

IN THE HIGH COURT OF NEW ZEALAND
Auckland Registry
I TE KŌTI MATUA O AOTEAROA
Tāmaki Makaurau Rohe

CIV-2018-

IN THE MATTER of an appeal under s 149V of the Resource Management Act 1991

AND IN THE MATTER of the East West Link Proposal

BETWEEN ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED, an incorporated society having its registered office at 205 Victoria Street, Wellington

Appellant

AND NEW ZEALAND TRANSPORT AGENCY, a Crown entity established under s 93 of the Land Transport Management Act 2003 and having its head office at Victoria Arcade, 50 Victoria Street, Wellington

Respondent

NOTICE OF APPEAL

DATED 13 FEBRUARY 2018

**Royal Forest and Bird Protection Society
of New Zealand Inc**
Solicitor acting: Sally Gepp/Peter Anderson
PO Box 266, Nelson 7040
021558241
s.gepp@forestandbird.org.nz/p.anderson@forestandbird.org.nz

To: The Registrar of the High Court at Auckland

And to: New Zealand Transport Agency

And to: Auckland Council

And to: Environmental Protection Authority

TAKE NOTICE that the Royal Forest and Bird Protection Society of New Zealand Inc will appeal to the High Court against a decision of a Board of Inquiry appointed by the Environmental Protection Authority to confirm Notices of Requirement and grant resource consents sought by the New Zealand Transport Agency for the East West Link Proposal upon the grounds that the decision was wrong in law. The decision was made on 21 December 2017 and publicly notified on 23 January 2018.

ERRORS OF LAW

First error of law

1. The Board erred in finding that the proposal is not contrary to the objectives and policies of the Auckland Unitary Plan, such that the Proposal was consistent with s 104D of the Act. In reaching the s 104D finding, the Board erred in its assessment of the Auckland Unitary Plan D9.3 significant ecological areas policies:
 - a. It erred in its assessment of whether the Proposal was contrary to the Policy D9.3(9) requirement to avoid adverse effects on specified biodiversity values, by misinterpreting the D9.3(9) policies and applying effects thresholds not found in the policies.
 - b. It erred in its assessment of whether the Proposal was contrary to the Policy D9.3(10) requirement to avoid significant adverse effects on other specified biodiversity values by finding that that the Proposal is consistent in part, and not contrary to Policy D9.3(10), when the evidence as to the Proposal's significant adverse effects at Anns Creek East was inconsistent with and contradictory of that finding.
 - c. It erred in finding that the Proposal was not contrary to the coastal and biodiversity provisions on the basis that the Proposal will not result in significant adverse effects on populations or ecosystems and there is no practicable alternative to the proposed alignment:
 - i. by applying the wrong effects threshold; and
 - ii. where the evidence that the Proposal would have significant adverse effects on ecosystems, including loss of unique ecological values (lava shrubland ecosystems and loss of a

naturally uncommon ecosystem type) at Anns Creek was inconsistent with and contrary to the finding.¹

2. The first error of law was also material to the Board's decisions under s 104 and s 171.

Second error of law

3. In reaching the s 104D finding, the Board failed to consider mandatory relevant considerations, being:
 - a. the Chapter D9 objectives; and
 - b. Policy D9.3(11).
4. The second error of law was also material to the Board's decisions under s 104 and s 171.

Third error of law

5. In reaching the s 104D finding, the Board incorrectly interpreted Policy F2.2.3(2) (reclamation) as requiring "consideration of" the overlay policies when Policy F2.2.3(2) requires that reclamation is "in accordance with" the overlay policies; a different legal relationship that materially affects the assessment of whether the proposal is contrary to the objectives and policies. The Board failed to consider whether the effects of the reclamation were managed "in accordance with" the overlay policies.
6. The third error of law was also material to the Board's decisions under s 104 and s 171.

Fourth error of law

7. The Board erred by taking a "holistic" approach to s 104D(1)(b) which assessed whether the Proposal is contrary to the objectives and policies based on a "fair appraisal" of "the objectives and policies read as a whole". The correct approach was:
 - a. that the Proposal must not have been contrary to any of the objectives or policies; or
 - b. in the alternative, that the Board ought to have undertaken a reconciliation of the applicable objectives and policies, paying careful attention to the manner in which they are expressed, and recognising that policies requiring avoidance of adverse effects are so directive that the Proposal could not lawfully be considered "not contrary" to the objectives and policies read as a whole.

¹ [592]

Fifth error of law

8. In its decision to grant consent under s 104, the Board applied a wrong legal test and misinterpreted the term “avoid adverse effects” in reaching its findings under s 104(1)(b)(v) and s 104(1)(b)(vi). The Board’s “overall balanced finding” is not based on the wording of the policies themselves and is not the correct legal approach under s 104.

Sixth error of law

9. In making its s 104 and 171 decisions the Board failed to have regard/particular regard to mandatory relevant considerations, being:
 - a. The New Zealand Coastal Policy Statement objectives.
 - b. The Auckland Unitary Plan regional policy statement provisions relating to indigenous biodiversity, in particular Objective B.7.2.1(1) and Policy B7.2.2(5).

QUESTIONS OF LAW TO BE RESOLVED

10. Did the Board err in its assessment of the Auckland Unitary Plan (regional plan) D9.3 significant ecological areas policies? If so was the error material to the Board’s s 104D, 104 or 171 findings?
11. Were the Chapter D9 objectives and Policy D9.3(11) mandatory relevant considerations, and did the Board fail to consider those provisions? If so, was that failure material to the Board’s s 104D, 104 or 171 findings?
12. Is the Board’s interpretation of Policy F2.2.3(2) (reclamation) as requiring “consideration of” the overlay policies correct? If not, did the Board’s misinterpretation of Policy F2.2.3(2) materially affect its assessment of the Proposal under ss 104D, 104 or 171?
13. Does s 104D(1)(b) call for a “holistic” approach where the assessment of whether the Proposal is contrary to the objectives and policies is based on a “fair appraisal” of “the objectives and policies read as a whole”? If that approach was not correct, was the error material to the Board’s s104D decision?
14. Did the Board err in its s 104 decision by taking an overall judgment approach to its consideration of the planning instruments and misinterpreting the term “avoid adverse effects”? If so was that error material to its s 104 decision?
15. Were the New Zealand Coastal Policy Statement objectives and the Auckland Unitary Plan (Regional Policy Statement) provisions relating to indigenous biodiversity, in particular Objective B.7.2.1(1) and Policy B7.2.2(5) mandatory relevant considerations? Did the Board fail to have regard/particular regard

to them? If so was that error material to the Board's s 104 and s 171 decisions?

GROUNDINGS OF APPEAL

First error of law

16. Under s 104D of the Act, the Board could grant resource consents for the proposal (a non-complying activity) only if satisfied either that the adverse effects of the activity on the environment would be minor (s104D(1)(a)), or that the activity would not be contrary to the objectives and policies of the relevant plans (s 104D(1)(b)). The Board accepted that the adverse effects of the Proposal would be more than minor and was therefore required to consider the second limb of s 104D(1).²

17. In reaching the s 104D finding, the Board erred in its assessment of consistency with the objectives and policies relating to indigenous biodiversity.

Policy D9.3(9)

18. The Board erred in its assessment of whether the Proposal was contrary to the Policy D9.3(9) requirement to avoid adverse effects on specified biodiversity values.

Threatened or at risk indigenous species

19. The Board found that there would be permanent loss of threatened birds' feeding and roosting areas that must be considered significant³, but in addressing Policy D9.3(9)(a)(i) held that it was "contestable" whether the Proposal would have non-transitory or more than minor adverse effects on threatened or at risk indigenous species given that the Proposal would not adversely affect the populations of those species.⁴

20. The Board's application of a "population level" effects threshold was an incorrect interpretation of Policy D9.3(9)(a)(i). Such a threshold is not derived from or supported by the Plan:

- a. Policy D9.3(9)(a)(i) is to avoid activities in the coastal environment where they will result in non-transitory or more than minor adverse effects on threatened or at risk indigenous species.
- b. Policy D9.3(2) sets out the types of adverse effects on indigenous biodiversity values in significant ecological areas that the D9 policies apply to. This includes (inter alia) a reduction in the size and extent

² [615]

³ [471], [605]

⁴ [645]

of, indigenous ecosystems and the habitats of indigenous species. The Board does not refer to this policy.

21. On a correct interpretation the Proposal is contrary to Policy D9.3(9)(a)(i).

Habitats of indigenous species which are naturally rare

22. The Board held in terms of Policy D9.3(9)(a)(ii) that the Proposal would have non-transitory and more than minor adverse effects on areas of habitat utilised by some rare species “but that the shore birds will roost and feed elsewhere”.⁵ The Board was incorrect to interpret and apply Policy D9.3(9)(a)(ii) as if it only applied to habitat of rare species that was not available elsewhere. On a correct interpretation the Proposal is contrary to Policy D9.3(9)(a)(ii).

Threatened or rare indigenous ecosystems and vegetation types, including naturally rare ecosystems and vegetation types; areas containing nationally significant examples of indigenous ecosystems or indigenous community types

23. The evidence was that the Proposal would have significant adverse effects on threatened or rare indigenous ecosystems and vegetation types:

- a. The ecological witnesses agreed that the Proposal would have significant effects on rare and threatened biodiversity and ecosystems at Anns Creek East.⁶
- b. The evidence called by the New Zealand Transport Agency was that construction of the Anns Creek viaducts will result in significant ecological effects including disturbance and loss of lava shrubland ecosystems, disturbance and loss of freshwater raupo wetland and saltmeadow communities, disturbance and loss of ecological sequences from terrestrial to saline to freshwater and loss of and impacts on a naturally uncommon ecosystem type.⁷

24. In assessing those effects in terms of Policy D9.3(9)(a)(iii) and D9.3(9)(a)(iv), the Board held that the Proposal had sought to avoid adverse effects on Anns Creek to the greatest extent practicable, and otherwise minimise and mitigate unavoidable adverse effects” and on that basis held that the proposal was not consistent with but “not contrary to those policies”.⁸

25. The Board erred in holding that a Proposal that seeks (but fails) to avoid adverse effects is not contrary to policies requiring that adverse effects are avoided. On a correct interpretation, the Proposal is contrary to Policies D9.3(9)(a)(ii) and (iv).

⁵ [645]

⁶ Joint witness statement - ecology

⁷ [592]

⁸ [646]

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

26. The Board held that displacement of birds from areas directly affected by the reclamations would be permanent and that there would also be some disturbance from people using a proposed walkway, but in assessing these effects against Policy D9.3(9)(b) held that it is unclear whether the Proposal is contrary to that policy directive and that birds will likely opportunistically feed and roost elsewhere.

27. The Board erred in applying Policy D9.3(9)(b) as if it only applied to disturbance of migratory bird roosting, nesting and feeding areas where the birds could not feed and roost elsewhere. On a correct interpretation, the Proposal is contrary to Policy D9.3(9)(b).

Policy D9.3(10)

28. The Board erred in its assessment of whether the Proposal was contrary to the Policy D9.3(10) requirement to avoid significant adverse effects on other specified biodiversity values.

29. The Board found that:

- a. The Proposal has avoided significant adverse effects on Anns Creek, and will mitigate other effects on that environment.⁹
- b. The Proposal is consistent in part, and not contrary to Policy D9.3(10).

30. The evidence was inconsistent with and contradictory of those findings:

- a. The evidence called by the New Zealand Transport Agency was that:
 - i. Anns Creek East contains sensitive and unique ecological values with lava shrubland habitats, threatened plant habitats and gradients between mangroves to saltmarsh to freshwater wetland.
 - ii. Construction of the Anns Creek viaducts, including access for temporary staging and location of a construction yard will result in significant ecological effects including (a) disturbance and loss of lava shrubland ecosystems; (b) disturbance and loss of freshwater raupo wetland and saltmeadow communities; (c) disturbance and loss of ecological sequences from terrestrial to saline to freshwater;

⁹ [649]

(d) loss of and impacts on a naturally uncommon ecosystem type.

iii. Viaducts will result in significant adverse effects on the north-eastern lava flow, and loss of raupo wetland and saltmarsh ecosystems.

iv. Ongoing operational effects of the Anns Creek viaducts will include shading and rain shadow effects on vegetation in Anns Creek, and increased weed invasion from the construction and staging footprint.¹⁰

b. The ecological witnesses agreed that the Proposal would have significant adverse effects on rare and threatened biodiversity and ecosystems at Anns Creek.¹¹

c. The affected ecological values at Anns Creek constitute biodiversity values to which Policy D9.3(10) applies.

31. The only reasonable finding on the evidence was that the Proposal is contrary to Policy D9.3(10).

Overall assessment

32. In assessing consistency with Chapter F2 and the extent that it engages the biodiversity provisions in D9, the Board determined that the Proposal was not contrary to those provisions on the basis of its findings that the Proposal would not result in significant adverse effects on populations or ecosystems and there was no practicable alternative to the proposed alignment.

33. The Board erred:

a. In applying a test of “significant adverse effects on populations or ecosystems” when relevant D9.3 provisions incorporating a more stringent test were contravened.

b. In finding that the Proposal was not contrary to those provisions when it had found that the Proposal would be contrary to Policy D9.3(9)(c) as it would result in deposition of material at levels that would adversely affect the natural ecological functioning of the area of deposition.

c. Because on a correct interpretation, it ought to have found the Proposal to be also contrary to other D9.3 policies as set out at paragraphs 19 to 30 above.

¹⁰ [592]

¹¹ Expert conferencing joint witness statement to the Board of Inquiry – Ecology dated 23 May 2017

- d. Even if a threshold of “no significant adverse effects on populations or ecosystems” were the appropriate threshold to apply, the evidence was inconsistent with and contradictory of that finding.

- 34. On a correct interpretation, the Proposal is contrary to those provisions.
- 35. The error in the Board’s assessment of consistency with the objectives and policies relating to indigenous biodiversity also materially affected the Board’s decisions:
 - a. To grant resource consent under s 104.¹²
 - b. To approve Notice of Requirement under s 171(1)(a).¹³

Second error of law

- 36. In reaching the s 104D finding, the Board’s failure to consider mandatory relevant considerations, being:
 - a. the Chapter D9 objectives.
 - b. Policy D9.3(11).
- 37. The Chapter D9 objectives and Policy D9.3(11) were engaged by the Proposal, and are not achieved by the proposal. The failure to consider these provisions was material to the Board’s s 104D finding.
- 38. Those errors also materially affected the Board’s decisions:
 - a. To grant the resource consents under s 104.¹⁴
 - b. To approve the notices of requirement under s 171(1)(a).¹⁵

Third error of law

- 39. In reaching the s 104D finding, the Board erred in its assessment of the Proposal’s consistency with the Auckland Unitary Plan provisions by misinterpreting Policy F2.2.3(2).
- 40. The Board erred in its assessment of Policy F2.2.3(2) by applying an incorrect legal test to the relationship between the Chapter D9 policies and the Chapter F2 reclamation policies:
 - a. The Board found:

[629] Policy F2.2.3(2) **requires consideration of** the overlay policies that are relevant to the area of the proposed reclamation. In this case that engages the policies in

¹² [704] - [706], [730]-[731]

¹³ [1229]-[1231],[1265], [1301]

¹⁴ [704] - [706], [730]-[731]

¹⁵ [1229]-[1231],[1265], [1301]

Chapters D9 (Significant ecological areas overlay) and D17 (Historic Heritage Overlay). Those provisions are assessed further below.

...

[642] Returning to Policy F2.2.3(2), the Board **is required to consider the relevant provisions of** Chapter D9 (Significant Ecological Areas overlay), Chapter D10 (Outstanding Natural Features overlay) and Outstanding Natural Landscapes Overlay) and Chapter D17 (Historic Heritage Overlay).

- b. The Board also found that the overlay policies “**do not trump**” the reclamation policies. The Board read the overlay policies “within the set of all relevant policies that must be considered under s104D and s104(1) of the RMA”.¹⁶
- c. Policy F2.2.3(2) is:
 - (2) Where reclamation or drainage is proposed that affects an overlay, manage effects in accordance with the overlay policies.
- d. A reclamation proposal that affects an overlay is consistent Policy F2.2.3(2) only where its effects are managed in accordance with the overlay policies. This is more stringent than merely requiring consideration of the overlay policies.
- e. The Board found that the proposal would be inconsistent with or contrary to various Chapter D9 (Significant Ecological Areas Overlay) policies.¹⁷ On a proper interpretation, the Proposal is contrary to Policy F2.2.3(2) due to the effects of the reclamation not being managed in accordance with the Chapter D9 overlay policies.
- f. The Board’s finding that the proposal was not contrary to the coastal provisions (which include the Chapter F2 reclamation provisions)¹⁸ and that on balance the proposal was not contrary to the objectives and policies of the Auckland Unitary Plan was affected by its error.

41. That error also materially affected the Board’s decisions:

- a. To grant resource consents under s 104.¹⁹
- b. To approve the notices of requirement under s 171.²⁰

¹⁶ [643]

¹⁷ [646] – [649]

¹⁸ [654]

¹⁹ [704] - [706], [730]-[731]

²⁰ [1229]-[1231],[1265], [1301]

Fourth error of law

42. The Board erred by taking a “holistic” approach to s 104D(1)(b) which assessed whether the Proposal is contrary to the objectives and policies based on a “fair appraisal” of “the objectives and policies read as a whole”.²¹
43. The correct approach was that to meet s 104D(1)(b) the activity must not be contrary to any of the objectives or policies: *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817.²² The Proposal was contrary to AUP policies and as such was not consistent with s 104D(1)(b) and resource consents could not have been granted.
44. In the alternative, the Board ought to have undertaken a reconciliation of the applicable objectives and policies, paying careful attention to the manner in which they are expressed, and recognising that policies requiring avoidance of adverse effects are so directive that, given its inconsistency with those policies, the Proposal could not lawfully be considered “not contrary” to the objectives and policies read as a whole.

Fifth error of law

45. In its decision to grant consent under s 104, the Board erred in taking an overall judgment approach to its consideration of the planning instruments and misinterpreting the term “avoid adverse effects”.
46. The correct approach was to assess the Proposal’s consistency with the planning instruments’ policy direction:
- a. as derived from the words of the provisions themselves, recognising the directive nature of avoidance policies; and
 - b. without introducing extraneous considerations not found within the policies.
47. The Board erred by assessing directive provisions “on balance against all relevant provisions”, making an “overall balanced finding”²³, taking into account extraneous considerations²⁴ and finding that the Proposal achieved a “level of consistency with the planning framework commensurate with the overall benefits of the Proposal”.²⁵
48. The overall judgment approach meant that less directive enabling policies prevailed over directive policies requiring avoidance of adverse effects. On the correct approach, the Proposal cannot be considered consistent with the policy direction of the planning instruments.

²¹ [364]-[368]

²² At [37] – [39].

²³ [694] [705] [731]

²⁴ [705]

²⁵ [731]

Sixth error of law

49. In making its s 104 and s 171 decisions, the Board was required to have regard/particular regard to the New Zealand Coastal Policy Statement and the Auckland Unitary Plan (Regional Policy Statement).
50. The New Zealand Coastal Policy Statement contains objectives that were relevant to the Proposal before the Board.
51. The Auckland Unitary Plan (Regional Policy Statement) contains provisions relating to indigenous biodiversity, in particular Objective B.7.2.1(1) and Policy B7.2.2(5), that were also relevant to the Proposal before the Board.
52. The Board failed to have regard/particular regard to those provisions. The failure was material to the Board's s 104 and s 171 decisions.

RELIEF SOUGHT

53. The Appellant seeks the following relief:
- a. An order overturning the Board's decision and declining NZTA's applications for resource consents and notices of requirement.
 - b. The costs of this appeal.
 - c. Such other relief as the court considers appropriate.

Dated 13 February 2018



Sally Gepp/Peter Anderson

Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc

Address for service

Tel: 021558241

0212866992

Email: s.gepp@forestandbird.org.nz/p.anderson@forestandbird.org.nz

Post: Royal Forest and Bird Protection Society of New Zealand Inc

PO Box 266

PO Box 2516

Nelson 7040

Christchurch 8140