

**IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI**

SC 25/2021

IN THE MATTER of an appeal under s149V 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**

Appellant

AND **NEW ZEALAND TRANSPORT AGENCY**

Respondent

AND **AUCKLAND COUNCIL**

**NGĀTI MARU RUNANGA TRUST, TE ĀKITAI
WAI OHUA WAKA TAUA INC, NGĀTI
TAMAOHO TRUST AND NGĀI TAI KI
TĀMAKI TRUST**

NGĀTI WHĀTUA ŌRĀKEI WHAI MAIA LTD

Section 301 Parties

**LEGAL SUBMISSIONS ON BEHALF OF AUCKLAND COUNCIL
REGARDING THE PORT OTAGO APPEAL**

5 April 2022

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MAY IT PLEASE THE COURT

1. INTRODUCTION

- 1.1 In its 17 March 2022 Minute the Court noted that it had granted leave to appeal the Court of Appeal's decision in *Port Otago Ltd v Environmental Defence Society Incorporated* [2021] NZCA 638 (**Port Otago Decision**),¹ and that the approach taken in that appeal may have implications for the disposal of this appeal (the **EWL Appeal**). The Court invited the parties in the EWL Appeal to file written submissions on the issues raised in the Port Otago appeal.
- 1.2 As the Court knows, the EWL Appeal is against a decision of the High Court (**High Court's Decision**)² to uphold the Board of Inquiry's (**Board's**) decision to grant resource consents and confirm designations (subject to conditions) (**Board's Decision**)³ to enable the construction, operation and maintenance of a four lane arterial road and associated works known as the East West Link (**EWL**).
- 1.3 Auckland Council (**Council**) appeared before the Court⁴ in the EWL Appeal and was generally in support of the position taken by the respondent, Waka Kotahi (the New Zealand Transport Agency).
- 1.4 The Council's position in the EWL Appeal is summarised at paragraphs 3.3 to 3.6 of its 29 October 2021 legal submissions. By way of summary, that position was that:
- (a) The approach promoted by the Royal Forest and Bird Society of New Zealand Incorporated (**RFB**) in the EWL Appeal is a narrow and unrealistic approach, that does not fairly recognise the multi-faceted and complex nature of

1 SC 6/2022.

2 *Royal Forest and Bird Protection Society of New Zealand Inc and Ngāti Whātua Ōrākei Whai Maia Ltd v New Zealand Transport Agency* [2021] NZHC 390 (**Judgment Under Appeal**).

3 Final Report and Decision of the BoI into the East West Link Proposal – Volume 1 – Report and Decision (**Board's Decision**).

4 The Council also appeared before the Board as a submitter in support of the EWL (subject to specific modifications to better address the adverse effects of the EWL on the environment) and before the High Court in opposition to the appeal against the Board's Decision.

Auckland, the EWL and the Board's task. RFB does not acknowledge the benefits and positive effects of the EWL or the significant package of methods⁵ proposed to address the adverse effects that are the focus of the New Zealand Coastal Policy Statement (**NZCPS**) and Auckland Unitary Plan (**AUP**) 'avoid' policies. Equally, RFB is promoting a legal and planning regime that does not reflect the real world issues and circumstances applying to Auckland through an inflexible 'absolutist' approach.

- (b) The Council does not agree with RFB's contention that the AUP's biodiversity policies, which require effects to be avoided, in effect, trump all of the other AUP policies (collectively and individually), including those that recognise the need for and benefits of infrastructure. The key reason for RFB's position is that the AUP biodiversity policies give effect to NZCPS Policy 11, which also refers to the avoidance of adverse effects on important indigenous species and habitat. RFB says that because the NZCPS 'avoid' directives are an absolute veto (in its view), then the AUP policy 'avoid' directives – which must 'give effect to' the NZCPS - must also be read as being a veto (and if they cannot be read that way, they are ultra vires).⁶
- (c) Auckland is a highly complex and dynamic environment involving, amongst other things, a fast growing and intensifying urban environment between two harbours. As Auckland's primary planning document under the Resource Management Act 1991 (**RMA**), the AUP must address a broad range of differing and sometimes incommensurate values and outcomes. Moreover, it must be reasonably agile and responsive to cater for the rapidly changing urban

5 A combination of mitigation and offsets in addition to various modifications to the project made by the Board.

6 Waka Kotahi's legal submissions (14 October 2021) at [4.1(b)].

environment and the people and communities that live there.

- (d) The logical consequence of RFB's argument is that for practical purposes:
 - (i) the Significant Ecological Areas (**SEAs**)⁷ that are scheduled in the AUP and abut relatively large parts of Auckland's urban area (as shown in Appendix A to these submissions) cannot be used for anything other than very minor purposes;⁸ and
 - (ii) there is no scope *to even consider* any activity that has adverse effects on these areas that are non-transitory or more than minor, notwithstanding other methods of addressing the effects or any positive effects (including significant permanent public benefits or broader environmental effects) the activity may have.
- (e) The NZCPS should not be read as *the* 'rule book' for the entire "coastal environment" of Aotearoa New Zealand. It was not prepared with the level of analysis that would be required for it to have that effect.⁹ Instead, it is a statement of national *policy* that:
 - (i) does not require (as a 'rule') in all cases that the adverse effects on areas of ecological significance (including the SEAs) associated with public infrastructure be completely avoided before

7 As per AUP Chapter D9.1.1 and D9.1.2 these are areas of significant indigenous vegetation or significant habitats of indigenous fauna.

8 Refer to Appendix A and [4.11] and [4.12] of the Council's 29 October 2021 legal submissions.

9 Waka Kotahi's legal submissions (14 October 2021) at [5.22], [5.25], [5.28] and [5.31]; Auckland Council's legal submissions (29 October 2021) at [5.7].

resource consent can be granted (or a notice of requirement confirmed);¹⁰

- (ii) does require the benefits of infrastructure to be ‘recognised’; and
 - (iii) must be applied in the context of local circumstances to achieve the purpose of the RMA.
- (f) If central Government wishes to create rules that apply to the entire “coastal environment” of Aotearoa New Zealand, then it can do so through National Environmental Standards.¹¹
- (g) The Supreme Court’s decision in *King Salmon*¹² does not, as RFB argue, require a reading of the NZCPS and the AUP such that adverse effects that are non-transitory or more than minor on important ecology must be completely avoided in all cases (with no options for otherwise addressing such effects). Policy 11 is a strong *policy* direction that must be given effect to in lower order statutory planning documents. But, this does not constitute a prohibition on activities, like the EWL, that respond to the policy in ways other than complete avoidance of effects.
- (h) The Council’s position is that it is lawful for the AUP to *potentially* allow for activities such as the EWL to obtain RMA approval – because, while not strictly meeting the ‘avoid’ policies, they appropriately respond to them. In doing so, the AUP is giving effect to the NZCPS. Likewise,

10 The factors used to identify SEAs (see Schedules 3 and 4 in Chapter L of the AUP as referred to in chapter D9.1.1 and D9.1.2) are not the same as the ecological values identified for protection in Policy 11 of the NZCPS, although there is some overlap. See also [4.24] of the Council’s 29 October 2021 legal submissions.

11 Waka Kotahi’s legal submissions (14 October 2021) at [5.19]-[5.22]. Note that under the NES Freshwater the Mangere Inlet (where the EWL is located) would be a “natural wetland” (as per *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113) and so the EWL would require an additional discretionary consent.

12 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

it is lawful to obtain RMA approval for activities such as the EWL under the full suite of AUP provisions.

1.5 In our respectful submission, the Council's position in the EWL Appeal is not altered as a result of the Port Otago Decision. This is because:

- (a) In the Port Otago Decision the Court of Appeal was addressing, under Part 5 of the RMA, the consistency of two planning documents. In contrast the assessment under Part 6 of the RMA as to whether the EWL should be given resource consent involves a materially different legal test and evaluative process.
- (b) The Port Otago Decision does not support a proposition that the NZCPS 'avoid policies' establish strict limits that can *never* be breached.
- (c) Any implication in the Port Otago Decision that an 'avoid policy' in the NZCPS or in lower-order planning instruments such as the AUP, requires in every case, a particular adverse effect to be avoided, cannot be correct given the clear wording in Part 6 of the RMA.

2. FACTUAL AND LEGAL CONTEXT TO PORT OTAGO DECISION

2.1 In the Port Otago Decision the Court of Appeal addressed a materially different legal and factual context to that in the EWL Appeal. In particular:

- (a) it concerns the wording of a policy in the Proposed Otago Regional Policy Statement (**PORPS**) with a statutory

requirement that a Regional Policy Statement (**RPS**) “gives effect to” the NZCPS,¹³ and in particular Policy 13; and

- (b) there is no certainty as to what specific activities may be affected by the PORPS policies at issue (other than that they relate to nationally and regionally significant infrastructure).¹⁴

2.2 In contrast, the EWL Appeal concerned a specific activity being considered under Part 6 of the RMA, where the relevant test is to:

- (a) “have regard to” the NZCPS and the relevant AUP provisions (which includes the RPS, the Regional Plan, Regional Coastal Plan and District Plan for Auckland);¹⁵ and
- (b) grant consent only if the activity has minor adverse effects or is “not contrary to” the relevant AUP provisions.¹⁶

2.3 Therefore, the Port Otago Decision is only addressing the relationship between the NZCPS and lower order planning documents. Clearly there must be *policies* in the Regional Plan/RPS sections of the AUP that “give effect to” the relevant NZCPS policies.¹⁷ That must be done in the context of real world circumstances of each region, although where those are ‘*avoid policies*’ there may be limited scope but to, in effect, mirror the NZCPS wording.

2.4 Indeed, the AUP policies at issue in the EWL Appeal (at chapter D9.3) were subject to an appeal on that issue.¹⁸ That appeal was

13 Resource Management Act 1991, section 62(3). The requirement of a Regional Plan is the same – it must “give effect to” the NZCPS: Resource Management Act, section 67(3).

14 *Port Otago Ltd v Environmental Defence Society Incorporated* [2021] NZCA 638 (**Port Otago Decision**) at [13]: “the exact problems faced by Port Otago were amorphous and difficult to assess. Its evidence shed very little light on them”. See also PORPS policy 4.3.4(1): *Port Otago Ltd v Otago Regional Council* [2018] NZEnvC 183 at [36].

15 Resource Management Act 1991, section 104.

16 Resource Management Act 1991, section 104D.

17 *Port Otago Decision* at [79].

18 *Royal Forest and Bird Society of New Zealand Inc. v Auckland Council* [2017] NZHC 980. This decision was issued on 15 May 2017, shortly before the Board Hearing commenced on 27 June 2017.

resolved by the insertion in D9.3 of new policies (9) and (10), which largely duplicated existing biodiversity policies (E15.3(9) and (10)) that give effect to NZCPS Policy 11.¹⁹ As a result, and as noted at paragraph 4.29 of the Council's legal submissions, the AUP contains a very strong *policy* direction to avoid effects on indigenous biodiversity in SEAs in the coastal environment – in the nature of a policy 'bottom line'.

2.5 Importantly, however, giving effect to the NZCPS is not the only requirement for RMA planning documents. As explained in our opening legal submissions, the AUP must, and does, address a broad range of often overlapping and complex RMA issues (including where necessary to give effect to other national policy statements).²⁰

2.6 In the Council's respectful submission the Port Otago Decision does not support a proposition that the NZCPS 'avoid policies' establish strict limits that can *never* be breached. This is because:

- (a) The Court's comments that follow its finding in paragraph 79 must be read in light of the legal issue before the Court: whether the PORPS "gave effect to" the relevant NZCPS policy. As such, the Court of Appeal's subsequent comment that "the avoidance policies require adverse *effects* to be avoided in or on specific areas or values",²¹ must be read in that context. In the Council's submission, the point that the Court of Appeal is seeking to make is that the 'avoid policies' in the NZCPS require that the relevant adverse effects be avoided *as a matter of policy*.
- (b) Indeed at paragraph 84 the Court of Appeal accepts that the High Court went too far in inferring that "the inevitable effect

19 Auckland Council's legal submissions (29 October 2021) at [4.22]-[4.23].

20 Auckland Council's legal submissions (29 October 2021) at [2.3], [3.5(a)], [4.29] and [6.4].

21 *Port Otago Decision* at [85].

of *King Salmon* is that implementation of the avoidance policies in the NZCPS would result inevitably in rules creating prohibited activities that cannot obtain a resource consent... Provided plans give effect to the avoidance policies, prohibited activity status is not inevitable and the matter should not be prejudged at this stage when plans have not yet been formulated". Similarly, in paragraph 85 the Court's focus is on what is required for the purposes of "policy compliance". Non-compliance with policy does not necessarily require decline of a resource consent (as explained below).

3. POLICY NON-COMPLIANCE NOT A VETO

3.1 To the extent that the Court of Appeal might be indicating that an 'avoid policy' in the NZCPS must be implemented by way of *an outcome* on a resource consent application or notice of requirement - that in every case, the particular adverse effect must be avoided - the Council submits that the Court of Appeal erred.

3.2 The wording of sections 104, 104D and 171 (among others) are clear about what is required of decision-makers under Part 6 of the RMA. Those decision-makers:

- (a) *do not* need to "give effect" to the 'avoid policies' in the NZCPS;
- (b) must, instead, "have regard to"²² (or "have particular regard" for decisions under section 171 on a notice of requirement) the NZCPS, RPS and Regional Plan provisions; and

- (c) must be satisfied that a resource consent for a non-complying activity such as the EWL is not “contrary to the objectives and policies” of the Regional Plan.²³

3.3 As explained in the Council’s legal submissions, this does not mean that ‘avoid policies’, and in particular those giving effect to the NZCPS, can be simply outweighed or ‘balanced out’ by other policies. On the contrary, they have a significant and material impact on decision-making.²⁴

3.4 The ‘avoid policies’ compel applicants and decision-makers to engage directly with them.²⁵ The starting point - but not *necessarily* the end point - is that the relevant effects are to be avoided. In the context of AUP’s recognition of infrastructure, there is a relatively small ‘policy window’ to allow for the *consideration* of infrastructure proposals that, for example, respond to the ‘avoid policies’ with appropriate design elements and mitigation packages. In the Council’s submission, the EWL is an example of this. The effects on the values recognised in the D9.3 policies were a particular focus of Waka Kotahi, the Council and the Board. This resulted in design modifications and a substantive mitigation package.²⁶

3.5 The Court of Appeal was not required to consider how the PORPS or NZCPS policies at issue would affect a specific proposal. Instead, at issue was the adequacy of the specific wording of a proposed planning document under Part 5 of the RMA.

3.6 In contrast, the Board was considering, under Part 6 of the RMA, the specific EWL proposal – a proposal for the construction of a significant public asset, in a highly modified environment, that would generate significant public and broader environmental benefits, and

23 Resource Management Act 1991, section 104D.

24 The EWL exemplifies this: see Auckland Council’s legal submissions (29 October 2021) at [6.4]-[6.8].

25 Auckland Council’s legal submissions (29 October 2021) at [4.20].

26 See the references in [6] and [7] of the Outline of Oral Argument on behalf of Waka Kotahi (16-17 November 2021). See also (for example) [580] of the Board’s Decision: EWL Appeal Case on Appeal [[316.04128]].

that included a significant ecological ‘mitigation’ package,²⁷ and which engaged a wide range of provisions under the relevant planning documents, primarily the AUP. The Board’s task in respect of the EWL was quite different to the task before the Supreme Court in *King Salmon* and the Court of Appeal’s task in the Port Otago Decision. As explained by the Court of Appeal in *RJ Davidson*, “there is no equivalent in the resource consent setting to the range of provisions that the Supreme Court [in *King Salmon*] was able to refer in the context of the NZCPS, designed to ensure its provisions were implemented”.²⁸

3.7 As noted above, the requirement to “give effect to” the NZCPS (including the ‘avoid policies’), does not mean that lower order documents (such as the AUP) can ignore the broad range of other RMA and NZCPS issues that must be addressed in order to achieve the purpose of the RMA – including the need for, and benefits of, the infrastructure necessary to provide for the wellbeing of Auckland’s communities.²⁹ This also means that decision-makers such as the Board must take into account all relevant objectives, policies, and rules in accordance with the RMA provisions set out above.

3.8 As explained in the Council’s legal submissions, the various and competing resource management issues in Auckland results in a relatively complex set of plan provisions. As the Board correctly observed:³⁰

Most plans of course, and the [AUP] is no exception, will contain a multitude of policies and objectives covering different fields, some of which will overlap and some of which will not. The very nature of Auckland’s geography, where much of the city surrounds two harbours and spreads up and along two North Island coastlines, triggers complex

27 This includes direct mitigation and offsets.

28 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, (2018) 20 ELRNZ 367 at [70]. See also [66].

29 Including Objective 6 and Policy 6(1) of the NZCPS which recognise that enabling people and communities to provide for their wellbeing can involve use of the coastal environment, including through the provision of infrastructure: Auckland Council’s legal submissions (29 October 2021) at [5.3]-[5.5].

30 Board’s Decision at [364]: EWL Appeal Case on Appeal [[316.04072]].

AUP issues, given the proximity of Auckland and its many zones to the CMA. ...

- 3.9** How the multitude of AUP provisions are brought together depends on the nature and scale of the specific proposal that is subject to consideration in accordance with sections 104 and 104D. The EWL brought a very broad range of numerous AUP provisions into play. This type of evaluation is, therefore, quite different to the assessment as to whether a specific RPS policy gives effect to the NZCPS, which is the context of the Port Otago Decision.

4. CONCLUSION

- 4.1** For the reasons set out above, the Port Otago Decision does not alter the position the Council took in the EWL Appeal.
- 4.2** The Council does not intend to present oral submissions at the hearing on 12 April 2022.

DATED at Auckland this 5th day of April 2022

G C Lanning / C J Ryan
Counsel for the Auckland Council

I certify that the submissions are suitable for publication and do not contain any information that is suppressed.

Appendix A: extent of SEAs around Auckland³¹

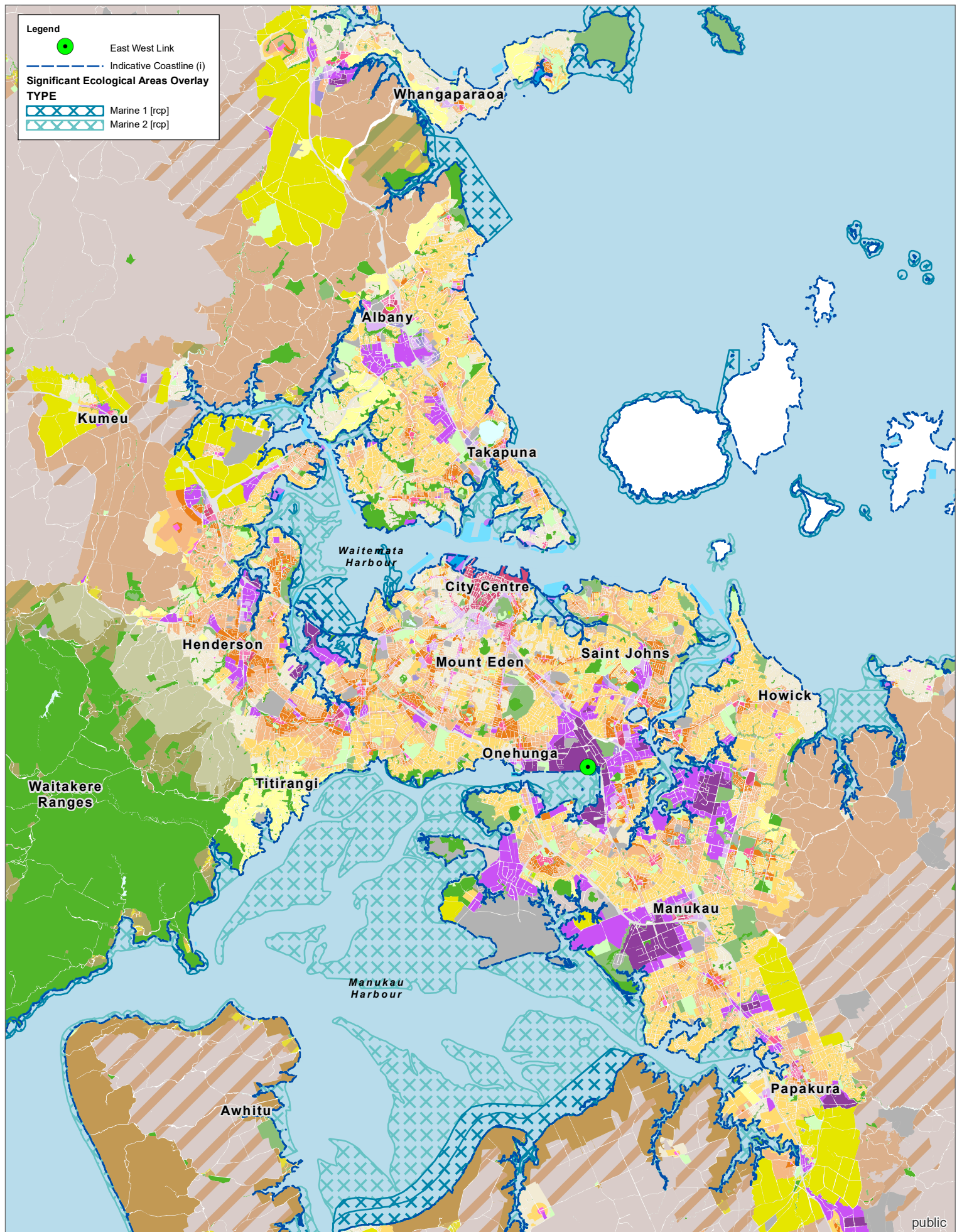
Coastline area:

SEA Marine Area	SEA Area (sq.m)	Only General Marine zone		CMA including other zones	
		Total Coastal marine area (sq.m)	Percentage	Total Coastal marine area (sq.m)	Percentage
M1	417,177,778.00	11,245,615,146.00	3.7	11,260,908,358	3.7
M2	590,138,083.00	11,245,615,146.00	5.2	11,260,908,358	5.2
Total	1,007,315,862	11,245,615,146	8.9	11,260,908,358	8.9

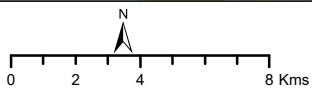
Coastline length:

SEA Type	SEA adjacent coastline perimeter (m)	Total mainland Perimeter (m)	Percentage
SEA M1	704,912	2,300,528	30.6
SEA M2	941,869.90	2,300,528	40.9
Total	1,646,780	2,300,528	71.5

³¹ These calculations were appended to the Council's memorandum of counsel dated 18 November 2021 and replaced those appended to the Council's legal submissions. The maps that follow are those that were appended to the Council's 29 October 2021 legal submissions.



public



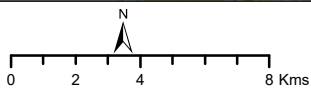
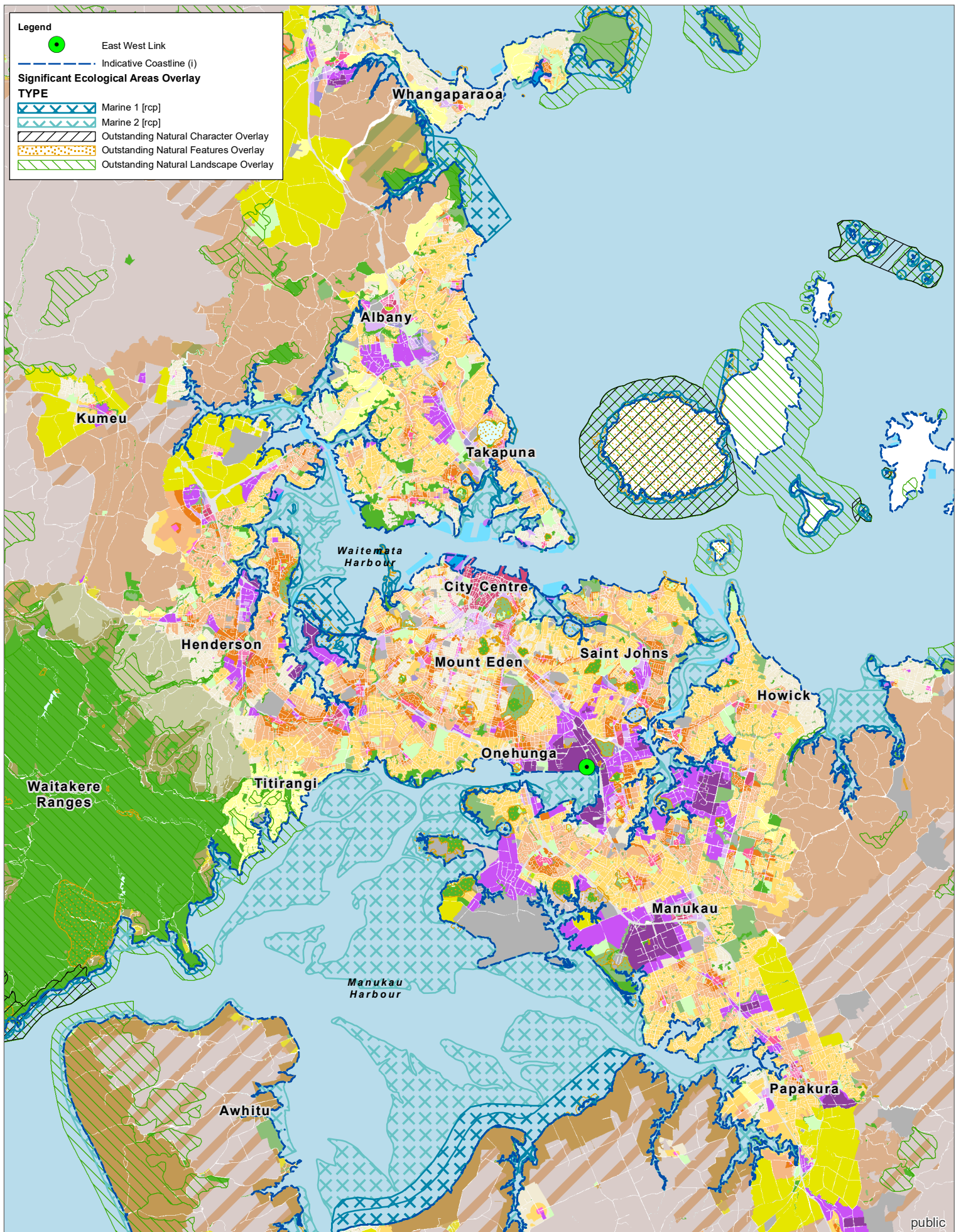
Whilst due care has been taken, Auckland Council gives no warranty as to the accuracy and completeness of any information on this map/plan and accepts no liability for any error, omission or use of the information.

Date: 12/10/2021

Auckland urban area - Significant Ecological Area - Marine



Received Supreme Court: 5 April 2022 electronic filing



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Date: 12/10/2021

Auckland urban area with coastal overlays



Received Supreme Court: 5 April 2022 electronic filing

Places and Places

List of authorities relied on by the Council

Cases

- *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593
- *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113
- *Port Otago Ltd v Environmental Defence Society Incorporated* [2021] NZCA 638
- *Port Otago Ltd v Otago Regional Council* [2018] NZEnvC 183
- *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, (2018) 20 ELRNZ 367
- *Royal Forest and Bird Society of New Zealand Inc. v Auckland Council* [2017] NZHC 980

Legislation

- Resource Management Act 1991, ss 62, 67, 104, 104D, 171