 See for example *Auckland Council v Auckland Council* [2020] NZEnvC 70 and *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196; (2019) 21 ELRNZ 539.

45 *King Salmon* at [131].

46 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.

47 At [66].

48 At [73].

fact any substantive difference in approach required as a result of the *King Salmon* decision, or more broadly between the approach identified in *Dye* and that contended for by Ms Gepp. As Mr Lanning noted in his submissions:

> It is not clear what the difference is between an analysis that 'considers' and 'reconciles' relevant plan provisions; and the 'holistic' or 'thrust' approach. The latter approach requires the relevant plan provisions to be considered and reconciled, to the extent possible, where those provisions pull in different directions.

[30] It follows that in order to reach a conclusion as to whether the proposed EWL is not contrary (in the sense of not being repugnant) to the objectives and policies of the AUP for the purposes of s 104D(1)(b) of the RMA, the relevant plan provisions must all be considered comprehensively and, where possible, appropriately reconciled. This is necessary in order to ascertain whether the conclusion reached by the Board was open to it, or whether, as Mr Gepp submitted, there was in fact no other conclusion available to the Board than to find the proposed EWL was contrary to the objectives and policies of the AUP.

Chapter D9

[31] As noted, the critical part of the AUP from the perspective of Forest and Bird is chapter D9. I begin with the objectives set out in D9.2, which as Ms Gepp noted was not mentioned by the Board in its analysis. D9.2(1) sets the following objective:[49]

> Areas of significant indigenous biodiversity value in terrestrial, freshwater, and coastal marine areas are protected from the adverse effects of subdivision, use and development.

[32] The principal policy for giving effect to this objective is D9.3(1)(a) which requires the effects of activities on the SEA to be managed by:

> Avoiding adverse effects on indigenous biodiversity in the coastal environment to the extent stated in Policies D9.3(9) and (10) …

[33] D9.3(9) and (10) in turn state:

> (9) Avoid activities in the coastal environment where they will result in any of the following:

---

[49] D9.2(1).

(a) non-transitory or more than minor adverse effects on:

(i) threatened or at risk indigenous species (including Maui's Dolphin and Bryde's Whale);

(ii) the habitats of indigenous species that are at the limit of their natural range or which are naturally rare;

(iii) threatened or rare indigenous ecosystems and vegetation types, including naturally rare ecosystems and vegetation types;

(iv) areas containing nationally significant examples of indigenous ecosystems or indigenous community types; or

(v) areas set aside for full or partial protection of indigenous biodiversity under other legislation, including the West Coast North Island Marine Mammal Sanctuary.

(b) any regular or sustained disturbance of migratory bird roosting, nesting and feeding areas that is likely to noticeably reduce the level of use of an area for these purposes; or

(c) the deposition of material at levels which would adversely affect the natural ecological functioning of the area.

(10) Avoid (while giving effect to Policy D9.3(9) above) activities in the coastal environment which result in significant adverse effects, and avoid, remedy or mitigate other adverse effects of activities, on:

(a) areas of predominantly indigenous vegetation;

(b) habitats that are important during the vulnerable life stages of indigenous species;

(c) indigenous ecosystems and habitats that are found only in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;

(d) habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes including fish spawning, pupping and nursery areas;

(e) habitats, including areas and routes, important to migratory species;

(f) ecological corridors, and areas important for linking or maintaining biological values; or

(g) water quality such that the natural ecological functioning of the area is adversely affected.

[34] It is the injunction to avoid the specific types of adverse effects identified in D9.3(9) that lies at the heart of the case for Forest and Bird. The types of adverse effects contemplated in D9.3(1) and D9.3(9) and (10) are detailed in D9.3(2) and make it clear that those effects are extraordinarily broad.[50] Likewise, there can be no doubt that a requirement to avoid is intended to stop something from happening.[51]

[35] Moreover, in this case, the Board concluded that the proposed EWL was actually or potentially inconsistent with:

(a) D9.3(9)(a)(ii) - the Board finding that the proposed EWL would have "non-transitory and more than minor effects on areas of habitat utilised by some rare species".[52]

(b) D9.3(9)(a)(iii) and (iv) - the Board found the "placement of the road across Anns Creek is not consistent with the policy directive".[53]

(c) D9.3(9)(b) - The Board found "displacement of the birds from areas directly affected by the reclamations will be permanent, … and ongoing disturbance may result from people utilising the proposed coastal walkways, which will extend further into the inlet than the current walkway. Thus, the [proposed EWL] can be considered inconsistent with D9.3(9)(b)".[54]

(d) D9.3(9)(c) - The proposed EWL "will result in deposition of material at levels that would adversely affect the natural ecological functioning of the area of deposition".[55]

---

50 Adverse effects include (but are not limited to) fragmentation of, or reduction in the size and extent of, indigenous ecosystems and the habitats of indigenous species; loss of ecosystem services; downstream effects on wetlands, rivers, streams and lakes from hydrological changes further up the catchment; the destruction of, or significant reduction in, educational, scientific, amenity, historical, cultural, landscape, or natural character values; and reduction in the historical, cultural, and spiritual association held by Mana Whenua or the wider community.

51 *King Salmon* at [96] and [126].

52 Board Decision at [645].

53 Although the Board subsequently noted that "the efforts made to avoid the relevant effects to the greatest practicable [sic] suggest that the [proposed EWL] is not contrary to those policies": Board Decision at [646].

54 At [647].

55 At [648].

[36] In addition to these identified inconsistencies, I also accept the submissions of both Forest and Bird and the Auckland Council that the Board erred in concluding it was "contestable whether the [proposed EWL] will have non-transitory or more than minor adverse effects or threatened at risk species" for the purposes of D9.3(9)(a)(i).[56]

[37] The Board based its conclusion on evidence that the proposed EWL "would not adversely affect the populations of those species and that the shorebirds would opportunistically feed elsewhere on the Māngere Inlet, Manukau harbour or Tāmaki River".[57] However as Mr Lanning pointed out, such a finding cannot be sustained in light of the Board's findings elsewhere in its report that "there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such effects must be considered significant."[58] Given D9.3(9) does not impose a significant threshold before activities are required to be avoided, but simply requires the identification of non-transitory or more than minor adverse effects, it follows that the Board should have also concluded that the proposed EWL could not avoid such effects on threatened or at risk species in terms of D9.3(9)(a)(i), as well as the other parts of D9.3(9) identified in its decision.

[38] Although the Board appeared to have limited its detailed consideration to D9.3(1), (9) and (10), it is clear that other policies in D9.3 reinforce the wording contained in those policies. For example, although D9.3(3)-(5) provide for the enhancement or enabling of activities, the wording of those policies does not permit derogation from the direction to avoid the activities identified in D9.3(9) and (10).

[39] On the contrary, the thrust of the remaining provisions in D9.3 is either to avoid a range of specific activities entirely or to provide specific guidance on particular issues while applying D9.3(9) and (10). Relevant provisions include:

(a) avoiding removal of vegetation and loss of biodiversity in the course of construction activities (D9.3(6));

---

56 At [645].
57 At [645].
58 At [471].

(b) avoiding subdivision use and development where it results in permanent use and occupation (D9.3(11));

(c) taking into account additional matters and managing adverse effects of use and development on the values of SEA-M (D9.3(12));

(d) avoiding structures in SEA-M1 (except where a structure is necessary for particular purposes) (D9.3(13)); and

(e) additional policies to avoid the extension to or alteration of any existing lawful structures in SEA-M1 unless particular matters can be demonstrated (D9.3(14)).

[40] Of particular note is D9.3(11), to which the Board also did not refer. This adds a further level to the protections contained in D9.3(9) and (10), stating:

> In addition to Policies D9.3(9) and (10), avoid subdivision, use and development in the coastal environment where it will result in any of the following:
>
> (a) the permanent use or occupation of the foreshore and seabed to the extent that the values, function or processes associated with any Significant Ecological Area – Marine is significantly reduced;
>
> (b) any change to physical processes that would destroy, modify, or damage any natural feature or values identified for a Significant Ecological Area – Marine in more than a minor way; or
>
> (c) fragmentation of the values of a Significant Ecological Area – Marine to the extent that its physical integrity is lost.

[41] As Ms Gepp submitted, there is nothing within chapter D9 that remotely contemplates a project on the scale of the proposed EWL within an overlay area. Indeed the only mention of providing for infrastructure in chapter D9 is contained in policy D9.3(8), which provides:

> Manage the adverse effects from the use, maintenance, upgrade and development of infrastructure in accordance with the policies above, recognising that it is not always practicable to locate and design infrastructure to avoid significant ecological areas.

[42] Although D9.3(8) recognises that infrastructure may not be able to avoid SEA and is situated before D9.3(9) and (10), the reference to "managing in accordance with the policies above" clearly incorporates D9.3(9) and (10) through D9.3(1)(a). As a result, nothing in D9.3(8) can be relied upon to authorise infrastructure where adverse effects will occur of the type prescribed in D9.3(9) and (10).

[43] The fact that the Board failed to consider the relevant objectives (D9.2), and a number of other relevant policies noted above, does not however give rise to an error for the purposes of the appeal. The ultimate issue is not whether the proposed EWL was inconsistent with any particular objective or policy but whether it was contrary to the objectives and policies of the AUP. The Board's conclusion the proposed EWL was unable to comply with the various specific D9 policies noted above could be argued to provide a sufficient basis to conclude that the proposed EWL is contrary to the objectives and policies of the AUP. This can however be so only in the event that I accept Ms Gepp's submission that D9 is in effect paramount to the other relevant parts of the AUP for the purposes of the proposed EWL, such that it makes the proposed EWL repugnant to the objectives and policies of the AUP. As the Board noted, simply because the proposed EWL is inconsistent with discrete parts of the AUP, including D9, does not necessarily mean that it is contrary to the objectives and policies of the AUP for the purposes of s 104D(1)(b) of the RMA. Whether the fact that the proposed EWL is inconsistent with chapter D9 means that the proposed EWL is by definition contrary to the objectives and policies of the AUP can only be finally determined after all relevant provisions have been properly reconciled in the manner discussed above.

Relationship of D9 with other chapters

[44] I therefore turn to consider the relationship between D9 and the following chapters of the AUP which the parties identified in argument as the relevant chapters of the AUP in this case:

(a) Chapter F2 - General Coastal Marine Zone

(b) Chapter E15 - Vegetation management and biodiversity

(c) Chapter A - Introduction

(d) Chapter E26 - Infrastructure

[45] I begin with chapter F2, given it was through consideration of the relevant provisions of the General Coastal Marine Zone that the Board turned its attention to chapter D9.[59] As noted above, the detailed analysis undertaken by the Board for the purposes of s 104D(1)(b) was largely limited to an analysis of the Drainage, reclamation and declamation section of F2,[60] and the connection between those policies and the overlay policies contained in D9.3.

[46] The Board's focus on the Drainage, reclamation and declamation section of F2 (F2.2) was not just because of the scale of the reclamation contemplated by the proposed EWL but because of the specific requirements in F2.2.3(2) to "consider the relevant provisions of chapter D9" when reclamation or drainage is proposed where it affects an overlay.[61] This provision had been inserted into the AUP by way of a consent decision of this Court[62] after Forest and Bird raised concerns that the NZCPS had not appropriately been given effect in the AUP as it was then drafted. In inserting F2.2.3(2), the Court does not appear to have been made aware of the broader provisions contained in F2.1. In defining the area subject to the objectives, policies and rules in the General Coastal Marine Zone, F2.1 specified:

> If an overlay applies to the area where an activity is proposed, the provisions of the overlay will also apply, including any overlay rule that applies to the activity.

[47] It is thus clear that the Board overlooked that the D9 overlay provisions applied not only to the Drainage, reclamation and declamation section of the General Coastal Marine Zone , but also to all of the other sections identified by the Board as being relevant to the proposed EWL, and specifically:

(a) F2.3 (Depositing and Disposal of Material);[63]

---

59 Board Decision at [620]-[642].
60 F2.2.
61 At [642].
62 *Royal Forest and Bird Protection Society Incorporated v Auckland Council* [2017] NZHC 980.
63 Board Decision at [655].

(b) F2.4 (Dredging);[64]

(c) F2.5 (Disturbance of the Foreshore and Seabed);[65]

(d) F2.7 (Mangrove removal);[66]

(e) F2.10 (Damming and impounding water);[67]

(f) F2.11 (Discharges); and[68]

(g) F2.14 (Structures, public amenities, artwork and associated use and occupation).[69]

[48] As a result the relevant provisions in chapter F2 are entirely subject to chapter D9 where there is a relevant overlay. Therefore, to the extent that the proposed EWL was contrary to D9 for the purposes of F2, it was equally contrary to the other relevant parts of F2 for the same reasons the Board had identified in relation to F2.2. There is accordingly nothing in chapter F2 that purports to authorise a project on the scale of the proposed EWL where that is contrary to the policies in chapter D9.

[49] There is equally nothing in chapter E15 – (Vegetation management and biodiversity) which diminishes the protections contained in chapter D9, and indeed did not form a specific part of the Board's s 104D analysis.[70] On the contrary, in the context of this case, chapter E15 is essentially complimentary to chapter D9. E15.1 provides:[71]

> The objectives and policies in this chapter apply to the management of terrestrial and coastal vegetation and biodiversity values outside of scheduled significant ecological areas.

---

64 At [656].
65 At [657].
66 At [658].
67 At [658].
68 At [658].
69 At [658].
70 The Board does mention E15 at [210] and [704]-[705] but outside the s 104D analysis. At footnote 85 the Board noted that the biodiversity policies in D9 and E15 are essentially worded the same.
71 It is noted E15.1 also provides that the rules for SEA-T (not relevant to the s 104D analysis) are contained within chapter E15.

[50] The objectives set out in E15.2 apply slightly less prescriptively than the equivalent objectives in D9 (D9.2(1)) but nevertheless provide for a high level of protection. Objective E15.2(1) states:

> Ecosystem services and indigenous biological diversity values, particularly in sensitive environments, and areas of contiguous indigenous vegetation cover, are maintained or enhanced while providing for appropriate subdivision, use and development.

[51] The policies set out in E15.3 likewise appear to provide for alternatives other than outright avoidance, as E15.3(1)-(4) details:

> (1) Protect areas of contiguous indigenous vegetation cover and vegetation in sensitive environments including the coastal environment, riparian margins, wetlands, and areas prone to natural hazards.
>
> (2) Manage the effects of activities to avoid significant adverse effects on biodiversity values as far as practicable, minimise significant adverse effects where avoidance is not practicable, and avoid, remedy or mitigate any other adverse effects on indigenous biological diversity and ecosystem services, including soil conservation, water quality and quantity management, and the mitigation of natural hazards.
>
> (3) Encourage the offsetting of any significant residual adverse effects on indigenous vegetation and biodiversity values that cannot be avoided, remedied or mitigated, through protection, restoration and enhancement measures, having regard to Policy E15.3(4) below and Appendix 8 Biodiversity offsetting.
>
> (4) Protect, restore, and enhance biodiversity when undertaking new use and development through any of the following:
>
> (a) using transferable rural site subdivision to protect areas in Schedule 3 Significant Ecological Areas -Terrestrial Schedule;
>
> (b) requiring legal protection, ecological restoration and active management techniques in areas set aside for the purposes of mitigating or offsetting adverse effects on indigenous biodiversity; or
>
> (c) linking biodiversity outcomes to other aspects of the development such as the provision of infrastructure and open space.

[52] At the same time, E15.3(7) requires the development of infrastructure to be carried out in accordance with the policies in E15.3, "recognising that it is not always practicable to locate or design infrastructure to avoid areas with indigenous biodiversity value".

[53] Within the coastal environment, the prescriptive language used in D9.3(9) and (10) is essentially replicated in E15(9) and (10), which provide:

> (9) Avoid activities in the coastal environment where they will result in any of the following:
>
> (a) non-transitory or more than minor adverse effects on:
>
> (i) threatened or at risk indigenous species (including Maui's Dolphin and Bryde's Whale);
>
> (ii) the habitats of indigenous species that are at the limit of their natural range or which are naturally rare;
>
> (iii) threatened or rare indigenous ecosystems and vegetation types, including naturally rare ecosystems and vegetation types;
>
> (iv) areas containing nationally significant examples of indigenous ecosystems or indigenous community types; or
>
> (v) areas set aside for full or partial protection of indigenous biodiversity under other legislation, including the West Coast North Island Marine Mammal Sanctuary.
>
> (b) any regular or sustained disturbance of migratory bird roosting, nesting and feeding areas that is likely to noticeably reduce the level of use of an area for these purposes;
>
> (c) the deposition of material at levels which would adversely affect the natural ecological functioning of the area; or
>
> (d) fragmentation of the values of the area to the extent that its physical integrity is lost.
>
> (10) Avoid (while giving effect to Policy E15(9) above) activities in the coastal environment which result in significant adverse effects, and avoid, remedy or mitigate other adverse effects of activities, on:
>
> (a) areas of predominantly indigenous vegetation;
>
> (b) habitats that are important during the vulnerable life stages of indigenous species;
>
> (c) indigenous ecosystems and habitats that are found only in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;
>
> (d) habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes including fish spawning, pupping and nursery areas;

(e) habitats, including areas and routes, important to migratory species;

(f) ecological corridors, and areas important for linking or maintaining biological values; or

(g) water quality such that the natural ecological functioning of the area is adversely affected.

[54] Despite the apparent clarity of the relevant provisions of chapters D9, F2 and E15 those chapters must still however be read in their wider context. That context is provided by Chapter A (Introduction), and Chapter E26 (Infrastructure), and is of particular importance in this case.

[55] Chapter A is one of only three chapters that applies across the entire AUP and plays a significant role in reconciling the plan as a whole. Section A1.1 begins by setting out the statutory purposes of the AUP, before explaining the key roles of the plan of which the following are directly relevant in the present case:[72]

(1) it describes how the people and communities of the Auckland region will manage Auckland's natural and physical resources while enabling growth and development and protecting the things people and communities value;

(2) it provides the regulatory framework to help make Auckland a quality place to live, attractive to people and businesses and a place where environmental standards are respected and upheld;

[56] As Mr Mulligan and Mr Lanning both submitted, a tension is immediately obvious in the identified roles; in particular, the requirement to provide for growth, development **and** protection.

[57] Chapter A goes on to explain the structure of the plan in some detail and, in particular, the relationship between the different chapters. For example, because the AUP is a combined plan incorporating the coastal plan for the Auckland region:[73]

> Any provision of the [AUP] which applies to activities or natural or physical resources in the coastal marine area is a provision of the Auckland regional coastal plan.

---

72 A1.
73 A1.5.

[58] Likewise, chapter A provides guidance with regard to the hierarchy between different elements of the plan, including in particular the relationship between the overlay provisions (as contained in chapter D9) and Auckland-wide provisions (for example, chapter E26 (Infrastructure)). The somewhat elastic nature of the relationship is explained as follows:[74]

> **A1.6.2. Overlays**
>
> Overlays manage the protection, maintenance or enhancement of particular values associated with an area or resource. Overlays can apply across zones and precincts and overlay boundaries do not follow zone or precinct boundaries. Overlays also manage specific planning issues such as addressing reverse sensitivity effects between different land uses.
>
> Overlays generally apply more restrictive rules than the Auckland-wide, zone or precinct provisions that apply to a site, but in some cases they can be more enabling. Overlay rules apply to all activities on the part of the site to which the overlay applies unless the overlay rule expressly states otherwise.
>
> …
>
> **A1.6.3. Auckland-wide provisions**
>
> Auckland-wide provisions apply to the use and development of natural and physical resources across Auckland regardless of the zone in which they occur.
>
> Auckland-wide provisions are located in Chapter E of the Plan and cover natural resources, Mana Whenua, the built environment, infrastructure, environmental risk, subdivision and temporary activity matters. Auckland-wide provisions generally apply more restrictive rules than the zone or precinct provisions that apply to a site, but in some cases they can be more enabling.
>
> …

[59] Finally, the chapter explains the differences between the type of activities provided for in the plan. Again, of particular relevance in the context of the present case, the explanation given for non-complying activities provides:[75]

> Resource consent is required for a non-complying activity. As threshold matters, the proposal must be assessed to determine whether its adverse effects on the environment will be no more than minor or whether it will not be contrary to the objectives and policies of the Plan. If the proposal is found not to breach one or other of those thresholds, then its merits may be considered on a broadly discretionary basis and consent may be granted (with or without conditions) or refused. If it is found to breach both thresholds, then consent must be refused.

---

74 A1.6.2.
75 A1.7.5.

> Activities are classed as non-complying where greater scrutiny is required for some reason. This may include:
>
> - where they are not anticipated to occur; or
> - where they are likely to have significant adverse effects on the existing environment; or
> - where the existing environment is regarded as delicate or vulnerable; or
> - otherwise where they are considered less likely to be appropriate.

[60] It is within the context established by chapter A that chapter E26 is set. While it is clear that the proposed EWL cannot meet the standards prescribed by the policies in chapter D9 and, as a result, chapter F2, E26 takes a much broader view. It specifically envisages that it will sometimes be necessary to locate infrastructure within an overlay area, notwithstanding the apparently mandatory nature of the protections contained in chapter D9.

[61] E26 does this not by specifically overriding the protections contained in D9, but rather enabling a decision-maker, including the Board in this case, to consider whether particular infrastructure is required even where it would otherwise be unable to be accommodated by particular objectives and policies, including those in D9.

[62] Specifically, chapter E26 begins by noting in E26.1.1:

> Infrastructure is critical to the social, economic, and cultural well-being of people and communities and the quality of the environment. This section provides a framework for the development, operation, use, maintenance, repair, upgrading and removal of infrastructure.

[63] The same section of E26 makes it clear that a wide range of issues must be balanced before a decision on the appropriateness of infrastructure in any given location can be determined:

> As well as benefits infrastructure can have a range of adverse effects on the environment, visual amenity of an area, and public health and safety. The sensitivity of adjacent activities, particularly residential, to these effects can lead to complaints and ultimately constraints on the operation of infrastructure. Managing these reverse sensitivity effects is essential. Equally in some circumstances other activities and development need to be managed in a way that does not impede the operation of infrastructure.

[64] With this approach in mind, the objectives set out in E26.2.1 relevantly provide:

> (1) The benefits of infrastructure are recognised.
>
> (2) The value of investment in infrastructure is recognised.
>
> (3) Safe, efficient and secure infrastructure is enabled, to service the needs of existing and authorised proposed subdivision, use and development.
>
> (4) Development, operation, maintenance, repair, replacement, renewal, upgrading and removal of infrastructure is enabled.
>
> (5) The resilience of infrastructure is improved and continuity of service is enabled.
>
> …
>
> (9) The adverse effects of infrastructure are avoided, remedied or mitigated.

[65] The policies to give effect to these objectives are set out in E26.2.2. Far from precluding infrastructure in any particular area, including the General Coastal Marine Zone and/or overlay areas, the relevant policies instead envisage a detailed analysis be undertaken to determine whether particular infrastructure will be appropriate in any particular location so as to:

> (1) Recognise the social, economic, cultural and environmental benefits that infrastructure provides, including:
>
> (a) enabling enhancement of the quality of life and standard of living for people and communities;
>
> (b) providing for public health and safety;
>
> (c) enabling the functioning of businesses;
>
> (d) enabling economic growth;
>
> (e) enabling growth and development;
>
> (f) protecting and enhancing the environment;
>
> (g) enabling the transportation of freight, goods, people; and
>
> (h) enabling interaction and communication.

(2) Provide for the development, operation, maintenance, repair, upgrade and removal of infrastructure throughout Auckland by recognising:

(a) functional and operational needs;

(b) location, route and design needs and constraints;

(c) the complexity and interconnectedness of infrastructure services;

(d) the benefits of infrastructure to communities within Auckland and beyond;

(e) the need to quickly restore disrupted services; and

(f) its role in servicing existing, consented and planned development.

…

(4) Require the development, operation, maintenance, repair, upgrading and removal of infrastructure to avoid, remedy or mitigate adverse effects, including, on the:

(a) health, well-being and safety of people and communities, including nuisance from noise, vibration, dust and odour emissions and light spill;

(b) safe and efficient operation of other infrastructure;

(c) amenity values of the streetscape and adjoining properties;

(d) environment from temporary and ongoing discharges; and

(e) values for which a site has been scheduled or incorporated in an overlay.

(5) Consider the following matters when assessing the effects of infrastructure:

(a) the degree to which the environment has already been modified;

(b) the nature, duration, timing and frequency of the adverse effects;

(c) the impact on the network and levels of service if the work is not undertaken;

(d) the need for the infrastructure in the context of the wider network; and

(e) the benefits provided by the infrastructure to the communities within Auckland and beyond.

(6) Consider the following matters where new infrastructure or major upgrades to infrastructure are proposed within areas that have been scheduled in the Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character:

(a) the economic, cultural and social benefits derived from infrastructure and the adverse effects of not providing the infrastructure;

(b) whether the infrastructure has a functional or operational need to be located in or traverse the proposed location;

(c) the need for utility connections across or through such areas to enable an effective and efficient network;

(d) whether there are any practicable alternative locations, routes or designs, which would avoid, or reduce adverse effects on the values of those places, while having regard to E26.2.2(6)(a) - (c);

(e) the extent of existing adverse effects and potential cumulative adverse effects;

(f) how the proposed infrastructure contributes to the strategic form or function, or enables the planned growth and intensification, of Auckland;

(g) the type, scale and extent of adverse effects on the identified values of the area or feature, taking into account:

(i) scheduled sites and places of significance and value to Mana Whenua;

(ii) significant public open space areas, including harbours;

(iii) hilltops and high points that are publicly accessible scenic lookouts;

(iv) high-use recreation areas;

(v) natural ecosystems and habitats; and

(vi) the extent to which the proposed infrastructure or upgrade can avoid adverse effects on the values of the area, and where these adverse effects cannot practicably be avoided, then the extent to which adverse effects on the values of the area can be appropriately remedied or mitigated.

(h) whether adverse effects on the identified values of the area or feature must be avoided pursuant to any national policy statement, national environmental standard, or regional policy statement.

…

[66] Given the specified importance of infrastructure within the AUP, it is clear that both the objectives and policies in chapter E26 envisage a careful and balanced look at the merits of a particular infrastructure proposal in order to determine whether it should proceed, whether or not such a proposal may be contrary to or inconsistent with any particular provision in the AUP.[76]

[67] As a result, far from confirming that the development of infrastructure such as the proposed EWL is contrary to the AUP for the purposes of s 104D(1)(b), chapter E26 retains a discretion to approve such development if it is found to be appropriate following the type of comprehensive analysis required by the policies contained in E26.2.2 set out above. The nature of the enquiry envisaged requires a comprehensive assessment of the merits of the proposed infrastructure against all relevant provisions in the relevant planning documents, and not just the objectives and policies of the relevant plan required by the threshold test in s 104D(1)(b).

[68] As both Mr Mulligan and Mr Lanning submitted, when the relevant objectives and policies of the AUP are properly reconciled it is apparent that the AUP provides a specific, albeit narrow, framework for the consideration of infrastructure proposals rather than automatically excluding them at the s 104D stage. Instead, the AUP, through chapter E26 in particular, specifically contemplates the approval of significant infrastructure when other non-complying activities giving rise to more than minor adverse effects would be precluded as contrary to the objectives and policies of the AUP. Given this position, I conclude that when the relevant chapters are properly construed the AUP was never intended to categorically block infrastructure projects such as the proposed EWL at the s 104D stage as to do so would preclude the very analysis envisaged in chapter E26.

---

[76] Unless, of course, it is a prohibited activity.

Conclusion on the s 104D issue

[69] I therefore conclude the effect of chapter E26 is that infrastructure, like the proposed EWL where the adverse effects will be more than minor, cannot be by definition contrary to the objectives and policies of the AUP for the purposes of s 104D(1)(b). The Board did not err in reaching this conclusion notwithstanding:

(a) the apparent mandatory nature of the protective provisions in chapter D9 (and in particular D9.3(9), (10) and (11)) and the associated protective provisions discussed above; and

(b) despite those provisions being clearly intended to take precedence over the general provisions in chapter F2.

[70] The s 104D limb of the Forest and Bird appeal is dismissed.

The s 104/171 issue

[71] As I have found the Board was correct in concluding consideration of the merits of the proposed EWL was not precluded by s 104D(1)(b), the focus turns to the Board's assessment of the merits of the proposal. This is both in terms of the resource consent applications (pursuant to s 104 of the RMA) and the NoR (pursuant to s 171).

[72] Although the Board's task in determining those matters naturally involved a much broader enquiry, the limited ability to challenge the decision on appeal means that the appeals by Ngāti Whātua and Forest and Bird against the s 104/171 analysis undertaken by the Board is limited to whether the Board properly considered the NZCPS.

[73] In particular, Mr Enright for Ngāti Whātua and Te Kawerau, who took the lead for the appellants on this limb of the appeals, submitted that the Board erred in law in its analysis of NZCPS. While Mr Enright accepted that the Board had specifically turned its attention to the NZCPS, he submitted it had applied the wrong legal test by incorrectly fettering its assessment of the relevant policies within the NZCPS through adopting what he described as a "particularisation" approach. By this Mr Enright

contended that the Board had failed to independently assess the proposed EWL against the relevant provisions of the NZCPS but rather:

> The Board wrongly limited its assessment to confirming consistency between the NZCPS and the [AUP]. The Board decided that it was not necessary to undertake a cross checking or "loop back" to the NZCPS objectives and policies. Instead, it was only necessary to confirm that the [AUP] 'particularised' the NZCPS provisions. This was a truncated (and erroneous) assessment. … It was arguably a methodology error, but it could also be described as wrong legal test or misinterpretation.

[74] In support of his submission Mr Enright pointed in particular to the Board's explanation of its approach, where it stated:[77]

> Turning to the NZCPS, on the question of whether to focus the Board's attention on the provisions of the [AUP], which as Mr Mulligan reinforced has been prepared in full recognition of *King Salmon*, or whether to loop back up to higher order instruments such as the NZCPS received much attention at the Hearing.
>
> In principle, the Board agrees that the RMA anticipates that in giving effect to the higher order NZCPS, regional coastal plans will be refined to reflect the specifics of the region. Otherwise the RMA would have required plans to "adopt" the NZCPS, rather than "give effect to" it. As noted in chapter 12 of this Report, the Board also accepts the general assertion that referring in detail to the higher order planning instruments may be limited to instances of invalidity, incomplete coverage or uncertainty of meaning in the lower order documents.
>
> However, in order to be satisfied that there is consistency (or otherwise), the Board must be cognizant of the higher order documents, in this case the NZCPS, and s104(1)(b)(iv) requires the Board to have specific regard to the NZCPS. Having had such regard, the Board is satisfied that there is no specific incongruity between the NZCPS and [AUP]. Any key differences are an anticipated and appropriate particularisation between the national and regional level documents. Therefore, the substantive discussion on coastal objectives and policies herein is made against the [AUP] provisions. The NZCPS assessment is limited to confirming the consistency between the two documents, with particular attention to reclamation and biodiversity provisions. In taking this approach, the Board acknowledges and considers the emphasis placed on the NZCPS by Mr Brown and Ms Coombes in particular, and takes account of their evidence throughout the following assessment.
>
> (citations omitted)

[75] Mr Enright argued that the Board's approach was inconsistent with the approach taken in *King Salmon*. He submitted the Board erred in relying instead on an Environment Court decision in *Appealing Wanaka Incorporated v Queenstown Lakes*

---

[77] Board Decision at [678]-[680].

District Council[78] and the decision of the High Court in *R J Davidson Family Trust v Marlborough District Council*.[79] Mr Enright submitted that, although a plan change case, the correct approach was set out by Wylie J in *Royal Forest and Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council* ("*Forest and Bird BOP decision*") and in particular the following comments:[80]

> There is nothing in the majority's observation in *King Salmon* which suggests that a decision-maker can confine his, her or its attention to unchallenged parts of the planning document in issue or to the planning document immediately above the document under consideration, and ignore or gloss over higher order planning documents.
>
> …
>
> Counsel also referred me to *Appealing Wanaka Inc v Queenstown Lakes District Council Inc*, where the Environment Court held as follows: [81]
>
> > The recent decision of the Supreme Court in *EDS v NZ King Salmon* sets out an amended — and simpler — approach to assessing plan changes … The principle in *EDS v NZ King Salmon* is that if higher order documents in the statutory hierarchy existed when the plan was prepared then each of those statutory documents is particularised in the lower document. It appears that there is, in effect, a rebuttable presumption that each higher document has been given effect to or had regard to (or whatever the relevant requirement is). Thus there is no necessity to refer back to any higher document when determining a plan change provided that the plan is sufficiently certain, and neither incomplete nor invalid. This seems to have been accepted by the High Court in a recent decision — *Thumb Point Station Ltd v Auckland City Council*. …
> >
> > We respectfully agree provided that the reference to giving effect to the "purposes and principles" of the Act includes giving effect to the higher order statutory instruments, and indeed to the consideration of the other statutory documents referred to in sections 74 and 75 of the RMA.
>
> As I have already noted, the Environment Court in the case before the Court did not refer to the *Appealing Wanaka* decision, but it appears to have adopted the same approach.
>
> I have reservations about the approach taken by the Environment Court in *Appealing Wanaka*. First, I do not consider that it accurately records what was said in *King Salmon* or by this Court in *Thumb Point*. Secondly, and perhaps more importantly, in my view there is a distinct risk that the intent and effect of

---

78 *Appealing Wanaka Incorporated v Queenstown Lakes District Council* [2015] NZEnvC 139.

79 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017] NZRMA 227.

80 *Royal Forest and Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1 at [84] and [86]-[88].

81 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139, at [43].

> higher order plans can be diluted, or even lost, in the provisions of plans lower in the planning hierarchy. Put colloquially, the story can be lost in the re-telling. Indeed, a similar point was noted in *Appealing Wanaka*, where the Court sounded a warning in the following terms:[82]
>
> …While the simplicity of that process may sometimes be more theoretical than real, since in practice plans may be uncertain, incomplete or even partly invalid, it is easier than the exhaustive and repetitive process followed before the Supreme Court decided *EDS v NZ King Salmon*.
>
> In my judgment, there are dangers in the truncated approach taken in *Appealing Wanaka* and by the Environment Court in this case.
>
> (citations included).

[76] As a result, Mr Enright submitted in adopting a particularisation approach, the Board failed to acknowledge or address differences between the wording of, in particular, policies 2, 10 and 11 of the NZCPS and the corresponding wording within the AUP including in chapters F2 and D9 and with regard to the Regional Policy Statement, including in particular chapter B6 (Mana whenua). Mr Enright submitted this error in approach was material and should therefore be remitted back to the Board to be considered afresh.

Discussion – the s 104/171 issue

[77] There is no dispute that the NZCPS was a mandatory relevant consideration for the Board as it considered the applications for resource consent and NoR. Having considered carefully the Board's approach as set out in the Board Decision, I am however unable to see any error in the approach that was taken.

[78] Contrary to the cases advanced by the appellants, I do not consider the Board in any way incorrectly fettered its approach, or otherwise failed to consider the relevant parts of the NZCPS as it was required to do. On the contrary, it is clear that far from simply relying upon the way in which the NZCPS had been reflected in the AUP, the Board had in fact satisfied itself that the NZCPS was appropriately reflected in the AUP, with a particular reference to the planning evidence adduced by both the Auckland Council and Ngāti Whātua, and at no stage had it simply assumed that the AUP was consistent to the NZCPS.

---

82 At [47].

[79] First, in an earlier section of its decision the Board confirmed it understood where the NZCPS fitted into its analysis, noting:[83]

> The New Zealand Coastal Policy Statement is a national policy statement under the RMA. The purpose of the NZCPS is to state policies in order to achieve the purpose of the RMA in relation to New Zealand's coastal environment.
>
> The Board is required to "have regard" or "particular regard" to the relevant provisions of the NZCPS. The Board has already noted that it must do so in the context of all of the relevant considerations provided for in ss104 and 171 while attributing the appropriate weight to those provisions, particularly in light of the *King Salmon* decision. In that regard, various aspects of the NZCPS are relevant, particularly to the proposed reclamations of the Māngere Inlet that traverse the coastal environment and to the discharges to the CMA that will result from the construction and operation of the Proposal.

[80] The Board went on to set out carefully what the Supreme Court had said in *King Salmon*:[84]

> The Supreme Court in *King Salmon* was considering plan changes to facilitate the development of a marine farm in an area of outstanding natural character and outstanding natural landscape. The Court was, therefore, required to address the provisions of the NZCPS relating to those aspects of the coastal environment, namely Policies 13(1)(a) and 15(a). A key issue was whether those policies established "environmental bottom lines" that needed to be strictly applied or whether an "overall broad judgment" in accordance with hitherto accepted practice needed to be exercised. The Court concluded that the policies in question require the avoidance of adverse effects on areas of the coastal environment that have outstanding natural character, outstanding natural features and outstanding natural landscapes. In those circumstances, where the regional coastal plan was required to "give effect to" the NZCPS, strict adherence to directive policies contained in the NZCPS was required. It was not appropriate for decision-makers on plan changes to make an "overall broad judgment" in terms of Part 2 of the RMA.
>
> Of particular importance, the majority considered the use and relevance of the verb "avoid" in relation to Policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS:
>
> > "[96] … We consider that 'avoid' has its ordinary meaning of 'not allow' or 'prevent the occurrence of'. In the sequence of 'avoiding, remedying, or mitigating any adverse effects of activities on the environment' in s 5(2)(c), for example, it is difficult to see that 'avoid' could sensibly bear any other meaning. Similarly in relation to policies 13(1)(a) and (b) and 15(a) and (b), which also juxtaposed the words 'avoid', 'remedy' and 'mitigate'. This interpretation with objective two of the NZCPS which is, in part, '[t]o preserve the natural character of the coastal environment and protect natural features and landscape values through … identifying

---

83 Board Decision at [171]-[172].
84 Board Decision at [173]-[174].

> those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities'.
>
> …
>
> [97] However, taking that meaning [of avoid] may not advance matters greatly: whether 'avoid' (in the sense of 'not allow' or 'prevent the occurrence of') bites depends on whether the 'overall judgment' approach or the 'environmental bottom line' approach is adopted under the 'overall judgment' approach, a policy direction to 'avoid' adverse effect is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to greater weight; under the 'environmental bottom line' approach, it has greater force."

[81] As the Board went on to note however:[85]

> The Board has given careful consideration to these dicta relating to NZCPS by New Zealand's final appellate court. It is clear from the Supreme Court decision that the NZCPS, particularly the directive policies such as Policies 13(1)(a) and 15(a), are clearly entitled to very significant weight. The Board has accorded those policies such weight in deference to the Supreme Court's decision. However, as already noted, the Board is required by s104 to "have regard to" and s171 "to have particular regard" only (not to "give effect to") the NZCPS. It is required to consider that instrument alongside other factors made relevant by those sections in making a balanced judgment taking account of all such factors. That is the approach it has adopted, as will be apparent from its specific consideration of this issue in the context of the applications before the Board. As discussed later, it is the [AUP] that has given effect to the NZCPS. The overlap and duplication is considerable and highly relevant.

[82] It is this latter point that establishes clearly that different considerations are required as between plan change cases and those determining applications for resource consent and/or NoR. As Mr Enright responsibly acknowledged at the hearing, the Board was not required to give effect to the NZCPS as were the decision-makers involved in formulating new plans such as in *King Salmon* and the *Forest and Bird BOP decision* but rather in determining applications for resource consent and NoR necessary for the proposed EWL was required simply to have regard[86] or particular regard[87] to the NZCPS respectively.

[83] In the context of applications for resource consent and NoR as in the present case, and as Mr Lanning submitted, the Board was required to "give genuine attention

---

85 At [175].
86 Resource Management Act, s 104.
87 Section 171.

and thought to the matters set out in s 104 and 171 [including the NZCPS] but they must not necessarily be accepted".[88]

[84] Given that context and far from disclosing an error, paragraphs [678]-[680] of the Board's decision set out at [74] above, together with the other specific references to the Board Decision criticised by the appellants, make it clear that the Board did not just assume that the AUP had given effect to the NZCPS. It instead considered the relevant parts of the NZCPS and the corresponding provisions of the AUP, and to the extent that there were differences preferred the formulation contained in the AUP as it was entitled to do.

[85] The extent of the analysis undertaken by the Board is in fact made clear in a number of different sections of the Board Decision. The Board confirmed that it had specifically considered the relevant parts of the policies put at issue by the appellants, including the planning witness called on behalf of Ngāti Whātua, and in the course of its analysis specifically considered Policy 2,[89] 10,[90] and 11[91] of the NZCPS. In that regard the Board specifically considered and rejected the arguments raised by Ngāti Whātua that the NZCPS itself did not favour the construction of roads within the coastal marine area,[92] and that with regard to the Mana Whenua section of the AUP:[93]

> Consistent with the NZCPS, under Policy 2 the Board accepts that in taking account of the principles of the Treaty of Waitangi, NZTA have incorporated mātauranga Māori (Policy 2(c)) through the consultation and engagement process, recognising the importance of culturally significant sites such as (but not limited to) Mutukāroa, Te Tō Waka and Te Apunga o Tainui. They have clearly provided opportunities for Māori involvement in decision-making (Policy 2(d)) and, as set out later in this Report, NZTA has taken into account relevant iwi resource management plans. The Board accepts that each of these requirements has been met as part of the consultation and engagement process that occurred.

---

88 See for example *Foodstuffs [South Island] Limited v Christchurch City Council* [1999] NZRMA 481 (HC) and the Environment Court's discussion of that case in *Unison Networks Limited v Hastings District Council* [2011] NZRMA 394 at [69]-[70], and see discussion in *R J Davidson v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [71]-[73].

89 Board Decision at [689] and [773]. The Board considered 2(a) and (c) and Mr Enright's suggestion that Policy 2(f) was also relevant, but this is clearly a direction for those developing relevant plans and had no relevance to a resource consent application in the nature of the proposed EWL.

90 At [682]-[685].

91 At [686]-[688].

92 At [698]-[700].

93 At [773].

(citations omitted)

Conclusion on the s 104/171 issue

[86] By any measure, I am satisfied that the Board has had as it was required to do regard/particular regard to the NZCPS in the course of its consideration of the proposed EWL. Having done so it was therefore entirely open to the Board to reject, as it did, the submission made on behalf of Ngāti Whātua and Forest and Bird that the specific wording of the NZCPS somehow trumped the provisions of the AUP, and, likewise, for the Board to instead prefer the relevant provisions of the AUP to the extent that these differed from the NZCPS.

[87] Having concluded there was no error in approach by the Board to its consideration of the NZCPS, there is no basis upon which the second limb of the appeal can succeed. The appeals on the s 104/171 issue are accordingly dismissed.

Decision

[88] The appeals are dismissed. Should the respondents seek costs, memoranda are to be filed within one month of the issue of this judgment. The parties from whom costs are sought will have one further month to respond, following which I will determine the issue on the papers.

_____

Powell J