

**IN THE SUPREME COURT OF NEW ZEALAND  
I TE KŌTI MANA NUI SC25/2021**

**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**

**Appellant**

**AND** **WAKA KOTAHI / NEW ZEALAND TRANSPORT  
AGENCY**

**Respondent**

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**Synopsis of Oral Argument on behalf of Ngāti Whātua Ōrākei Whai  
Maia Ltd**

**Dated this 12<sup>th</sup> May 2022**

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- 1 Key issues:
  - (1) Environmental bottom lines and tikanga
  - (2) Environmental bottom lines and Treaty principles
  - (3) Second limb of S104D RMA requires assessment of materiality
  - (4) The problem of the narrow pathway
  - (5) Objectives in the NZCPS

### **Tikanga**

- 2 The submissions for the supporting Mana Whenua or Iwi Authorities<sup>1</sup> on tikanga address issues outside scope of the questions of law. But in case the Court wishes to consider the issue, then Ngāti Whātua Ōrākei submits that tikanga may include environmental bottom lines. Tikanga may also be consistent with bottom lines.
- 3 Whether tikanga recognizes a bottom line depends on the issue. Context is key. An environmental bottom line can and should respond to context, including the relevant effects of what is proposed. Examples include:
  - 3.1 Raw or treated sewage/wastewater should not be discharged to water.
  - 3.2 A television translator should not be installed on the wāhi tapu and ancestral maunga, Horea, located on the west side of Raglan Harbour.<sup>2</sup>
  - 3.3 Fishing should not take place within an area subject to a rāhui at Ōtaiti Reef, and in other areas identified by kaumatua and pūkenga as requiring protection.<sup>3</sup>
  - 3.4 A road (Tāmaki Drive) should not be constructed when it severed the connection between kainga, ūrupa, and Okahu Bay: evidence of Ngarimu Blair in EWL.<sup>4</sup>
  - 3.5 Transpower should not install new transmission lines adjacent to the Maungatapu Marae, if there were other practicable options reasonably available for replacement infrastructure. This was a cultural bottom line for the hapū of Ngāti Hē: *Tauranga Protection Society* at [93]-[99].<sup>5</sup>
- 4 The NZCPS can recognize cultural bottom lines, as well as environmental ones.<sup>6</sup> Section 58(1)(b) RMA empowers a NZCPS to state objectives and policies about “..the protection of the characteristics of the coastal environment of special value

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<sup>1</sup> While referred to as the supporting Mana Whenua parties, and “Mana Whenua parties” as shorthand, the Board did not make findings on mana whenua/tangata whenua status (in terms of the relative strength of relationship as between those Iwi and Hapū that have historical and contemporary connections to the Manukau and its surrounds). “Mana whenua group” is defined in Vol 1 of the Board decision at [CB316.03974](#) to include other Iwi and Hapū that were submitters.

<sup>2</sup> *TV3 Network Services Ltd v Waikato DC* [1997] NZRMA 539 (HC) (Hammond J).

<sup>3</sup> *Attorney-General v Trustees of Motiti Rohe Moana Trust* [2019] NZCA 532, [2019] 3 NZLR 876 (CA)

<sup>4</sup> EWL Vol 307, COA307.02210 at paragraph [37]

<sup>5</sup> *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 (**Tauranga Protection Society**)

<sup>6</sup> *Tauranga Protection Society* (ibid) at [93]-[99]

to the tangata whenua including waahi tapu, tauranga waka, mahinga mataitai, and taonga raranga” and, in s58(1)(gb), the “protection of customary rights..”

- 5 Specific to the EWL proposal, the competing positions of Iwi and Hapū reflected their tikanga on the effects of reclamation and other issues.<sup>7</sup>
- 6 The EWL Board made an uncontested finding that the Manukau is a taonga, both because of its mauri (life force), and its role as habitat.<sup>8</sup> This required active protection. How to achieve active protection was not agreed.
- 7 In a materially different, non-RMA context, the wider issue (of tikanga) has recently been addressed by the High Court in *Ngāti Whātua Ōrākei Trust v Attorney-General*.<sup>9</sup>

### Treaty principles

- 8 This Court in *King Salmon* has already indicated that the principles of the Treaty under s8 RMA may have a supervening effect, even in relation to the NZCPS. This was identified as one of the “three caveats” to the in-principle position (that reference to Pt 2 RMA was not required, given that it was implemented by the NZCPS):

“[88]..Moreover, the obligation in s8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including when giving effect to the NZCPS..”

- 9 This *obiter* leaves open the prospect of reliance on Treaty principles in preference to directive bottom lines in the NZCPS, if required on the merits. This answers head-on the criticism of internal hierarchy as trumping Treaty and tangata whenua interests. In addition:
  - 9.1 The priorities identified by the NZCPS were prepared having regard to the relevant Treaty and tangata whenua interests identified for the coastal environment.
  - 9.2 Objective 3 and Policy 2 NZCPS require that a Te Ao Māori lens is considered when interpreting the other policies. A proposed marae may be

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<sup>7</sup> In brief: Ngāti Te Ata Waiohū opposed the EWL proposal: Board decision, Vol 1, at [395], [455]; Ngāti Whātua Ōrākei fully opposed the EWL proposal: Board decision at [396]; the final position of Te Kawerau ā Maki and Makaurau Marae was to oppose: Board decision at [397], [399]; the position of supporting Iwi Authorities was identified by the Board at [388] to [401], [415]. At [454] to [464], the Board identified the respective positions of Iwi Authorities on reclamation. While opposed in principle, the extent to which it is adverse is dependent on their views about context, scale and form. As noted, an environmental bottom line responds to context.

<sup>8</sup> Board decision at [402], COA316.04084; [742], 316.04165

<sup>9</sup> The decision is very recent, and may be subject to appeal, and accordingly these submissions are without prejudice to Ngāti Whātua Ōrākei’s position on that decision. Palmer J observed (*inter alia*) that:

- (a) the law that accompanied Māori to Aotearoa was constituted by tikanga. Many aspects are law in NZ now. Tikanga is specific to Iwi and Hapū, but the underlying values and principles that inform the broader system of tikanga are universal and of general application;
- (b) there are different examples of which principles are regarded as “core” to tikanga; Ngāti Whātua Ōrākei in their evidence identified seven: whanaunatanga, manaakitanga, kaitiakitanga, mana, tapū and noa, utu and ea. Other Iwi parties adopted a different position in their evidence to tikanga.
- (c) Tikanga is contextual, the principles that are relevant depend on the context of the particular issue that arises, holistically.

able to be constructed on a beachfront identified as a coastal ONL, because Policy 15 recognises a cultural dimension to landscape values. The physical presence of the Marae, and the kaitiaki, may form an intrinsic part of what is outstanding. In the same way that the Man O'War vineyards and working farm were part of the ONL at Waiheke, not adverse to it.<sup>10</sup> Landscapes can include the dimensions of time,<sup>11</sup> memory, and therefore whakapapa. Appropriateness requires an assessment of the Māori lens or tikanga perspective.

- 10 Accordingly, environmental bottom lines are not necessarily inconsistent with Treaty principles. Whether they are consistent requires a contextual assessment of the relevant Treaty principles engaged by the evidence.

### **2<sup>nd</sup> limb of s104D RMA**

- 11 The second (policy) limb of [S104D RMA](#) requires an assessment of materiality and relevance of the objectives and policies from the relevant plan. A proposal contrary to material directive policies will fail the second limb. If the policy is directive but not material, then the proposal should not fail the second limb. This answers the criticism about “tripping the wire” from any directive policy, whether material or not.

### **Problem of narrow pathway ?**

- 12 If there is a narrow pathway for ports or infrastructure seeking non-complying resource consent through the NZCPS avoidance framework, then query whether this exception can be easily replicated so that it becomes wider. For example, offsetting not avoidance of adverse effects on protected biodiversity.
- 13 The answer is to require the reconciliation exercise identified by *King Salmon* as the starting point (and likely end point). In that regard, *King Salmon* should be treated as authoritative in relation to interpretation of the NZCPS policy framework, whether under Part 5 (plan review) or Part 6 (resource consents). While the processes are different, the instruments are the same and therefore the meaning should not differ. In short, where policies are directive and can be reconciled, then there is no narrow pathway to get through.
- 14 This reflects the reasoning in *Davidson*, which noted the NZCPS may be determinative for consent processes.<sup>12</sup> If reconciliation cannot resolve the issue, then *Davidson* has identified how to approach [Pt 2 RMA](#), for resource consent

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<sup>10</sup>*Man O'War Station Ltd v Auckland Council* [2017] NZCA 24 at [80]

<sup>11</sup>*Western Bay of Plenty District Council v Bay of Plenty Regional Council* [2017] NZEnvC147 at [77]

<sup>12</sup>*RJ Davidson Family Trust v Marlborough DC* [2018] NZCA 316, [2018] 3 NZLR 283 at [72]- [73], citing *Dye Auckland Regional Council* [2002] 1 NZLR 337 (CA) - a “fair appraisal” of the objectives and policies as a whole.

proposals.<sup>13</sup> That approach is supported, but with s8 RMA having its own mandatory force, per *King Salmon*.

- 15 A key question is whether Pt 2 RMA, and s5(2), include bottom lines, not an overall broad judgment. It is submitted that Pt 2 RMA does not lead to an overall broad judgment. It results in a similar exercise to that identified in the NZCPS, because there are directive as well as enabling provisions such as s5(2) and s6 RMA. Section 5 includes environmental bottom lines to be met in parallel with other wellbeing considerations. “While” means “at the same time as”, for reasons identified in *King Salmon* at [24](c).

### **NZCPS Objectives**

- 16 NZCPS Objectives are mandatory considerations and material to a purposive interpretation of the NZCPS policy framework. The importance of the NZCPS Objectives has emerged as a theme from submissions on the *Port Otago* decision.<sup>14</sup> It therefore reinforces the materiality of the error by the EWL Board which failed to consider Objectives 1, 3 and 6. This confirms error 6 in the EWL Appeal.

I, Rob Enright, certify that this document is suitable for publication

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<sup>13</sup> *Davidson (supra)* at [70]-[72]

<sup>14</sup> Submissions for Port Otago Ltd at [7.3]; Submissions for Mana Whenua parties in support at [15]