



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND
INCORPORATED v NEW ZEALAND TRANSPORT AGENCY

(SC 25/2021)[2024] NZSC 26

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Glossary

- EWL = East West Link
- AUP = Auckland Unitary Plan
- RMA = Resource Management Act 1991
- NZCPS = New Zealand Coastal Policy Statement
- Board = The Board of Inquiry
- Royal Forest and Bird = Royal Forest and Bird Protection Society of New Zealand Incorporated, the Appellant
- Waka Kotahi = New Zealand Transport Agency | Waka Kotahi, the Respondent
- Ngāti Whātua Ōrākei = Ngāti Whātua Ōrākei Whai Māia Limited, an Interested Party
- The avoid policies = Policies in the NZCPS and AUP directing the avoidance of harm to indigenous biodiversity

Background

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

The EWL is intended to run along the northern shore of the Māngere Inlet, at the north-eastern corner of the Manukau Harbour. Works for the EWL comprise a range of measures, including reclamation of part of the Inlet. Some of these works occur in parts of the environment identified as “significant ecological areas” in the Auckland

Unitary Plan (AUP). Some of the project works in these areas have the potential to cause adverse effects on indigenous birds and flora.

Waka Kotahi requires certain approvals (resource consents and notices of requirement) before it can proceed with the proposed EWL. The legal proceedings relate to whether these approvals can be given consistently with the Resource Management Act 1991 (RMA) and the relevant planning instruments, namely the AUP and the New Zealand Coastal Policy Statement (NZCPS).

Procedural history

The issue was first heard by an expert Board of Inquiry (the Board), which granted Waka Kotahi the necessary approvals with conditions (with the exception of a coastal permit for dredging, which was only granted in part).

The Royal Forest and Bird Protection Society of New Zealand Incorporated (Royal Forest and Bird) and Ngāti Whātua Ōrākei Whai Māia Limited (Ngāti Whātua Ōrākei) appealed the Board's decision to the High Court. Because the EWL was treated as a non-complying activity for consent purposes, it had to pass through a "gateway" test in section 104D(1)(b) of the RMA and a further test contained in section 104. The notices of requirement had to satisfy a similar test in section 171. Broadly, the appeal turned on whether the EWL was contrary to the objectives and policies of the AUP (which would mean that it could not meet section 104D(1)(b)) and whether the Board had failed to properly have regard to the NZCPS for the purposes of sections 104 and 171. The High Court dismissed the appeals.

On 28 May 2021, the Supreme Court granted leave to Royal Forest and Bird to appeal the High Court's judgment on the question of whether the Court was correct to dismiss the appeal against the Board's decision.

The parties' positions

Royal Forest and Bird

Royal Forest and Bird submits that the adverse effects the EWL proposal would have on flora and birds mean that it breaches policies in the NZCPS and AUP which direct the avoidance of harm to indigenous biodiversity (the avoid policies). It submits that this means the EWL cannot satisfy sections 104D, 104 and 171.

Waka Kotahi

Waka Kotahi submits that the avoid policies are strong considerations, but breaching them will not mean that the EWL cannot obtain approval. Rather, the planning documents contain a narrow window through which the EWL can pass, despite the adverse effects it will cause.

Interested parties

Ngāti Whātua Ōrākei, as an interested party, supports the position of Royal Forest and Bird and also made further submissions on issues relevant to mana whenua.

Auckland Council, and Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Incorporated, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust, as interested

parties, support the position of Waka Kotahi. The latter four parties also made submissions on issues relevant to mana whenua, opposing those of Ngāti Whātua Ōrākei. The Supreme Court did not deal with these issues as they were not part of the appeal to the High Court.

The Supreme Court decision

The Supreme Court allowed the appeal by a majority (comprising Winkelmann CJ, Glazebrook, Ellen France and Williams JJ). This majority as to the result ruled that the decision should be remitted to the Board for reconsideration in line with the terms of the judgment.

The reasons

A different majority as to reasons (comprising Winkelmann CJ, Ellen France and Williams JJ) found that the AUP, read in line with the NZCPS, contemplates a narrow exception for significant infrastructure that has adverse effects on indigenous biodiversity. It will be very difficult to meet the conditions for this exception to apply. The Board erred as it took an “overall judgment” approach, conflated the requirement that the EWL be “reasonably necessary” under section 171 with the requirement that there be “no practicable alternative” to the EWL under the NZCPS and AUP, and assessed environmental effects in a manner inconsistent with the policies. Given these errors, the Court found that the proposal should be remitted back to the Board.

Glazebrook J, while agreeing with the result, disagreed as to this majority’s reasons. She would have found that the avoid policies in the NZCPS and AUP did not leave room for significant infrastructure where the relevant proposal has adverse effects in breach of avoid policies (though she did not exclude the possibility that a conflict between infrastructure and avoid policies could be found on other facts). The avoid policies in the NZCPS and AUP would apply as bottom lines, meaning that the EWL could not pass through sections 104 and 171 of the RMA.

Dissenting position

William Young J dissented. He would have found that the relevant provisions leave flexibility in how avoid policies are considered in relation to resource consents and notices of requirement. He would have found that the EWL could pass through the relevant RMA provisions and that there was no error of law in the Board’s approach. As such, he would have dismissed the appeal.

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