

In the Supreme Court of New Zealand
I Te Kōti Mana Nui

SC 25/2021

Between **Royal Forest and Bird Protection
Society of New Zealand
Incorporated**

Appellant

And **New Zealand Transport Agency**

Respondent

**SUBMISSIONS ON BEHALF OF THE ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW ZEALAND INC REGARDING THE
ISSUES RAISED BY THE *PORT OTAGO* APPEAL**

Dated 5 April 2022

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Tēnā, e te Kōti —

1. These submissions are filed pursuant to the Court's minute dated 17 March 2022 inviting the parties in this appeal to file written submissions on the issues raised by the *Port Otago* appeal as they relate to each party's position.
2. Forest & Bird is both the appellant in this appeal and the third respondent in the *Port Otago* appeal. It has filed contemporaneously a set of full written submissions in the *Port Otago* appeal setting out its position on the issues raised, as they relate to its position in that appeal. Those submissions are adopted as relevant to the issues in *Port Otago* that touch and concern this appeal. These submissions are accordingly limited to highlighting where Forest & Bird's position on the relevant issues is set out in the primary written submissions filed by Forest & Bird in each appeal.

Overall context

3. Forest & Bird's position in both appeals is that if a regional plan properly gives effect to the directive avoidance policies of the NZCPS (or an RPS or other higher order instrument), then it will not be possible for the consent authority to grant consent for an activity that is contrary to those directive avoidance policies.
4. This is the fact pattern in this appeal, where policies 9.3(9) and (10) of the AUP give effect to the directive avoidance policy 11 (indigenous biodiversity) of the NZCPS.
5. This issue is also raised in the *Port Otago* appeal where one of the factors brought into the appeal by Port Otago is how the proposed policy in the PRPS, or its absence, will affect Port Otago's ability to obtain consent for potential future activities. Although Port Otago is existing

infrastructure, its complaint is about the potential effect of the PRPS on a future expansion not its existing activities.

The approach to interpretation of a plan

6. Forest & Bird submits in this appeal that the AUP – and other plans – should be interpreted and reconciled in the way mandated by *King Salmon* for the NZCPS. See *East West Link* submissions at paragraphs 22 to 25.
7. Forest & Bird’s submissions on the approach mandated by *King Salmon* for the NZCPS are set out at paragraphs 53 to 55 of its *Port Otago* submissions.

Meaning of the avoidance policies in the NZCPS and AUP and their reconciliation with the use and development policies

8. Forest & Bird submits that the effect of directive avoidance policies in the NZCPS or other instruments is to create environmental bottom lines, as described by the Court in *King Salmon*.
9. If such an environmental bottom line is created in the NZCPS, then a lower order plan does not give effect to the NZCPS unless it gives effect to the same bottom line.
10. Both policies 11, 13, 15 and 16 of the NZCPS and policy 9.3(9) and (10) of the AUP create environmental bottom lines in this sense.
11. These directive avoidance policies are easily reconciled with the less directive ports policy 9 of the NZCPS and infrastructure policy E26 of the AUP. There is no conflict. These policies recognise ports and infrastructure activities, but against the background that such activities cannot occur in an area protected by the directive avoidance policies if it will have one of the effects directed to be avoided.
12. See paragraphs 33 to 49 of Forest & Bird’s submissions in *East West Link* and paragraphs 56 to 85 of its submissions in *Port Otago*.

Effect of directive avoidance policies at the consent stage

13. When read in their statutory context (and having regard to the RMA’s purpose), the consenting provisions require that environmental bottom lines are upheld in consenting decisions.

14. Section 104D(1)(b) at issue in *East West Link* must be interpreted such that a non-complying activity is contrary to the objectives and policies of the plan if it would contravene a directive avoidance policy.
15. Similarly, it cannot be the case that a consent authority can properly have had regard / particular regard to a plan for the purposes of sections 104 and 171 if the consent authority grants a consent for an activity that will have effects that contravene a directive avoidance policy in the NZCPS. These are environmental bottom lines. Further, consent decisions under sections 104 and 171 are “subject to part 2”. The NZCPS is the embodiment of part 2 of the RMA in the coastal environment.
16. This means that the avoidance policies of the NZCPS have prescriptive effect on activities within the coastal environment. Their exact application depends on a factual assessment of what the effects of activities will be. However, they do leave space for activities. The avoidance policies provide a graduated level of protection depending on the level of protection given to a particular area. They are applied to the environment as it exists now. The adverse effects to be avoided are not any adverse effects, but those which affect the protected qualities, and are unlikely to include minor or transitory adverse effects.
17. These issues are the core subject matter of the appeal in *East West Link*. Forest & Bird’s position on it is threaded through its *East West Link* submissions. They are addressed at paragraphs 86 to 101 of Forest & Bird’s *Port Otago* submissions.

Certification

18. Counsel certify that these submissions are suitable for publication under paragraph 7(2) of the Supreme Court Submissions Practice Note 2021.

Dated 5 April 2022

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