



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 INC v
NEW ZEALAND TRANSPORT AGENCY

(SC 25/2021)

CASE HISTORY SYNOPSIS

This synopsis is provided to assist in understanding the history of the case and the issues to be heard by the Court. It does not represent the views of the panel that will hear the appeal in the Supreme Court. The synopsis does not comprise part of the reasons for the judgment of the High Court. A direct link to the judgment is included at the end of this synopsis.

Background

The East West Link (EWL) is a proposal from the respondent, the New Zealand Transport Agency | Waka Kotahi, 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. It 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.

Works for the proposed EWL include reclamation of part of the Māngere Inlet, dredging and works associated with construction of a viaduct at Anns Creek. The affected area includes parts of the coastal environment identified as “significant ecological areas” in the Auckland Unitary Plan (AUP). The proposal area is also a significant cultural landscape to mana whenua.

Waka Kotahi requires certain approvals 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 relevant planning instruments.

Procedural history

Waka Kotahi lodged two notices of requirement and 24 applications for resource consent with the Environmental Protection Authority (EPA) on 16 December 2016. In line with s 146 of the RMA, the EPA recommended to the relevant Ministers, the Minister for the Environment and the Minister of Conservation, that the EWL be declared a proposal of national significance and



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the applications referred to a Board of Inquiry for streamlined consideration and decision-making.

On 8 February 2017, the Ministers jointly directed that the matters be referred to a Board of Inquiry under s 147 of the RMA as a proposal of national significance. The Board commenced substantive hearings in June 2017. It issued its Final Report and Decision on 21 December 2017.

In broad terms, the Board unanimously approved the notices of requirement and resource consent applications (subject to conditions) sought by Waka Kotahi, with the exception of a coastal permit for dredging, which was granted in part.

Royal Forest and Bird Protection Society of New Zealand Inc and Ngāti Whātua Ōrākei Whai Maia Ltd (supported by Te Kawerau Iwi Tribal Authority) both appealed the Board's decision to the High Court. Under s 149V of the RMA, these appeals were limited to questions of law.

There were two issues in the appeals. First, Forest and Bird argued that the particular policies that the Board had accepted that the proposal could not comply with meant the proposal was contrary to the objectives and policies of the AUP. It argued this meant the proposal did not meet the threshold test in s 104D(1)(b) of the RMA, which says resource consent can be given for a non-complying activity only if the activity will not be contrary to the objectives and policies of the relevant plan (in this case, the AUP). So, the Board did not have jurisdiction to approve the notices of requirement and grant the resource consents. In the alternative, both Forest and Bird and Ngāti Whātua Ōrākei argued that the Board failed to have regard or particular regard to the New Zealand Coastal Policy Statement 2010 (NZCPS) when it considered the resource consent applications and notices of requirement, as it was required to under ss 104 and 171 of the RMA respectively.

The High Court Judge dismissed the appeals, being satisfied that there were no errors of law in the Board of Inquiry's approach.

This appeal

Under s 149V of the RMA, a party cannot appeal to the Court of Appeal from a determination of the High Court on a question of law in relation to a proposal of national significance. Instead, if the party wishes to appeal the decision, it must apply to the Supreme Court for leave to bring an appeal. The Supreme Court can then give leave to appeal to the Supreme Court (if it considers the circumstances are exceptional), give leave to appeal to the Court of Appeal, or refuse leave to appeal altogether. If the Supreme Court gives leave to appeal to the Court of Appeal, the decision of the Court of Appeal is final.

Forest and Bird accordingly applied for leave to appeal directly to the Supreme Court against the High Court decision. The Supreme Court granted leave to appeal to the Supreme Court, being satisfied the appeal both raised issues of general and public importance and that there



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were exceptional circumstances. The approved question is whether the High Court was correct to dismiss the appeal against the decision of the Board of Inquiry.

Several other parties who participated in the Board of Inquiry process and the High Court appeals have maintained their involvement as interested parties: Ngāti Whātua Ōrākei, Auckland Council, Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Inc, Ngāti Tamaoho Trust and Ngāi Tai ki Tāmaki Trust.

Among other issues, the appeal asks the Supreme Court to consider for the first time:

- the correct interpretation of s 104D of the RMA, which, as noted above, sets out the circumstances in which a resource consent may be granted for a non-complying activity; and
- the implications of the Court's earlier decision in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* – which related to the plan-making process under the RMA – in this case's different context of resource consent and notice of requirement decisions.

Remote viewing of hearing

The appeal was due to be heard in Auckland. However, due to COVID-19 restrictions it will now be heard in the Supreme Court courtroom in Wellington (assuming Wellington remains in either Alert Level 1 or Alert Level 2), with those counsel based in areas under Alert Level 3 or Alert Level 4 appearing remotely. The hearing is set down for 16 and 17 November 2021.

This hearing can be viewed remotely by a limited number of members of the public. The [Protocol for Remote Viewing of Hearings](#) will apply. No recording is permitted.

If you wish to view this hearing remotely, please email your request with your name and phone number to the Supreme Court Registry, supremecourt@courts.govt.nz, before 1 pm on 15 November 2021.

Contact person:

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High Court decision: [\[2021\] NZHC 390](#) (5 March 2021)

Supreme Court leave decision: [\[2021\] NZSC 52](#) (28 May 2021)