IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 25/2021
[2024] NZSC 26

BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCOPORATED Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing:	16–18 November 2021
Further submissions:	11–12 May 2022
Court:	Winkelmann CJ, William Young, Glazebrook, Ellen France and Williams JJ
Counsel:	S R Gepp, M C Wright and P D Anderson for Appellant V E Casey KC, V S Evitt and J W E Parker for Respondent G C Lanning and C J Ryan for Auckland Council as Interested Party R B Enright for Ngāti Whātua Ōrākei Whai Māia Limited as Interested Party P F Majurey and D T K Ketu for Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Incorporated, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust as Interested Parties
Judgment:	11 April 2024

JUDGMENT OF THE COURT

A The appeal is allowed.

B The matter is remitted to the Board of Inquiry for reconsideration in line with the terms of this judgment.

C Costs are reserved.

REASONS

WINKELMANN CJ, ELLEN FRANCE AND WILLIAMS JJ
(Given by Williams J)

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Introduction

The East West Link

[1] The New Zealand Transport Agency | Waka Kotahi (Waka Kotahi) builds and maintains Aotearoa's state highways. This appeal relates to Waka Kotahi's proposal to construct the East West Link (EWL), a new four-lane arterial road in Auckland connecting State Highway 1 (SH 1) at Penrose/Mt Wellington to State Highway 20 (SH 20) at Onehunga. It is intended to run along the northern shore of the Māngere Inlet, at the north-eastern corner of the Manukau Harbour (the Harbour).

[2] Important context for this proposal is that Auckland is a rapidly growing city. When Waka Kotahi filed the necessary applications and notices for the EWL in December 2016, the accompanying *East West Link: Assessment of Effects on the Environment* (AEE) report estimated Auckland's population at 1.4 million.[1] By 30 June 2021 that estimate had increased to 1.72 million according to the Auckland Council website, an increase of 23 per cent.[2] This growth must be accommodated within Auckland's location along a narrow isthmus set between the Waitematā and Manukau Harbours. Geography has two important implications for the EWL. First, Auckland's perimeter is dominated by coastline, much of which is ecologically vulnerable. Second, this means that options for enhancing Auckland's road network to meet present and future needs are physically constrained. This appeal is primarily about the way in which the objectives and policies of the Auckland Unitary

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1 *East West Link: Assessment of Effects on the Environment* (NZ Transport Agency | Waka Kotahi, December 2016) [AEE] at 10.

2 Auckland Council | Te Kaunihera o Tāmaki Makaurau "Te taupori o Tāmaki Makaurau | Auckland's population" Auckland Plan 2050 <www.aucklandcouncil.govt.nz>.

Plan (AUP) and those of the New Zealand Coastal Policy Statement (NZCPS) navigate this acute tension between urban intensification and coastal protection.[3]

[3] In 2015, the industrial and manufacturing area encompassing Onehunga, Penrose, Mt Wellington and Ōtāhuhu provided 10 per cent of Auckland's employment with an estimated workforce of over 68,000.[4] The area contributed some $4.7 billion annually in 2012, or 7.5 per cent of Auckland's gross domestic product. It is also the main transport hub for the upper North Island. Key factors in that respect are that it is close to Auckland International Airport, transected by the country's main rail corridor and contains three inland ports. Construction of a more efficient link through this area connecting SH 1 and SH 20 has been a priority project in Auckland's spatial plan for some time.[5]

[4] The Board of Inquiry (the Board) summarised the EWL's expected benefits as follows:[6]

(a) improved and more reliable travel time;

(b) accessibility that supports business growth and economic prosperity;

(c) improved safety and connected communities; and

(d) the provision of environmental improvements and social/community opportunities to the local area.

[5] But as Powell J noted in the High Court, while the northern shore of the Manukau Harbour has been heavily modified, the Māngere Inlet (the Inlet) remains ecologically significant, particularly, but not only, as a habitat and food source for

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3 Auckland Unitary Plan: Operative in Part [AUP]; and "New Zealand Coastal Policy Statement 2010" (4 November 2010) 148 *New Zealand Gazette* 3710 [NZCPS]. Any references to the AUP in these reasons refer to the version provided to us by the parties to the appeal. Some parts of the AUP were not included in the excerpts submitted by the parties, but any changes to these parts since the date of the Board decision are not material for the purposes of this appeal.

4 *Final Report and Decision of the Board of Inquiry into the East West Link Proposal: Volume 1 of 3 – Report and Decision* (21 December 2017) [Board decision] at [242]; and AEE, above n 1, at 207–208.

5 Board decision, above n 4, at [12]–[14].

6 At [11].

shorebirds and relatively rare or threatened migratory seabirds.[7] The Board recorded the relevant evidence in the following terms:[8]

> [465] It is also uncontested that the inter-tidal areas of the Inlet are a feeding and roosting area for various shore birds. Dr Bull noted that:
>
> > *"A diverse assemblage of species were recorded foraging on the Māngere Inlet intertidal mudflats and included NZ pied oystercatcher (At Risk), bar-tailed godwit (At Risk), pied stilt (At Risk), lesser knot (Threatened), wrybill (Threatened), northern NZ dotterel (Threatened), royal spoonbill (At Risk), white-faced heron (Not Threatened), red-billed gull (Threatened) and black-backed gull (Not Threatened)."*
>
> [466] The significance of the Inlet for those species was confirmed by Dr Lovegrove, who identified its particular significance as a key feeding and roosting site and departure point for the endemic wrybill plover (*Nationally Vulnerable*). He stated that the wrybill has a global population of c5,000 birds, with up to 1,200 of these having been reported in the Māngere Inlet. This was corroborated by Dr Bull.

[6] Further, a portion of the proposal area above the shoreline contains relatively rare survivor lava shrubland and raupō wetland as well as mangrove to saltmarsh to freshwater wetland gradients. Primary areas of focus in terms of likely adverse effects include:

(a) permanent loss and compromise of wading bird and shorebird habitats (roosting and feeding areas) along the Inlet shoreline due to reclamation, construction of boardwalks and the placement of piers supporting a viaduct to span the Anns Creek Estuary; and

(b) permanent loss of, or other adverse impacts on, lava shrubland and raupō, and on gradient complexes around Anns Creek above the north-eastern corner of the Inlet.

[7] These impacts will occur in areas that are identified and protected by objectives, policies and rules in the AUP. As Powell J noted, the likely environmental effects of the project are such that, from the outset, it has been controversial.[9]

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7 *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 (Powell J) [HC judgment] at [4].

8 Board decision, above n 4 (footnotes omitted, emphasis in original).

9 HC judgment, above n 7, at [4].

[8] In response to some of the concerns expressed, Waka Kotahi proposed a package of compensatory, offset and improvement measures that it submits avoids, remedies or mitigates adverse effects. Waka Kotahi also submitted that the project's ecological cost would effectively be counterbalanced by its ecological benefits. For example, the "almost ruler-straight"[10] northern shoreline of the Inlet would be recontoured to provide an alignment that is at least reminiscent of the original shoreline; stormwater for the entire 611 ha catchment would be redirected for treatment through a newly constructed wetland complex before discharge into the Inlet; and groundwater contaminated with leachate from three local landfills would be diverted by a new bund and treated.

[9] Further, as mitigatory and offset measures, Waka Kotahi proposed to:

(a) buy Ngā Rango e Rua o Tainui, a privately owned island of about 0.33 ha located in the centre of the Inlet, to establish alternative shorebird roosting sites there;

(b) provide other new roost structures in the Inlet and further protection for seabird habitat elsewhere in the Harbour;

(c) carry out 30 ha of ecological restoration and habitat enhancement in the project area, including provision of replacement raupō planting for the area to be lost; and

(d) undertake pest control and enhancement measures for threatened or at risk avifauna at sites in the South Island with particular focus on the wrybill plover population.

Required approvals

[10] Because Auckland Council is a unitary authority,[11] all approvals required for the project are subject to the objectives, policies and rules of the AUP. The AUP is a combined planning document comprising Auckland's regional policy statement,

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10 Board decision, above n 4, at [474].
11 Local Government (Auckland Council) Act 2009, s 6.

regional coastal plan, regional plan and district plan. For clarity, where we intend to refer specifically to the provisions of one or other of the policy statement or plans within the AUP, we will include those references in brackets—for example, AUP(rps) or AUP(plans). As to the latter, we generally use the plural plans to cover all three embedded plans—regional coastal, regional and district. We will use the generic form AUP when intending to refer to the entire document.

[11] The EWL requires approvals for a combination of notices of requirement (NORs) and resource consents to facilitate the following works:

(a) a new four-lane arterial road between the existing SH 20 Neilson Street Interchange in Onehunga and SH 1 at Mt Wellington, and connection of the new arterial road to SH 1 via two new ramps south of the Mt Wellington Interchange;

(b) the widening of SH 1 and an upgrade of the Princes Street Interchange;

(c) reconfiguration of the Neilson Street Interchange and surrounding roads, including a trench on the southern side of the Interchange, with a local bridge connecting Onehunga Harbour Road to Onehunga Wharf;

(d) new commuter and recreational cycle paths alongside the EWL, and a new pedestrian and cycle connection across Ōtāhuhu Creek;

(e) new local road connections to and from the EWL main alignment and associated roading improvements;

(f) grade-separation at the intersection with Great South Road/Sylvia Park Road;

(g) reclamation of 18.4 ha along the northern foreshore of the Māngere Inlet to construct:

(i) parts of the EWL main alignment;

(ii) stormwater treatment areas;

(iii) headlands to form a naturalised coastal edge; and

(iv) recreational space; and

(h) a bund to intercept contaminated runoff from three historic landfills before it enters the Māngere Inlet.

Notices of requirement

[12] There are two NORs proposed for inclusion as designations in the district plan provisions of the AUP: the first for the construction, operation, and maintenance of the EWL between Onehunga and Ōtāhuhu, and the second to alter the SH 1 designation to accommodate the EWL.

[13] NORs are governed by Part 8 of the Resource Management Act 1991 (RMA). Waka Kotahi is a network utility operator and requiring authority in terms of s 166.[12] This gives it a kind of priority status. It can notify the Council that works or proposed works for which it has responsibility should be included in the relevant district plan. This is done by a NOR.[13] In the ordinary course of events, on receipt of a NOR, the responsible council may inquire into it and recommend to the requiring authority that it confirm, modify or withdraw the NOR, or that conditions be imposed.[14] The requiring authority then makes its own decision on the NOR. It may accept or reject the council's recommendation, but its decision is subject to a right of appeal on the merits to the Environment Court.[15] When a NOR is included as a designation in the district plan, its terms take effect as rules in that plan, effectively rendering the

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12 Resource Management (Approval of New Zealand Transport Agency as Requiring Authority) Order 1992, cl 2; "Resource Management (Approval of Transit New Zealand as Requiring Authority) Notice 1994" (3 March 1994) *New Zealand Gazette* No 1994-go1500; "Resource Management (Approval of NZ Transport Agency as a Requiring Authority) Notice 2015" (19 November 2015) *New Zealand Gazette* No 2015-go6742; and "The Resource Management (Approval of New Zealand Transport Agency as a Requiring Authority) Notice 2023" (18 September 2023) *New Zealand Gazette* No 2023-go4371.

13 Resource Management Act 1991 [RMA], s 168(2). See also s 166 definition of "designation".

14 Section 171(2).

15 Sections 172 and 174.

designated works permitted activities for which land use consents under s 9(3) are not required.[16] Section 171 relevantly provides:

> **171 Recommendation by territorial authority**
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> …
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
>
> (a) any relevant provisions of—
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
>
> (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; and
>
> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
>
> (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.
>
> (1B) The effects to be considered under subsection (1) may include any positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from the activity enabled by the designation, as long as those effects result from measures proposed or agreed to by the requiring authority.
>
> …

[16] Sections 175(2)(a) and 176(1)(a). See also s 9(3) as to the requirement for resource consents.

Resource consents

[14] In part because of its intended location in the coastal marine area (CMA), significant aspects of the EWL fall under Auckland Council's separate regional council jurisdiction.[17] The NORs cannot authorise those aspects, as NORs only immunise a public work from the need to obtain consents to contravene a rule in a district plan—that is, a rule promulgated by Auckland Council acting in its capacity as a territorial authority.[18] Resource consents are still required under ss 9(2), 12, 13, 14 and 15 as these relate to contravention of regional or regional coastal plan rules rather than district plan rules. They are also required for contravention of any district plan rule which is not expressly covered by a NOR.[19] Twenty-four resource consents must be obtained. These comprise:

(a) four coastal permits in relation to construction activities including reclamations, deposition, waste disposal and placement of structures in the CMA;

(b) six water permits for works in water courses and associated drainage and diversion activities;

(c) five discharge permits for discharges of contaminants into air or onto land or water, and discharges of stormwater;

(d) one land use consent for end purpose activities on the proposed foreshore reclamation land;

(e) one land use consent for the operation of a temporary concrete batching plant; and

(f) seven land use consents relating to works on existing contaminated soil, other earthworks, vegetation alteration and removal, siting of new

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17 Section 30.
18 Sections 9(3), 175(2)(a) and 176(1)(a).
19 Section 9(3).

network infrastructure, and construction of new impervious road surfaces.

[15] Some of the foregoing activities, and all of the contentious ones in terms of effects, are non-complying under the AUP(plans) in terms of s 87A(5) of the RMA. As the AUP usefully explains, activities are accorded non-complying activity status where greater scrutiny of the proposed activity is required. This may be because, for example, the activity is not anticipated in the place proposed, it is likely to have significant adverse effects on the existing environment, the environment is particularly vulnerable or, more generally, the activity is less likely to be considered appropriate in that place.[20]

[16] It is common ground that, for consenting purposes, the proposal's scale and complexity meant the appropriate approach was to bundle all relevant activities into a notional single activity to be classified as non-complying.

[17] To obtain the necessary resource consents, the EWL must be evaluated against the list of relevant considerations in s 104, the controlling provision for all resource consent applications whatever their activity status. Though by no means identical, the considerations under s 104 are similar to those for NORs under s 171.

[18] Since the EWL is a non-complying activity, it must also pass through one or other of the two gateways in s 104D. Both ss 104 and 104D require the consent authority to have regard to the proposal's environmental effects and to the relevant provisions of any applicable plans. But s 104D adds a second, more focused filter. It provides that consent for a non-complying activity may only be granted if either its adverse effects on the environment will be no more than minor or the activity itself is not contrary to the objectives and policies of the relevant plan.

[19] Section 104D relevantly provides:

104D Particular restrictions for non-complying activities

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[20] AUP, Policy A1.7.5.

(1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; …

…

[20] If the s 104D gateway test is satisfied, the applications must then be considered in the ordinary way under s 104. Section 104 relevantly provides as follows:

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2 and section 77M, have regard to–

(a) any actual and potential effects on the environment of allowing the activity; and

(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and

(b) any relevant provisions of—

…

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement:

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

…

Inquiry process

[21] The applications relevant to the EWL were filed with the Environmental Protection Agency pursuant to s 145 of the RMA. Following the Agency's recommendation, the Minister for the Environment and the Minister of Conservation considered the EWL to be a proposal of national significance for the purpose of Part 6AA. The Ministers appointed a Board of Inquiry under s 149J to consider the proposal. The effect of this "call in" under Part 6AA is to foreshorten the applicable appellate pathways. Appeals are only on a question of law and must be brought in the High Court.[21] In general terms, the Board of Inquiry replaces Auckland Council as consent authority but, unlike the Council, it has the power of final decision on the NORs.[22] The Board, for the purposes of inquiry into the EWL, comprised four members including a retired High Court judge acting as Chair.

[22] A total of 689 submissions were received following notification of the proposal, including a submission in support of the proposal by Auckland Council. According to the Board, 85 per cent of the submissions opposed the proposal. The scale of the proposal meant inquiry procedures were purpose designed. They involved prehearing expert conferencing and ongoing evidence exchange. Conferencing was separated into 24 subheadings and, as the needs of the process evolved, continued into the hearing process itself. The Board sat for 49 days over a period of some 12 weeks and in due course issued a decision comprising 356 pages, excluding two volumes of appendices and consent conditions.

Decisions under appeal

The Board

[23] The Board found that, although the proposal would have more than minor adverse effects on the environment, it was not contrary to the objectives and policies

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21 Section 149V.

22 Section 149P(4)(b). Contrast s 171(2).

of the AUP for the purposes of the s 104D gateway. On that issue, the Board framed its conclusion in this way:[23]

> [664] While the Proposal is concluded to be contrary to a small number of policies or subclauses of policies, the Board does not consider those individually or cumulatively as reason to conclude that the Proposal is repugnant to the policy direction of the [AUP(plans)] with respect to the resource consents sought. The Board's conclusion is that where the Proposal infringes policies, neither individually nor cumulatively do those infringements tilt the balance for s 104D purposes against the Proposal as a whole.

[24] The Board's conclusion as to the need for the EWL was in these terms:[24]

> … the Board is satisfied that "an EWL" servicing the Onehunga-Southdown industrial area, would be a highway of strategic and national importance. The evidence satisfies it that such a highway is long overdue and is urgently needed to provide better freight transport links to an area of national and regional significance.

[25] The Board then concluded that the adverse effects of the proposal, though in some areas significant,[25] could be avoided where possible and adequately remedied or mitigated in all other instances.[26] This meant that, with some modifications, the resource consents could be granted under s 104 and the designations confirmed under s 171.[27]

High Court

[26] In the High Court, Powell J confirmed the Board's decision. As to the s 104D threshold, he found that:[28]

> … when the relevant objectives and policies of the AUP are properly reconciled it is apparent that the AUP provides a specific, albeit narrow, framework for the consideration of infrastructure proposals rather than automatically excluding them at the s 104D stage. … I conclude that when the relevant chapters are properly construed the AUP was never intended to categorically block infrastructure projects such as the proposed EWL at the s 104D stage as to do so would preclude the very analysis envisaged in chapter E26 [which contains the relevant AUP infrastructure policies].

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23 Board decision, above n 4.
24 At [266].
25 See for example at [471].
26 At [1391].
27 At [1398].
28 HC judgment, above n 7, at [68].

[27] In relation to the substantive decisions under ss 104 and 171, the appellant argued in the High Court that the AUP policies directed the Board to avoid adverse effects on vulnerable areas and the proposal could not satisfy that requirement.[29] Further, if, contrary to that submission, it was accepted that the objectives and policies of the AUP could accommodate the proposal, then the AUP was inconsistent with the NZCPS which required such effects to be avoided, and the NZCPS is the predominant document and must be applied.[30] The Judge rejected these arguments. He concluded:

> [86] By any measure, I am satisfied that the Board has had as it was required to do regard/particular regard to the NZCPS in the course of its consideration of the proposed EWL. Having done so it was therefore entirely open to the Board to reject, as it did, the submission made on behalf of Ngāti Whātua and Forest and Bird that the specific wording of the NZCPS somehow trumped the provisions of the AUP, and, likewise, for the Board to instead prefer the relevant provisions of the AUP to the extent that these differed from the NZCPS.

The issues

[28] There are three broad categories in which issues arise for determination.

One: the s 104D gateway

[29] At the Board hearing, Waka Kotahi and Auckland Council accepted that the adverse environmental effects of the EWL will be more than minor.[31] The Board therefore had to be satisfied for the purposes of s 104D(1)(b) that the activity "will not be contrary to the objectives and policies" of the AUP(plans).

[30] As noted, the Board and the High Court accepted that the EWL could pass through this gateway, although for different reasons. The Board found that the s 104D(1)(b) test permits an overall assessment of the relevant AUP(plans) objectives and policies, such that a measure of internal inconsistency did not necessarily mean the EWL was contrary to them.[32] The High Court, on the other hand, found that although the EWL was contrary to certain protective objectives and policies, they

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29 At [9] and [21]–[23].
30 At [9] and [72].
31 Board decision, above n 4, at [615].
32 At [662]–[664].

could, on careful analysis, be reconciled with infrastructure objectives and policies, leaving a "specific, albeit narrow, framework" through which the EWL could pass.[33]

[31] The issues under s 104D are:

(a) Is locating major infrastructure in vulnerable coastal environments inconsistent with the AUP(plans)'s indigenous biodiversity "avoid" policies?[34]

(b) If yes to (a), can such a proposal nonetheless *not* be contrary to the AUP(plans)'s objectives and policies for the purposes of s 104D?

(c) If yes to (b), is there an inconsistency between the NZCPS and the AUP(plans) such that the relevant "avoid" policy in the NZCPS should effectively prevail?

Two: ss 104 and 171 and the effect of the NZCPS

[32] This issue arises if the proposal passes through the s 104D gateway. It relates to the Board's merits assessment of the resource consent applications under s 104 and the NORs under s 171. "Regard" (under s 104) or "particular regard" (under s 171) must be had to any applicable objectives and policies promulgated under the RMA. At the risk of belabouring the point, this cascade of RMA instruments operates at national level (relevantly in this case in the NZCPS); at regional level in regional policy statements, regional plans and regional coastal plans; and at local level in district plans. But, in the case of Auckland, its policy statements and plans are consolidated into the single AUP.

[33] As will be seen, on the view we take of the AUP's objectives and policies, the real focus under this issue is the effect of the requirement to have regard/particular regard to the relevant avoid policy in the NZCPS. Does this duty mean consent authorities must give effect to that policy? This issue is therefore similar, but not

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33 HC judgment, above n 7, at [68].

34 We use the term "avoid policies" throughout these reasons to refer to those policies in the AUP and NZCPS that require the avoidance of adverse environmental effects. See our discussion below at [72] and following.

identical, to issue (c) above at [31]. To avoid unnecessary repetition, we will address them together.

Three: offsets, compensation and the "bucket approach"

[34] Section 104(1)(ab) allowed the Board to take account of proposed measures which were likely to "offset or compensate" expected adverse effects by providing a countervailing positive effect.[35] Waka Kotahi proposed various offsets to compensate for the project's harms, including habitat loss due to the proposed reclamation and other shoreline and terrestrial works.

[35] The first issue under this heading is whether offsets can be deployed to "avoid" specific adverse effects expressly required by an applicable plan or policy statement to be avoided. A second issue is whether compensatory measures deployed in accordance with Waka Kotahi's "bucket approach" can, by balancing different effects, render the proposal consistent overall with relevant objectives and policies. These category three issues are logically relevant to issue categories one and two above.

Mana whenua issues

[36] For completeness, we note that Ngāti Whātua Ōrākei Whai Māia Ltd (Ngāti Whātua Ōrākei) raised mana whenua issues before us, in support of the appeal by Royal Forest and Bird Protection Society of New Zealand Inc (Royal Forest and Bird). However, we accept the submission of Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Inc, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust that these issues were not part of the appeal to the High Court and that it is therefore inappropriate to deal with them.[36]

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35 Section 171(1B) is of similar effect with regard to notices of requirement. We note there is an issue regarding when these provisions entered into force, but we agree it is not material in this case for the reasons Glazebrook J gives below at [229], n 256.

36 See also the reasons of Glazebrook J below at [186], n 181 and William Young J at [372].

Policies and objectives relevant to this case

[37] There are three applicable layers of objectives and policies: those in the NZCPS, the AUP(rps) and the AUP(plans). The AUP(plans) is a particular focus of the s 104D issue because of the terms of s 104D(1)(b), and the NZCPS is a focus in the ss 104/171 issue, but all objectives and policies are either directly or indirectly relevant to both of these issues.

[38] Throughout this cascade there is tension between providing for development that meets community need and protecting vulnerable elements of the environment from such development. This is unsurprising. It is the tension built into the definition of sustainable management in s 5(2). It is particularly acute in Auckland and the AUP's provisions accurately reflect that extra dimension.

[39] To avoid repetition, we will summarise the effect of all relevant objectives and policies in a single preliminary section, before turning to address the three issue categories.

Policies in the NZCPS

Avoiding adverse effects on indigenous biodiversity

[40] Sections 62(3) and 67(3) provide that the AUP must give effect to the NZCPS. It must therefore be expected that the policies of the NZCPS will be reflected in the more place- and subject-specific provisions of the AUP. Further, ss 104(1)(b)(iv) and 171(1)(a)(ii) require consent authorities to consider the NZCPS directly. The NZCPS is therefore an important and powerful driver of decision-making under the RMA.

[41] Policy 11 of the NZCPS is central to this appeal. It provides as follows:[37]

> To protect indigenous biological diversity in the coastal environment:
>
> (a) avoid adverse effects of activities on:
>
> (i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;

[37] Footnotes omitted.

(ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;

(iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;

(iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;

(v) areas containing nationally significant examples of indigenous community types; and

(vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

(i) areas of predominantly indigenous vegetation in the coastal environment;

(ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;

(iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;

(iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;

(v) habitats, including areas and routes, important to migratory species; and

(vi) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

[42] As can be seen, Policy 11 is strongly worded, especially in paragraph (a) in relation to the protection of rare or threatened indigenous ecology, habitats and taxa. It directs that relevant adverse effects on indigenous biodiversity must be avoided.

Infrastructure and development

[43] Policy 6 of the NZCPS relates to development generally in the coastal environment and Policy 10 relates to reclamation specifically. Policy 6 relevantly provides:

> (1) In relation to the coastal environment:
>
> (a) recognise that the provision of infrastructure [is] … important to the social, economic and cultural well-being of people and communities;
>
> (b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment;
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> …
>
> (2) Additionally, in relation to the coastal marine area:
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> …
>
> (c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;
>
> (d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there; …
>
> …

[44] Infrastructure is expressly supported and future planning around infrastructure is encouraged. A key qualifying criterion for a CMA location is "functional need", meaning "the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment".[38] Where there is such a need, the directive is to provide for the activity in "appropriate places". As will be seen, the AUP takes a more expansive approach by accepting that "operational need" may also suffice; "operational need" refers to "the need for a

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[38] Ministry for the Environment | Manatū Mō Te Taiao *National Planning Standards* (November 2019) at 58. For example, most structures to support shipping activities must be located in a marine environment.

proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints".[39]

[45] Policy 10 of the NZCPS relates specifically to reclamation. It relevantly provides:

> (1) Avoid reclamation of land in the coastal marine area, unless:
>
> (a) land outside the coastal marine area is not available for the proposed activity;
>
> (b) the activity which requires reclamation can only occur in or adjacent to the coastal marine area;
>
> (c) there are no practicable alternative methods of providing the activity; and
>
> (d) the reclamation will provide significant regional or national benefit.
>
> …
>
> (3) In considering proposed reclamations, have particular regard to the extent to which the reclamation and intended purpose would provide for the efficient operation of infrastructure, including … coastal roads …
>
> …

[46] This policy contains important elements which, it will be seen, are replicated in the AUP. They are central to resolving this appeal. Reclamation is to be avoided and will only be supported exceptionally, if three elements are met. First, it must be the case that there is no practicable alternative method of solving the transport problem.[40] Second, it must be that the proposed solution "can only occur" in (or adjacent to) the CMA.[41] Third, the proposed solution must bring significant regional or national benefit. In the present case, these elements mean Waka Kotahi must demonstrate there is no practicable method of solving the transport problem other than building a new road, there is no alternative to an alignment requiring reclamation, and

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[39] At 62. For example, if terrestrial locations would displace a community or be prohibitively expensive, an operational need to locate a structure or activity in the marine environment may be established.

[40] We take the term "activity" in Policy 10(1)(c) to be a reference, in this case, to transportation. Of course, it is possible to read "activity" narrowly so that it applies only to the road but this seems inconsistent with the very broad language of the policy, construing it purposively.

[41] This may include, as we shall see, circumstances in which the absence of alternatives to a CMA location is because there is no available land outside that area: NZCPS, Policy 10(1)(a).

the EWL will bring significant regional or national benefit. For completeness, we note that reclamation for infrastructure generally (and coastal roading specifically) is identified as a subcategory by Policy 10(3) and given a measure of priority in the assessment.

Objectives and policies in the AUP

[47] At the AUP level, relevant objectives and policies "recognise" the importance of maintaining a roading network that meets the economic and social needs of Auckland's growing population.[42] Other objectives and policies, equally relevant, direct decision makers to "avoid" adverse effects on vulnerable indigenous avifauna, vegetation and ecosystems.[43] The AUP navigates that tension by acknowledging that it may be necessary in exceptional circumstances to "recognise" that some level of infrastructure may need to be located in vulnerable environments where adverse effects must be "avoided". For instance, in their explanation and principal reasons for adopting the infrastructure objectives and policies in the RPS section of the AUP, the drafters explained:[44]

> Infrastructure can have adverse effects on the environment, including on sites and areas specifically identified for their high values as well as on neighbouring activities. Sometimes infrastructure must be located in sensitive areas because of the location of development and to achieve appropriate degrees of efficiency. *Managing the reciprocal effects of infrastructure on more sensitive areas … is required as Auckland grows and intensifies*. Conflicts or incompatibilities between adjoining land uses need to be avoided as far as practicable or mitigated where avoidance is not practicable, in order to protect valued parts of the environment while ensuring that the operation of infrastructure is not unreasonably compromised.

AUP(rps) biodiversity overlay policies

[48] After the NZCPS, the next document in the RMA hierarchy is the AUP(rps) which forms chapter B of the AUP. The AUP(rps) must give effect to the NZCPS and, in turn, the AUP(plans) must give effect to the AUP(rps). Included in the AUP(rps) are protective indigenous biodiversity policies and specific infrastructure and coastal development policies.

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42 AUP, Policy E26.2.2(1) and (14)–(15).
43 See for example Policy D9.3(9).
44 Policy B3.5 (emphasis added).

[49] Policy B7.2.2 is the protection side. It provides the criteria for selecting marine and terrestrial locations marked for special protection. These are called Significant Ecological Areas (SEAs). They are listed in schs 3 and 4 of the AUP. They operate as overlays on the operative underlying zones and impose additional protective controls.[45] These overlays are central to the appeal. They are one side of the infrastructure vs coastal environment tension that, as noted, is built into the AUP. The scale of the tension across the region is reflected in the fact that 71.5 per cent of Auckland's urban area abuts a SEA marine overlay. Policy B7.2.2 provides as follows:

> **B7.2.2. Policies**
>
> (1) Identify and evaluate areas of indigenous vegetation and the habitats of indigenous fauna in terrestrial and freshwater environments considering the following factors in terms of the descriptors contained in Schedule 3 Significant Ecological Areas – Terrestrial Schedule:
>
> (a) representativeness;
>
> (b) stepping stones, migration pathways and buffers;
>
> (c) threat status and rarity;
>
> (d) uniqueness or distinctiveness; and
>
> (e) diversity.
>
> (2) Include an area of indigenous vegetation or a habitat of indigenous fauna in terrestrial or freshwater environments in the Schedule 3 of Significant Ecological Areas – Terrestrial Schedule if the area or habitat is significant.
>
> (3) Identify and evaluate areas of significant indigenous vegetation, and the significant habitats of indigenous fauna, in the coastal marine area considering the following factors in terms of the descriptors contained in Schedule 4 Significant Ecological Areas – Marine Schedule:
>
> (a) recognised international or national significance;
>
> (b) threat status and rarity;
>
> (c) uniqueness or distinctiveness;
>
> (d) diversity;
>
> (e) stepping stones, buffers and migration pathways; and
>
> (f) representativeness.

[45] Policy B7.2.2(5).

(4) Include an area of indigenous vegetation or a habitat of indigenous fauna in the coastal marine area in the Schedule 4 Significant Ecological Areas – Marine Schedule if the area or habitat is significant.

(5) Avoid adverse effects on areas listed in the Schedule 3 of Significant Ecological Areas – Terrestrial Schedule and Schedule 4 Significant Ecological Areas – Marine Schedule.

[50] The key control is the requirement at B7.2.2(5) that adverse effects in the SEAs must be avoided. This reflects the language of NZCPS Policy 11.

Infrastructure and development policies in the AUP(rps)

[51] The development and infrastructure side is contained in Policies B3 and B8. Policies B3.2.2(3) and (6), for example, relevantly provide:

(3) Provide for the locational requirements of infrastructure by recognising that it can have a functional or operational need to be located in areas with natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character.

…

(6) Enable the development, operation, maintenance and upgrading of infrastructure in areas with natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character while ensuring that the adverse effects on the values of such areas are avoided where practicable or otherwise remedied or mitigated.

[52] These acknowledge that there will be occasions where infrastructure may need to be sited in overlay areas. If that is the case, proposals must ensure that adverse effects on protected environmental values are avoided where practicable, or otherwise remedied or mitigated.

[53] Policy B8.3.2 provides for development (including reclamation) in the coastal environment. B8.3.2(3) and (9) relevantly provide:

(3) Provide for use and development in the coastal marine area that:

(a) have a functional need which requires the use of the natural and physical resources of the coastal marine area;

(b) are for the public benefit or public recreation that cannot practicably be located outside the coastal marine area; [or]

(c) have an operational need making a location in the coastal marine area appropriate and that cannot practicably be located outside the coastal marine area; …

…

Reclamation

(9) Avoid reclamation of land in the coastal marine area unless all of the following apply:

(a) land outside the coastal marine area is not available for the proposed activity;

(b) the activity which requires reclamation can only occur in or adjacent to the coastal marine area;

(c) there are no practicable alternative methods of providing for the activity; and

(d) the reclamation will provide significant regional or national benefit.

[54] According to these policies, development may be acceptable in the CMA, subject to strict criteria. Specifically, there must be a functional need for such location. If functional need cannot be established, there must be no practicable alternative to a CMA location and additional requirements must also be met: either the development is for the public benefit or public recreation, or there is an operational need making location in the CMA appropriate. Note, as presaged, the addition of "operational" alongside functional need to locate in the CMA. This extends the qualifying criterion in NZCPS Policy 6(2)(d) which "generally" permits only functional need. We address the significance of this issue below.[46] Reading the NZCPS and AUP together, we understand operational need as only exceptionally justifying the location of a development in the CMA. Finally, reclamation is specifically mentioned, alongside additional criteria lifted from NZCPS Policy 10. It is to be avoided unless there is no other practicable method of solving the problem (in this case, the transport problem), the proposed solution "can only occur" in (or adjacent to) the CMA,[47] and the reclamation will provide significant regional or national benefit.

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[46] See below at [112].
[47] See above at [46].

The AUP(plans) introduction

[55] The approach of the AUP(plans) to the development vs protection tension is reflected in the protective overlay policies in D9.3, the infrastructure objectives and policies in E26.2, and the coastal activity policies in F2.2.3, especially as the last mentioned relates to reclamation. There are other relevant AUP(plans) objectives and policies, but these three are at the heart of the contest and provide what is needed for a proper assessment of the AUP's approach to this conundrum.

AUP(plans) biodiversity and SEA overlays

[56] Chapter D incorporates all overlay categories. Generally speaking, they contain special protections over and above those in the underlying zones, for the protective purposes expressed in the overlay categories. These categories include, for example, historic heritage, built environment and mana whenua overlays.

[57] D9 contains the objectives and policies that populate the vulnerable environment or biodiversity overlays referred to as SEAs. In the CMA they are designated SEA-M (for marine), while land-based SEAs are designated SEA-T (for terrestrial).[48] In this case, the proposal area is within, or adjacent to, both SEA-M and SEA-T overlays.

[58] Marine overlays are then split into two categories: SEA-M1, which broadly relates to particularly vulnerable marine environments, threatened or rare species and the like; and SEA-M2, which relates more generally to indigenous species, ecosystems and habitats with characteristics deserving of a level of protection.[49] The protective policies are stronger for the former.[50] The proposal area contains both M1 and M2 overlays.

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48 AUP, Policy D9.1.1–D9.1.2.
49 Policy D9.1.2.
50 See for example Policy D9.3(13)–(14) and (16).

[59] D9 contains strong avoid policies which push back against the infrastructure and coastal activity policies. The overlays take their lead from NZCPS Policy 11 and AUP(rps) B7. Relevant D9 objectives and policies are as follows:

> **D9.2. Objectives [rcp/rp/dp]**
>
> (1) Areas of significant indigenous biodiversity value in terrestrial, freshwater, and coastal marine areas are protected from the adverse effects of subdivision, use and development.
>
> (2) Indigenous biodiversity values of significant ecological areas are enhanced.
>
> …
>
> **D9.3. Policies [rcp/rp/dp]**
>
> *Managing effects on significant ecological areas – terrestrial and marine*
>
> (1) Manage the effects of activities on the indigenous biodiversity values of areas identified as significant ecological areas by:
>
> (a) avoiding adverse effects on indigenous biodiversity in the coastal environment to the extent stated in Policies D9.3(9) and (10);
>
> (b) avoiding other adverse effects as far as practicable, and where avoidance is not practicable, minimising adverse effects on the identified values;
>
> …
>
> (8) Manage the adverse effects from the use, maintenance, upgrade and development of infrastructure in accordance with the policies above, recognising that it is not always practicable to locate and design infrastructure to avoid significant ecological areas.
>
> *Protecting significant ecological areas in the coastal environment*
>
> (9) Avoid activities in the coastal environment where they will result in any of the following:
>
> (a) non-transitory or more than minor adverse effects on:
>
> (i) threatened or at risk indigenous species (including Maui's Dolphin and Bryde's Whale);
>
> (ii) the habitats of indigenous species that are at the limit of their natural range or which are naturally rare;
>
> (iii) threatened or rare indigenous ecosystems and vegetation types, including naturally rare ecosystems and vegetation types;

(iv) areas containing nationally significant examples of indigenous ecosystems or indigenous community types; or

(v) areas set aside for full or partial protection of indigenous biodiversity under other legislation, including the West Coast North Island Marine Mammal Sanctuary.

(b) any regular or sustained disturbance of migratory bird roosting, nesting and feeding areas that is likely to noticeably reduce the level of use of an area for these purposes; or

(c) the deposition of material at levels which would adversely affect the natural ecological functioning of the area.

(10) Avoid (while giving effect to Policy D9.3(9) above) activities in the coastal environment which result in significant adverse effects, and avoid, remedy or mitigate other adverse effects of activities, on:

(a) areas of predominantly indigenous vegetation;

(b) habitats that are important during the vulnerable life stages of indigenous species;

(c) indigenous ecosystems and habitats that are found only in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;

(d) habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes including fish spawning, pupping and nursery areas;

(e) habitats, including areas and routes, important to migratory species;

(f) ecological corridors, and areas important for linking or maintaining biological values; or

(g) water quality such that the natural ecological functioning of the area is adversely affected.

(11) In addition to Policies D9.3(9) and (10), avoid subdivision, use and development in the coastal environment where it will result in any of the following:

(a) the permanent use or occupation of the foreshore and seabed to the extent that the values, function or processes associated with any Significant Ecological Area – Marine is significantly reduced;

(b) any change to physical processes that would destroy, modify, or damage any natural feature or values identified for a

Significant Ecological Area – Marine in more than a minor way; or

(c) fragmentation of the values of a Significant Ecological Area – Marine to the extent that its physical integrity is lost.

…

(13) In addition to Policies D9.3(9) and (10), avoid structures in Significant Ecological Areas – Marine 1 (SEA-M1) except where a structure is necessary for any of the following purposes:

…

(d) to benefit the regional and national community, including structures for significant infrastructure where there is no reasonable or practicable alternative location on land, or elsewhere in the coastal marine area outside of a Significant Ecological Area – Marine 1(SEA-M1).

…

[60] For present purposes, the key provisions in relation to the SEA-M overlays are D9.3(9) and (10). Paragraph (9) generally corresponds to the higher vulnerability SEA-M1 overlays. It directs that "non-transitory or more than minor adverse effects" on the habitats of rare indigenous species, and threatened or rare indigenous ecosystems and vegetation must be avoided,[51] as must "regular or sustained disturbance" of migratory birds' roosting, nesting and feeding areas where it is likely this would "noticeably reduce" their use.[52] Paragraph (10) generally relates to the SEA-M2 overlays which cover less vulnerable locations. It directs that in certain circumstances, "significant adverse effects" must be avoided on the indigenous species, ecosystems and habitats within the overlay.

[61] Significantly, D9.3(9) and (10) were added following settlement of an appeal to the High Court by Royal Forest and Bird.[53] Whata J accepted the, by then, agreed view of the parties that Policy B7.2.2(5), requiring adverse effects to be avoided in the SEAs, had not been given proper effect in the original terms of D9.3.[54] He also

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51 Policy D9.3(9)(a).
52 Policy D9.3(9)(b).
53 *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council* [2017] NZHC 980, (2017) 20 ELRNZ 390.
54 At [36] and [39].

accepted that NZCPS Policy 11 required the addition of (9) and (10).[55] Policy 11(a)[56] maps broadly onto the new D9.3(9) and the locations to be selected for SEA-M1 overlays, and Policy 11(b)[57] maps generally onto D9.3(10) and the locations to be selected for SEA-M2 overlays.

[62] On the other hand, it must also be noted that D9.3(13)(d) contemplates, as an exception, the location of structures for significant infrastructure in SEA-M1 overlays. Once again, the strict requirements are that such structures are necessary to benefit the regional and national community and there are no practicable alternative locations outside SEA-M1 overlays.[58] Also significant for present purposes is D9.3(8), which addresses the tension point in a tentative fashion. It affirms the importance of managing adverse effects in SEAs in a way that avoids these effects, while recognising that it is not always practicable to locate and design infrastructure to avoid SEAs.

[63] At this stage, it is appropriate to note the key distinction between our approach to the construction of the relevant polices and that taken by Glazebrook J. Our interpretation of the policies in D9.3 illustrates this difference. Glazebrook J considers that D9.3(8) and (13) are not exceptions to D9.3(9) and (10). Instead, she considers D9.3(9) and (10) to be paramount.[59] In our view, that construction of the D9.3 policies is incorrect. As we say with reference to authorities at [79]–[80] below, the relevant policies must be read "as a whole" in order to get at the true intent of the drafter. This means the internal relationships between policies in D9.3 and their connection, in turn, with related policies such as those in F2 and E26 must be understood. Taking this approach, D9.3(8), (9) and (10) are meant to be read together as a cohesive whole.[60] It must be remembered that when D9.3(8) was drafted, D9.3(9) and (10) did not exist. The latter were inserted by consent in the High Court in a case in which the effect of D9.3(8) and its relationship with D9.3(9) and (10) were not in

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55 At [36]–[403], [49], [56] and 404–409.

56 Regarding the avoidance of adverse effects on threatened, rare or at risk taxa, ecosystems, vegetation types and habitats.

57 Regarding the avoidance of significant adverse effects on indigenous vegetation, habitats, ecosystems and species.

58 We note, for completeness, that Policy D9.3(13)(d) uses the phrase "no *reasonable* or practicable alternative location" (emphasis added). However, we take "reasonable" to mean the same as "practicable" when the AUP is read in line with the NZCPS.

59 Below at [264].

60 See the reasons of Glazebrook J below at [264].

issue.[61] Of equal importance is the fact that D9.3(8) covers the same ground as D9.3(13)(d), the policy that captures the circumstances in which "significant infrastructure" may be located within SEA-M1s. That policy would be neutralised if it was entirely subject to D9.3(9), this because infrastructure of any significance is likely to have adverse effects which cross the threshold in D9.3(9). It is necessary, and plainly intended, that the D9.3, F2 and E26 policies be read together; otherwise, what could "no practicable alternative location" possibly mean?

AUP(plans) infrastructure objectives and policies

[64] The relevant objectives of the AUP(plans) in relation to infrastructure are as follows:

> **E26.2.1. Objectives [rp/dp]**
>
> (1) The benefits of infrastructure are recognised.
>
> …
>
> (3) Safe, efficient and secure infrastructure is enabled, to service the needs of existing and authorised proposed subdivision, use and development.
>
> (4) Development, operation, maintenance, repair, replacement, renewal, upgrading and removal of infrastructure is enabled.
>
> …
>
> (9) The adverse effects of infrastructure are avoided, remedied or mitigated.

[65] The relevant policies are as follows:

> **E26.2.2. Policies [rp/dp]**
>
> (1) Recognise the social, economic, cultural and environmental benefits that infrastructure provides, including:
>
> (a) enabling enhancement of the quality of life and standard of living for people and communities;
>
> …
>
> (c) enabling the functioning of businesses;
>
> (d) enabling economic growth;

[61] See above at [61].

(e) enabling growth and development;

(f) protecting and enhancing the environment;

(g) enabling the transportation of freight, goods, people; and

…

(2) Provide for the development, operation, maintenance, repair, upgrade and removal of infrastructure throughout Auckland by recognising:

(a) functional and operational needs;

(b) location, route and design needs and constraints;

…

(d) the benefits of infrastructure to communities [within] Auckland and beyond;

…

Adverse effects of infrastructure

(4) Require the development, operation, maintenance, repair, upgrading and removal of infrastructure to avoid, remedy or mitigate adverse effects, including, on the:

…

(d) environment from temporary and ongoing discharges; and

(e) values for which a site has been scheduled or incorporated in an overlay.

(5) Consider the following matters when assessing the effects of infrastructure:

(a) the degree to which the environment has already been modified;

(b) the nature, duration, timing and frequency of the adverse effects;

(c) the impact on the network and levels of service if the work is not undertaken;

(d) the need for the infrastructure in the context of the wider network; and

(e) the benefits provided by the infrastructure to the communities within Auckland and beyond.

(6) Consider the following matters where new infrastructure or major upgrades to infrastructure are proposed within areas that have been scheduled in the Plan in relation to natural heritage, Mana Whenua,

natural resources, coastal environment, historic heritage and special character:

(a) the economic, cultural and social benefits derived from infrastructure and the adverse effects of not providing the infrastructure;

(b) whether the infrastructure has a functional or operational need to be located in or traverse the proposed location;

…

(d) whether there are any practicable alternative locations, routes or designs, which would avoid, or reduce adverse effects on the values of those places, while having regard to E26.2.2(6)[(a)–(c)];

(e) the extent of existing adverse effects and potential cumulative adverse effects;

(f) how the proposed infrastructure contributes to the strategic form or function, or enables the planned growth and intensification, of Auckland;

(g) the type, scale and extent of adverse effects on the identified values of the area or feature, taking into account:

(i) scheduled sites and places of significance and value to Mana Whenua;

(ii) significant public open space areas, including harbours;

…

(v) natural ecosystems and habitats; and

(vi) the extent to which the proposed infrastructure or upgrade can avoid adverse effects on the values of the area, and where these adverse effects cannot practicably be avoided, then the extent to which adverse effects on the values of the area can be appropriately remedied or mitigated.

(h) whether adverse effects on the identified values of the area or feature must be avoided pursuant to any national policy statement, national environmental standard, or regional policy statement.

[66] These policies and objectives acknowledge the importance of infrastructure for Auckland's growth, development and quality of life. They also acknowledge that infrastructure can have significant adverse effects on communities and the environment. One mechanism the AUP(plans) uses to address development-related

adverse effects is the SEA overlays already discussed. These are the focus of the policies in E26.2.2(6).

[67] E26.2.2(6) requires consideration of a number of constraining factors before a proposal located in a SEA can be supported. Once again, and critically in terms of this appeal, they include the requirement to show functional or operational need to locate within a SEA and that there are no practicable alternative locations.[62] This policy also cross-references the higher order documents, thereby requiring consideration of whether the overlay area is subject to any avoid policy in the NZCPS or the AUP(rps).[63]

AUP(plans) reclamation policies

[68] Chapter F of the AUP(plans) relates to coastal zone activities and contains policies in relation to reclamations. As the proposal involves relatively significant reclamations, these policies are relevant. In general terms, reclamations are to be avoided in the CMA except in exceptional circumstances:

> **F2.2.3. Policies [rcp]**
>
> (1) Avoid reclamation and drainage in the coastal marine area except where all of the following apply:
>
> (a) the reclamation will provide significant regional or national benefit;
>
> (b) there are no practicable alternative ways of providing for the activity, including locating it on land outside the coastal marine area;
>
> (c) efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use, or to enable drainage.
>
> (2) Where reclamation or drainage is proposed that affects an overlay, manage effects in accordance with the overlay policies.
>
> (3) Provide for reclamation and works that are necessary to carry out any of the following:
>
> …

---

62 AUP, Policy E26.2.2(6)(b) and (d).
63 Policy E26.2.2(6)(h).

(e) enable the construction and/or efficient operation of infrastructure, including but not limited to, ports, airports, roads, pipelines, electricity transmission, railways, ferry terminals, and electricity generation; or

(f) create or enhance habitat for indigenous species where degraded areas of the coastal environment require restoration or rehabilitation.

…

(6) Consider where the adverse effects of drainage or reclamation cannot be completely avoided, remediated or mitigated on site, compensating for those adverse effects by additional or enhanced public access or public facilities or environmental enhancement or restoration.

[69] Consistently with the infrastructure policies, and again, critically in terms of this appeal, the effect of F2.2.3 is that reclamations will be allowed if the regional or national benefit is significant, there are no practicable alternatives to reclamation in a CMA, and the area to be reclaimed is the minimum necessary.[64] Again, the overlay policies are referenced; a significant policy directive at F2.2.3(2) is that the effects of reclamation within SEAs must be managed in accordance with the relevant overlay policies, which in this case, as noted, are in D9. On the other hand, reclamation is enabled ("provide for") where it supports the usual forms of infrastructure,[65] and there is an acknowledgement that it may be necessary to consider options short of avoidance.[66] Whether the specific reference to D9 is intended to override support for infrastructure and the options for remediation and mitigation (rather than avoidance) is a matter for further consideration.

[70] The activity status table at rule F2.19.1 reflects this approach of allowing exceptions to avoid policies for significant infrastructure in a revealing way. The table is part of the AUP(plans) and gives effect to F2.2.2 and F2.2.3 by inserting rules that apply specifically to the SEA-Ms governed by D9. In SEA-M1 overlays, reclamation is generally prohibited—meaning consent cannot even be applied for—*unless* it falls into one of the exceptions listed in the activity table. Leaving to one side exceptions relating to existing reclamations and the provision of public access (the scale of which

64 Policy F2.2.3(1).
65 Policy F2.2.3(3)(e).
66 Policy F2.2.3(6).

would necessarily be minor), the activity table classifies infrastructural reclamation as a non-complying activity, regardless of scale.

[71] In other words, and this is crucial to the structure of the regime overall, infrastructural reclamation is contemplated as an exception to the firm requirement to avoid adverse impacts of development in SEA-M1 overlays, even where it is more than minor in scale. It might be said that more than minor infrastructural reclamation is not the same as reclamation with more than minor adverse effects, but, realistically, there is likely to be a high degree of overlap between the two concepts. In a sense, this rule contains the rub that is at the centre of the present appeal.

Why avoid policies are so important

[72] So, taking their lead from s 5 itself, the NZCPS and AUP both set up the same tension between recognising and providing for the needs of communities while, at the same time, avoiding adverse effects on the vulnerable environments in which those communities live. Within this frame, directive policies, such as policies requiring particular environmental impacts to be avoided, have greater potency than other non- or less directive policies. This Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* (*King Salmon*) explains why, so it is appropriate to refer to it at this juncture.[67]

[73] *King Salmon* involved a plan change under Part 5 rather than a resource consent. At issue was a proposal to make specific provision in the Marlborough Sounds Resource Management Plan for aquaculture in a coastal area with significant landscape values.[68] Policy 8 of the NZCPS provides that lower order documents should recognise the significant contribution of aquaculture to the wellbeing of people and communities. On the other hand, NZCPS Policies 13 (preservation of natural character) and 15 (protection of natural features and

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

68 The plan change as originally proposed made provision for eight discrete sites, but the appeal related to only one of them. The consent application that followed in relation to the appeal site was addressed by this Court in *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673.

landscapes) direct that adverse effects on outstanding natural character, features and landscapes must be avoided.

[74] The Board of Inquiry in *King Salmon* used a technique referred to as "overall judgment", under which NZCPS policies found to be in tension could be re-weighted according to the priorities of the particular region. This meant a "recognise" policy could carry more weight than an "avoid" policy according to local preference.

[75] The majority in this Court found an overall judgment approach was not permitted. "Avoid", it held, carried its ordinary meaning of "not allow" or "prevent the occurrence of",[69] and avoid policies directed an outcome for which provision had to be made in lower order documents. It was not sufficient for councils merely to take that into account when promulgating their own plans. Rather, the Court found, the requirement that lower order plans must "give effect" to the NZCPS was a strong directive which lower order plans were obliged to implement.[70] This suggested, the Court considered, an obligation to avoid inappropriate development "might be thought to provide something in the nature of an 'environmental bottom line'" for lower order policy statements and plans.[71] That said, Policies 13 and 15 did not prohibit development. Their focus was the avoidance of *inappropriate* development.

[76] On the other side of the scale, Policy 8(a) encourages recognition of the importance of aquaculture by enabling its location in "appropriate places". Thus, the Court found, "inappropriate" could do the work of reconciling apparently conflicting policies.[72] Nonetheless, the primary point is that avoid policies have particular potency in the hierarchy of NZCPS policies with implications all the way down the RMA cascade.

[77] *King Salmon* is relevant in two ways. The first is that, generally speaking, directive policies will take priority over other policies wherever they appear in the hierarchy. The fact that the focus in *King Salmon* was the NZCPS is not particularly material to the application of this principle. Experience so far suggests that where

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69 *King Salmon*, above n 67, at [96] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
70 At [77] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and RMA, s 67(3)(b).
71 *King Salmon*, above n 67, at [103] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
72 At [98]–[105] and [126] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

directive policies appear in lower order documents, they have taken their cue from the NZCPS anyway. The second aspect is that the specific language of directive policies is important. It will provide the best guidance on how policies that are in tension may be reconciled. In *King Salmon*, "inappropriate" did that work.

[78] But, as we suggest in the next section, there is also one important issue that *King Salmon* does not address.

A fair appraisal of the AUP read as a whole

[79] Sections 104(1)(b)(v) and (vi), and 171(1)(a)(iii) and (iv), require regard/particular regard be had to any "relevant provisions" of the AUP. Section 104D(1)(b)(i) asks whether the proposal is contrary to "the objectives and policies" of the relevant plan. In considering the correct approach to s 104D, the Court of Appeal in *Dye v Auckland Regional Council* explained that "a fair appraisal of the objectives and policies read as a whole" is required.[73] In other words, isolating and de-contextualising individual provisions in a manner that does not fairly reflect the broad intent of the drafters must be avoided. The approach will be the same under ss 104 and 171.

[80] That does not mean all objectives and policies can simply be put in a blender with the possible effect that stronger policies are weakened and weaker policies strengthened. Rather, attention must be paid to relevant objectives and policies both on their own terms and as they relate to one another in the overall policy statement or plan. As the Environment Court noted in *Akaroa Civic Trust v Christchurch City Council*, the interpretive exercise must acknowledge that some policies will, in context, be more important than others.[74] The way in which inevitable tensions between policies are identified and worked through in the documents must be grappled with. As *King Salmon* held, the mere presence of tension does not open up an unfettered discretion to choose between unequal policies.[75] On the other hand, the presence of tension between stronger and weaker policies will not always be resolved

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73 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25] per Gault, Keith and Tipping JJ.

74 *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at [74] per Judge Jackson.

75 *King Salmon*, above n 67, at [129]–[130] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

in favour of the stronger. Ecosystems are complex and dynamic, as is the impact of human communities located within them. Fact and context will be important in determining how tensions between policies will be resolved.

[81] With the foregoing in mind, we begin with a fair appraisal of the AUP(plans) objectives and policies as relevant to this case:

(a) The strong "avoid" language in D9.3, mandated by B7.2.2(5), means that constructing major infrastructure in SEA overlays will almost always be contrary to the objectives and policies of the AUP(plans), in terms of s 104D, if adverse effects breach applicable thresholds for the relevant SEA—in particular, the non-transitory or more than minor effects and significant adverse effects thresholds. We say almost always because, as we have summarised, there are narrowly defined exceptions built into the framework.

(b) The fact that the High Court added D9.3(9) and (10) to bring the AUP(plans) into line with the AUP(rps) and NZCPS suggests that avoid policies in D9 will override the infrastructure focused "recognise and provide for" policies in E26 in almost all cases. This is particularly apparent in light of the express reference to the relevance of AUP(rps) and NZCPS avoid policies in E26.2.2(6)(h).

(c) Furthermore—and despite the enabling reclamation and infrastructure policies in F2.2.3, B3 and B8—significant reclamation in SEA-Ms is likely to be contrary to the general coastal zone activity policies in chapter F, given the express reference in F2.2.3(2) to managing effects within overlays in accordance with the requirements of relevant overlays.

[82] Picking up on the point we make at (a), the difficult question that must be resolved in this appeal is how wide the gap in the avoid policies is. If the adverse effects thresholds in D9.3(9) and (10) are hard lines that may not be exceeded in any circumstances, that gap is very narrow indeed. Any development in SEAs that

contravenes them, including infrastructural development, will not just be inconsistent with the particular avoid policy; it will be contrary to the objectives and policies of the AUP(plans) overall in terms of s 104D. This is first because the tension between protection of Auckland's vulnerable coastal environments and provision for better infrastructure is an essential feature of the AUP and cannot be ignored. If relevant policies clearly resolve this tension in favour of "avoid", that outcome also reflects the intention of the AUP(plans) objectives and policies "read as a whole". Second, the D9.3(9) and (10) thresholds might be seen to do the work that "inappropriate" development did in *King Salmon*. That would require the softer "recognise" and "provide" standards in E26 to give way to the directive "avoid" whenever those thresholds are breached, these being "something in the nature of a bottom line".[76]

[83] If that were the correct approach, the EWL would likely be contrary to the AUP(plans) objectives and policies given the uncontested finding that the EWL's adverse effects will be more than minor, including, clearly, in the SEAs.

[84] But that analysis is too rigid to be applied to the AUP policies and the challenges of the Auckland environment. *King Salmon* dealt with a very different scenario to the one before the Court in this case. The proposed plan change in that case would have reclassified aquaculture in "avoid" areas from prohibited to discretionary and included policies to ensure consent for new marine farms would ultimately be obtained. It would have turned a flat ban into a permissive regime, in obvious disregard of avoid policies. This Court's firm stance against such a proposal is not surprising.

[85] The EWL context is different in material ways. First, infrastructure is a public good. In terms of the first part of the s 5(2) definition of sustainable management, adequate infrastructure is a precondition to any community's well-being, health and safety, not least that of the country's largest commercial entrepôt. While E26 and F2.2.3 both cross-reference the SEAs, it must not be overlooked that E26.2.2(6) and F2.2.3(3) and (6) also highlight infrastructure's importance. There is also cross-recognition of infrastructure in the avoid policies themselves. D9.3(13)(d)

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[76] At [132] per Elias CJ, McGrath, Glazebrook and Arnold JJ, although these comments in *King Salmon* were made in the context of different policies in the NZCPS.

accepts that there may be a need for structures associated with "significant infrastructure" even in the most sensitive SEA-M1 areas and D9.3(8) acknowledges that sometimes avoiding adverse effects will be impossible.

[86] Second, unlike the plan change in *King Salmon,* the AUP does not just choose development over avoidance, thumbing its nose, as it were, at the NZCPS avoid policies. In the AUP, the circumstances in which an exception might be made are carefully circumscribed and narrow. For example, the "no other practicable alternative" requirement was not addressed in *King Salmon*, still less in the context of a public good proposal.

[87] Third, the underlying drivers in Auckland are very different to those in play in *King Salmon.* Given the pressures of population growth in Auckland and the deployment of SEAs along 71.5 per cent of its coastlines, it ought to be unsurprising that necessary infrastructure, even at scale, that is unable to locate anywhere but in overlays, will not necessarily be contrary to the objectives and policies of the AUP(plans). In fact, it would be surprising if such provision were not made in some carefully defined way. In other words, there is very good reason to interpret the AUP in a manner that contemplates some narrow exceptions to "avoid".

[88] We have therefore come to the view that the carefully calibrated relationship between E26, F2 and D9 suggests that, mindful of *King Salmon*, the AUP has attempted to "thread the needle" between the two extremes of banning all development in SEAs and permitting it as a fully discretionary activity.[77]

[89] As noted, the activity rules in F2.19.1 classify infrastructural reclamation as non-complying in the SEA-M overlays, regardless of its scale. On the other hand, all new *non*-infrastructural reclamation of any significant scale is generally prohibited. So, the gap, such as it is, provides only for infrastructure. Non-complying status ensures that even then, approval will be obtained only in truly exceptional circumstances.

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[77] We note that this phrase was employed for a different purpose by the Board: see Board decision, above n 4, at [223]. Whereas the Board used "threading a needle" in reference to the difficulty of finding a workable alignment for the EWL, we use it in a conceptual sense, to articulate the difficulty of navigating the exceptions pathway in the AUP's policies and objectives.

[90] Once again, this rule reflects the same exceptions-based approach found in E26.2.2(6)(b), (d) and (f), and D9.3(8) and (13)(d). The fit is not a particularly comfortable one, but that is understandable, even unavoidable. The issues present inherently uncomfortable choices in Auckland's difficult context. They must be worked through with the benefit of a real application and tangible facts.

[91] To conclude then, the particular AUP objectives and policies engaged in this case are carefully designed so that it will be very difficult, but not impossible, to obtain approval to locate significant infrastructure requiring reclamation in a SEA. There will be close scrutiny of any proposal. First, it must be a necessary, and not just a desirable, solution. The AUP frames the necessity of a solution in terms of requirements relating to functional or operational need, benefit to the regional and national community, and lack of practicable alternative locations and solutions.[78] In effect, this means the circumstances of the case leave no real choice. This is a very high bar. Second, adverse effects that cannot be avoided must be remedied or mitigated to a standard that corresponds with the significance of the environment, ecosystem and/or species that ought to have been protected to an avoid standard. Third, the benefits of the solution must plainly justify the environmental cost of granting consent; if, despite all best efforts, the values that will be unavoidably compromised are simply too significant, those values will—indeed, must—prevail.

A fair appraisal of the NZCPS read as a whole

[92] Section 104D(1)(b)'s exclusive focus on plans does not mean the NZCPS can be ignored when applying the gateway test. As noted, lower order plans must "give effect" to the NZCPS.[79] If at all possible, therefore, the AUP(plans) must be construed as having that result. After the RMA itself, the NZCPS is the primary document in the hierarchy, so if it is not possible to reconcile the NZCPS with the AUP(plans), that raises the prospect that the latter is unlawful to that extent.[80] The Court in *King Salmon* considered it "inconceivable" that regional councils would,

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78 AUP, Policies B8.3.2(3), B8.3.2(9), D9.3(13)(d), E26.2.2(2), E26.2.2(6) and F2.2.3(1). See also Policies B3.2.2(3) and D9.3(8).

79 RMA, ss 67(3) and 75(3). See also s 43AA as to regional coastal plans.

80 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 [*RJ Davidson*] at [71] per Cooper, Asher and Brown JJ.

by resort to their own "overall judgment", be free to prepare policy statements and plans that were inconsistent with the national policy choices reflected in the NZCPS.[81] So, analysis of the AUP(plans) for the purposes of the s 104D(1)(b) gateway must be undertaken with one eye on the NZCPS.

[93] Further, if the gateway is cleared, ss 104(1)(b)(iv) and 171(1)(a)(ii) make any "relevant provisions" of the NZCPS mandatory relevant considerations. As with construing the objectives and policies of plans, the appropriate approach is to undertake a fair appraisal of the NZCPS, read as a whole.

Recap on NZCPS policies

[94] As discussed, three NZCPS policies are relevant to the EWL: Policy 6 on development in the coastal environment; Policy 10 on reclamation; and Policy 11 on indigenous biodiversity.

[95] Policy 6 provides that lower order policy statements and plans should recognise the importance of infrastructure to the wellbeing of communities, and should consider the need to prepare for future growth in a way that does not compromise "other values of the coastal environment".[82] Locating development in the CMA may be acceptable if there is a functional need for it.[83] If not, development should "generally" not be located there.[84] In the context of this case, reclamation in the CMA is, by virtue of Policy 10, to be avoided except (in summary) where there is no practicable alternative method of solving the transport problem, there is no alternative to an alignment requiring reclamation, and the reclamation-based solution will bring significant regional or national benefit. Infrastructure is specifically identified for consideration within this exceptions category.

[96] On the other side of the equation, indigenous biodiversity in the coastal environment is protected by Policy 11. Adverse effects (without further qualification) on threatened, rare or at risk indigenous taxa, ecosystems, vegetation types and

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81 *King Salmon*, above n 67, at [118] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
82 NZCPS, Policy 6(1)(a)–(b).
83 Policy 6(2)(c).
84 Policy 6(2)(d).

habitats must be avoided.[85] Significant adverse effects on coastal indigenous vegetation, habitats, ecosystems and species must also be avoided.[86] This policy is strong and directive in the same way that Policies 13 and 15 were in *King Salmon*. But, for obvious reasons, it was not drafted with Auckland's particular challenges in mind.

[97] In light of this, Waka Kotahi and Auckland Council then take a different tack to clear the hurdle presented by Policy 11. They argue that the directive potency of Policy 11 is diluted by the fact that ss 104 and 171 require only that consent authorities have regard or particular regard to it. This, it is argued, is materially different to the "give effect" standard applicable to plan preparation in Part 5; the standard at issue in *King Salmon*.

[98] In what follows, we address that argument, but the more important question we turn to now is whether, on a fair appraisal basis, the NZCPS can accommodate the AUP's exceptions to the SEA avoid policies. In other words, is the AUP consistent with the NZCPS objectives and policies?

Can the NZCPS avoid policies tolerate the AUP exceptions?

[99] Waka Kotahi argued that "have regard to" introduces flexibility into the application of directive policies in a way that "give effect to" would not permit. We do not agree that ss 104 and 171 have this effect, for reasons we will come to, but we do agree that, in principle, flexibility in the application of Policy 11 does not inevitably subvert it. On the contrary, despite Policy 11 being rule-like and containing something in the nature of a bottom line, there will still be room for deserving exceptions that do not subvert the policy's purpose. In short, wriggle room is built into the policy layers of the system.

[100] This argument is not new. As Lord Reid said in *British Oxygen Co Ltd v Minister of Technology*, there is often no practical difference between a policy and a rule.[87] Through long application or careful drafting, a policy can evolve into

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85 Policy 11(a).
86 Policy 11(b).
87 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL) at 625.

something so precise that it might as well be a rule. "There can," his Lordship considered, "be no objection to that, *provided the authority is always willing to listen to anyone with something new to say*".[88] That proviso is now a cornerstone principle of administrative law.[89] It is also important for the practical application of the NZCPS, this notwithstanding that the NZCPS is a statutory scheme of objectives and policies expressly designed to constrain the exercise of otherwise open-ended discretions.[90]

[101] The interpretive approach required here must reconcile the fact that policies mean what they say with the fact that they are still policies. A residual discretion to prevent outcomes plainly inconsistent with the purpose of the RMA must be preserved in order to ensure that, when applied to difficult cases, the policies do not subvert that purpose. Seen this way, recognising a residual discretion will ensure the policy will not be implemented unlawfully.[91] We turn now to applying this interpretive approach.

[102] As this Court explained in *King Salmon*, albeit in the context of the requirement that regional plans "give effect to" the NZCPS,[92] there will be more and less directive policies.[93] This will depend in part on the level of generality or abstraction with which the given policy is framed:

> [80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more

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88 At 625 (emphasis added).

89 See for example *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 at [118]–[119]; *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [39] and [45]; and *Practical Shooting Institute (NZ) Inc v Commissioner of Police* [1992] 1 NZLR 709 (HC). See generally Richard Moules *Environmental Judicial Review* (Hart Publishing, Oxford, 2011) at 197; and Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [15.76].

90 Compare in an analogous context *Hawke's Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106, [2017] 1 NZLR 1041 at [131] per Elias CJ, Glazebrook and Arnold JJ; and *Talley's Fisheries Ltd v Minister of Immigration* HC Wellington CP201/93, 10 October 1995 at 13–16, as examples of engagement with legislatively mandated policies. The RMA context is, of course, different in important ways, including that policies are promulgated following a national public hearing process, followed by a report and recommendations to the Minister of Conservation, and there is a statutory direction that the policies must give effect to Part 2.

91 *King Salmon*, above n 67, at [88].

92 RMA, s 67(3)(b).

93 *King Salmon*, above n 67, at [127].

> prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[103] Some directive policies in the NZCPS are very specific as to subject matter and concrete as to intended effect. For example, Policies 19(3), 21(d), 22(2), 23(2)(a) and 29 are, with great clarity, expressed, in whole or in part, as rules:

(a) "*Only* impose a restriction on public walking … where such a restriction is necessary";[94]

(b) [G]ive priority to improving [water] quality by … *requiring* that stock are excluded from the coastal marine area … within a prescribed time frame";[95]

(c) "*Require* that … development will not result in a significant increase in sedimentation in the coastal marine area";[96]

(d) "*[D]o not allow* … discharge of human sewage directly to water in the coastal environment without treatment";[97] and

(e) "Local authorities are *directed* under sections 55 and 57 of the Act to amend documents … to give effect to this policy … without using the process in Schedule 1 of the Act".[98]

[104] There is not much wriggle room in this kind of language. To frame the point in Lord Reid's terms, there is unlikely to be much new that could usefully be said to justify departing from these policies—although, in an area as complex as coastal management, one should never say never.

[105] Policy 11 is different. It is directive to be sure, in a way that Policies 6 and 10 are not. And, like Policies 13 and 15, it has "the effect of what in ordinary speech

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94 NZCPS, Policy 19(3) (Walking access) (emphasis added).
95 Policy 21(d) (Enhancement of water quality) (emphasis added).
96 Policy 22(2) (Sedimentation) (emphasis added).
97 Policy 23(2)(a) (Discharge of contaminants) (emphasis added).
98 Policy 29(2) (Restricted Coastal Activities) (emphasis added).

would be a rule".[99] But its subject matter (biodiversity in indigenous ecosystems, habitats and taxa) is set at a high level of generality and applying its thresholds (adverse or significant adverse effects) to particular cases may involve fine judgments. In other words, while Policy 11 is designed to avoid adverse effects, it is not intended to produce perverse outcomes in pursuit of that high level purpose. Rather, its broad terms mean it does—indeed, must—leave room for deserving exceptions, even if, in almost all cases, its effect is clearly "not allow" or "prevent the occurrence of".[100] These exceptions are necessary for the broad language of the policy to work as intended in the innumerable places and circumstances to which it must be applied, and without producing outcomes plainly at odds with Part 2. The residual discretion is simply a mechanism to ensure that the policies are applied in accordance with the purpose of the RMA.

[106] In *RJ Davidson Family Trust v Marlborough District Council* (*RJ Davidson*) Cooper J (as he then was), writing for the Court, addressed the role of the NZCPS in s 104.[101] The narrow issue was whether the express subordination of s 104 to Part 2 of the Act meant the NZCPS could be ignored if the circumstances of the case meant that Part 2 and the NZCPS were at odds. The Court rejected that suggestion. Within its domain, the Court said, the NZCPS is the embodiment of Part 2's requirements. Logically then, the subordination of s 104 to Part 2 could not be invoked "for the purpose of subverting a clearly relevant restriction in the NZCPS".[102]

[107] We agree with respect. It would be strange indeed if choices made in a scheme at the apex of the hierarchy of RMA decision-making and designed, through judicial inquiry and assessment, to fulfil the requirements of Part 2, could then, relying on Part 2 considerations, be routinely overridden. That would be to introduce uncertainty and complexity into decision-making, when the NZCPS process was designed, at great public and private cost, to produce consistency and clarity.

[108] For the same reasons, we take the view that the "have regard/particular regard" standards in ss 104 and 171 cannot be invoked to produce outcomes that *subvert*

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99 *King Salmon*, above n 67, at [116].
100 At [93].
101 *RJ Davidson*, above n 80.
102 *RJ Davidson*, above n 80, at [71].

applicable NZCPS policies. In this respect we differ from the reasoning of William Young J[103] and the statutory interpretation suggested by Waka Kotahi. Taking a purposive approach, the careful and strong language of the objectives and policies matters as much as the softer form of direction employed in ss 104 and 171. In addition to the reasons traversed, the argued for diluting effect would apply not only to objectives and policies but also to regulations and rules, since regard must be had to all three.[104] Plainly, regulations and rules are not intended to be mere considerations. They are intended to bind.

[109] But, relevantly for the purposes of this discussion, there is a corollary to Cooper J's rejection of the proposition that "have regard to" and Part 2 could authorise consent authorities to subvert relevant policies in their decision-making. The corollary is that a genuine, on-the-merits exception, by its nature, will not *subvert* a general policy, even a directive one. On the contrary, true exceptions can protect the integrity of the subject policy from the corrosive effect of anomalous or unintended outcomes. There is a fundamental difference between allowing consent authorities to routinely undermine important policy choices in the NZCPS (as rejected in *RJ Davidson*), and permitting true exceptions that will not subvert them. Of course, the more precise and sharp-edged the policy, the less room there will be for outcomes that can fairly be considered so anomalous or unintended that an exception is justified. Policies 19, 21–23 and 29 may be seen to fall into that kind of category. But Policy 11 does not.

[110] That is why the broad subject matter of Policy 11 admits of exceptions. A certain level of flexibility will assist in achieving its purpose and avoiding unintended outcomes at the margin that are inconsistent with Part 2 and the terms of Policy 11 itself.[105] To put it another way, Policy 11 has a powerful shaping effect on all lower order decision-making, but "avoid" does not exclude a margin for necessary exceptions where, in the factual context, relevant policies are not subverted and sustainable management clearly demands it.

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103 See below at [369], [385] and [390]–[395].

104 RMA, s 104(1)(b). See also s 171(1)(a), although because a designation is a form of rule change, the point has less potency in that context. Also note that although s 171(1)(a) does not reference regulations, that is because the effect of a designation is only to immunise the public work from compliance with any relevant district rule. Other applicable controls will apply (or not) according to their terms. See the reasons of Glazebrook J below at [222].

105 See also *RJ Davidson*, above n 80, at [76] in the context of plans.

[111] Whether the EWL is such an exception requires an assessment of the whole proposal, including its benefits and adverse effects and its remedial or mitigatory aspects, bearing in mind that, as with any exception to the application of a strong policy, the case to be made out is a difficult one.

[112] Finally, there is one matter of detail that we presaged in the main summary of the relevant objectives and policies that may be conveniently addressed here. It is that, unlike AUP B8 and F2, NZCPS Policy 6 generally supports reclamation only where a functional need to locate in the CMA is established.[106] It provides that activities without a functional need should "generally" not be located in the CMA.[107] The AUP on the other hand, accepts that operational need may suffice. As we have noted, we do not view this difference as problematic.[108] The effect of Policy 6 in this regard is not hard edged. Rather, infrastructure "generally" should not be located in the CMA for operational reasons. This wording, too, contemplates deserving exceptions.

Overall conclusion so far

[113] We conclude, therefore, for present purposes at least, that large scale infrastructure located in the CMA is not, by definition and without regard to circumstance, prohibited by the objectives and policies of the AUP or the NZCPS. Such infrastructure is therefore not inevitably contrary to the objectives and policies of the AUP(plans) for the purposes of the s 104D(1)(b) gateway, nor is it necessarily inconsistent with the NZCPS- or AUP-related requirements of ss 104 and 171. We now turn to determine whether the Board and the High Court correctly construed the confined nature of the infrastructure exception and applied the correct requirements to the proposal.

Application of objectives and policies to the EWL

[114] With apologies for the foregoing long, but in the end necessary, dissertation on the meaning and effect of the applicable objectives and policies, we turn now to consider the way in which the Board and Powell J applied them to the EWL.

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106 NZCPS, Policy 6(2)(c).
107 Policy 6(2)(d).
108 See the discussion of functional and operational need above at [44].

The facts briefly recapped

[115] As noted at the outset, the AUP objectives and policies reflect the tension between the vulnerability of Auckland's long coastline and the demands of a fast growing population. In a sense, the Onehunga–Penrose/Mt Wellington area is emblematic of the problem: it is a significant industrial, manufacturing and transport hub for Auckland and the upper North Island; it is bounded on one side by the Manukau Harbour; and its main transport routes are increasingly stressed by vehicle movements to, from and through the area, particularly heavy vehicle movements. On the other hand, the EWL's proposed alignment will result in adverse effects on avifauna values in SEA-M1 and SEA-M2 overlays and on flora in SEA-T overlays.[109]

[116] In addition to the economic and social benefits of improved transport infrastructure, Waka Kotahi also identified ancillary ecological benefits such as the partial recontouring of the shoreline along the EWL alignment, stormwater treatment for the surrounding 611 ha catchment and bunding to intercept leachate-contaminated groundwater. Separate offset and compensation measures include providing substitute roosting sites (in part through the purchase of a small island in the Inlet); 30 ha of ecological restoration and enhancement in the project area; and management and enhancement measures at relevant South Island sites occupied by at risk or threatened avifauna that also occupy the Inlet.

The policies briefly recapped

[117] The propositions that we consider provide the necessary framework are:

(a) NZCPS Policy 11 contains a strong direction against locating major infrastructure in the CMA, but, when read in context,[110] it does not impose a blanket prohibition on relevant adverse effects within SEAs and so permits exceptions which do not subvert the policy and are otherwise consistent with the purpose of the RMA and the other provisions of Part 2;

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109 See above at [6] and [58].

110 This aligns with what we consider to be the correct interpretive approach: see above at [63] and [79]–[80].

(b) AUP(rps) B3 and B8 acknowledge that infrastructure may be located within SEAs, and the "avoid" language in B7 is not a blanket prohibition and so permits exceptions;

(c) AUP(plans) confirms, in E26 and F2, the circumstances in which exceptions may be made, subject to adequate remedial or mitigatory steps and the wider ss 104 and 171 considerations; and

(d) AUP(plans) Policies D9.3(8) and (13)(b) acknowledge the possibility that there may be exceptions.

A summary of the exceptions pathway

[118] Though expressed in different ways, the relevant NZCPS and AUP policies in essence require a proponent seeking to locate significant infrastructure requiring reclamation in a SEA to show that three elements are met:[111]

(a) it is a necessary—and not just a desirable—solution by reference to functional or operational need, the regional or national benefit obtained,[112] and the absence of any practicable alternative locations or solutions;

(b) adverse effects that cannot be avoided have been remedied or mitigated to a standard that corresponds with the significance of the environment, ecosystem and/or species that ought to have been protected to an avoid standard; and

(c) the benefits of the solution plainly justify the environmental cost of granting consent.

[119] In other words, given the potential environmental cost, necessity must be established but it may not be enough. The consent authority will also need to satisfy

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111 Compare above at [91].

112 We note, for completeness, that AUP(plans) Policy D9.3(13)(d) phrases this requirement as "regional *and* national" benefit in relation to development in SEA-M1 overlays (emphasis added). This may have been to emphasise the particularly vulnerable nature of the overlay environment.

itself that the proposal provides for environmental offset and compensation packages that both minimise and make up for the damage the proposal will do in the SEA. These packages will necessarily be exceptional as even then, the consent authority will still need to be satisfied that any remaining harm is justified. For the purposes of clarity, if a proposal satisfies the requirements of this exceptions pathway in the AUP, we consider it will be a genuine exception to NZCPS Policy 11 which does not subvert its objectives; the proposal will have "thread[ed] the needle" appropriately.[113] As stated above, this pathway is particular to the specific circumstances of this case, although particular considerations within it may be relevant in similar cases.

[120] In her reasons, Glazebrook J says that our analysis subverts *King Salmon*'s bottom line approach to the NZCPS avoid policies and that we will render redundant the *Port Otago Ltd v Environmental Defence Society Inc* methodology for resolving unavoidable conflicts between directive policies.[114] We have explained that the facts in *King Salmon* were materially different to those in the present case. It would be wrong to treat the distinctive context of Auckland and the EWL as irrelevant; this would risk subverting the purpose of the RMA.[115]

[121] Two further points. First, as we have already noted, the Court in *King Salmon* acknowledged that the prescriptive power of a policy will depend not only on the directive verb it employs, but also on the level of abstraction and generality of its subject matter.[116] In other words, the fact that Policy 11 uses "avoid" is not solely determinative of its prescriptive power. Second, it must be kept in mind that the issue in *King Salmon* was whether, in the context of a "give effect to" duty, the use of "avoid" should control the outcome or just be one mandatory relevant factor among many. There was no consideration of, nor any need to consider, the more difficult cases in the area between these extremes. Those cases fall for consideration now. The EWL is one such case. It provides an opportunity, in accordance with the common law method, to further refine prior broadly framed authoritative propositions of law by applying them to materially different circumstances.

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113 See above at [88].

114 *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] 1 NZLR 205; and see the reasons of Glazebrook J below at [330].

115 See above at [99] and following.

116 *King Salmon*, above n 67, at [80].

[122] *Port Otago* is not sidelined by our approach. The task set for the Court in *Port Otago* was to resolve conflicts between equally powerful directive policies. Its methodology is directed at finding a workable compromise between them. Waka Kotahi's task is far more difficult. The starting point for the EWL is that it may not be built because Policy 11 may not be compromised. But there is a rider. Policy 11 should not be interpreted in a way that produces perverse outcomes plainly inconsistent with sustainable management. So, for example, if in the absence of practicable alternatives, abandoning the EWL will pose a genuine risk of injury to the regional or national economy, then Policy 11's "bottom line" should not stand in the way—that is, not without very good reason. That leads to the final step of analysis in the exceptions pathway: if on a proper appraisal of the adverse environmental effects, those effects still outweigh the adverse impact on human communities, then the SEA values must be protected.

[123] It may assist to put the foregoing into more concrete regulatory terms. In the *Port Otago* case, where there was a conflict between directive policies, the Regional Coastal Plan could have given some port activities discretionary or even restricted discretionary activity status[117] in areas subject to avoid policies, if they satisfied regional policies drafted to give effect to the *Port Otago* methodology. By contrast, achieving any status more permissive than non-complying would be impossible for roading infrastructure on any scale in the Māngere Inlet. This is because in the case of the EWL, there is no contest between equally powerful directive policies and *Port Otago* does not apply.

[124] Glazebrook J also says that there is no justification for the creation of a "freestanding" exception to the NZCPS bottom lines as *King Salmon* has already established what they should be. But the *King Salmon* exceptions merely confirm that invalid, uncertain or inapplicable policies cannot have directive effect.[118] By contrast, the exception being discussed here is a merits-based one, by reference to the purpose of the RMA. Further, Glazebrook J does not discount the possibility that the facts of the case may themselves justify an exception to "avoid", even where there is no

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117 RMA, ss 77A(2)(c)–(d) and 87A(3)–(4).

118 We do not comment on the Treaty of Waitangi-based procedural exception referred to in *King Salmon*, above n 67, at [88].

conflict with another directive policy.[119] Our point is that the no alternative-based policies in the AUP provide a framework for assessing when these facts arise.

[125] At a broader level, Glazebrook J's concern appears to be that exceptions of any kind will erode the directive effect of avoid policies and open the floodgates. We do not share that concern. As we have emphasised, the threshold for approval of infrastructure is high and so will be truly exceptional, and even then the avoid policies will continue to powerfully constrain decision makers throughout the approval process. Rather, our concern is that interpreting avoid policies as imposing a no-exceptions ban on infrastructure in the CMA brings with it a risk of undermining the RMA's purpose. It is impossible to predict every circumstance to which a generally framed avoid policy will be applied. For example, if an avoid policy were interpreted and applied in a manner that exposed a coastal community to inundation or erosion, there would have to be a question about whether that interpretation is consistent with sustainable management. These are the difficult cases. It seems unlikely that those who promulgated the NZCPS chose environmental protection over, say, the safety of an existing settlement by using avoid language—and that this choice would be the embodiment of sustainable management. Potential exceptions like this will be truly rare, but there can be no doubt that it is necessary to construe avoid policies so as to allow for them.[120]

[126] The AUP contains just such an exceptions pathway. Its sole purpose is to ensure that applying avoid language to general objects, such as those referred to in Policy 11, does not generate outcomes so plainly contrary to s 5 as to be perverse. And, again, the pathway is plan-driven, residual and narrow; it is based on proven necessity and absence of alternatives. It will not be enough that the project is a good idea—even a very good idea—or that a failure to approve the project would be very inconvenient for the community that expects to benefit from it. This is not, on any view, a step back to overall judgment. Nor will the floodgates open.

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119 Below at [238] and [249]–[250]. Accepting that there is such a possibility is difficult to reconcile with the strict application of *King Salmon* by Glazebrook J.

120 We say potential, because, even if there was no choice but to build the seawall or undertake the reclamation required to protect the settlement, it would still need to be the case that the benefits plainly justify the environmental cost.

[127] We turn now to consider in more detail the reasons why the Board and the High Court both accepted, though for different reasons, that the EWL met the relevant policies.

The Board's reasons

[128] The Board's summary of its s 104D conclusions was in these terms:[121]

> [662] … In some consent applications a provision may be so central to a proposal that it sways the s104D decision, but generally the s104D assessment will be made across the objectives and policies of the plan as a whole and not determined by individual provisions. The Board finds that the latter applies in this case, notwithstanding that there are indeed some inconsistencies between the [Waka Kotahi] Proposal and relevant objectives and policies, particularly in the areas of reclamation and biodiversity. In doing so, the Board has given measured weight to the word "avoid", which is clearly not a direction to be ignored.
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> [663] On balance, the Board finds that the Proposal is not contrary to the objectives and policies of the [AUP] when considered as a whole. Its consideration has given particular focus to the provisions most directly relevant to the activities with noncomplying status but has also recognised the broader planning assessments of Ms Rickard and Mr Gouge. The Board is left in no doubt that its conclusion would be strengthened if it were to look in detail at every relevant objective and policy (of which there are many), rather than those provisions of most relevance, as it has done.
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> [664] While the Proposal is concluded to be contrary to a small number of policies or subclauses of policies, the Board does not consider those individually or cumulatively as reason to conclude that the Proposal is repugnant to the policy direction of the [AUP] with respect to the resource consents sought. The Board's conclusion is that where the Proposal infringes policies, neither individually nor cumulatively do those infringements tilt the balance for s 104D purposes against the Proposal as a whole.

[129] In its final section, entitled "Overall Judgment", the Board slightly reframed these conclusions. It accepted that some activities within the EWL, particularly the reclamations, were contrary to the AUP(plans) avoid policies, but this was outweighed by the effect of the policies overall, the ecologically compromised state of the Inlet and the lack of a practicable alternative to the proposed coastal location.[122] It therefore "squeeze[d] through" the s 104D(1)(b) gateway.[123]

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121 Footnotes omitted.
122 At [1364].
123 At [1364].

[130] Turning then to the further consideration of objectives and policies under ss 104 and 171, the Board found that there was "no specific incongruity" between the NZCPS and AUP and so focused attention on the latter with passing reference to the NZCPS as and when necessary.[124] In relation to the AUP objectives and policies, the Board found that at a conceptual level, the EWL was necessary and brought national benefit:[125]

> … [T]he Board is satisfied that "an EWL" servicing the Onehunga-Southdown industrial area, would be a highway of strategic and national importance. The evidence satisfies it that such a highway is long overdue and is urgently needed to provide better freight transport links to an area of national and regional significance.

[131] The Board found further that its coastal alignment was operationally necessary:[126]

> [699] … The Board agrees with Mr Brown [who gave planning evidence for Ngāti Whātua Ōrākei] that, "*[T]he route is there by choice, not functional necessity*". …
>
> [700] While the Board agrees with Mr Brown that there is not a functional need for the road to be located within the CMA, on the basis of the Board's finding in relation to the route selection, there is an operational need for it to be located within the CMA. …

[132] The focus in relation to the availability of practicable alternatives was on the reclamation aspects of the EWL. The Board found as follows:

> [623] In the context of its consideration of the [AUP(plans)] provisions most relevant to the proposed reclamations, it is critical for the Board to be satisfied that the EWL alignment is indeed the option that provides the most enduring transport benefits to the extent that those benefits are necessary and that there are no "practicable alternatives" to achieve that outcome.
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> [624] Mr Burns [counsel for Onehunga Enhancement Society and others], when addressing the Board on Policy F2.2.3(1)(b) submitted:
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> > "[T]he test is not whether this is the best, or cheapest, option for [Waka Kotahi]'s road, or whether it is justified by transport outcomes, but simply whether there are any practicable ways of putting the road somewhere else.["]
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> [625] The Board disagrees. The analysis undertaken by Mr A Murray, which contributed to the balancing of all factors in choosing the proposed

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124 At [680]; and, as to reclamation, at [685].
125 At [266].
126 Emphasis in original, footnote omitted.

> alignment, must be relevant to whether there is a practicable alternative. It is not appropriate, under the detailed and integrated option selection process undertaken, to apply such a simplified interpretation of "practicable alternative" i.e. whether any road can be located elsewhere, regardless of how inferior its transport, walking and cycling, or public transport benefits may be.
>
> [626] For these reasons, the Board is indeed satisfied that there is no "practicable alternative" to the route [Waka Kotahi] proposes. The Board reaches this conclusion simply because it is satisfied that [Waka Kotahi]'s scrutiny of alternative routes did not produce any enduring transport solution other than the selected route.

[133] In the context of its application of Policy F2.2.3(1), the Board noted it was:[127]

> … satisfied with [Waka Kotahi]'s evidence on the assessment of alternatives and enduring transport benefits conferred by the chosen alignment. Therefore, it finds that there are no "practicable alternative" ways of providing for the objectives of the Proposal in a manner that avoids the proposed reclamations and coastal occupation.

[134] It is appropriate to mention two extra aspects of s 171 that are relevant at this point. They are the requirements of s 171(1)(b)(ii) and (c) which provide as follows:

> …
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> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
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> …
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> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
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> …
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> (ii) it is likely that the work will have a significant adverse effect on the environment; and
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> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
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> …

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127 At [627(b)].

[135] These provisions also require the Board to consider whether Waka Kotahi adequately assessed alternative routes and the necessity for the work in terms of achieving its objective. The Board summarised the evaluation process adopted by Waka Kotahi as follows:

> [1309] The evaluation process was designed to arrive at a preferred corridor for the EWL and then a preferred alignment within that corridor. Some 16 corridor options were created to form a long list. From that long list, six short list corridor options were identified (Options A to F), which were then considered in greater detail. Both the long list options and the short list options were subjected to an MCA, which assessment used an 11-point scoring method. Two of the options (Options E and F) were identified as conferring the most enduring transport benefits. The MCA weighed a large number of factors (reflected in the scoring system), which included road safety, construction, performance against the Proposal's objectives, natural environment, cultural and heritage factors, operational factors, and social and economic factors.
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> [1310] [Waka Kotahi]'s chosen alternative for a corridor was Option F, inside which the fine details of the NoR alignment fit.

[136] As to reasonable necessity, the Board's conclusion was in the following terms:[128]

> … [T]he evidence demonstrates the EWL is long overdue and is urgently needed to provide better freight transport links in and to an area of national and regional significance.

[137] Having accepted that the necessity, practicable alternative and benefit standards had all been satisfied, the Board then turned to the EWL's adverse effects. The Board acknowledged that there would be permanent loss of feeding and roosting areas for shorebirds including those of threatened and at risk species. While it accepted these effects were significant, there would be no loss of habitat "sufficiently rare" to impact on overall species population or on their continued presence in the area.[129] On the other hand, the Board was satisfied that the integrated approach adopted by Waka Kotahi in relation to mitigation, compensation and offsets provided a material counterbalance to those adverse effects. It concluded in the following terms:[130]

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128 At [1329].
129 At [605].
130 At [614].

> Overall, the Board accepts the integrated approach to the consideration of ecological effects, mitigation and offsets in relation to the Proposal. The range of effects and the scale of the Proposal facilitates this approach and provides greater flexibility to offset effects that cannot be adequately mitigated, provided that the scale of effects themselves is acceptable. In this case, the Board finds that the magnitude, scale and intensity of effects is acceptable in the context of the mitigation and offsets proposed, and by a margin that has improved throughout the Hearing. While there will be direct adverse effects on rare and threatened species, those effects will not compromise the viability of those populations or ecosystem types. However, an outcome that at least balances the ecological effects through mitigation and offset benefits is an appropriate requirement. The Board finds that such an outcome will be achieved through the deletion of the sub-tidal dredging, modification or deletion of headlands, and implementation of the additional ecological mitigation and offsets proposed.

The High Court decision

[138] As the appeal before Powell J was on questions of law only, and his focus was primarily on s 104D, this decision can be addressed in more summary terms. Relying on the submissions of Royal Forest and Bird, the Judge accepted that "there is nothing within D9 that remotely contemplates a project on the scale of the proposed EWL within an overlay area".[131] The Judge also accepted that F2 on reclamation was subject to the strong avoid policies in D9 and so the EWL was as contrary to F2 as it was to D9.[132] In these respects he disagreed with the Board.

[139] But infrastructure, he considered, was intended to be treated differently to other forms of development in the coastal environment. E26, when read alongside the Auckland-wide perspective of chapter A, "specifically envisages that it will sometimes be necessary to locate infrastructure within an overlay area, notwithstanding the apparently mandatory nature of the protections contained in chapter D9".[133] The Judge described this as a "specific, albeit narrow, framework for the consideration of infrastructure proposals rather than automatically excluding them at the s 104D stage".[134]

[140] Having established that, overall, the objectives and policies of the AUP(plans) did not set themselves against the EWL, the Judge then concluded that at consent/NOR

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131 HC judgment, above n 7, at [41].
132 At [48].
133 At [60].
134 At [68].

stage, the discretion available to the Board was somewhat wider. In particular, and in contrast to the position in *King Salmon,* the Board was not required to "give effect" to the NZCPS.[135] Rather, it needed only to satisfy the softer regard/particular regard standards under ss 104 and 171 in respect of the listed considerations—in particular, the NZCPS.[136] The requirement was merely to "give genuine attention and thought" to the NZCPS, rather than a duty to accept its requirements.[137] The Judge concluded that "[b]y any measure" the Board had met that softer standard.[138]

Analysis

[141] We do not entirely agree with the approach of the Board. We consider the approach taken by Powell J was much closer to the mark, subject to one crucial exception that we have already presaged and will explain below.

The framework

[142] The exceptional circumstances referred to in the policies are, all other factors being equal, as we have set out above. Briefly, these circumstances are that the proposal must be necessary in the ways specified in the policies, any adverse effects that cannot be avoided must be minimised, and any remaining environmental harm must be plainly justified by the proposal's benefits.[139] These are high thresholds not easily cleared. This must be so because strong "avoid" language is consistently employed from the top to the bottom of the RMA cascade. The direction to "avoid" must be complied with unless those exceptional circumstances are established, as required by the objectives and policies of the AUP.

[143] There is no escaping the fact that this exercise demands much of decision makers. Where proposals demonstrate genuine potential to engage the exceptions to avoid policies, community need will generally be significant as will be the impact on vulnerable environments, ecosystems or species. Determining whether the environmental cost is justified will usually require the decision maker to make difficult

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135 At [82].
136 At [82] and [86].
137 At [83].
138 At [86].
139 See above at [91] and [118].

choices between incommensurables. This task must be confronted directly and with real care; decision makers must be transparent and honest about any trade-offs they are making. Reasons adequate to the gravity of the task must be given. This considered approach is necessary because any departure from the starting point that adverse effects must be "avoided" is, by definition, exceptional. A less rigorous approach would risk consent authorities inadvertently slipping back into the territory of "overall judgment".

A regression to overall judgment

[144] We accept Royal Forest and Bird's argument that the Board and the High Court did not correctly construe and apply the objectives and policies of the AUP and NZCPS, although we have come to that view for different reasons. We do not accept Royal Forest and Bird's primary argument that infrastructure at the scale of the EWL in the CMA would, by definition, always breach—or, to use the term in *RJ Davidson*, subvert—the objectives and policies of the NZCPS and AUP.[140] But we do accept that the Board failed properly to understand just how narrow the pathway to approval was intended to be. Instead, the Board, in substance, took the overall judgment approach rejected in *King Salmon*.

[145] It is sufficient to refer briefly to three instances where it did so. First, the Board acknowledged the "very significant weight" to be attributed to NZCPS directive policies, but did not consider itself bound by them:[141]

> However, as already noted, the Board is required by s 104 to "have regard to" and s171 "to have particular regard" only (not to "give effect to") the NZCPS. It is required to consider that instrument alongside other factors made relevant by those sections in making a balanced judgment taking account of all such factors.

[146] Second, the Board relied on s 5 to support its preferred overall judgment approach:[142]

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140 *RJ Davidson*, above n 80, at [71].

141 Board decision, above n 4, at [175]. See above at [107]–[108], in relation to the effect of ss 104 and 171.

142 Board decision, above n 4, at [358].

> Obviously, at the end of any RMA consideration, a decision-maker would be wise to ensure that his or her decision is consistent with the s 5 purpose. That is almost certainly why an overall judgment is necessary.

[147] Third, although in the context of a discussion of issues of relevance to mana whenua, the Board repeated in expansive terms its preferred approach to the contest between RMA considerations:[143]

> Overall, in the context of the above discussion, the Board finds that, consistent with the overall judgment, the Proposal will enable people and communities to provide for their social, cultural and economic wellbeing (or at least contribute to that effect). Despite the potential adverse effects of the Proposal on the coastal environment, and Te Hōpua a Rangi in particular, this can be achieved while avoiding, remedying or mitigating the Proposal's adverse effects as required under s 5(2)(c).

[148] These misapplications of ss 5, 104 and 171 compounded three important errors in the Board's approach to assessing the evidence before it. We turn to those now.

Conflating s 171 and the AUP policies

[149] The Board's assessment was complicated by the fact that s 171 contains parallel considerations that are similar to, but not the same as, those in the objectives and policies. In particular, s 171 required the Board to be satisfied that the EWL is "reasonably necessary" for achieving Waka Kotahi's objectives and that alternatives had been adequately considered. These requirements are designed to encourage robust decision making in relation to investment in infrastructure, but, unlike the AUP policies, they do not require the proponent to overcome a strong presumption against project approval. It appears that the Board relied on Waka Kotahi's s 171(1)(b) and (c) assessments, and in particular its option selection process, to satisfy itself that both the requirements of s 171 and the stricter requirements of the AUP policies were met.

[150] This led the Board to adopt a hybrid analysis that tied the standards in s 171 and the AUP together in a single assessment. For example, the Board acknowledged that Waka Kotahi chose a foreshore alignment because it would provide "the most enduring transport benefit".[144] This was the standard Waka Kotahi applied to select

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143 At [779].
144 Board decision, above n 4, at [622].

its final option under s 171. The Board appears then to have transposed this standard to its application of the AUP policies. It described its approach in these terms:

> [623] In the context of its consideration of the [AUP(plans)] provisions most relevant to the proposed reclamations, it is critical for the Board to be satisfied that the EWL alignment is indeed the option that provides the most enduring transport benefits to the extent that those benefits are necessary and that there are no "practicable alternatives" to achieve that outcome.
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> …
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> [626] … [T]he Board is indeed satisfied that there is no "practicable alternative" to the route [Waka Kotahi] proposes. The Board reaches this conclusion simply because it is satisfied that [Waka Kotahi]'s scrutiny of alternative routes did not produce any enduring transport solution other than the selected route.

[151] This suggests that the Board took "the most enduring transport benefit" as the yardstick against which to assess whether alternative methods or alignments to the EWL were practicable. Put another way, if an option did not achieve the most enduring benefit, it could not be a practicable alternative. This is not the approach mandated by the policies. Rather, the policies require the Board to be satisfied that Waka Kotahi selected a practicable solution to the problem that also has the least adverse effects in SEAs. How enduring or otherwise an alternative may be will, of course, be very relevant to assessing its practicability, but a less enduring alternative that produces better environmental outcomes may still be practicable enough for the purposes of the policies. In other words, in any contest between perfect endurance and environmental protection, the policies require the latter to be prioritised and the former to be compromised to the extent possible.

[152] To be clear, we agree with the Board that "no practicable alternative" does not require Waka Kotahi to establish that it is physically impossible to locate the EWL anywhere except in the SEA.[145] Such a standard could never be satisfied. Practicable alternatives are those that are reasonably available. For example, an inland option may be practicable unless it is, for some practical reason, either incapable of solving the problem that must be solved, or unreasonably expensive in light of the environmental benefit of avoiding the SEA.

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145 At [625].

[153] That said, the best option and the only practicable option will not always, and perhaps only rarely, be the same thing. The powerful shaping effect of "avoid" requires a scrupulously disciplined approach to determining whether it is appropriate to make an exception. The starting point must be that the answer is no. It is apparent that the Board did not take this approach.

[154] The Board may have failed to recognise that, unlike the relevant policies, s 171 is process-based; the Board needed only be satisfied that Waka Kotahi had given "adequate consideration" to alternatives and that the proposal was "reasonably necessary" to achieve the objectives Waka Kotahi wished to pursue. It is, as the Board itself noted, the process not the result that is the focus under s 171.[146] When it comes to the policies, however, the Board is required to reach its own view on the availability of practicable alternatives and, in turn, the necessity of the proposal. We acknowledge, of course, that the Board did purport to come to its own view, as William Young J notes,[147] but it relied on evidence collated to serve the more limited and less focused purposes of s 171 rather than those provided in the policies. This had downstream effects, as we now explain.

[155] Waka Kotahi's s 171 assessment relating to the EWL involved consideration of a wide range of relevant factors. These included:[148]

(a) performance against project objectives;

(b) road safety;

(c) construction;

(d) operation;

(e) social and economic;

(f) natural environment; and

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146 At [1306].
147 Below at [418].
148 AEE, above n 1, at 134.

(g) culture and heritage.

[156] Significant contextual factors were then added to the mix to avoid what Waka Kotahi described as "the averaging and aggregating" effect of a "Multi Criteria Analysis process". Those factors were as follows:[149]

- Limiting land acquisition from industrial activities where such take would adversely impact on the viability of such areas;
- Limiting effects on the safe and efficient access to businesses along the Church–Neilson Streets corridor;
- Providing transport outcomes that will not compromise the land use plans of the Auckland Council (in particular the intention to support industrial land uses in Onehunga and Penrose);
- Limiting conflicts between freight vehicles and buses;
- Limiting impact on travel times for through traffic on SH1 and SH20; and
- Providing appropriate social, cultural and environmental outcomes.

[157] Six of the original 16 alignment options were shortlisted against these criteria, primarily for reasons related to likely benefits compared to financial cost.[150] Although environmental considerations were included in both lists of criteria, there was no suggestion that they be accorded any particular weight as against social and economic needs, let alone that environmental considerations were key. In the end, Waka Kotahi selected the option that it considered produced the "most enduring transport benefit". The Board accepted that Waka Kotahi's approach was appropriate:[151]

> As discussed in chapter 15.12 of this Report [the alternatives analysis under s 171], the Board is satisfied with [Waka Kotahi]'s evidence on the assessment of alternatives and enduring transport benefits conferred by the chosen alignment. Therefore, it finds that there are no "practicable alternative" ways of providing for the objectives of the Proposal in a manner that avoids the proposed reclamations and coastal occupation. The Board accepts that in refining the EWL alignment, [Waka Kotahi] has sought to balance a range of effects, including ecological, business disruption, cultural and social.

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149 At 119.
150 At 120. Option E referred to greater environmental impacts.
151 Board decision, above n 4, at [627(b)].

[158] This summary, too, replicated the overall judgment approach, which, as we have noted, was rejected in *King Salmon*. It was also inconsistent with the requirements of the AUP policies which, again, had been developed in light of that judgment. Put simply, the focus in F2, E26 and D9 is more hard-edged, with clear weightings in favour of protecting the SEAs. This reflects, and was plainly intended to reflect, the potency of the avoid policies and the fact that the EWL could obtain approval only in exceptional circumstances. By contrast, the unstructured approach the Board endorsed concealed trade-offs between environmental outcomes and other considerations. An AUP-driven exceptions approach would have prevented this and may not have permitted the trade-offs to be made at all.

[159] Relatedly, on the evidence before us, it seems to be the case that the assessment of alternatives under s 171 involved only a new road, with the debate being around alignment. Part D of the AEE contained a summary of Waka Kotahi's consideration of alternatives. The introduction to that Part advised that alternative methods of achieving Waka Kotahi's objectives would be outlined, but if that was intended to encompass options other than a road, none were offered.[152] Once again, given the strength of the avoid policies, the assessment ought, we might have thought, to have included any potential alternative methods which alone, or in combination with less intrusive roading options, might have resolved the transport problem without significant impact in the SEAs.[153] It is not for us to suggest what any alternative method or combination of methods might be, but it is perhaps telling that no material of that kind was provided to or sought by the Board.[154] It calls into question the evidential basis upon which the Board could find that the EWL was, indeed, necessary.

[160] We accept, of course, that despite the shortcomings in Waka Kotahi's selection process, the Board could still have rectified matters by engaging with evidence that

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152 AEE, above n 1, at 111.

153 The AEE referred to different options for managing discharges to the environment and for managing location-specific effects, but they all proceeded on the basis of the EWL alignment as proposed.

154 We note that the Board did consider the possibility of public transport providing an alternative solution, but rejected that suggestion as "fanciful": Board decision, above n 4, at [253]. It noted that the situation in the area would continue to deteriorate well before public transport could solve any relevant congestion issues: at [262] and [1357]. That may well be the case, but the Board did not consider, for example, whether public transport might have formed part of a suite of responses to the problem. Such consideration would have been more consistent with the strict requirements of the exceptions pathway.

plugged the gap (if there was such evidence),[155] identifying where specific trade-offs were to be made and explaining why making them was consistent with the AUP pathway as we have summarised it. But it did not. Instead, the Board asserted in conclusory terms that the EWL was a necessary solution to the transport problems in the Onehunga–Penrose/Mt Wellington area. And it asserted in equally conclusory terms that there was no practicable alternative to locating the EWL within SEAs.

[161] To complete the picture, we note that the Board also offered an alternative pathway through the policies as follows:[156]

> [628] As a result, the Board finds that the Proposal is generally consistent with, and not contrary to, Policy F2.2.3(1) [reclamation to be avoided] of the [AUP(plans)]. In the event that Parties maintain a different interpretation regarding the F2.2.3(1)(b) [no practicable alternative to reclamation] … this is but one sub-clause of the policy. Notwithstanding the inclusive wording of the policy that requires that all sub-clauses apply, the Board has also considered the degree to which the Proposal is consistent with the policy in conjunction with its overall balanced assessment.

[162] This too is inconsistent with the AUP policies. As we have said, the exceptions framing in the AUP policies is at the core of its approach to development in the CMA. The requirement that there be no practicable alternative to a SEA location is a key component of that approach. Adopting an "overall balanced assessment" to facilitate avoiding its effect is not permitted.[157] Indeed, as already noted, this approach was rejected in *King Salmon.*

Acceptable adverse environmental effects

[163] As we have noted, the selection process under s 171 was likely to have concealed trade-offs made with environmental outcomes. This was compounded by the Board separating its assessment of adverse environmental effects from its discussion of option selection. That was understandable, as there was a great deal of evidence to work through, but the risk was that the Board would lose an opportunity to discipline its option selection by reference to specific environmental effects that could have been avoided.

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155 We were not provided with a full record of the evidence and so are unable to assess whether such evidence did, in fact, exist.

156 To similar effect, see at [662]–[663].

157 See above at [107]–[108] and [145], in relation to the effect of ss 104 and 171.

[164] For example, the evidence was that a "diverse assemblage" of at risk and threatened species foraged in the inter-tidal areas of the Māngere Inlet.[158] Among them is the wrybill, a threatened species with a global population of around 5,000 birds, of which up to 1,200 forage in the Inlet.[159] Along the northern shoreline of the Inlet, the primary feeding and roosting areas for these (and other) birds is in the SEAs affected by the proposal.[160] The Board accepted:[161]

> … that there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such effects must be considered significant. On the basis of the evidence, however, the Board concludes that the proposed coastal works will not result in loss of habitat that is sufficiently rare that it would impact on the overall populations of those species, or the presence of those species within the Māngere Inlet or adjacent coastal areas. Therefore, provided that appropriate and adequate mitigation and offsets are implemented, the Board finds that the effects of the proposed reclamations and coastal structures are acceptable when considered against the objectives and benefits of the works that necessitate those activities.

[165] Missing from this analysis is whether there was a practicable alternative or alternatives to avoid the permanent loss of feeding and roosting areas in the Inlet that might still have been capable of solving the transport problem. This is the test required to be met by Policy F2.2.3(1)(b).[162] It cannot be known whether the impacts described are indeed "acceptable" as the Board found if there has not been a proper assessment of options that might have avoided them. The justifying comparator is not just the EWL's benefits. It includes also the possibility of a less harmful solution to the transport problem. The Board's assessment was in much broader brushstrokes. It only rarely engaged at the level of detail commensurate with the presumptive starting point that locating a proposal of this scale in SEAs is most unlikely to be approved.

[166] Even if we were to accept the Board's framing of the issue, its approach was internally inconsistent. It accepted that the proposal breached Policy D9.3(9)(a)(ii), (b) and (c) yet concluded that it was not inconsistent with the objectives and policies of the AUP (again, on an overall judgment approach).[163] The Board relied on a factual

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158 Board decision, above n 4, at [465].
159 At [465]–[466].
160 At [467].
161 At [471].
162 As we have noted, this was the test which the Board considered could be bypassed either by the distorting effect of "the most enduring transport benefit" standard or on the basis that this was only one of many policies: see above at [151] and [161]–[162].
163 Board decision, above n 4, at [471], [645]–[648] and [662]–[663].

finding that affected birds that currently feed in the SEAs could opt to feed elsewhere opportunistically.

[167] It is difficult to follow the Board's reasoning here.[164] It would depend on an underlying understanding that feeding and roosting areas for the threatened or at risk species were in such plentiful supply outside the SEA that the loss of those inside the overlay would have minor or transitory effects only. If that were the case, it is hard to understand why the affected area of the Inlet is a SEA at all. There is a second problem. The policies protect both habitat and species independently within the SEA-M1. In other words, if the policies value habitat in its own right, it cannot be right that the significance of habitat loss is only measured against the consequences for a species feeding there.[165]

Conclusion on the Board's approach

[168] To sum up, the Board misinterpreted the "have regard to" standard in ss 104 and 171, misused the s 171 options selection process to serve the stricter requirements of the AUP policies, and decoupled the consideration of adverse effects from the assessment of practicable alternatives. These missteps left the door open for the Board to regress to an overall judgment approach by which it could undervalue the avoid policies and overvalue the pro-infrastructure policies. Consequently, the Board started from a more neutral starting point than that required by the AUP. In the result, the Board failed to engage properly with the central premise of the AUP, which is that the EWL is presumptively inconsistent with and contrary to relevant objectives and policies and should not be approved except in narrowly defined exceptional circumstances.

The High Court and "have regard"

[169] Turning to the High Court, as noted, we consider Powell J's construction was more consistent with the requirements of the NZCPS and AUP. However, he erred in his application of the duties to have regard/particular regard to relevant objectives and

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[164] See the reasons of Glazebrook J below at [319]–[321].

[165] The *habitats* of fauna are a matter of national importance which must be provided for: RMA, s 6(c).

policies. Again, those duties do not invest consent authorities with a broad discretion to "give genuine attention and thought"[166] to directive policies, only to then refuse to apply them.[167] That would contradict what we have already described as the consistently strong "avoid" language employed from top to bottom in the RMA hierarchy of objectives and policies. It would also be to waste the significant resources invested by public and private stakeholders in the processes by which those objectives and policies are settled.

[170] Inevitably, therefore, the matter must be referred back to the Board for further consideration on the proper basis.

A final comment

[171] William Young J rightly comments that the foregoing analysis does not fully reflect the way the appeal was originally framed by the parties.[168] As we have said, Royal Forest and Bird took the high ground, arguing that infrastructure at the scale of the EWL could never obtain consent in light of the policies of the NZCPS and AUP. On the other hand, Waka Kotahi and Auckland Council supported the Board's reasons, albeit accepting that avoid policies were highly important. Understandably, neither side argued for the narrow exceptions framework which we consider correctly reflects the text and intention of the NZCPS and AUP. That middle position was, however, raised with the parties in the hearing, as William Young J recognises.[169] It was discussed at some length.

[172] We have found that the Board's reasons contained errors of construction that led it to take, in substance, an overall judgment approach to its task of interpreting and applying the NZCPS and AUP policies. These errors included misconstruing the effect of the requirement to "have regard to" relevant policies and misunderstanding the role that s 5 plays when consent applications and proposed designations fall to be assessed against those policies. These matters were central to the appeal and fully ventilated before us. Even if we had not interpreted the policies in a manner that provided an

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166 HC judgment, above n 7, at [83].
167 *King Salmon*, above n 67, at [127]–[131]; and *RJ Davidson*, above n 80, at [73].
168 Below at [421].
169 Below at [421(b)].

exceptions pathway, the errors that led to the Board's overall judgment approach remain; either way, the Board's decision cannot stand. Following full argument as to the meaning of the relevant RMA provisions and policies, we have interpreted them—even if not in the way the parties would have. Ultimately, the framing of the appeal cannot prevent the Court from drawing the conclusions it considers to be correct according to law.

Offsets, compensation and the bucket approach

[173] In light of our conclusion that the NZCPS and AUP permit limited exceptions to their respective avoid policies, this category of issues takes on less significance, so we need address it only briefly. The arguments relate to ss 104(1)(ab) and 171(1B) which, in broadly similar terms, require consent authorities to take into account measures proposed or agreed to by the applicant or requiring authority that will have positive environmental effects to offset or compensate for adverse effects. The issue is not whether offsets can, more broadly, be considered under ss 104 and 171 (an issue which is definitively settled by these provisions) but the more specific issue of whether offsets can be used to satisfy avoid policies.

[174] The first issue is whether proposed offsets are capable of assisting a proposal to satisfy avoid policies it would not otherwise satisfy. This arises in the context of special measures proposed by Waka Kotahi to replace habitat that will be lost due to reclamations and to provide habitat support elsewhere in the country which, according the evidence, will benefit the Māngere Inlet's shorebird population.

[175] The appellant argues that offsets are not capable of satisfying avoid policies. Waka Kotahi argues that they can.

[176] In our view, this is a question of fact and degree measured against the terms of the relevant avoid policy. For example, an activity that would otherwise have more than transitory effects on the vulnerable habitat of a threatened species may nonetheless not breach NZCPS Policy 11(a) if those adverse effects are offset in net terms. Whether the impact of the offset must be in situ or can be deployed elsewhere will be very much context specific. It will, we imagine, depend on the environmental element or value that must be protected and the nature of the adverse effect that is to

be offset. Unlike Glazebrook J, who largely treats these as questions of construction,[170] we consider that they are matters of evidence, and probably largely expert evidence, to be carefully assessed by the fact finder. The relevant question is not how to define an offset or what kinds of offsets can satisfy avoid policies; it is whether the relevant adverse effect can be avoided in fact. If the contention in the evidence is that adverse effects at the level identified in the relevant policy (locality, population, ecosystem and so forth) can be avoided through offsets applied elsewhere, that will be a matter to be assessed by the fact finder.

[177] The second issue relates to what the experts agreed was Waka Kotahi's "integrated ecosystem approach" to the consideration of ecological effects.[171] The scale of the EWL meant it was both necessary and preferable to take a holistic approach in which some unavoidable adverse effects could be balanced against benefits to other elements or values within the affected ecosystem. This is essentially the compensation aspect of ss 104(1)(ab) and 171(1B). The Board found that this "bucket approach", as it was unattractively described, was consistent with the requirements of ss 104 and 171.

[178] Royal Forest and Bird submitted that this was incorrect, at least as applied to avoid policies. This must be correct, for the reasons already discussed, at least insofar as avoid policies are concerned. It is plainly not correct to suggest that unrelated environmental benefits could be offered up to avoid other adverse environmental effects. In reality, it appears that the Board, while purporting to apply avoid policies, accepted that they could be breached, provided the breach was acceptable in light of other compensatory measures, all considered by means of an overall judgment. This was impermissible. It short-circuited the requirement to establish, in a disciplined assessment, whether the relevant exceptional circumstances existed in which "avoid" duties need not apply.

[179] But that does not mean the bucket approach is irrelevant. Rather, if exceptional circumstances can be established, then compensatory benefits will be very much in play. At that point, a bucket approach may be useful. In other words, to be clear, the

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170 Below at [229], n 255, and [311], n 372.
171 Board decision, above n 4, at [581(a)].

bucket approach does not provide a way to circumvent the avoid policies; it may only assist at the stage that the avoid policies have been satisfied or necessity has been demonstrated to the requisite level to engage the exceptions pathway.

Summary of conclusions

[180] To summarise, our conclusions are as follows:

(a) Locating major infrastructure in SEAs is not necessarily contrary to the AUP(plans) objectives and policies for the purpose of s 104D, nor inconsistent with them for the purposes of ss 104 and 171, but the Board and the High Court failed to identify and apply the correct assessment standards.

(b) Locating major infrastructure in environments protected by Policy 11 of the NZCPS is not necessarily inconsistent with that policy for the purposes of ss 104, 104D and 171, but the Board and the High Court failed to identify and apply the correct assessment standards.

(c) Offsets can be deployed to address avoid policies, but whether they achieve the desired outcome is a question of fact measured against the terms of the relevant policy.

(d) The bucket approach cannot be used to evade the effect of avoid policies, but any beneficial effects will be relevant if the AUP's exceptions pathway for infrastructure is available.

(e) Permanent loss of feeding and roosting areas in the affected SEA is likely to be inconsistent with relevant avoid policies, but whether that is so is ultimately a question of fact.

Disposition

[181] The appeal is allowed. The matter is remitted to the Board of Inquiry for reconsideration in line with the terms of this judgment.

[182] Costs are reserved. If costs cannot be agreed, the parties should file memoranda on costs on or before 9 May 2024.

GLAZEBROOK J

Table of Contents

Introduction

[183] I write separately because, although I agree with Winkelmann CJ, Ellen France and Williams JJ (the majority) that the appeal should be allowed, I do so for different reasons.

[184] The project at issue is a proposed East West Link (EWL), a new four-lane arterial road to connect State Highway 20 in Onehunga with State Highway 1 (SH 1) in Penrose/Mt Wellington. It was designated as a proposal of national significance and referred to a board of inquiry (the Board) established pursuant to s 149J of the Resource Management Act 1991 (RMA).[172] The relevant applications were largely approved by the Board, thereby enabling the proposed EWL to proceed.[173] The Board's decision was upheld by the High Court.[174] The appeal to this Court is from the decision of the High Court.[175]

[185] Broadly, this appeal concerns how provisions in the New Zealand Coastal Policy Statement (NZCPS)[176] and the Auckland Unitary Plan (AUP)[177] requiring protection of the coastal environment interact with provisions relating to the provision of infrastructure and the effect of these planning documents at the resource consent level. The most significant cases I will consider are this Court's decisions in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* (*King Salmon*)[178] and *Port Otago v Environmental Defence Society Inc* (*Port Otago*).[179] I will also comment on the Court of Appeal's decision in *RJ Davidson Family Trust v Marlborough District Council* (*RJ Davidson*).[180]

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172 The Board was chaired by Dr John Priestley CNZM, KC (a retired High Court judge). The other members were Alan Bickers MNZM, JP (the Deputy Chairperson), Michael Parsonson and Sheena Tepania.

173 *Final Report and Decision of the Board of Inquiry into the East West Link Proposal: Volume 1 of 3 – Report and Decision* (21 December 2017) [Board decision].

174 *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 (Powell J) [HC judgment].

175 *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZSC 52 (O'Regan, Ellen France and Williams JJ). In this appeal Ngāti Whātua Ōrākei Whai Māia Ltd (Ngāti Whātua Ōrākei) generally supports the position of the Royal Forest and Bird Protection Society of New Zealand | Te Reo o te Taiao [Royal Forest and Bird]. Auckland Council | Te Kaunihera o Tāmaki Makaurau [Auckland Council] generally supports New Zealand Transport Agency | Waka Kotahi [Waka Kotahi], as do Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Inc, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust.

176 "New Zealand Coastal Policy Statement 2010" (4 November 2010) 148 *New Zealand Gazette* 3710 [NZCPS].

177 Auckland Unitary Plan: Operative in Part [AUP]. I refer to the AUP as it was in the version provided to us by the parties. Some parts of the AUP were not part of the excerpts submitted by the parties, but any changes to these parts since the date of the Board decision are not material for the purposes of this appeal.

178 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*]. Elias CJ, McGrath, Glazebrook and Arnold JJ were in the majority with William Young J dissenting.

179 *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] 1 NZLR 205 [*Port Otago*].

180 *RJ Davidson Family Trust v Marlborough District* Council [2018] NZCA 316, [2018] 3 NZLR 283 [*RJ Davidson*].

[186] I start by giving some background and analysing the relevant legal principles. Against that context, I discuss the correct interpretation of the relevant planning documents, (the NZCPS and the AUP), and outline the errors of interpretation made by the Board and the High Court. I then examine the errors made by the Board and the High Court in their assessment of the EWL arising out of their erroneous interpretation of the planning documents. After this, I discuss Waka Kotahi's notice to support the High Court decision on other grounds and offer some comments on the reasons of the majority and William Young J. Finally, I summarise my conclusions and the reasons I would allow the appeal.[181]

Background

[187] The EWL involves a range of activities but, for the purposes of the 24 resource consents required, they were bundled and treated as "non-complying activities".[182] This means that they had to pass the threshold test in s 104D of the RMA, as well as the more substantive assessment in s 104. Two notices of requirement are also necessary. The first is for the construction, operation and maintenance of the EWL (and associated works) between Onehunga and Ōtāhuhu. The second is to alter the SH 1 designation to accommodate the EWL.

[188] The route of the EWL was selected after an extensive process involving stakeholder consultation and was evaluated according to a number of criteria, including transport, social and health outcomes, "constructability" and the natural environment.[183]

[189] The design of the EWL incorporates stormwater treatment for an adjacent 611 ha of developed urban catchment in the Onehunga-Penrose area, as well as leachate management from adjacent landfills.[184] It also encompasses new commuter

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181 I do not deal with the cultural and Treaty issues raised by Ngāti Whātua Ōrākei. I accept the submission of Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Inc, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust that these issues were not part of the appeal to the High Court and that it is therefore inappropriate to deal with them.

182 Board Decision, above n 173, at [32] and [128]. See below at [233].

183 Louise Allwood and others *East West Link: Assessment of Effects on the Environment* (NZ Transport Agency | Waka Kotahi, December 2016) [AEE] at [8.0]–[8.4.5]. First a preferred corridor evaluation process was undertaken and then a preferred alignment within the preferred corridor was identified: at [8.0]. The assessment methodology is summarised at 113, figure 8-1.

184 Board Decision, above n 173, at [9].

and recreational cycle paths connecting the Onehunga, Penrose and Sylvia Park communities, and a new pedestrian and cycle connection across Ōtāhuhu Creek.[185]

[190] Works for the proposed EWL that are relevant to this appeal include reclamation of 18.4 ha of the Māngere Inlet, as well as dredging and works associated with the construction of a viaduct at Anns Creek.[186]

[191] Although the northern shore of the Manukau Harbour has already been heavily modified, both the Māngere Inlet and the adjacent land subject to the proposed EWL nonetheless remain ecologically significant.[187] Anns Creek East contains sensitive and unique ecological values with lava shrubland habitats, threatened plant habitats and gradients between mangroves to saltmarsh to freshwater wetland.[188] The project area is also home to roosting and feeding areas for various native bird species, which may be affected by the project.[189]

[192] The New Zealand Transport Agency | Waka Kotahi (Waka Kotahi)[190] put forward a package of offset, remediation and mitigation measures to address the negative environmental effects of the EWL.

[193] The application documents set out four expected benefits of the EWL which broadly include: improved and more reliable travel times; accessibility that supports businesses for growth and economic prosperity; improved safety and connected communities; and enabling and providing environmental improvements and social/community opportunities to the local area.[191]

The law

[194] I begin this section with a discussion of *King Salmon*, before moving to this Court's recent decision in *Port Otago*. I then explain why *King Salmon* applies to

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185 At [6(d)].
186 At [444].
187 HC judgment, above n 174, at [4].
188 Board Decision, above n 173, at [592].
189 At [465]–[471].
190 Waka Kotahi is the name that was used in oral submissions.
191 AEE, above n 183, at [3.4].

resource consents. After this, I offer a brief analysis of the role of offsets in meeting environmental protection policies before setting out the proper approach to s 104D.

King Salmon

[195] *King Salmon* concerned an application to change salmon farming in a number of locations from a prohibited activity to a discretionary activity in the Marlborough Sounds Resource Management Plan.[192] It was held that, as the proposed salmon farm would have significant adverse effects on the area's outstanding natural attributes (contrary to the relevant NZCPS policies requiring the avoidance of certain types of environmental harm), the plan change application should have been declined.[193]

[196] This Court held that environmental protection is "a core element of sustainable management" as defined in s 5 of the RMA.[194] This means that environmental protection by requiring avoidance of the adverse effects of development is within the concept of sustainable management and that it is "a response legitimately available to those performing functions under the RMA".[195]

[197] The Court rejected the "overall judgment"[196] approach to resource management.[197] This had become the accepted approach and involved making "an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources" under s 5 of the RMA.[198] As this Court said in *Port Otago*, that approach tended to lead to the discounting of environmental values.[199] I comment that a key point in this regard is that instrumental considerations (for example, efficiency or financial gain) are not straightforwardly commensurable with environmental values.[200] Species, ecosystems, habitats, vegetation types and important environmental features are generally characterised by

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192 *King Salmon*, above n 178, at [1] per Elias CJ, McGrath, Glazebrook and Arnold JJ. By the time of the appeal to this Court only one location was still at issue.
193 At [153]–[154] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
194 At [24(d)] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
195 At [150] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
196 For a description of the approach, see at [38]–[43] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
197 At [106]–[154] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
198 *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 347.
199 *Port Otago*, above n 179, at [81].
200 At [80].

their intrinsic value, whereas economic considerations are generally characterised by their instrumental value. Consequentialist calculus cannot be easily applied where intangible environmental values are concerned.

[198] This Court in *King Salmon* instead endorsed an "environmental bottom line" approach.[201] This approach entails that the safeguards in s 5(2)(a)–(c) relating to the protection of the environment all have to be met before the purpose of the RMA is fulfilled.[202] A further feature of this approach is that decision making is "not about achieving a balance between benefits occurring from an activity and its adverse effects".[203]

[199] The definition of sustainable management should be read as an integrated whole. The Court interpreted the word "while" in the definition in s 5(2), before subparas (a), (b) and (c), as meaning "at the same time as".[204] This means that the environmental principles in subparas (a), (b) and (c) must be observed in the course of the management referred to in the opening part of the definition. As such, the Court stated that the relevant avoidance policies in that case "provide something in the nature of a bottom line".[205]

[200] The Court said that, given the reasonably elaborate process involved before an NZCPS is issued, it is implausible that Parliament intended that the ultimate determinant of a plan change application would be Part 2 of the RMA[206] (through an overall judgment approach) and not the NZCPS itself.[207] It also considered that it was contrary to the legislative scheme to hold that the NZCPS could be treated as

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201 *King Salmon*, above n 178, at [132] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

202 *Shell Oil New Zealand Ltd v Auckland City Council* PT W8/94, 2 February 1994 at 10 as cited in *King Salmon*, above n 178, at [38] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

203 *Campbell v Southland District Council* PT W114/94, 14 December 1994 at 66 as cited in *King Salmon*, above n 178, at [38] per Elias CJ, McGrath, Glazebrook and Arnold JJ. I therefore disagree with the majority's description of s 5(2) as involving a "tension" between meeting community need and protecting vulnerable elements of the environment: above at [38].

204 *King Salmon*, above n 178, at [24(c)] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

205 At [132] per Elias CJ, McGrath, Glazebrook and Arnold JJ. As I discuss later, both the majority's reasons and the reasons of William Young J undermine these choices made in the RMA, NZCPS and AUP. See further below at [328]–[329], [335] and [337].

206 Section 5 of the Resource Management Act [RMA] is contained in Part 2.

207 *King Salmon*, above n 178, at [86(a)] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

"a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment".[208]

[201] Further, as the Court pointed out, any regional plan must give effect to any national policy statement and any NZCPS.[209] The Court held that "give effect to" means "implement" and that it is a "strong directive, creating a firm obligation on the part of those subject to it".[210] The NZCPS is "an instrument at the top of the hierarchy".[211] As such, the NZCPS can require that particular parts of the coastal environment be protected from adverse effects.

[202] The Court commented that the overall judgment approach creates uncertainty. As it said, "[t]he notion of giving effect to the NZCPS 'in the round' or 'as a whole' is not one that is easy either to understand or to apply".[212]

[203] This Court in *King Salmon* acknowledged that there may be occasions where particular policies in the NZCPS "pull in different directions" but said that this is not likely to occur frequently, "given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording".[213] A close attention to the wording of the policies may mean an apparent conflict dissolves. The Court considered that differences in expression matter and commented that a danger of the overall judgment approach is that is it likely to minimise the significance of these differences in expression.[214]

[204] The Court acknowledged a number of exceptions and qualifications to its "in principle" finding[215] that a decision maker would be acting "in accordance with" Part 2 of the RMA by giving effect to the NZCPS.[216] First, before this approach can be taken, there must be no issue as to the validity of the NZCPS or any part of it.

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208 At [142] per Elias CJ, McGrath, Glazebrook and Arnold JJ. Both the approach of the majority and that of William Young J (summarised at [324]–[327]) are contrary to *King Salmon* and are therefore contrary to the legislative scheme: see below at [328]–[341].
209 RMA, s 67(3)(a)–(b).
210 *King Salmon*, above n 178, at [77] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
211 At [152] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
212 At [137] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
213 At [129] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
214 At [127] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
215 At [85] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
216 At [88] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

Second, where the NZCPS does not "cover the field", a decision maker will have to consider "whether Part 2 provides assistance in dealing with the matter(s) not covered".[217] Third, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi, which has procedural as well as substantive aspects, is also an exception. Finally, if there is uncertainty as to the meaning of particular policies in the NZCPS, Part 2 may aid in a purposive interpretation.[218]

[205] In all cases, including where these exceptions and qualifications apply, decision makers should also, as well as referring to Part 2, refer to the objectives and policies in the NZCPS and downstream documents where relevant. Reference to the objectives and policies of these planning documents will often be sufficient to resolve issues, ambiguities or conflicts, given that these documents already reflect Part 2.[219]

Port Otago

[206] A possible conflict between policies in the NZCPS was at issue in *Port Otago.* The appeal concerned the relationship between NZCPS Policy 9 (the ports policy) and the NZCPS avoidance policies.[220] This Court held that there was a conflict between the ports policy and the avoidance polices as all were directive.

[207] The Court stated that, while it was preferable that any conflicts be dealt with at the regional policy and plan level,[221] the ability of regional planning instruments to anticipate all conflicts was limited, such that some conflicts would have to be resolved at the resource consent level.[222]

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217 At [88] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

218 There was no mention by the Court of any other exceptions, and certainly no mention of a general exception of the nature the majority finds in the present case (summarised below at [325]–[326]). Nor was there any mention of the more open-ended exception found in the reasons of William Young J summarised below at [327]. This is unsurprising given that environmental bottom lines are set through s 5(2)(a)–(c) of the RMA and the avoidance policies in the NZCPS: see below at [329]. See also my comments on the majority's view of *RJ Davidson* below at [224], n 247.

219 At [90] per Elias CJ, McGrath, Glazebrook and Arnold JJ. The paragraph cited refers to the NZCPS as reflecting Part 2. The same analysis must apply to downstream planning documents.

220 *Port Otago*, above n 179, at [71]. In *Port Otago* the avoidance policies at issue were Policies 11, 13, 15 and 16.

221 At [72].

222 At [73].

[208] Before a conflict "with regard to any particular project" is identified, a decision maker (which must include a decision maker at resource consent level), must be satisfied that:[223]

> (a) the project is required to ensure the safe and efficient operation of the ports in question (and not merely desirable);
>
> (b) assuming the project is required, all options to deal with the safety or efficiency needs of the ports have been considered and evaluated. Where possible, the option chosen should be one that will not breach the relevant avoidance policies. Whether the avoidance policies will be breached must be considered in light of the discussion above on what is meant by "avoidance"; including whether conditions can be imposed that avoid material harm; and
>
> (c) if a breach of the avoidance policies cannot be averted, any conflict between the policies has been kept as narrow as possible so that any breach of any of the avoidance policies is only to the extent required to provide for the safe and efficient operation of the ports.

[209] The Court outlined the approach to take where there is, after due analysis (on the basis of (a)–(c) above), a conflict between directive policies in the NZCPS.[224] Before doing this, the Court said:[225]

> [75] As there is not sufficient information before us to attempt any detailed reconciliation between the ports policy and the avoidance policies, we provide only *general guidance as to how a decision-maker at the resource consent level* might approach the reconciliation between the ports policy and the avoidance policies.

[210] Importantly, the Court said there can be no presumption that one directive policy will always prevail over another. Even where a decision maker is satisfied that the conditions set out above are met, this does not mean that a resource consent will necessarily be granted.[226] The appropriate balance between avoidance policies and other directive policies must be weighed in a "structured analysis" which reflects the particular circumstances and the values inherent in the policies and objectives in the NZCPS (and any other relevant plans or statements).[227]

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223 At [76] (footnotes omitted).
224 At [76]–[84].
225 Emphasis added.
226 At [77].
227 At [78].

[211] This structured analysis is not the same as an overall judgment approach. While the *Port Otago* structured analysis still requires judgements to be made, "they are disciplined, through the analytical framework [provided in *Port Otago*], to focus on how to identify and resolve potential conflicts among the NZCPS directive policies".[228]

[212] I comment that the process outlined above is explicitly said to apply to resource consents as well as plan changes. As stated above, the Court made clear that some conflicts may be left to the resource consent level. As such, when the Court set out to explain how potential conflicts should be approached "with regard to *any particular project*"[229] this clearly applies to the resolution of conflicts at the resource consent level.

Resource consents and King Salmon

[213] Waka Kotahi submits that *King Salmon* does not apply to resource consents. I reject that submission. *King Salmon*, and in particular the rejection of the overall judgment approach, applies to resource consent decisions.[230] If it did not, then one might have expected *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* (*Sustain Our Sounds*) to say so, given that it was released at the same time and dealt with both plan changes and consents.[231]

[214] It is true, as Waka Kotahi submits, that the issue in *King Salmon* was the validity of a proposed plan change. The Court based its decision, however, on an analysis of the definition of sustainable management in Part 2.[232] As ss 104 and 171 are subject to Part 2, *King Salmon* necessarily applies to those sections where there are avoidance policies in the relevant planning documents.

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228 At [81].

229 Emphasis added.

230 Prior to *King Salmon,* the overall judgment approach had been applied not just in the context of plan changes but also in assessing resource consent applications. See for example Kenneth Palmer "Resource Management Act 1991" in Derek Nolan (ed) *Environmental and Resource Management Law* (3rd ed, LexisNexis, Wellington, 2005) at [3.24]–[3.25]. Indeed, the Court in *King Salmon* said, at [39] per Elias CJ, McGrath, Glazebrook and Arnold JJ, that this approach appears to have had its origins in a resource consent case: *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

231 *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 [*Sustain our Sounds*] at [5].

232 See above at [196]–[198].

[215] There would be little point in the long and elaborate planning process, which at each stage should give effect to Part 2, and which becomes more specific as to substance and locality as it progresses, if the relevant policy statements and plans could be side-lined at resource consent level where actual projects in particular localities are being assessed.[233]

[216] Waka Kotahi suggests that a decision maker must give genuine consideration to avoidance policies as strong policy guidance but can choose to prioritise other policy considerations. Arguably therefore it does not advocate a return to the pure overall judgment approach rejected by the Court in *King Salmon* but suggests a somewhat modified approach.

[217] The issues identified in *King Salmon* also apply to Waka Kotahi's proposed approach. It would undermine the structured nature of the planning process and would lead to uncertainty. The danger of not taking a regional approach clearly remains. If consents for individual projects can be given in protected areas of ecological value or for projects affecting ecological diversity on a "piecemeal basis"[234] at the resource consent level, it is hard to see how the protection of these areas and values could have any stability.

[218] I reject Waka Kotahi's submission that the setting of environmental bottom lines is not compatible with s 5 of the RMA. Protection of the environment is an element of sustainable management,[235] and the NZCPS may make legitimate policy choices favouring the avoidance of adverse effects,[236] including by requiring absolute protection.[237] Further, a policy in a New Zealand coastal policy statement may have the effect of what in ordinary speech, as against the specialist RMA definition, would be called a "rule".[238]

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233 The danger identified in *King Salmon*, above n 178, at [139]–[140] per Elias CJ, McGrath, Glazebrook and Arnold JJ, that spot zoning plan change applications potentially undermine the required regional planning approach, applies with even more force with regard to applications for resource consents because decision makers will be considering individual projects rather than taking the strategic, region-wide approach required for plan changes.

234 At [140] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

235 At [24(d)] and [150] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

236 At [152] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

237 At [118] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

238 At [116] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and see also *Port Otago*, above n 179, at [62].

[219] I am of course conscious, as Waka Kotahi stressed, that s 104(1) sets out a list of factors a consent authority must "have regard to", including the actual and potential effects of the project and relevant provisions of statements and plans. Section 171(1) states that a territorial authority must "have particular regard to" various matters including relevant provisions of statements and plans.

[220] It is not surprising that ss 104(1) and 171(1) are worded in this manner. Consent authorities must decide on particular projects in particular localities and against a background where relevant statements or plans may not exist or are only in draft form. Clearly the actual effects of the particular projects must be considered. Further, what is being considered at consent level is at a more specific level than even a district plan, and therefore is unlikely to be covered specifically in relevant statements or plans, which in any event may not "cover the field", even in terms of general guidance.[239]

[221] Against the background of the scheme of the RMA, however, s 104(1) does not, by virtue of recourse to Part 2 or otherwise, allow a consent authority to override the provisions of those statements or plans that *do* cover the field and are directly relevant.

[222] Further support for this approach comes from looking at s 104(1)(b) as a whole. Included in the list, along with national policy statements, the NZCPS, regional policy statements, and plans, are national environmental standards[240] and "other regulations".[241] Both national environment standards and other regulations are binding.[242] As such, if "have regard to" in s 104(1)(b) merely meant "consider as strong policy directives" then national environmental standards or other regulations which must be complied with would not be included in the list.[243]

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239 *King Salmon*, above n 178, at [88] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
240 Section 104(1)(b)(i).
241 Section 104(1)(b)(ii).
242 Regulations are binding by their nature, and national environmental standards are regulations per RMA, s 43(1).
243 See also the reasons of the majority above at [108], where the same conclusion seems to be reached.

[223] *King Salmon* held, on the basis of an analysis of s 5, that environmental protection through avoidance policies is consistent with sustainable management.[244] As a consequence, requiring the avoidance policies in the NZCPS to be followed does not involve ignoring Part 2. As the Court noted, the NZCPS is the mechanism by which Part 2 is given effect in relation to the coastal environment.[245] The lower-order statements and plans must give effect to the choices made higher up the chain and thus necessarily also give effect to Part 2. Each step in the hierarchy (to be valid) will reflect the choices higher in the hierarchy and by necessity Part 2.

[224] It is not open to decision makers at resource consent level to undermine the choices made in planning documents of favouring environmental protection through avoidance policies if directly applicable to the relevant project. As the Court of Appeal said in *RJ Davidson*, "resort to [Part 2] for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to *King Salmon*".[246] A relevant plan provision is "not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side".[247]

[225] I agree. The approach suggested by Waka Kotahi of treating the avoidance policies as merely constituting strong policy guidance is not valid. It does not accord with the statutory scheme, purpose or wording. Nor does it accord with the wording and purpose of the relevant policies and it would effectively entail overruling *King Salmon*, at least in part. This would be inappropriate, given that *King Salmon* is

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244 See above at [196] and [218].

245 *King Salmon*, above n 178, at [86(b)] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

246 *RJ Davidson*, above n 180, at [71]. I note that, in places, the Court of Appeal in *RJ Davidson* might appear to be maintaining an overall judgment approach in the context of consents (see for example at [67] and [69]). I accept the submission made by Royal Forest and Bird that the Court of Appeal was, however, using "overall judgment" merely to mean that there could be recourse to Part 2.

247 At [73]. Royal Forest and Bird makes a similar point in its submissions: that an avoidance policy is not properly had regard to if it is merely considered and set aside. I agree. I also disagree with the majority that there is a corollary to the reasoning in *RJ Davidson* whereby exceptions to avoidance policies can be permitted: above at [109]. Simply put, no reference to an exception of this kind is found anywhere in the Court of Appeal's discussion and, if such an exception logically followed as a "corollary" from the Court of Appeal's decision, one would have expected the Court of Appeal to say so explicitly and clearly.

a recent decision of this Court and no plausible, let alone compelling, reason has been put forward for overruling it.[248]

[226] In summary, and for all of the above reasons, *King Salmon* applies to resource consent decisions. For similar reasons it also applies to s 171. If anything, the case for *King Salmon* is further strengthened with regard to s 171 by the fact that territorial authorities are directed to "have *particular* regard" to relevant provisions of relevant plans and policy statements.[249]

Role of offsets[250]

[227] As noted above, Waka Kotahi put forward a package of offset, remediation and mitigation measures to address the negative environmental effects of the EWL. The issue therefore is whether as a matter of law these measures could potentially satisfy the avoidance policies in the NZCPS and AUP.

[228] The term "avoid", as used in the NZCPS, has its ordinary meaning of "not allow" or "prevent the occurrence of".[251] The avoidance policies in the NZCPS must, however, be interpreted in light of what is sought to be protected, including the relevant values and areas.[252] Any adverse effects must also be material or significant, depending on whether the avoidance policies are "qualified" or "unqualified" in the sense outlined below.[253] Mitigation, remediation and adaptive management may as a matter of law operate to bring the harm down to less than material or significant (as the case may be).[254]

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248 These comments also apply to the reasons of the majority above at [78]–[91] and [99]–[112]; and the reasons of William Young J below at [380]–[398].

249 RMA, s 171(1)(a) (emphasis added).

250 In this section I am talking only about environmental offsets, as opposed to economic or social offsets, which provide a non-environmental benefit.

251 *King Salmon*, above n 178, at [96] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

252 *Port Otago*, above n 179, at [68]. And interpretation of the policies is a matter of law.

253 See below at [244].

254 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [252] and [261] per Glazebrook J, [292]–[293] per Williams J, and [309]–[311] and [318]–[319] per Winkelmann CJ. In *Port Otago* this Court held that, while decided in a different statutory context, the comments in *Trans-Tasman* were "nonetheless applicable to the NZCPS": *Port Otago*, above n 179, at [65].

[229] I accept that offsets may also as a matter of law mean avoidance policies can be met if they bring down the harm to less than material or significant (as the case may be).[255] The harm could only be so reduced if the offsets relate to the values protected by the particular avoidance policies and usually would require them to operate at the point of impact of the proposed activity. Otherwise, the offset would not be capable of reducing the harm protected by the values to the requisite levels.[256]

[230] Offsetting also usually includes a level of uncertainty about its effectiveness in countering the environmental harm at issue. In determining whether offsets can reduce harm to a less than material or significant (as the case may be) level, the decision maker must therefore as a matter of law take a precautionary approach, considering the extent of the risk to the protected value, the importance of the activity, the degree of uncertainty and the extent to which any offset will reduce risk and uncertainty (including the risk of non- or partial compliance).[257]

[231] This precautionary approach is mandated by NZCPS Policy 3. It is reinforced by the concern in the NZCPS Preamble regarding "a lack of understanding about some coastal processes and the effects of activities on them". In the AUP, it is similarly pointed out that the coastal marine area "has not been comprehensively surveyed" for

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255 I therefore reject Royal Forest and Bird's submission that offsets cannot function to avoid adverse effects. Whether offsets do or do not bring harm down to less than material or significant (the test required by law) is a matter of fact, but determining what values are protected (and therefore what is required to bring the harm down to the requisite levels) will depend on the construction of the relevant avoidance policy, the interpretation of which is a matter of law. A precautionary approach is also required as a matter of law. I therefore do not agree with the comments of the majority above at [176].

256 These requirements are only relevant to whether offsets can bring harm down to less than material or significant for the purpose of meeting avoidance policies. Offsets generally are able to be taken into account in resource consent and notice of requirement decisions: see ss 104(1)(ab) and 171(1B) of the RMA. Both of these sections were inserted by the Resource Legislation Amendment Act 2017. That Act was not in effect at the time of the EWL proposal. The relevant sections came into force on 18 October 2017. Prior to this amendment, offsets had usually been dealt with under s 104(1)(c), which provides for consideration of "any other matter the consent authority considers relevant and reasonably necessary to determine the application" (or its predecessor, s 104(1)(i)). See for example *J F Investments Ltd v Queenstown Lakes District Council* NZEnvC Christchurch C48/2006, 27 April 2006 at [42]; and *Director-General of Conservation v The Wairoa District Council* NZEnvC Wellington W81/2007, 19 September 2007 at [42]. Offsets had also sometimes been dealt with as mitigation: see for example *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at [463].

257 See *Sustain Our Sounds*, above n 231, at [129]. This approach was affirmed in *Port Otago*, above n 179, at [67]. *Sustain our Sounds* specified that a precautionary approach was needed for adaptive management, but the Court said that the factors at [129] would determine if prohibition "rather than an adaptive management *or other approach*" would be required (emphasis added). The principles expressed in *Sustain our Sounds* are therefore also relevant to offsets.

the purpose of identifying significant marine communities and habitats and that the D9 overlay "under-represents the significant marine communities and habitats present in the sub-tidal areas of the region".[258] The AUP explicitly states that "[a] precautionary approach is therefore required to manage effects in the coastal environment."[259]

[232] As a practical example as to why caution is necessary, I note that one witness before the Board, Dr Bishop, referred in his evidence to a failed attempt at saltmarsh restoration undertaken at Ambury Park in the 1990s.[260]

Section 104D

[233] As noted above, the activities requiring resource consent were bundled and treated as non-complying. This means that the threshold in s 104D must be applied. The parties are agreed that the effects of the EWL proposal are more than minor. It follows that it does not pass the first test in s 104D(1)(a).[261] The critical issue therefore is whether it will be contrary to the objectives and policies of the AUP, in terms of s 104D(1)(b).

[234] The leading authority on this issue appears to be *Dye v Auckland Regional Council*.[262] In that case, the Court of Appeal noted that, in the case of a non-complying activity, positive support for the activity cannot be expected to be contained in the plan.[263] The question is whether the activity is contrary to the objectives and policies of the plan, properly constructed.[264]

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258 AUP, above n 177, at F2.1.

259 At F2.1.

260 Board decision, above n 173, at [602]. Dr Craig Douglas Bishop is a terrestrial ecologist employed by Auckland Council, called by the Council as an expert witness. In this case Dr Bishop argued that the restoration by Waka Kotahi would require considerable adaptive management, and that trials in degraded areas unaffected by construction should be undertaken to gain more experience and certainty. The Board rejected this suggestion, noting at [603] that the ecosystem restoration plan at issue in this case had a greater chance of success than the Ambury Park restoration because the current Waka Kotahi "proposal is to restore and enhance an existing ecosystem rather than creating a new ecosystem" (footnote omitted).

261 Board decision, above n 173, at [615].

262 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA). That this is treated as the leading case is perhaps a bit odd as the Court in that case was assessing whether there were errors of law in the Environment Court's decision, as the High Court had found, rather than setting a general test. Indeed, the comments on a general approach are very sparse.

263 At [14].

264 At [14] and [23].

The Court of Appeal decided that the Environment Court's view of the plan in that case (effectively allowing for the possibility of development in the relevant area) was open to it "on a fair appraisal of the objectives and policies read as a whole".[265]

[235] Assuming the *Dye* approach is appropriate, I accept the submission of Royal Forest and Bird that the "fair appraisal" must be reached on the basis of the language of the policies themselves, rather than on the basis of an overall judgment. This means that a fair appraisal in terms of *Dye* must take into account (in accordance with *King Salmon*) any avoidance policies that have the effect of what in ordinary parlance would be called rules and which set environmental bottom lines.[266] There were no such avoidance policies at issue in *Dye.* Further, the Court of Appeal in *Dye* said that it did not need to consider what the situation would be if the objectives and policies of a plan were inconsistent with or contrary to the terms of a higher-order planning document or the provisions of Part 2.[267]

[236] Regarding the meaning of the phrase "contrary to" in s 104D, *New Zealand Rail Ltd v Marlborough District Council* defined "contrary to" as meaning "opposed to in nature, different to or opposite" and "repugnant and antagonistic".[268] It also said that contrary must mean "something more than just non-complying".[269] I agree that something more than being non-complying is required, but I am not sure that it is helpful to provide synonyms for the term "contrary to" as the words have an ordinary meaning that can be applied.

[237] The issue remains as to the basis of the assessment under s 104D(1)(b). I see s 104D as a threshold. The assessment of whether the threshold is passed does not take place in the abstract but in the context of the particular project at issue. What is required is a holistic assessment of whether, on the basis of the proper interpretation of the plan as a whole, the particular project could (not would) be granted the relevant resource consents. This is a preliminary assessment only. Whether or not the consents

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265 At [25].
266 See above at [198] and [218].
267 *Dye v Auckland Regional Council*, above n 262, at [24].
268 *New Zealand Rail Ltd v Marlborough District Council*, above n 230, at 80.
269 At 80.

would be granted if the threshold is passed would depend on the outcome of the full analysis under s 104.

[238] Where there are avoidance policies at issue, the preliminary s 104D(1)(b) analysis would require an assessment of the level of seriousness of any breaches of the avoidance policies and a preliminary consideration of any other environmental effects. It would also require a consideration of whether there might be a conflict between directive policies in the sense outlined in *Port Otago*, either on the basis of the language or (possibly) on the facts. It would only be in circumstances where, after such assessment and on a proper interpretation of the relevant plan, a consent clearly could not be granted that a project would fail the s 104D(1)(b) threshold. Treating s 104D as a threshold in this manner seems to me to be consistent with the approach in *Dye*.

[239] Given that the errors of law I identify below made by both the High Court and the Board, including interpretation errors relating to the AUP, apply equally to the threshold question under s 104D as they do to ss 104 and 171, I do not intend to discuss the position under s 104D and its relationship to s 104 in any more detail.

Interpretation of the relevant provisions of the NZCPS

[240] I begin with this analysis of the NZCPS because it is the document that was at issue in *King Salmon* and is above the AUP in the planning hierarchy. The AUP must give effect to it.[270]

[241] The NZCPS has a range of policies that favour infrastructure but also recognise possible environmental effects. Those relevant to this appeal are Policies 6 and 7 (collectively referred to in these reasons as the infrastructure provisions).[271] Policy 6(1)(a) recognises the importance of infrastructure.[272] Policy 6(2)(c) directs

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[270] RMA, s 67(3)(b).

[271] Policy 7 directs decision makers, in preparing regional policy statements, to consider where and how to provide for future development, and to identify areas of the coastal environment where particular activities and forms of subdivision, use and development are inappropriate or may be inappropriate without consideration of effects through a resource consent application or similar process.

[272] Policy 6(1)(b) also recognises the importance of infrastructure, but specifically in connection to population growth.

decision makers to "recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places". Policy 6(2)(d) states that "activities that do not have a functional need for location in the coastal marine area generally should not be located there".

[242] The term "functional need" is defined in the National Planning Standards 2019 as "the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment".[273] This definition is consistent with the term's natural meaning.

[243] Policy 10 deals with reclamation. It provides that reclamations should not occur unless certain conditions are met: that land outside the coastal marine area is not available for the proposed activity; that the activity which requires reclamation can only occur in or adjacent to the coastal marine area; that there are no practicable alternative methods of providing the activity; and that the reclamation will provide significant regional or national benefit. I classify Policy 10 as a hybrid provision. By this I mean that it serves both to enable and constrain development, rather than being a pure avoidance policy or empowering provision. Although it says that reclamations should be avoided, this is subject to an exception where certain criteria are met. These criteria are, however, necessary but not sufficient conditions for reclamation to take place within the coastal marine area.

[244] Policies 11 (Indigenous biological diversity (biodiversity)), 13 (Preservation of natural character) and 15 (Natural features and natural landscapes) are avoidance policies. These policies are directed at protecting particular, specified environmental values. It is also helpful to divide the operative components of these policies into "qualified" and "unqualified" avoidance policies. "Unqualified" avoidance policies are those which merely specify that certain adverse effects should be avoided.

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273 Ministry for the Environment | Manatū Mō Te Taiao *National Planning Standards* (Wellington, November 2019) [National Planning Standards] at 58. See also Ministry for the Environment | Manatū Mō Te Taiao *National Policy Statement for Freshwater Management 2020* (25 January 2024), cl 3.21(1); and Ministry for the Environment | Manatū Mō Te Taiao *National Policy Statement for Indigenous Biodiversity* (7 July 2023) [National Policy Statement for Indigenous Biodiversity], cl 1.6(1). For a recent discussion of the functional need test see *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629 at [38]–[60]. As we had no argument on the point, I make no comment on whether the discussion in that case is correct or not.

"Qualified" avoidance policies require a higher threshold of harm before an adverse effect is required to be avoided (for example, "avoid *significant* adverse effects"). Particularly important for this appeal is Policy 11(a), an unqualified avoidance policy, and Policy 11(b), a qualified avoidance policy, relating to the avoidance of adverse effects and significant adverse effects (respectively) on various indigenous biodiversity values.

[245] The relationship between the infrastructure provisions and the avoidance policies is relevant to this appeal and, in particular, whether the infrastructure provisions can be equated to Policy 8 (Aquaculture) (the aquaculture policy), which was held in *King Salmon* to be subject to the directive avoidance policies on the basis of the different language used.[274] The alternative is that the infrastructure policies are themselves directive and a conflict arises with the directive avoidance policies, as was the case with the ports policy at issue in *Port Otago*.[275]

[246] A core feature of the *Port Otago* decision that the ports policy was directive was the fact that this Court found the word "requires" to be a key verb in the NZCPS ports policy.[276] There is no similar directive wording in the provisions dealing with infrastructure or reclamation. To the contrary, the wording of the infrastructure provisions equates with the aquaculture policy wording at issue in *King Salmon*.[277]

[247] Turning to the hybrid Policy 10 relating to reclamation, although it says that reclamations should be avoided, this is subject to an exception where certain criteria are met. But the Policy does not *require* reclamation to occur if the criteria are met. Whether reclamations should occur, even when those criteria are met, has to be considered against the background of the statement at the beginning of Policy 10(1) that reclamation of land should be avoided. Policy 10 is not therefore a directive policy in conflict with the specific avoidance policies in Policy 11. Rather, it too is subject to the avoidance policies. I do not consider that the mention of the "efficient operation of infrastructure" in Policy 10(3) changes that position.

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274 *King Salmon*, above n 178, at [126]–[132] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
275 *Port Otago*, above n 179, at [69]–[71].
276 At [69].
277 As pointed out by the High Court in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1 at [113] and [121].

[248] This means that, except possibly in the limited circumstances I now discuss, the infrastructure and reclamation policies in the NZCPS are subject to the avoidance policies.

[249] It was recognised in *Port Otago* that there was already an established network of ports and that ports by their nature had a (functional) need to be located in the coastal marine area.[278] I do not therefore totally rule out the possibility that *Port Otago* contemplates that a conflict could arise on the facts, even where it does not arise on the wording of the particular policies considered in the abstract. If this is the case, then this would mean that, despite there being no directive wording in the infrastructure policy, a conflict could arise on the facts where there is a functional need for essential infrastructure to be located in the coastal marine area and the only possible location for that infrastructure conflicts with the avoidance policies. If such a conflict were contemplated by *Port Otago*, a structured analysis would apply to the resolution of this conflict.[279]

[250] I do not need to decide if *Port Otago* contemplates a conflict on the facts, however, because the Board's finding was that there was no functional need for the EWL to be located in the coastal marine area.[280] It appears also that there were other available corridors and routes. This means that there could be no relevant conflict on the facts even if *Port Otago* contemplates that this might occur. There is therefore no need to discuss this point any further.

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278 *Port Otago*, above n 179, at [70].

279 The majority relies on the word "generally" in Policy 6(2)(d) to find that the NZCPS contemplates an exception for operational need in some circumstances: above at [112]. The majority says, however, that operational need should only exceptionally justify the location of a development in the coastal marine area: above at [54]. I agree, but this does not mean that the NZCPS contemplates operational need justifying the infrastructure in the coastal marine area where this would be contrary to the directive avoidance policies unless there is a conflict between policies. On the basis of *Port Otago*, a conflict can only arise where there is a directive element in the wording of both policies or, if *Port Otago* contemplates this, a conflict in fact where there is a functional need for the infrastructure to be located in the coastal marine area, as was the case for ports, and where it can only be located in an area subject to the avoidance policies. For a definition of operational need, see below at [272]. I do not accept that my recognition of a possible exception on the facts (if indeed such can exist) conflicts with the strict approach in *King Salmon* (see above at [124], n 119) given that it would not be a freestanding exception but one that would recognise a possible conflict between policies in terms of *Port Otago*.

280 Board decision, above n 173, at [700]. See below at [292].

Interpretation of the relevant chapters of the AUP

[251] The AUP includes a regional policy statement,[281] a regional coastal plan,[282] a regional plan[283] and a district plan.[284] It applies to all of Auckland except the Hauraki Gulf islands.[285] The AUP has 14 chapters. Chapter A is the introductory chapter. The regional policy statement is found in chapter B. Chapter D contains overlays that apply a higher level of protection to certain scheduled areas. These overlays generally align with the NZCPS avoidance policies. Chapter E applies Auckland-wide. It has a number of sections. The most important for this appeal is E26 which deals with infrastructure, including roads. Chapter F contains the regional coastal plan. F2 deals with the General Coastal Marine Zone and governs activities within it, including reclamations.

[252] The Board interpreted the biodiversity and reclamation policies in the AUP "on balance against all relevant provisions",[286] finding that the EWL achieved a level of consistency with the planning framework that was commensurate with its overall benefits.[287] The High Court held that, properly construed, the AUP provides a narrow "framework for the consideration of infrastructure proposals rather than automatically excluding them".[288]

[253] I start my analysis with a discussion of the applicable interpretation principles. I then examine the relationship between the NZCPS and the AUP before moving to the proper interpretation of the AUP. I start with chapters D and F and then turn to chapter E, before discussing the interpretation errors made by the Board and the High Court.

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281 See RMA, ss 59–62.
282 See s 64.
283 See ss 63–70.
284 See ss 72–77.
285 AUP, above n 177, at A1.2.
286 Board decision, above n 173, at [694].
287 At [731].
288 HC judgment, above n 174, at [68]. The High Court's discussion and parts of the Board's discussion of the consistency of the EWL with the AUP took place in the context of the discussion of s 104D. I deal with these in the context of s 104 as I see s 104D as a threshold.

Interpretation principles

[254] The AUP is a lower-order planning document and must give effect to the NZCPS.[289] This means that the AUP should be interpreted in a manner that would make it valid (that is, giving effect to the NZCPS) if possible.[290]

[255] In *Port Otago*, this Court set out the principles for interpreting the NZCPS, essentially derived from *King Salmon*.[291] These principles are equally applicable to interpreting the provisions of lower-order planning documents, with, as noted above, the additional requirement of consistency with higher-order documents.

[256] The Court, reiterating points made in *King Salmon*, said that conflicts between provisions are likely to be rare if the provisions are properly construed, even where they appear to be pulling in different directions. Any apparent conflict between provisions may dissolve if careful attention is paid to the way in which they are expressed.[292] Apparent inconsistencies between provisions can often be reconciled through a close regard to the scheme and purpose of the document in question,[293] reading down one of the provisions,[294] and applying interpretation rules such as the rule that general provisions do not derogate from specific ones.[295] Where provisions conflict, an interpretation that gives both meaning would normally be preferred.[296] If a conflict remains it should be resolved according to the structured analysis set out in *Port Otago*.

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289 See above at [198]–[201]. These requirements apply across the different lower-order documents in the RMA cascade: see s 67(3)(b) (regional plans), s 75(3)(b) (district plans) and s 62(3) (regional policy statements). The RMA also introduces requirements for proposed lower-order documents to be modified so that they will give effect to higher-order documents: s 73(4) contains requirements for a local authority to amend a proposed district plan to give effect to a regional policy statement, and a similar requirement applies to proposed regional plans under s 65(6).

290 See generally Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013) at 231–232.

291 *Port Otago*, above n 179, at [60]–[63].

292 *King Salmon*, above n 178, at [129] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and *Port Otago*, above n 179, at [63].

293 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 607–612. Though the principles discussed in this text relate to legislation, they are also applicable to the interpretation of the AUP.

294 At 607.

295 At 609–610.

296 At 607–612.

Relationship of the NZCPS and AUP

[257] The Board considered that there was "no specific incongruity" between the NZCPS and the AUP.[297] Any differences between the NZCPS and the AUP were "an anticipated and appropriate particularisation between the national and regional level documents".[298] It therefore made its assessment based on the AUP provisions.[299] The High Court was of the view that the Board was entitled to give effect to the AUP where the NZCPS differs from the AUP.[300]

[258] As in any case of moving from the general to the specific, the AUP contains more detailed provisions that are not carbon copies of the provisions in the NZCPS. As long as these more detailed provisions represent a legitimate application of the NZCPS to Auckland's specific circumstances, then decision makers should of course apply the AUP provisions. However, if the High Court was suggesting that decision makers are entitled to prefer and apply provisions in the AUP that clearly conflict with the provisions of the NZCPS, this is not correct.[301]

[259] In this case no party has challenged the validity of the AUP. If there are, however, provisions in the AUP that do, properly interpreted, conflict with the NZCPS, then the Board should not have applied them.

Chapter D

[260] As noted above, chapter D contains overlays which apply a higher level of protection to certain Significant Ecological Areas (SEA).[302] The most relevant part of chapter D for this appeal is D9 (Significant Ecological Areas Overlay). Broadly, D9.3(9) contains unqualified avoidance policies, including D9.3(9)(a) which directs avoidance of a range of adverse effects on biodiversity (that are "non-transitory or

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297 Board decision, above n 173, at [680].

298 At [680].

299 At [680]. The Board went on to outline how the NZCPS is reflected in various provisions of the AUP: at [681]–[690].

300 HC judgment, above n 174, at [84].

301 In this I agree with the submission of Royal Forest and Bird.

302 The AUP uses overlays to recognise, manage and protect particular values associated with an area or resource. Significant Ecological Areas – Terrestrial (SEA-T) and Significant Ecological Areas – Marine (SEA-M) are overlays which protect areas of important ecological value on land and in marine areas respectively.

more than minor"). D9.3(10) is similar but contains qualified avoidance policies requiring the avoidance of "significant adverse effects".

[261] Waka Kotahi puts forward several arguments, based on an analysis of certain words and phrases, as to why D9.3(9) and (10) are not directive. I have considered those arguments but do not accept them. Viewed overall and in context, the words and phrases referred to by Waka Kotahi either support or do not detract from the directive character of D9.3(9) and (10).

[262] For example, it is submitted by Waka Kotahi that in certain circumstances the policies in D9.3(9) and (10) are qualified, as indicated by the use of the word "while" in D9.3(6) (rather than a stronger phrase like "subject to"). I do not accept this argument.[303] The full phrase is "[w]hile also *applying*".[304] Properly read, the phrase therefore directs that D9.3(9) and (10) be applied, and adds an additional requirement: to avoid "as far as practicable the removal of vegetation and loss of biodiversity". In other words, D9.3(9) and (10) should be applied *concurrently* with the requirement to avoid, as far as practicable, the removal of vegetation and the loss of biodiversity.

[263] I also consider that the majority is wrong to rely on D9.3(8) and D9.3(13) as establishing a tension in D9.[305] Strictly speaking, D9.3(8) applies to those policies "above" and so it does not apply to (9) or (10). It may apply to D9.3(1)(a) which directs the management of effects to the extent stated in (9) and (10) but the phrase "[m]anage … in accordance with" in D9.3(8) can and should be read as requiring the application of directive avoidance policies when they are present. D9.3(13) is worded "[i]n addition to Policies D9.3(9) and (10), avoid structures in Significant Ecological Areas – Marine 1 …". The phrase "in addition to" means that D9.3(13) cannot be read as qualifying (9) or (10) in any way.[306] It is, rather, an *independent* avoidance policy governing structures, to which D9.3(13)(d) is an exception. D9.3(13)(d) has no direct

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303 A similar argument based on the word "while", applied to the definition of sustainable management in RMA, s 5, was advanced and rejected in *King Salmon*, above n 178, at [24(c)] per Elias CJ, McGrath, Glazebrook and Arnold JJ. See above at [199].

304 Emphasis added.

305 Above at [62]. D9.3(9) and (10) were inserted by the High Court in *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council* [2017] NZHC 980, (2017) 20 ELRNZ 390 to give effect to NZCPS Policy 11: at [47]–[49] and 404–409.

306 The phrase "[i]n addition to Policies D9.3(9) and (10), avoid" was inserted at the beginning of the provision at the same time as (9) and (10) were added: at 410–411.

relation to the avoidance policies at issue in this appeal.[307] Reading the provisions as a whole therefore supports my interpretation.[308]

[264] In any event, a construction of D9.3(9) and (10) that made them less than directive would be contrary to the NZCPS. Such a construction would not be in line with the interpretation principle set out above requiring the AUP to be read as complying with the requirement to give effect to the NZCPS.[309] This means that the avoidance policies in D9.3(9) and (10) must be interpreted as being directive and properly mirroring the avoidance policies in the NZCPS, as adapted to conditions in the Auckland area.[310]

Chapter F

[265] Chapter F of the AUP applies to coastal areas. F2.1 provides that the purpose of the chapter is to provide for use and development in the coastal marine area and, in particular, those forms of use and development that have a functional or operational need to be undertaken in the coastal marine area, while achieving a range of social, cultural and environmental objectives.

[266] F2.1 also provides that, if an activity is proposed in an overlay area, then the provisions of the overlay will also apply. This statement in F2.1 is key to the interpretation of F2, as was recognised by the High Court.[311] As the High Court

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307 This interpretation is supported by the fact that D9.3(13) is, on its face, an avoidance policy of broader scope than D9.3(9) and (10). It directs the total avoidance of structures in SEA-M1 (subject to certain exceptions), without any qualification that structures need have adverse effects. This emphasises the fact that D9.3(13) is an avoidance policy of broader scope (providing broad protections against structures in the coastal marine area) which sits alongside D9.3(9) and (10), and is subject to its own internal exceptions which are necessitated by its broader scope.

308 Contrary to the view of the majority above at [63]. I comment that the fact that D9.3(8) and (13) were present in the AUP before D9.3(9) and (10) were added in fact cuts against the majority's view. D9.3 (9) and (10) were inserted to give effect to directive avoidance policies in the NZCPS and the provisions should be read as achieving that purpose to the extent possible. To allow existing provisions to qualify D9.3(9) and (10) would thwart that purpose and is in fact contrary to the wording of those policies as I explain. It is significant in the case of D9.3(13) that it was amended at the same time as the insertion of D9.3(9) and (10) to clarify the relationship between them.

309 See above at [254]–[256].

310 The meaning of "avoid" is discussed above at [228].

311 HC judgment, above n 174, at [46].

pointed out, F2.1 means that all relevant provisions in F2 are subject to D9 where there is a relevant overlay.[312]

[267] F2.2.3 relating to reclamations is also a key policy in this appeal. F2.2.3(1) provides that reclamation and drainage in the coastal marine must be avoided except in certain circumstances, including where the reclamation will provide significant regional or national benefit and where there are no practicable alternative ways of providing for the activity. F2.2.3(1) is limited not only by F2.1 (which provides that overlays apply) but also by F2.2.3(2) which provides that, where reclamation affects an overlay, decision makers should "manage effects in accordance with the overlay policies". In other words, if an overlay applies, then adverse effects or significant adverse effects (as the case may be) must be avoided.[313]

[268] I also note that the conditions for reclamation to occur in F2.2.3 do not exactly mirror those in the NZCPS Policy 10 in that the vital requirement in Policy 10(1)(b), that "the activity which requires reclamation can only occur in or adjacent to the coastal marine area", is missing. Further, the requirement that land outside the coastal marine area not be available for the proposed activity is also missing.[314] F2.2.3 must be read consistently with the NZCPS. This means the arguably watered-down "no practicable alternative ways" requirement must be read as incorporating those two requirements.

[269] Nor does F2.2.3 appropriately mirror the regional policy statement contained in AUP chapter B. B8.3.2(9) mirrors the test in NZCPS Policy 10. It includes the requirement that (a) land outside the coastal marine area is not available for the proposed activity and (b) the activity which requires reclamation can only occur in or

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312 At [46]–[48].

313 The reasons of the majority (above at [69]) take insufficient account of this provision's strength. F2.2.3(2) was added at the same time that D9.3(9) and (10) were added: *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council*, above n 305, at 422. The provision replaced F2.2.3(1)(d), which had required significant adverse effects on D17 and D21 overlays to be avoided or mitigated. This change was in response to Royal Forest and Bird's submission that the old provision could be read as limiting the avoidance of adverse effects to the D17 and D21 overlays: at [23]. As such, F2.2.3(2) should be read as being intended to give effect to these newly inserted provisions, which were themselves an attempt to give effect to Policy 11.

314 I accept that the requirements of Policy 10 must still be interpreted in a real-world context. Some possible alternatives may be available in the sense of being logically possible, but so infeasible that they are impossible in any real sense. I note, however, that this is still a higher standard than operational need.

adjacent to the coastal marine area.[315] This must also colour the interpretation of F2.2.3.[316]

[270] To summarise, two important points emerge from a correct interpretation of F2. First, on a proper reading of the AUP, F2 is entirely subject to the avoidance policies in D9 where there is a relevant overlay. Secondly, the F2.2.3 test for reclamation (even in areas not covered by overlays) must be read as incorporating the more stringent NZCPS test in Policy 10 to avoid inconsistency with the NZCPS.[317]

Chapter E

[271] Chapter E applies Auckland-wide. Most relevant to this appeal is E26 (Infrastructure).[318] E15 (Vegetation management and biodiversity), E18 (Natural character of the coastal environment) and E19 (Natural features and natural landscapes in the coastal environment) are also of relevance.

[272] E26.2.2 sets out various policies which govern how decision makers should assess the development of infrastructure. E26.2.2(2) requires that decision makers

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315 The majority finds that the regional policy statement envisages occasions where infrastructure will be located in overlay areas, and that decision makers in these situations must ensure projects avoid adverse effects where practicable and otherwise remedy or mitigate them: above at [52]; and see also AUP, above n 177, B3.2.2(3) and (6). But, as far as the coastal marine area is at issue, such an interpretation (provided that the relevant adverse effects are more than minor or transitory, or are significant, as the case may be) would be contrary to the NZCPS and *King Salmon*. In any event, it is contrary to the proper interpretation of chapters D, E and F in the regional coastal plan sections of the AUP. These chapters contain the operative provisions derived from the regional policy statement.

316 RMA, s 67(3)(c).

317 In coming to a different view of F2, the majority places key reliance on the activity table in F2.19.1 which it argues "contains the rub": above at [71]. But designating more than minor reclamation in SEA overlays as non-complying is not the same as permitting the overriding of avoidance policies. The avoidance policies in the NZCPS are environmental bottom lines that must be reflected in lower-order documents. In any event, there is not an inevitable correspondence between an activity occurring in a SEA and an activity breaching an avoidance policy. The majority rightly notes that a more than minor reclamation (allowed by F2.19.1) is also likely to be a reclamation with more than minor adverse effects. Even if this is correct, a more than minor reclamation will not necessarily be a reclamation which leads to the adverse effects prohibited by D9.3(9) or a reclamation rising to the threshold of having "significant" adverse effects, as contemplated by D9.3(10). A reclamation might, for example, not materially affect the values protected by D9.3(9) and have more than minor but less than significant adverse effects on the values protected by D9.3(10). In a situation like this, the adverse effects of the reclamation could be remedied or mitigated per D9.3(10) and it would not be prohibited by the avoidance policies. This means that to apply D9.3(9) and (10) as bottom lines is not inconsistent with F2.19.1. Nor would it make F2.19.1 powerless.

318 I note that E26 is not part of the regional coastal plan.

provide for the "development, operation, maintenance, repair, upgrade and removal of infrastructure" by recognising various considerations. These include "functional and operational needs"[319] and "location, route and design needs and constraints". Functional need[320] is distinct from "operational need" which is "the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints".[321]

[273] E26.2.2(4) requires the development, operation, maintenance, repair, upgrading and removal of infrastructure to "avoid, remedy or mitigate" adverse effects, including "values for which a site has been scheduled or incorporated in an overlay".[322] E26.2.2(5) directs that decision makers consider various matters when assessing the effects of infrastructure, including factors which pertain to the adverse effects and factors which pertain to the benefits of the infrastructure.

[274] E26.2.2(6) sets out a number of matters that must be considered where new infrastructure (like the EWL) or major upgrades to existing infrastructure are proposed

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319 The inclusion in the AUP of "operational need" as well as "functional need" was explained by the AUP Independent Hearings Panel in July 2016: Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topic 008 Coastal environment* (22 July 2016) at [3.1]–[3.2]. The Panel said that the NZCPS places "places a clear emphasis on providing for activities in the coastal marine area that have a functional need to locate there, and generally not providing for activities that do not": at [3.2]. The Panel, however, expressed concern "that some infrastructure, including roads, cables and pipelines, might have to be routed for considerable extra distances to go around inlets or harbours when they could more efficiently cross the coastal marine area": at [3.2]. It said that: "While these activities did not have a *functional* need to be in the coastal marine area, there may be very good *operational* and/or efficiency reasons why it would be appropriate to enable these activities to be in the coastal marine area": at [3.2] (emphasis added). It seems that the Panel thought its approach was supported by the National Policy Statement on Electricity Transmission, which provides that decision makers must consider constraints on environmental protection measures (including avoidance) imposed by the technical and operational requirements of the network: "National Policy Statement on Electricity Transmission" (13 March 2008) 58 *New Zealand Gazette* 1631, Policy 3. But the use of operational need as a justification for development in the AUP goes further than just providing for electricity transmission.

320 For a definition of functional need see above at [242].

321 National Planning Standards, above n 273, at 62. See also National Policy Statement for Indigenous Biodiversity, above n 273, cl 1.6(1). I comment that the NZCPS does not contemplate operational need as a matter-of-course justification for activity in the coastal marine area. Specifically, Policy 6(2)(d) of the NZCPS directs that decision makers "recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there". There may therefore be a disconnect between the AUP and the NZCPS in this regard, but this is not of any moment in this case given the conclusion below that E26 is subject to D9.

322 Since I find that E26 is subject to the avoidance policies in D9, I would interpret E26.2.2(4) as allowing adverse effects to be remedied or mitigated insofar as this renders harm less than material or significant (as the case may be).

within areas scheduled in the plan in relation to "natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character". This includes:

> (h) whether adverse effects on the identified values of the area or feature must be avoided pursuant to any national policy statement, national environmental standard, or regional policy statement.

[275] Although it is set out in a list of matters to "consider", I accept the submission of Royal Forest and Bird that the verb "must" in E26.2.2(6)(h) can and should be interpreted as recognising the directive character of the NZCPS avoidance policies and the provisions of the AUP, including D9, that apply them.

[276] In *Port Otago* this Court held that to recognise something is required is to accept that it is mandatory.[323] Analogously, to "consider" if adverse effects "must be avoided pursuant" to a statement, standard or plan implies that the relevant avoidance policy in the statement, standard or plan has mandatory effect. The thing a decision maker must "consider" is not whether or not it should choose to obey the avoidance policy. Rather, it is whether any avoidance policy applies and, therefore, "must" be obeyed.

[277] This means that E26.2.2(6)(h) would operate to require the avoidance of adverse effects or significant adverse effects (as the case may be) of infrastructure in the overlay areas. Any other interpretation would mean there was not the required consistency with the NZCPS.[324]

[278] That E26 must be read subject to chapter D is even clearer where infrastructure requires reclamation, as in the case of the EWL. I have already held that F2 is subject to overlay avoidance policies like those contained in D9. The combination of F2 and D9 will trump E26 because F2 and the overlay avoidance policies apply at a greater level of specificity: E26 deals generally with infrastructure but F2 comes into play

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323 *Port Otago*, above n 179, at [69].

324 It would also mean that the general provisions enabling infrastructure would override the directive nature of the specific provisions in D9 and mean they have no effect. This would not align with the general interpretation principles whereby specific provisions usually prevail over more general ones and the principle that, where provisions conflict, an attempt should be made to give as much meaning as possible to both provisions: Carter, above n 293, at 607–609.

when this infrastructure requires reclamation within an overlay. This combined operation of F2 and D9 is also largely consistent with the NZCPS. But in any event, consistency between E26 and the NZCPS is achieved by E26.2.2(6)(h) making E26 subject to D9.

[279] That E26 is subject to the avoidance policies and the overlays in D9 is reinforced by the existence of E15, E18 and E19, which are in the same chapter as E26 and which also apply Auckland-wide. They are protective of environmental values. Both E18 and E19 deal in large part with activities which occur adjacent to, or otherwise affect, values in scheduled areas. They thus reinforce the importance of the scheduled areas.

Errors in interpretation of reclamation provisions

[280] Turning first to reclamation, the Board gave an incorrect summary of F2.2.3 as merely requiring a decision maker to "consider" the relevant provisions of D9,[325] when in fact F2.2.3(2) requires effects to be managed in accordance with any overlays. In any event, the High Court was correct to hold that F2.1 means the whole of F2, including the reclamation policies, must be read as being subject to overlays. Contrary to the position taken by the Board, the High Court was correct when it held that there was nothing in F2 that purports to authorise a project on the scale of the EWL where that project is contrary to the policies in D9.[326]

[281] The Board also erred in its interpretation of F2.2.3(1) when it stated that F2.2.3(1)(b) was just one subclause among others, and that it was sufficient to reach a decision based on a cumulative assessment of the AUP as a whole.[327] As the Board itself acknowledges, F2.2.3(1) is worded inclusively: it is plainly a conjunctive test which governs when reclamations will be permissible. This interpretation also follows from the corresponding structure of NZCPS Policy 10(1). It was not open to the Board to hold that the question of practicable alternatives was just one consideration amongst others.[328] It was a necessary gateway, without which reclamation had to be avoided.

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325 Board decision, above n 173, at [629].
326 HC judgment, above n 174, at [48]
327 Board decision, above n 173, at [628].
328 See also the reasons of the majority above at [161]–[162].

[282] In any event, as I note above, to the extent possible F2.2.3 must be read consistently with the NZCPS and regional policy statement requirements that the activity requiring reclamation can only occur in or adjacent to the coastal marine area and that land outside the coastal marine area is not available for the proposed activity, and the requirement that there is "no practicable alternative" must be read accordingly.

[283] The Board considered that the AUP appropriately particularises the NZCPS, taking account of the particular circumstances in the region. It commented that the narrowness of the Auckland isthmus and the concentrated industrial area the EWL is designed to serve made the planning process akin to "threading a needle".[329] I do not agree with that reasoning. While these geographical factors are relevant to the application of any criteria for reclamation (for example whether an activity requiring reclamation can only occur in the coastal region), they cannot justify watering down the NZCPS reclamation test.[330]

A window for infrastructure?

[284] For the reasons discussed above, the Board erred in failing to find that E26 is subject to D9 and F2.[331] I note that some provisions in E26 may suggest a contrasting process of assessment which directs decision makers to undertake a fundamentally different kind of inquiry to the one envisaged by D9. But this contrasting process cannot displace D9. In addition, I note, as discussed above, that E26.2.2(6)(h) in any event operates to require the avoidance of adverse effects or significant adverse effects (as the case may be) in line with the NZCPS.[332]

[285] Despite being correct in its analysis of the relationship between chapter D and F2, the High Court considered that E26 is something of a code for infrastructure requiring a "careful and balanced look at the merits" of individual infrastructure proposals and that this provides a window for the approval of projects even if they do not meet F2 or D9.[333] For the reasons I have already explained, I consider that the

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329 Board decision, above n 173, at [223].
330 The majority makes a similar error: above at [84].
331 See above at [271]–[279].
332 See above at [275]–[277].
333 HC judgment, above n 174, at [66]–[68].

High Court erred when it effectively held that the enabling policies in E26 are able to override both D9 and F2. The High Court's analysis also ignores E26.2.2(6)(h).

[286] I therefore do not accept the submission of Waka Kotahi that the more general enabling provisions in E26 are able to override the more specific directive ones, albeit they are coloured by them. I do not consider that this approach would create only a "narrow window" for the avoidance provisions to be overridden. Getting through the alleged "narrow window" would only require there to be mitigation and offset measures and for the specific requirements of the enabling provisions to be met. As submitted by Royal Forest and Bird, any competently prepared application for resource consent should be able to achieve those requirements. I also accept the submission that every region has regionally significant projects and accommodating these by overriding the avoidance policies would mean the exception would risk becoming the rule.[334]

[287] At the risk of being trite, if Waka Kotahi's submission is accepted, the "narrow window" would be wide enough to allow in this case a four-lane highway to be driven through areas protected for their high environmental value and, what is more, a four-lane highway that has no functional need to be located in the coastal marine area and where alternative routes were available.[335]

[288] The High Court placed some reliance for its interpretation on chapter A. Chapter A provides no assistance. I accept that it refers to growth, development and protection, but this simply reflects the statutory definition of sustainable management. It does not prioritise growth and development over protection. As this Court held in *King Salmon*, protection of the environment is an element of sustainable management and protection of the environment through avoidance policies is a legitimate choice made by the NZCPS.[336] This choice must be, and is, reflected in the AUP.

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334 I accept that the exception found by the majority is narrower than the approach proposed by Waka Kotahi. It is, however, of uncertain scope as discussed further below.

335 See above at [250]; and below at [291].

336 See above at [196].

Summary of interpretation errors

[289] In summary with regard to the avoidance policies, I conclude that the Board and the High Court erred in law when they failed to hold that E26 and F2 are subject to D9. The Board, and to a lesser extent the High Court, failed to take into account the explicit provisions in the AUP making it clear that the avoidance policies prevail. That the NZCPS avoidance policies must be applied under E26 is made explicit by E26.2.2(6)(h). In the case of reclamation, chapter D will overarch the inquiry, given the effect of F2.2.3(2) and F2.1. The High Court was correct when it concluded that D9, F2 and E15 all stand together to require the application of the avoidance policies contained in D9.[337] The High Court erred in its reliance on chapter A to allow development contrary to the avoidance policies. There is no window, narrow or otherwise, that allows infrastructure to breach the environmental bottom lines set in both the NZCPS and the AUP.

Effect of interpretation errors

[290] These interpretive errors affected the Board's and the High Court's analyses under ss 104D, 104 and 171. A consequence was that the Board and the High Court did not undertake a proper factual assessment of whether the measures proposed by Waka Kotahi (including offsets) brought the harm down to levels that met the avoidance policies, as discussed further below.

[291] With regard to the proposed reclamations more generally, including outside overlay areas, the Board and High Court erred when they did not interpret the "no practicable alternative" requirement in accordance with the other relevant criteria for reclamation in NZCPS Policy 10(1): that the activity can only occur in the coastal marine area and that land outside the coastal marine area is not available. The Board also erred when it said that the "no practicable alternative" requirement was just one requirement amongst others and that it could be considered as part of a cumulative assessment rather than needing to be directly and separately applied.[338]

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337 HC judgment, above n 174, at [48]–[53].
338 Above at [281].

[292] On the basis of the Board's findings, the requirements for reclamation in NZCPS Policy 10(1) appear not to have been met. The Board accepted that there was no functional need for the EWL to be located in the coastal marine area but only an operational need.[339] It also accepted that the selected "route is there by choice, not functional necessity".[340] This means therefore that the EWL does not meet the NZCPS and regional policy statement criterion of an activity only being able to occur in or adjacent to the coastal marine area. Nor does it meet the requirement of land outside the coastal marine area not being available.[341]

[293] I do accept that the reclamation was accompanied by environmental protection measures that would not have occurred absent the project.[342] While some of these measures might be available offsets to meet the avoidance policies,[343] they would not turn what is at most an operational need for the EWL into a functional need. The protective measures would also not meet the requirement that the project could only be situated in the coastal marine area and certainly could not have any bearing on the requirement that land outside the coastal area not be available.

Assessment of the EWL

[294] I now examine how the Board and the High Court assessed the EWL in light of the avoidance policies in the NZCPS and the AUP.

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339 Board Decision, above n 173, at [700].

340 At [699]. The Board said that Waka Kotahi had selected its preferred route after a detailed consideration of the pros and cons of different options: at [699] and [1321]. According to the Board, the chosen route provides the most enduring transport benefits: at [254], [627(b)] and [1359]. The Board also noted at [627(b)] that "[i]f unencumbered by topography or development, it is intuitive that there will be a practical alternative landward route suitable for the provision of a road". It went on to say, however, that possible landward routes are "fully developed with industrial, commercial and residential land uses".

341 The "no practicable alternative" requirement in F2.2.3 must be read as including these requirements. The majority seems to transfer the elements of Policy 10 into its exception (see the summary above at [118]) and conclude that this justifies overriding the avoidance policies. This is problematic first because Policy 10 (and F2.2.3 in the AUP) only applies to reclamations and secondly because the conditions in Policy 10 do not empower development in contravention of avoidance policies (they are *necessary but not sufficient*). For the latter point see above at [243] and [247]. Policy 10, properly interpreted, is in any event subject to the avoidance policies, and F2.2.3 is explicitly made subject to the overlays in chapter D: above at [247] and [267].

342 See above at [192] and [227]–[232]; and below at [311]–[315].

343 As discussed later, see below at [314].

The decisions below

[295] The Board said that it was clear from *King Salmon* that the directive policies in the NZCPS are entitled to "very significant weight" (and that it had given them such weight).[344] However, it said that s 104 only required the Board to have regard (or "particular regard" in the context of s 171) to the NZCPS, rather than requiring it to give effect to the NZCPS.[345] There were other factors to consider and the Board was required to make "a *balanced judgment* taking account of all such factors".[346] The Board considered that, despite "aspects of inconsistency", the proposed EWL "achieves a level of consistency with the planning framework *commensurate with the overall benefits of the Proposal*".[347] The Board's overall conclusion was expressed in terms of the proposal's compliance with Part 2 but with no specific mention of the avoidance policies.[348]

[296] As noted above, Waka Kotahi proposes a package of ecological mitigation and offsets to address all ecological effects of the EWL. The approach was described by the Board as follows:[349]

> The approach taken was to assess a bucket of effects across the areas of ecology and develop a bucket of mitigation and offset, as it is not possible to propose like-for-like mitigation for effects such as permanent loss of marine habitat.

[297] The Board noted that there was agreement by experts that the "integrated ecosystem approach to effects, mitigation and offset is appropriate".[350] The experts were also agreed that the mitigation and offsets proposed were finely balanced and contingent on successful implementation of all measures.[351] In general, the Board approved of that approach provided the scale of effects was acceptable. It considered that "an outcome that at least balances the ecological effects through mitigation and

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344 Board decision, above n 173, at [175].
345 At [175].
346 At [175] (emphasis added). It spoke in similar terms about the avoidance policies contained in the AUP: at [694] (emphasis added). As noted earlier, the Board was of the view that the AUP appropriately reflected the NZCPS.
347 At [731] (emphasis added). The Board, at [1301], made a similar point in relation to s 171.
348 At [1396]–[1397].
349 At [578] quoting evidence given by Dr Sharon Betty De Luca, a senior ecologist at Boffa Miskell Ltd specialising in marine ecology who was called as an expert witness by Waka Kotahi.
350 At [581(a)].
351 At [581(b)].

offset benefits is an appropriate requirement".[352] This had been achieved "through the deletion of the sub-tidal dredging, modification or deletion of headlands, and implementation of the additional ecological mitigation and offsets proposed".[353]

[298] The Board accepted that there would be "direct adverse effects on rare and threatened species" but that these would not "compromise the viability of those populations or ecosystem types".[354]

[299] In terms of avifauna the Board acknowledged that "because the direct impact of the reclamation is permanent and cannot be avoided, offsets are the primary means of addressing effects on shorebirds".[355] The offsets highlighted by the Board included the enhancement of South Island breeding sites for bird species affected by the EWL, the restoration of saltmarsh and lava shrubland ecosystems and the restoration of Ngā Rango e Rua o Tainui Island as a roosting site,[356] as well as "research into recolonisation of inter-tidal soft and hard food sources for foraging birds".[357] The Board was satisfied that "the potential impacts that the Proposal will have on shore birds can be adequately mitigated and offset, with some modification of the design and construction methodology".[358] These changes would make the mitigation and offset package less finely balanced.

[300] Regarding Anns Creek East, the Board noted the evidence that the viaduct had been designed to be located in the more modified northern edges of the creek and that the location of piers would be designed to avoid sensitive areas of lava shrubland. The Board found that the road alignment across Anns Creek East had, "to the extent practicable, avoided the rare and threatened ecosystems".[359] The same evidence noted that there would be significant effects during construction of the viaducts and ongoing

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352 At [614].
353 At [614].
354 At [614].
355 At [584].
356 At [584] and [592].
357 At [600]. The Board was satisfied that appropriate modification had been made to the avifauna research conditions to require Waka Kotahi to deliver the research outcomes and that, even if recolonisation was not successful, contribution to the body of scientific knowledge is a satisfactory offset benefit of the research: at [601] and [606].
358 At [605].
359 At [706].

operational effects, including shading, rain shadowing and invasion of weeds.[360] The Board was, however, satisfied that the effects of the construction activity and the shading caused by the viaducts that had not been avoided would be adequately mitigated or offset.[361]

[301] The High Court did not deal specifically with many of the issues above but it did uphold the Board's decision.

Errors in the Board's approach

[302] First, the Board erred by not treating the avoidance policies as binding in accordance with *King Salmon.* As discussed above, *King Salmon* applies to resource consents and sets environmental bottom lines.

[303] Secondly, the Board erred when it said that the EWL was consistent with the planning framework to an extent that was "commensurate with the overall benefits of the Proposal".[362] This remark is important, as it highlights the Board's view that the more benefits the EWL delivered, the more it could be allowed to be inconsistent with the planning framework. This is not the correct approach. A greater level of non-environmental benefit (for example, benefits to infrastructure) will not override breaches of avoidance policies. If this were the case, the status of avoidance policies as environmental bottom lines would be eroded.

[304] A corollary of the above error is that the Board relied on the benefits of the proposal, and Part 2 generally, to water down the choices made in the NZCPS and AUP requiring the avoidance of adverse effects (either under qualified or unqualified avoidance policies). To rely on Part 2 to subvert avoidance policies contained in planning documents is to violate Part 2 itself by ignoring the fact that environmental protection through directive avoidance policies is an aspect of sustainable management and therefore a legitimate choice in planning documents.[363]

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360 At [592].
361 At [611].
362 At [731]; and see above at [252] and [295].
363 *RJ Davidson*, above n 180, at [71]; and see above at [224].

[305] The Board appears to have taken an overall judgment approach. This is clear from the Board's references to the need to *balance* various considerations in its reasoning, as highlighted above.[364] *King Salmon* held that the overall judgment approach is no longer valid where there are directive avoidance policies.[365] The Board did say that it accorded particular weight to the avoidance policies.[366] However, this too is not the proper approach. In the context of the AUP the directive avoidance policies operate as environmental bottom lines. They are therefore not policies merely to be accorded significant weight and balanced against the benefits of the project generally.

[306] The Board's erroneous view of its role and the law led to its third error. Its task was to assess whether the requisite avoidance policies, construed in light of the values they are designed to protect, could be complied with. In the case of the protected areas this meant assessing whether the adverse effects on the values protected were less than material or less than significant (as the case may be) because of the proposed mitigation or other relevant measures (such as offsets discussed below). It did not do this, largely because of the bucket approach taken, to which I now turn.[367]

Bucket approach

[307] Waka Kotahi confirmed at the hearing that the integrated bucket approach taken by the Board did not just include the values at issue in this appeal but all the other ecological issues that are not at issue in the appeal. This meant in the metaphorical "bucket" there was consideration of mitigation and offsets relating to, for example, lizards, freshwater issues and relating to coastal issues more generally.[368]

[308] This is important. If, within the bucket, harms to a bird species are balanced, for example, against measures of general benefit to the environment (but which do

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364 See above at [252], [295] and [297].
365 See above at [195]–[205] and [213]–[226].
366 Board decision, above n 173, at [662].
367 The Board also assessed negative and positive effects on an aggregate population-level basis. This caused it to err in its assessment of the necessary threshold for adverse effects on avifauna, which I discuss below in the context of Waka Kotahi's notice to support the decision on other grounds: see below at [317].
368 Counsel for Waka Kotahi said, in answer to a question at the hearing, that this did not mean, however, that lizards were traded off against birds, but did not explain why.

nothing to help that bird species), then the latter, while providing environmental benefits of another kind, cannot operate to bring harm down to less than material or significant in line with the avoidance policies.[369] It was not open to the Board to engage in a trade-off of this kind to the extent it balanced breaches of the avoidance policies against benefits to other environmental values.[370]

[309] I also comment that, depending on the ecological effects included in the bucket, the bucket approach could operate to obscure the significance of environmental effects and therefore lead to discounting them, even where avoidance policies are not at issue. Environmental values are not necessarily commensurable with each other. Assessing them in the round could lead decision makers to treat harm to important environmental values as having been effectively compensated for by benefits to less important values.

[310] I am not to be taken as suggesting that an integrated approach to the assessment of environmental benefits and harms is unnecessary or inappropriate. Underlying any integrated approach, however, there must be transparency in terms of identifying all environmental values at issue, assessing the extent to which they are affected (taking account of any mitigation, remediation or offset measures) and also assessing the importance of each environmental value affected.[371] Where avoidance policies are at issue, it must be clear that these have not been breached. Otherwise, any balancing will breach the environmental bottom lines set by the avoidance policies. At the risk of labouring the point, such transparency was lacking in the assessment undertaken by the Board in this case. In particular, the Board did not assess whether the proposed offset measures brought the harm down to less than material or significant (as the case may be).

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369 See above at [229].

370 There is some indication in the Board decision that it may have been doing this. In its decision, above n 173, at [578], the Board quotes an example of the bucket approach given by Dr De Luca. The example given is that, although permanent loss of marine habitat will occur due to the project, measures will be undertaken to enhance freshwater ecological values. This was to be done even though impacts on freshwater ecological values were not particularly significant. In this example, it seems that two different kinds of ecosystem (freshwater and saltwater) are being traded off against each other.

371 I accept that the different effects of the EWL on various ecological values were worked through in the evidence, but I must limit the analysis to the approach taken by the Board in explaining its decision.

Offsets in this case

[311] Failure to avoid adverse effects in contravention of avoidance policies will be an error of law. This is because the NZCPS sets those policies as environmental bottom lines. It is appropriate therefore to make some comments on whether the offsets proposed by Waka Kotahi were capable in law of meeting the avoidance policies, meaning bringing harm down to less than material or significant (as the case may be). Whether they in fact did so, properly assessed, I accept is a question of fact.[372]

[312] In the case of avoidance policies that apply to indigenous flora and fauna, like those in NZCPS Policy 11 and chapter D of the AUP, it seems clear that these policies are intended to protect particularly vulnerable values or populations at the point of impact of the harm. As such, for the benefits from offsets to bring the harm down to a less than material level, I consider that they must apply to the particular local values or populations at the point of impact, rather than the values or populations more generally.

[313] Because of the bucket approach taken and the Board's broader reliance on the overall judgment approach, the Board did not analyse the extent to which particular offsets met the avoidance policies. This means that I can make no definitive finding on whether the proposed offsets at issue meant that the avoidance policies were met.

[314] I accept, however, that some of the offsets proposed by Waka Kotahi might be capable of operating to bring harm down to less than material or significant, provided there was the proper level of caution applied to the assessment. These include the restoration of saltmarsh and lava shrubland ecosystems and restoration of Ngā Rango e Rua o Tainui Island as a roosting site. The enhancement of South Island breeding

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[372] See the reasons of the majority above at [176]. I note that the majority states that "[t]he relevant question is not how to define an offset or what kinds of offsets can satisfy avoid policies": above at [176]. While I agree that a fact-centred approach is necessary, some consideration of whether a given offset measure is available at law to meet an avoidance policy is totally unavoidable, as I discuss above at [229]. To give an obvious example, if a given avoidance policy (properly constructed) was intended to protect birds, then offsets which only benefitted lizards could not (as a matter of law) satisfy that avoidance policy. Similarly, if a given offset delivers some benefit to an ecological value protected by an avoidance policy but cannot bring the harm down to less than material or significant (as the case may be), it cannot meet the avoidance policies.

sites may be capable of meeting the avoidance policies, in light of Waka Kotahi's submission that it would have a direct effect on the birds in the relevant area covered by the EWL.

[315] On the other hand, the research into the recolonisation of food sources for foraging birds could have no direct and tangible effect on the values protected by the avoidance policies. Even if the research showed that "successful mitigation could be achieved on the ground",[373] further measures would be needed to apply the results of the research. This is not to discount the benefits of research, or to suggest that it was not relevant to the ss 104/171 analysis. The research just could not be taken into account in any assessment of whether the avoidance policies had been met, as it was not capable of bringing down harm to the requisite levels.

Notice to support the decision on other grounds

[316] In its notice to support the decision on other grounds, Waka Kotahi submits that the High Court erred when it concluded that there was an inconsistency in the Board's reasoning concerning the impact on avifauna.

[317] The Board accepted that the coastal works would mean "there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such effects must be considered significant."[374] The Board said, however, that the works would not impact on the overall population of those species or their presence in the Māngere Inlet or adjacent coastal areas. The birds would opportunistically feed elsewhere.[375] Provided there was adequate mitigation and offsets, the effects of the reclamation and coastal structures were acceptable in light of the benefits of the EWL.[376]

[318] The High Court considered that such a finding could not be sustained in light of the Board's finding that there would be a permanent loss of feeding and roosting areas and that these effects were significant.[377] But the High Court considered that

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373 Board decision, above n 173, at [606].
374 At [471].
375 At [645].
376 At [471].
377 At [471].

this error was not material, given that the "ultimate issue" was whether the EWL was "contrary to the objectives and policies of the AUP" (taken as a whole) rather than whether there were failures to comply with particular provisions in D9.[378]

[319] I do not accept Waka Kotahi's submission that the High Court erred when it concluded that the Board's findings on avifauna are inconsistent. The fact that birds may "opportunistically" feed elsewhere and that there would be no effect at the population level (whether local or otherwise) does not alter the fact that there would be a loss of feeding grounds that the AUP had considered merited protection.

[320] If area A is a habitat of local population B, it is hard to see how a significant impact on A would not have at least a more than minor impact on B. This seems to follow from the nature of a habitat as a location serving the needs of a local population. The only way to counter this proposition is to hold, as the Board did, that there will not be a significant impact because population B will opportunistically feed elsewhere.[379] But permanent habitat loss necessitating opportunistic feeding is a more than minor impact on a local population: the local birdlife has been forced to alter its feeding pattern in a material way.[380]

[321] I also note that D9.1 refers to loss of biodiversity *and* habitats. This indicates that the protection of habitats is important in itself in the context of the AUP. Further, the protection of habitats of fauna is listed as a matter of national importance under s 6(c) of the RMA. Also, to the extent that any opportunistic feeding would take place outside of the birds' current feeding grounds, this may not be subject to overlay protections. Whatever new feeding areas the birds might acquire could potentially be removed by a development which is allowed under the AUP. Fundamentally, it cannot

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378 HC judgment, above n 174, at [43]. See the discussion of the errors in this approach to the avoidance policies above at [285]–[288] and the errors made by the Board as a result of this approach: see above at [302]–[306].

379 William Young J considers that the fact "the birds will feed and roost elsewhere in the vicinity" is a plausible reason to find that negative effects on habitat will not themselves equate to adverse effects on bird species or local populations: below at [402]. But the majority has sympathy with the view of Powell J, finding it would be difficult to find that effects were not more than minor unless feeding and roosting areas outside the overlay were in such plentiful supply as to render any adverse effects minor or transitory only: above at [167].

380 I see the approach of William Young J as undercutting the precautionary principles identified in Policy 3 of the NZCPS. It would also more generally inhibit efforts to tackle the range of issues facing the coastal marine area identified in the NZCPS preamble.

be that the ability to feed in non-protected areas is sufficient reason for allowing development in protected areas. This undercuts the very reason that overlay areas exist.[381]

[322] I accept the submission of Royal Forest and Bird that the error I discuss above was material to the Board's decision, contrary to the finding of the High Court.[382] This is because the conclusion on avifauna was a material factor in the Board's overall finding that the EWL was not contrary to the AUP.

Comments on the reasons of the majority and William Young J

[323] In this section I offer some comments on the reasons of the majority and William Young J. I first summarise the potential exception to the avoidance policies found to exist by the majority and the wider exception proposed by William Young J. I then assess the extent to which these exceptions are inconsistent with prior caselaw and in particular with *King Salmon* and *Port Otago,* before critiquing the reasons the majority puts forward for its exception. After that, I deal with issues relating to the scope of the exceptions and the lack of certainty, and finally discuss the majority's reasons for allowing the appeal.

The exceptions found by the majority and William Young J

[324] The majority and William Young J hold that the avoidance policies do not create environmental bottom lines. Rather, as the majority puts it, "wriggle room is built into the policy layers of the system".[383]

[325] In summary, the majority finds that significant infrastructure requiring reclamation may be located in a SEA if:[384]

> (a) it is a necessary—and not just a desirable—solution by reference to functional or operational need, the regional or national benefit

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381 See also the reasons of the majority above at [166]–[167].

382 Given this conclusion, I do not need to comment on the other points raised in Waka Kotahi's notice to support on other grounds which are in any event effectively covered in my discussion related to the interpretation of the NZCPS and the AUP above.

383 Above at [99].

384 Above at [118] (footnote omitted). In laying out these requirements the majority draws on various criteria which occur across the AUP and, in particular, with regard to reclamation. The majority's view seems to be that there is an underlying agreement across the AUP on a narrow pathway for

obtained, and the absence of any practicable alternative locations or solutions;

(b) adverse effects that cannot be avoided have been remedied or mitigated to a standard that corresponds with the significance of the environment, ecosystem and/or species that ought to have been protected to an avoid standard; and

(c) the benefits of the solution plainly justify the environmental cost of granting consent.

[326] The majority explains that the proposal must "provid[e] for environmental offset and compensation packages that both minimise and make up for the damage the proposal will do in the SEA".[385] In addition, "the consent authority will still need to be satisfied that any remaining harm is justified".[386] Policy 11 of the NZCPS will, it says, continue to have a "powerful shaping effect" on lower-order documents.[387] The majority emphasises that it will "be very difficult, but not impossible" for a proposal to fit within this exception.[388]

[327] William Young J also finds that there is flexibility in the avoidance policies.[389] In his view, this follows from their function, the fact that they do not require activities to be prohibited (as against non-complying) and the differences in statutory wording in ss 104D, 104 and 171[390] compared to the plan change provisions at issue in *King Salmon*. His is a much more open-ended flexibility compared to the pathway laid out by the majority.

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major infrastructure. While certain phrases do occur across the AUP, these are each in their own context. They cannot be extracted and generalised into one cumulative exception and must be understood in light of the fact that, on a proper interpretation of the AUP, the infrastructure provisions in E26 and the reclamation provisions in F2 are all subject to chapter D. There is no unitary pathway in the AUP for major infrastructure.

385 Above at [119].

386 Above at [119].

387 Above at [110]. This point is similar to Waka Kotahi's submission (discussed above at [216] and [225]) that avoidance policies ought to be treated only as "strong policy directives", which as I have noted would involve overruling *King Salmon*. See in particular the comments of this Court in *King Salmon*, above n 178, rejecting the view that the NZCPS merely provided guidance or set out relevant considerations of different weight: at [128]. Neither the majority nor William Young J put forward any plausible reason to override such a recent decision of this Court.

388 Above at [91]. See also, for example, above at [111], [143]–[144] and [168].

389 Below at [380]–[395].

390 For my discussion on the differences in statutory wording see above at [219]–[222]; and see also the reasons of the majority above at [108]. I do not accept the majority's description at [121] of their exception as merely "further refinement". *King Salmon* held that the avoidance policies in the NZCPS can and should "control the outcome" as environmental bottom lines. It did not contemplate any "area between these extremes". To add such an exception is contrary to *King Salmon.*

Inconsistency with prior caselaw

[328] The approaches of the majority and William Young J are contrary to *King Salmon* for all of the reasons I set out above when assessing Waka Kotahi's submissions on this issue.[391] To summarise, they fail to recognise the NZCPS avoidance policies as environmental bottom lines (as they were held to be in *King Salmon*).[392] There would be little point in the elaborate planning process if the environmental bottom lines set in higher-order documents could be effectively set aside at resource consent level, whether with difficulty or not.[393]

[329] *King Salmon* already outlines a number of exceptions and qualifications.[394] If there were a freestanding exception of the kind the majority contemplates then one would have expected it to have been included in *King Salmon*, and it was not. It is unsurprising that the majority's proposed exception was not one of the exceptions or qualifications outlined in *King Salmon*.[395] This is because it would undermine the environmental bottom line approach taken in the NZCPS and upheld in *King Salmon*.[396]

[330] The exceptions found by the majority and by William Young J are also contrary to *Port Otago*: not just contrary to the particular approach in *Port Otago*, but to the entire rationale that underpinned the decision. While the general nature and importance of ports was considered in *Port Otago* and was highly important,[397] this consideration occurred in conjunction with a careful focus on the issue of whether the

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391 Above at [213]–[226].

392 Above at [198], [218] and [303].

393 Above at [200] and [215]. The majority attempts to distinguish *King Salmon* by referencing the fact that the plan change in that case was more wide-ranging than the consents and notices of requirement sought in this case (above at [84]) and by pointing to the unique circumstances of Auckland (above at [87]). The decision in *King Salmon* did not turn on either of these contextual factors. Neither the precise magnitude of the plan changes, nor the particular geographical features of the Marlborough Sounds had any relevance to the general principles *King Salmon* set out. Such contextual features can only affect the *application* of these principles. With particular regard to the unique context of Auckland, neither the fact that it is undergoing population growth nor the fact that a large percentage of its coastline is covered in SEAs can affect the application of *King Salmon*. The mere fact that a city is large (or growing) does not diminish the need for environmental protection. In fact, if anything it increases the need to preserve the environment.

394 Above at [204].

395 *King Salmon*, above n 178, at [88] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and see above at [204].

396 The same comment applies even more strongly to the more open-ended exception William Young J proposes.

397 *Port Otago*, above n 179, at [70]; and see above at [249].

verb "requires" in the ports policy was directive[398] and a structured analysis to resolve any conflict.[399]

[331] There would simply have been no need for the structured and careful process in *Port Otago* if it had been possible to apply a freestanding exception of the type that the majority suggests or if avoidance policies had the flexibility which William Young J suggests. This Court could simply have derived a general exception from the overarching importance of ports. But this Court did not do so. Instead, it set out a careful approach of first finding a conflict and then embarking on a structured analysis which gave full weight both to the needs of the port and to environmental factors, with no assumption one would prevail over the other.

[332] Deriving a general exception not tied to a conflict[400] subverts the foundation of *Port Otago* and effectively allows that structured analysis, so central to the *Port Otago* decision, to be sidestepped. At the least, it creates a parallel system of analysis, with no clear guidance on when each would apply (as discussed further below).

[333] In this case there is no conflict between the infrastructure and avoidance policies as discussed above. The infrastructure provisions in the NZCPS are not worded in a directive manner.[401]

[334] I comment further that "infrastructure" (even important infrastructure) is a far larger and more nebulous concept than "ports". Ports, by their nature, have a functional need to be located in the coastal marine area. Infrastructure as a category has no such need (though individual infrastructure projects may). In this regard, I do recognise above the possibility that *Port Otago* might envisage a conflict arising on the facts even where policies are not worded in a directive fashion. If there were such an exception, it would obviate the need for any freestanding exception of the type the

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398 At [69]; and see above at [246].
399 At [78]–[82]; and above at [209]–[211].
400 The majority makes it clear that their exception is not tied to a conflict between the avoidance and infrastructure policies: above at [122]–[123].
401 Above at [246]–[248].

majority recognises. Such a conflict on the facts does not, however, arise here, given there is no functional need for the EWL to be located in the coastal marine area.[402]

[335] In summary, the exceptions of the majority and William Young J (in spite of their differences in approach) overrule *King Salmon*, *Port Otago* and *RJ Davidson* to a greater or lesser degree. They undermine the environmental bottom line approach enshrined in the NZCPS, as upheld in *King Salmon* and applied in *RJ Davidson*, as well as the careful approach to the identification and resolution of conflicts in *Port Otago*. Neither the majority nor William Young J gives any reason justifying overruling these very recent decisions and, in any event, there is no plausible reason that could be given for doing so. Their exceptions effectively purport to overrule the legitimate choice of environmental protection made in the NZCPS.[403]

The majority's reasons for finding a freestanding exception

[336] The majority justifies its exception by saying that there is still room in Policy 11 for "deserving exceptions that do not subvert the policy's purpose".[404] In this regard, the majority refers to the remarks of Lord Reid in *British Oxygen Co Ltd v Minister of Technology* (*British Oxygen*).[405] The majority says that, unlike some of the other policies in the NZCPS, Policy 11 is set at a "high level of generality" and is "not intended to produce perverse outcomes". It must therefore leave room for exceptions to ensure it works in the "innumerable places and circumstances to which it must be applied, and without producing outcomes plainly at odds with Part 2" and to ensure policies are applied in accordance with the purpose of the RMA.[406] Allowing an exception can "protect the integrity" of the policy from "anomalous or unintended outcomes".[407] Therefore, the majority says, large-scale infrastructure is not, by definition, inevitably prohibited by or contrary to the objectives and policies

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402 Above at [246]–[250]. Any possible contention that *Port Otago* does not apply to resource consents is simply wrong: see above at [209] in particular.

403 See above at [196], [198] and [201]. In particular, I cannot see how applying the avoidance policies in their own terms as environmental bottom lines (a legitimate choice under the RMA) could ever be "plainly inconsistent with the purpose of the RMA" whatever the merits of the proposal that would breach those environmental bottom lines: see above at [101].

404 Above at [99].

405 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL) at 625.

406 See the reasons of the majority above at [105].

407 Above at [109].

of the AUP or NZCPS.[408] The majority derives the terms of the exception in this case from the provisions of the AUP and says that, if a proposal satisfies the requirements of this "exceptions pathway" in the AUP, it will be a "genuine exception to NZCPS Policy 11 which does not subvert its objectives".[409]

[337] I comment first on the majority's assertion that Policy 11 allows for exceptions that do not subvert its purpose. This is hard to follow, given that the purpose of Policy 11 is to set environmental bottom lines. An exception allowing those environmental bottom lines to be breached must by definition subvert that purpose. Preventing harm to the specific species to which Policy 11 refers can therefore never be "anomalous", "unintended" or "perverse".[410] It is *exactly* what Policy 11 is designed to do.[411] Environmental protection through avoidance polices also accords with Part 2 of the RMA, as *King Salmon* makes clear.[412] I also comment that what is a perverse, anomalous or unintended outcome to one person may seem totally sensible to another person.[413]

[338] It is also not correct that Policy 11 operates "at a high level of generality".[414] Policy 11(a) does apply a high level of protection, but to particular defined classes of highly vulnerable flora and fauna. For example, Policy 11(a)(i) and (ii) refer not just to indigenous or rare taxa in the abstract but to taxa which are specifically listed as threatened according to extrinsic criteria, and (vi) similarly refers to areas that are protected under legislation.[415]

[339] The majority's exception for significant infrastructure is not derived from the wording of Policy 11. Nor is it derived from the wording of the infrastructure policies

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408 Above at [113].
409 Above at [118]–[119].
410 Above at [105], [109] and [122].
411 Contrast the reasons of the majority above at [105] and [110].
412 See above at [196]–[198].
413 See for example the comments of Arnold J in the analogous context of contractual interpretation and commercial absurdity, where he cautioned that "absurdity tends to lie in the eye of the beholder": *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [90] per McGrath, Glazebrook and Arnold JJ.
414 See the reasons of the majority above at [105].
415 Note also that Policy 11(a)(iv) refers to species that are at the limit of their natural range and (v) refers to "nationally significant examples" of indigenous community types. Policy 11(b) is certainly more general, but is limited by the "avoid *significant* effects" threshold (emphasis added).

in the NZCPS or indeed the AUP properly construed.[416] This is despite the fact that *King Salmon* stresses the importance of analysing the wording in the NZCPS and by extension any lower-order planning documents which must give effect to it.[417] As noted above, the majority's exception was not an exception contemplated in *King Salmon.*[418]

[340] It is also unclear how an exception for "significant infrastructure"[419] in particular can be within the contemplation of Policy 11. Significant infrastructure, while it may deliver more in the way of non-environmental benefits and may be a public good, is by its nature more destructive of the environment than small-scale infrastructure and therefore creates much greater risk of major breaches of the environmental bottom lines protected by Policy 11.

[341] The reasoning of the majority rests to an extent on the proposition that all policies must have exceptions in terms of the remarks of Lord Reid in *British Oxygen*. That case related to a policy which had "evolved"[420] in the practice of a decision maker with wide discretionary authority.[421] By contrast, NZCPS Policy 11 is a directive policy set down in a document authorised by statute and one to which lower-order planning documents must give effect. It was subject to extensive public consultation[422] and sets environmental bottom lines. Appeal to *British Oxygen* or a

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416 Above at [244]–[248] and [261]–[279].

417 *King Salmon*, above n 178, at [126]–[129] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and above at [203]. The majority says that *King Salmon* focused on the prohibition of "inappropriate" development: above at [75]. The majority also states that "inappropriate" did the work of reconciling the relevant policies at issue in *King Salmon*: above at [77]. But the Court in *King Salmon* explicitly held that "inappropriate" in the context of the relevant avoidance policies means avoiding the relevant adverse effects: *King Salmon*, above n 178, at [102], and see also at [126] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

418 Indeed, it is quite contrary to the recognition in *King Salmon* of environmental protection being an integral part of sustainable management and with the decision's recognition of environmental bottom lines as being consistent with Part 2.

419 See the reasons of the majority above at [118].

420 At 625.

421 The relevant policy in *British Oxygen* concerned monetary grants for industrial items: above n 405, at 621. Lord Reid found that the relevant discretion not to give a grant was unqualified: at 624. The relevant passage states that an authority may adopt a policy restricting its own discretion but must not refuse to listen to considerations or arguments which might persuade it to change its policy: at 625.

422 In accordance with ss 46A, 47–51 and 57(1) of the RMA. I refer to the comments on the importance of consultation in *King Salmon* above n 178, at [15] and [32]. See also the discussion of the important role of the Minister of Conservation: at [13], [31] and [78]–[79].

general proposition that all policies (even those akin to rules)[423] must have exceptions cannot justify departure from *King Salmon* and the clear terms of Policy 11.[424]

Lack of certainty and guidance

[342] As noted above, the majority's exception is said to apply to projects requiring reclamation in a SEA.[425] The requirements for the exception are derived from the majority's interpretation of the provisions of the AUP (in particular the reclamation provisions), the view that infrastructure is a public good and the particular circumstances applying to Auckland.[426]

[343] This means that there is little guidance as to how an exception might operate in other regions and other contexts, apart from that any exception will be difficult to make out and is a high bar.[427] This is an issue not just at resource consent level[428] but also at the planning level, given the fact that the exception found by the majority in this case arises from the AUP (which, as noted above, must give effect to the

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423 See above at [218]. The majority also cites (above at [100], n 90) two examples of cases which they regard as presenting an "analogous context" to this one: *Hawke's Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106, [2017] 1 NZLR 1041 at [131] per Elias CJ; and *Talley's Fisheries Ltd v Minister of Immigration* HC Wellington CP201/93, 10 October 1995 at 13–16. They are not analogous for the reasons set out by the majority at [100], n 90.

424 *Wentworth Securities Ltd v Jones* [1980] AC 74 (HL) at 105 contains the classic statement of when courts can read qualifications into a statute. According to Lord Diplock, the purpose of the Act needs able to be precisely determined; it must be apparent that the drafters of the Act inadvertently overlooked the eventuality that the qualification seeks to address; and it must be possible to state "with certainty" that the additional qualifying words would have been inserted by the drafters and approved by Parliament had it considered this eventuality. See also Carter, above n 293, at 418–419. Applying Lord Diplock's criteria, by analogy, to policy statements like the NZCPS further demonstrates that an "exception" should not be read into the policy wording in the present case. Lord Diplock's criteria clearly have not been met. The policy makers cannot be said to have inadvertently overlooked, and thus failed to address, a situation where a significant infrastructure proposal impacts the flora and fauna protected in the avoidance policies. This has been explicitly addressed through the clear wording of the infrastructure and avoidance policies in the NZCPS itself. Nor can it be said with any certainty that the policy makers would have inserted and approved of the majority's qualification. To the contrary, the wording of the avoidance policies suggests the opposite.

425 Above at [118].

426 See the reasons of the majority above at [85]–[91].

427 See above at [91], [111] and [122].

428 It would seem that on the approach of William Young J, the lower-order planning documents must still give effect to the avoidance policies in the NZCPS by either prohibiting activities that breach them or by classifying such activities as non-complying. The flexibility then arises at the resource consent level.

NZCPS).[429] This undermines the certainty *King Salmon* considered important.[430] Another uncertainty is how the approach in this case will come to affect and undermine the approach to the application of other policies in the NZCPS (for example, the relationship between the avoidance policies and the ports policy at issue in *Port Otago*).

[344] It is unclear too how the majority's exception would apply in situations in Auckland which do not involve reclamation. It is of course the case that the majority does not draw *only* on the reclamation provisions in the AUP, but these provisions loom large in the majority's pathway. As such, what the majority's pathway would look like absent reclamation is unclear. Even in this project, not all of the reclamation area is in a significant ecological area and I understand that no reclamation is in the most vulnerable SEA-M1, although part is in SEA-M2. There are further environmental harms (for example, caused by activities in Anns Creek) which will not involve reclamation at all but will breach avoidance policies.[431]

Reasons for the majority allowing the appeal

[345] The majority would allow the appeal partially on the basis that the Board took an overall judgment approach, which *King Salmon* rejected.[432] While I agree that the Board did this, as soon as an exception is allowed to an environmental bottom line, it must be open for a decision maker to consider (as the Board obviously did) that a project is important enough for the avoidance policies to be overridden, provided that there is an adequate package of mitigation and offset measures proposed. Any failure to give appropriate weight to any particular factor in such an analysis would usually be an error of fact and not law.[433]

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429 At the risk of labouring the point, it is uncertain when lower-order documents may add an exception and the scope of any possible exception, and it is therefore uncertain whether or not any added exception would breach the obligation to give effect to the NZCPS.

430 *King Salmon*, above n 178, at [137] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and see above at [202].

431 These distinctions may not be significant in the present case as the EWL has been assessed as a whole. However, this may not always be the case in regard to other projects.

432 Above at [144]–[148].

433 There may be an exception where the notion of weight is built into the test itself, and where it is clear that the appropriate weight has not been given to that factor that may amount to an error of law. Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 1016 says that the "weight to be given to mandatory considerations is a matter for the decision-maker" but that "[a]n exception is where a mandatory relevant consideration

[346] Summarising its approach, the majority says that, for a proposal to qualify for its exception, it:[434]

> … must be necessary in the ways specified in the policies, any adverse effects that cannot be avoided must be minimised, and any remaining environmental harm must be plainly justified by the proposal's benefits.

[347] This seems very close to the process of reasoning followed by the Board. The Board certainly thought the EWL was necessary as a result of its national and regional significance and that operationally the EWL needed to be located in the coastal marine area;[435] that the harms were commensurate with its benefits;[436] and that there was a generous and well-prepared offset and mitigation package.[437]

[348] The Board's analysis seems to have started with its assessment of the national and local benefits of the EWL and a determination that the current route best meets the project's objectives. It then considered the avoidance policies but concluded that the effects were not serious enough to mean the consent applications should be declined: the birds would feed elsewhere and the most sensitive parts of Anns Creek East had been avoided.[438] Overall, it considered that at least a balance of ecological effects on an integrated (bucket) basis suffices.[439] The Board may have erroneously thought that there was only a minor breach of the avoidance policies related to avifauna (as discussed above). But it did assess environmental benefits (treating avoidance policies as important considerations)[440] and decided that the package of

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internalises built-in weight": at [17.23.2], citing *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 for this proposition but noting the appeal in *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.

434 Above at [142] (footnote omitted); and see also the majority's earlier summary of its pathway above at [118].

435 The Board found that the route of the EWL was operationally necessary (Board Decision, above n 173, at [653] and [700] and [1266]) and would provide significant regional or national benefit (at [236]–[267]; [627(b)] and [1301]). Similarly, the majority states that the proposal must meet requirements in relation to operational or functional need and requirements relating to regional or national benefit: above at [118(a)].

436 Board decision, above n 173, at [694], [731] and [1301]; and see above at [252], [295], [303] and [326].

437 Board decision, above n 173, at [614].

438 See above at [300].

439 See above at [297].

440 For example, the Board refers to avoidance policies as "strong directive[s]": Board decision, above n 173, at [731].

mitigation and offset measures was at least sufficient to balance these effects, particularly given the changes made in the course of the hearing.[441]

[349] It is even harder to understand why the majority concludes that the High Court erred. The majority does accept that the High Court was "much closer to the mark"[442] but says that Powell J erred by holding that consent authorities only have to genuinely consider directive policies but can refuse to apply them.[443] On the majority's approach, these statements (while not complying with the majority's pathway) are not material given the nature of Powell J's overall finding. Powell J found that there was a narrow framework contemplated by the AUP through which important infrastructure could pass.[444] This seems to be a similar conclusion to the majority's (although I accept that Powell J came to it by a different interpretive route).

[350] The majority would also allow the appeal on the basis that the Board erred by relying on Waka Kotahi's use of the s 171(1)(b) assessment of alternatives rather than satisfying itself that the "no practicable alternative" requirement in the relevant policies had been met.[445] The majority also considers that the Board wrongly transposed the standard Waka Kotahi applied to select the best route under s 171 ("most enduring transport benefit") and applied it in its application of the AUP policies.[446]

[351] I am inclined to agree with William Young J that the Board did not just rely on Waka Kotahi's assessment under s 171 but that the Board agreed with it.[447] Further, I comment that it seems unfair to characterise Waka Kotahi's assessment as selecting a route based on which route would provide "the most enduring transport benefit".[448] Their assessment was based on a two-stage process based on a multi-criteria

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441 At [605] and [731]. I accept, however, that the Board did not apply the exact approach now said to be necessary by the majority.
442 Above at [141].
443 Above at [169]; and HC judgment, above n 174, at [83].
444 At [68].
445 Above at [149]–[160] and [168].
446 Above at [150].
447 Below at [418].
448 Board decision, above n 173, at [622] as cited in the reasons of the majority above at [150]. The Board did say this but it may have been shorthand, given that Waka Kotahi's consideration included a range of factors, including environmental factors.

analysis.[449] It is fair to say, as the majority does, that environmental considerations were offered no overriding weighting against social or economic considerations in Waka Kotahi's multi-factorial analysis.[450] But environmental factors were nevertheless seen as relevant and important considerations.

[352] For example, in the selection of the recommended corridor, the opportunities for environmental betterment provided by the ultimate option chosen appear to have been a notable factor in its selection by Waka Kotahi.[451] Further, the *East West Link: Assessment of Effects on the Environment* stated that:[452]

> Potential effects of the Project on the important environmental and cultural values associated with Anns Creek … and reclamation in the Coastal Marine Area (CMA) were discussed in detail in the relevant assessments. All of those areas have significant values that are reflected in relevant planning documents. *The need to avoid effects on these values or if avoidance was not possible then remedy or mitigate as much as possible such effects, was expressly part of the considerations and assessments.*

[353] So it is clearly the case that environmental factors, and the avoidance policies in particular, played a significant role in the choice of route. I agree, however, as stated above, that primacy was not given to environmental considerations. But it is important to note that Waka Kotahi was under no obligation to afford environmental considerations such primacy, except in relation to the areas covered by the avoidance policies.

[354] William Young J criticises the majority for allowing the appeal on the basis of questions of law which did not form a major part of the appeal.[453] I agree with the majority that this Court is free to draw the legal conclusions it considers to be required even if they differ from the arguments put forward by the parties.[454] But I would comment that, while deciding an appeal on a different basis may be an available avenue for the Court, it should not be taken without having given the parties the

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449 Above at [188]. See also the description of Waka Kotahi's process summarised in the Board decision at [1309]–[1310] and cited in the reasons of the majority above at [135].

450 Above at [157].

451 AEE, above n 183, at 125–127. The Board noted that the final route for the EWL was a modified version of Option F: see at [799] and [804].

452 At 123 (emphasis added).

453 Below at [421].

454 Above at [172].

opportunity to make specific and considered submissions on the decisive point. That did not occur in this case with regard to the s 171 point.[455]

Summary of my reasons

The law

[355] In *King Salmon*, this Court rejected the overall judgment approach and held that a choice of absolute protection of the environment comes within the definition of "sustainable management" in s 5 of the RMA.[456] It held that avoidance policies in the NZCPS set environmental bottom lines and the effect of these must be carried through to lower-order planning documents.[457] It noted that conflicts between policies will be rare.[458] Where a conflict does arise, it will be resolved according to the structured analysis set out in *Port Otago*.[459] *King Salmon* applies to resource consents, as does *Port Otago*.[460]

[356] The NZCPS avoidance policies either require all adverse effects to be avoided or require significant adverse effects to be avoided. Avoid has its normal meaning of "not allow" or "prevent the occurrence of". Mitigation, remediation, offsets and adaptive management may as a matter of law operate to bring the harm down to less than material or significant (as the case may be). Some offsets proposed by Waka Kotahi may have been available to meet the avoidance policies, provided a proper precautionary approach was taken.[461] Others (particularly the proposed research funding) would not.[462]

Reclamation

[357] The reclamation policies in the AUP must be interpreted in accordance with the requirements of NZCPS Policy 10.[463] Policy 10 requires that land outside the

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455 See the comments of William Young J below at [421].
456 Above at [196]–[198].
457 Above at [201] and [223].
458 Above at [203].
459 Above at [206]–[211].
460 Above at [213]–[226] for *King Salmon*; and [209]–[212] for *Port Otago.*
461 Above at [314].
462 Above at [315].
463 Above at [268]–[270] and [282].

coastal marine area not be available for the proposed activity, that the activity can only occur in the coastal marine area, that there be no practicable alternative methods of providing the activity and that the reclamation will provide significant regional or national benefit. On the basis of the Board's factual findings these requirements are not met.[464] This in itself suffices to allow the appeal.

Relationship between infrastructure and avoidance policies

[358] The infrastructure and reclamation policies in the NZCPS are subject to the avoidance policies.[465] There is no relevant conflict among those policies on the wording or on the facts in this case.[466] The provisions of the AUP must give effect to the NZCPS and be interpreted accordingly.[467]

[359] The avoidance policies relating to biodiversity in D9.3(9) and (10) of the AUP are directive and properly mirror the avoidance policies in the NZCPS, as adapted to conditions in the Auckland area.[468] That the NZCPS avoidance policies must be applied under E26 of the AUP relating to infrastructure is made explicit by E26.2.2(6)(h).[469] In the case of reclamation, chapter D will overarch the inquiry, given the effect of F2.2.3(2) and F2.1.[470] All relevant provisions of the AUP are therefore subject to the avoidance provisions protecting biodiversity. There is no window, narrow or otherwise, allowing the avoidance policies to be breached.[471]

Errors made by the Board and the High Court

[360] The Board and the High Court erred in their interpretation of the relevant documents by not recognising the environmental bottom lines created by the NZCPS, and the need to respect and apply the directive avoidance policies in the NZCPS and

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464 Above at [291]–[293].
465 Above at [248].
466 Above at [246]–[248].
467 Above at [254].
468 Above at [260]–[263].
469 Above at [274]–[275].
470 Above at [266]–[267].
471 Above at [359].

AUP.[472] The High Court erred in finding that E26 provides a window for the approval of projects even if they do not meet F2 or D9.[473]

[361] The Board failed to treat the avoidance policies as binding in accordance with *King Salmon*.[474] It also erred when it relied on the benefits of the EWL to water down the choices to protect biodiversity made in the NZCPS and the AUP, and in taking what was, in effect, an overall judgment approach in violation of *King Salmon*.[475] The Board did say that it accorded particular weight to the avoidance policies.[476] However, this too is not the proper approach. In the context of the AUP the directive avoidance policies operate as environmental bottom lines.

[362] The Board also erred in failing to assess whether the mitigation and offsets package proposed by Waka Kotahi made the adverse effects on the values protected less than material or less than significant (as the case may be).[477]

[363] All of these errors were material and also mean that the appeal must be allowed.

Result and costs

[364] I agree with the majority that the appeal should be allowed but, as noted above, for different reasons.

[365] Had my views prevailed, there would likely have been little point in remitting to the Board. If the test in the AUP relating to reclamation is construed in accordance with the NZCPS, it does not seem possible that the reclamations necessary for the EWL could be lawful. This is because of the Board's factual finding that there was no functional need for the EWL's route and the fact that there were alternative routes available.[478] I accept that, on the majority's view, however, the proposal should be remitted to the Board.

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472 Above at [289] and [302].
473 Above at [284]–[287].
474 Above at [302].
475 Above at [303]–[305].
476 Board decision, above n 173, at [662].
477 Above at [308]–[310] and [313].
478 Above at [291]–[293].

[366] I agree with the majority that memoranda should be filed if costs cannot be agreed between the parties.[479]

[479] Above at [355].

WILLIAM YOUNG J

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Where I differ from the majority

[367] If the East West Proposal (the Proposal) complies with the Auckland Unitary Plan (AUP) policies specifically addressing infrastructure in sensitive areas (such as Policy F2.2.3(1)), I consider that it can (although will not necessarily) pass through the gateway provided for in s 104D(1)(b) of the Resource Management Act 1991 (RMA). This is so even though the Proposal is likely to cause effects that are within the AUP avoid policies, most relevantly Policy D9.3(9). To this extent, my approach

is at least similar in result to that of the majority. However, I differ from the reasoning of the majority in a number of ways and, most significantly, in the following respects.

[368] The first of these relates to whether the Board's conclusion that the Proposal complies with the infrastructure policies in the AUP (particularly Policy F2.2.3(1)) was premised on an approach that was erroneous in law. On the approach of the majority, at least as I understand it, this critical aspect of the case comes down, at least in large measure, to whether the Board appropriately determined that the "no practicable alternative" criteria in the infrastructure policies (particularly Policy F2.2.3(1)) had been satisfied. When considering the relevant notices of requirement under s 171(1)(b)(ii) of the RMA, the Board was required to address the adequacy of consideration given by Waka Kotahi | New Zealand Transport Authority (NZTA) to "alternative sites, routes, or methods of undertaking the work". In considering Policy F2.2.3(1), the Board itself had to be satisfied that there was no practicable alternative to the East West Link, including most particularly its proposed route. The assessments required by s 171(1)(b) and Policy F2.2.3(1) covered much the same ground, but they were different, possibly as to the exact nature of the relevant alternatives[480] and, more significantly for present purposes, as to the role of the Board.[481] The majority considers that the Board carried over to the Policy F2.2.3(1) exercise its conclusions in relation to s 171(1)(b) and did not appropriately form its own view as to the absence of practicable alternatives. As I will explain, I do not agree that this is what the Board did and, more generally, I see no error in this aspect of the Board's report (the Report).

[369] A second and more general difference between my approach and that of the majority is that I see the avoid policies in the AUP as less controlling than the majority does. As to this, the primary difference relates to what is entailed by the requirements in ss 104 and 171 of the RMA—respectively, to "have regard" and "particular regard" to the AUP and New Zealand Coastal Policy Statement (NZCPS). As will be apparent,

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480 The overlap between alternatives that were relevant for s 171(1)(b) and AUP Policy F2.2.3(1) was substantial to say the least and we heard no argument to as to whether there was a difference that was material.

481 Under s 171(1)(b), the Board had to be satisfied that NZTA had given adequate consideration to the issue (that is, the Board had to perform a review function) whereas AUP Policy F2.2.3(1) required the Board to be itself satisfied as to the absence of a practicable alternative.

I construe these requirements as meaning what they say, and thus not as if they were requirements to comply with those policies.

[370] A third and final difference relates to some criticisms of the Board's approach that I see as inappropriate. I give examples of this below at [419]–[420].

Structure of what follows

[371] In what follows I will discuss or provide:

(a) mana whenua issues;

(b) the relevant NZCPS and AUP policies and their legal consequences;

(c) the interpretation and application of the relevant NZCPS and AUP policies;

(d) the factual findings of the Board as to relevant effects;

(e) the application of the RMA s 104D(1)(b) "gateway test";

(f) the application of ss 104 and 171 of the RMA; and

(g) concluding remarks.

Mana whenua issues

[372] Ngāti Whātua Ōrākei Whai Māia Ltd (Ngāti Whātua Ōrākei) was an appellant before the High Court.[482] Grounds of appeal based on the mana whenua issues which Ngāti Whātua Ōrākei wished to pursue before us were abandoned in the High Court and Ngāti Whātua Ōrākei did not, itself, seek leave to appeal to this Court against the judgment. It is, instead, a party, under s 301 of the RMA, to the present appeal. The appellant, Royal Forest and Bird, did not advance the mana whenua issues when seeking leave to appeal. Had Ngāti Whātua Ōrākei itself applied for leave to appeal,

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[482] *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 (Powell J) [HC judgment].

it would have struggled to obtain leave in relation to arguments it had abandoned in the High Court.[483] In those circumstances, I consider that the mana whenua issues are not properly before us and therefore do not address their merits.

The relevant NZCPS and AUP policies and their legal consequences

Preliminary comments

[373] In light of the Board's factual findings and the basis on which the majority is allowing the appeal, the primarily important aspects of the NZCPS and AUP are:

(a) Policy 11(a) of the NZCPS; and

(b) Policies D9.3(1) and (9) and F2.2.3(1) of the AUP.

Because I can adequately explain my approach to the case by reference to these policies, I do not discuss other aspects of the NZCPS and AUP.

Policy 11(a) of the NZCPS

[374] The policy is relevantly in these terms:[484]

> To protect indigenous biological diversity in the coastal environment:
>
> (a) avoid adverse effects of activities on:
>
> (i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
>
> (ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;
>
> …
>
> (v) areas containing nationally significant examples of indigenous community types; …
>
> …

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483 That this appeal is to be allowed on the basis of arguments that were neither advanced in the High Court, nor signalled in the notice of appeal, and were addressed only in a limited way in argument by counsel for the appellant might be thought to cast a shadow over this comment. I nonetheless think it is correct and it is certainly correct as to what my position would have been if I had been addressing whether leave should be granted to pursue an appeal to this Court on a point abandoned in the High Court.

484 Footnotes omitted.

Policies in D9.3(1) and (9) of the AUP

[375] The general policies managing effects on significant ecological areas (which include the Māngere Inlet and the Ann's Creek area) are stated in D9.3(1) and include:

> (a) avoiding adverse effects on indigenous biodiversity in the coastal environment to the extent stated in [Policy] D9.3(9) …;
>
> (b) avoiding other adverse effects as far as practicable, and where avoidance is not practicable, minimising adverse effects on the identified values;
>
> (c) remedying adverse effects on the identified values where they cannot be avoided;
>
> (d) mitigating adverse effects on the identified values where they cannot be avoided or remediated; and
>
> (e) considering the appropriateness of offsetting any residual adverse effects that are significant and where they have not been able to be mitigated, through protection, restoration and enhancement measures, having regard to Appendix 8 Biodiversity offsetting.

[376] Policy D9.3(9)—also directed at protection of significant ecological areas—is stated in directive terms:

> Avoid activities in the coastal environment where they will result in any of the following:
>
> (a) non-transitory or more than minor adverse effects on:
>
> (i) threatened or at risk indigenous species …;
>
> (ii) the habitats of indigenous species that are at the limit of their natural range or which are naturally rare;
>
> (iii) threatened or rare indigenous ecosystems and vegetation types, including naturally rare ecosystems and vegetation types;
>
> (iv) areas containing nationally significant examples of indigenous ecosystems or indigenous community types; or
>
> …
>
> (b) any regular or sustained disturbance of migratory bird roosting, nesting and feeding areas that is likely to noticeably reduce the level of use of an area for these purposes; or
>
> (c) the deposition of material at levels which would adversely affect the natural ecological functioning of the area.

Policy F2.2.3(1) of the AUP

[377] Policy F2.2.3(1) reads:

> Avoid reclamation and drainage in the coastal marine area except where all of the following apply:
>
> (i) the reclamation will provide significant regional or national benefit;
>
> (ii) there are no practicable alternative ways of providing for the activity, including locating it on land outside the coastal marine area;
>
> (iii) efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use, or to enable drainage.

The statutory provisions as to the relevance and significance of the NZCPS and AUP policies

[378] The key statutory provisions are ss 104, 104D and 171 of the RMA. They relevantly provide:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must … have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
>
> (b) any relevant provisions of—
>
> …
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> … ; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

…

104D Particular restrictions for non-complying activities

(1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the adverse effects of the activity on the environment … will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; …

…

171 Recommendation by territorial authority

…

(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—

(a) any relevant provisions of—

…

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; …

I will refer to the requirements in ss 104 and 171 as "have regard to" obligations, noting for completeness that I recognise that the specific phrasing of s 171 is to have "particular" regard.

[379] Material to the interpretation and application of ss 104, 104D and 171 are ss 61(1)(da), 66(1)(ea), 67(3)(b) and (c), 74(1)(ea), and 75(3)(b) and (c) of the RMA. Under:

(a) s 61(1)(da), regional councils must prepare and change regional policy statements "in accordance with … [the NZCPS]";

(b) s 66(1)(ea), regional councils must prepare and change regional plans "in accordance with … [the NZCPS]";

(c) s 67(3)(b) and (c), regional plans "must give effect to … [the NZCPS]" and "any regional policy statement";

(d) s 74(1)(ea), territorial authorities must prepare and change district plans "in accordance with … [the NZCPS]; and

(e) s 75(3)(b) and (c), district plans "must give effect to … [the NZCPS] and "any regional policy statement".

For ease of discussion, I will refer to these provisions (including those using the expression, "in accordance with") as imposing "give effect to" requirements.

Interpreting and applying the relevant NZCPS and AUP policies

Flexibility of avoid policies

[380] For the purposes of the present appeal, I see the word "policy" as referring to the adoption of a consistent approach to the issue to which it is directed. Such a policy might be inflexible in that it is to be applied no matter what the circumstances. However, as a matter of ordinary English usage, an approach may be sufficiently:

(a) consistent to be properly regarded as a policy; but also:

(b) flexible enough to allow for occasional exceptions.

The flexibility or otherwise of a policy is a function of both the language in which it is expressed and its underlying purpose, and the context in which it is to be applied.

[381] Activities can be classified by reference not only to their nature and purpose (such as "residential", "commercial", "industrial" or, in this case, "reclamation"), but also to their effects.[485] If complete inflexibility had been the purpose of the avoid policies, I would have expected the NZCPS to have required prohibited activity classification for activities having effects within the avoid policies.[486] As it happens, it was not argued by anyone before us that the "give effect to" obligation in relation to Policy 11(a) of the NZCPS required a "prohibited" classification in the AUP of activities (such as reclamation) if they would cause effects required by Policy 11(a) to be avoided. For these reasons, I do not read the avoid policies as being inflexibly prohibitory in nature.

[382] In *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* (*King Salmon*), "avoid" in the NZCPS was treated by the majority as meaning "not allow" or "prevent the occurrence of".[487] Contrary to the apparent view of the *King Salmon* majority, I do not see "not allow" and "prevent the occurrence of" as exact synonyms. More particularly, for the reasons just given, I do not see "avoid" in the avoid policies as meaning "prevent the occurrence of". If that had been the purpose, the policies would have required prohibited activity classifications. I am, however, willing to treat "avoid" as meaning "not allow". On this basis, Policy 11(a) of the NZCPS can be given effect to in the AUP by:

(a) policies that are consistent with it (which is how I see Policy D9.3(9)); and

(b) rules under which activities that are likely to have such effects (such as reclamation) are "non-complying"—the most stringent classification after "prohibited".

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485 See for instance *Application by Christchurch City Council* [1995] NZRMA 129 (PT).

486 This is possible under RMA, s 58(1)(e), which provides for the NZCPS to state "policies about matters to be included in" regional coastal plans "in regard to preservation of the natural character of the coastal environment".

487 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*] at [93] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

[383] I construe the avoid policies in the AUP in the same broad way. As to this, I consider that the AUP should be considered as a whole so that, in interpreting the policies, the rules are relevant (and vice versa). If the purpose of the policies and rules was to preclude the granting of resource consents for activities with effects inconsistent with directive avoid policies, that could have been expressed very simply and directly by (a) the policies requiring such activities to be classified as prohibited; and (b) the rules so classifying them. In this context, the absence of a rule classifying such activities as prohibited provides powerful support for the view that the avoid policies were not intended to have an indirect prohibitory effect.

[384] The flexibility of the avoid policies is, as I have indicated, a function of not only their meaning but also the context in which they fall to be applied. Where that context is governed by "give effect to" obligations, there is no scope for flexibility beyond that provided for in the language of the policy construed in accordance with its purpose. However, in a context in which the governing statutory provisions stipulate only "have regard to" obligations, there might be thought to be considerable additional flexibility.

[385] By way of cross-reference to the approach of the majority, I see the text and purpose of the avoid policies as offering a degree of flexibility that is not dissimilar to that favoured by the majority. We do, however, differ significantly as to whether additional flexibility is available where the statutory requirement in relation to those policies is in the form of a "have regard to", and not a "give effect to", obligation. I will come back to discuss this after briefly considering the comparative weighting of different AUP policies.

Comparative weighting of the avoid and infrastructure policies in the AUP

[386] Policy 11 of the NZCPS is, in part,[488] given effect to by Policies D9.3(1) and (9) of the AUP containing directive avoid policies in relation to significant ecological areas, both terrestrial and marine.

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[488] NZCPS Policy 11 is also given effect to by the provisions of the AUP that define as non-complying those activities (such as reclamation) which have the potential to cause effects that the NZCPS requires to be avoided.

[387] I accept that the logic of *King Salmon* and the requirement to construe the AUP consistently with the avoid policies in the NZCPS means that policies in the AUP that recognise the need for infrastructure are less directive than those in D9.3(1) and (9).[489] This is also consistent with the qualifications in the infrastructure policies that are referred to in the reasons of the majority and Glazebrook J.[490]

The significance of this comparative weighting

[388] I consider that the result of a comparison of relative "directiveness", while material to the approach that the Board was required to take, is not of controlling significance. This is because the Board was not required to "give effect to" the AUP policies but rather to:

(a) have regard to them (under ss 104 and 171); and

(b) decide whether the proposal was contrary to them (under s 104D).

Did ss 104 and 171 require the Board to comply with the avoid policies in the NZCPS and AUP?

[389] As the avoid policies in the NZCPS and AUP do not mandate prohibition, the appellant's contention that these policies were controlling in respect of the Board's decisions under ss 104 and 171 largely falls away. But because questions as to the comparative directiveness to be accorded to these policies remain, the point nonetheless warrants discussion.

[390] I do not accept that requirements to "have regard to" the NZCPS (and the corresponding policies in the AUP) can be construed as requiring consent authorities (under s 104) and territorial authorities (under s 171) to "give effect to" the NZCPS and the AUP policies.

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489 See above at [72].

490 See the reasons of the majority above at [64]–[67] and the reasons of Glazebrook J above at [273]–[277].

[391] I accept, as I must, that *King Salmon* generally states the law as to the interpretation of the NZCPS.[491] I also accept that the *King Salmon* logic must also apply to the interpretation of the AUP policies that are relevant to this appeal. However, any extension of the *King Salmon* approach to resource consent applications (for instance by treating "have regard to" obligations as if they were "give effect to" obligations) would be a significant development and one I do not support.

[392] In issue in *King Salmon* was a proposed plan change under which salmon farming was to be reclassified as a discretionary, rather than prohibited, activity in specified locations in the Marlborough Sounds. Section 67(3)(b) of the RMA required the relevant regional plan "to give effect to" the NZCPS. Since salmon farming in the location in issue in the appeal would produce effects within the avoid policies of the NZCPS, the majority's interpretation of the NZCPS meant that the plan change could not be approved.[492] There was no issue as to the meaning of s 67(3). It was construed as meaning what it says.

[393] I see no reason why the "have regard to" language of ss 104 and 171 should not, likewise, be construed as meaning what it says. As to this, I note that:

(a) When concluding that the effect of the "have regard to" obligation in s 104 requires compliance with the relevant avoid policies, the majority offers no explanation as to why, if that was the legislative purpose, Parliament did not employ "give effect to" language of the kind used in ss 67(3) and 75(3) or impose a requirement to "act in accordance with" of the kind expressly provided for in ss 61(1)(da), 66(1)(ea), and 74(1)(ea).

(b) The majority observes that the "have regard to" obligations extend to "regulations" that "are intended to bind".[493] Obviously, if regulations directly control the decision-making of consent authorities, they must

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491 *King Salmon*, above n 487.

492 At [77] and [153]–[154] per Elias CJ, McGrath, Glazebrook and Arnold JJ. This is subject to the point made above at [382].

493 Above at [108]. The "have regard to obligations" also extend to "rules" but I am not aware of any "rules" that might be relevant in this context.

> be complied with. But such binding effect would not be a consequence of the "have regard to" obligation; rather, it would simply involve giving effect to the regulations in accordance with what they require. If a regulation were not independently binding on the decision-making of a consent authority, the "have regard to" obligation could not sensibly be thought to make it so. Regulations that are not directly controlling may nonetheless be relevant to such decision-making—for instance, as part of the regulatory landscape against which an application must be assessed, a consideration which provides a sensible explanation for a "have regard to" obligation.

[394] In *RJ Davidson Family Trust v Marlborough District Council*, the Court of Appeal commented: "A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side."[494] As expressed, that comment is plainly right. That said, similar language is sometimes deployed to suggest that the only way a consent authority can properly "have regard to" a policy is by complying with it, which is how I construe the majority's reasons.[495] Put simply, this is not what the statute requires. As it happens, I consider that the Board did "have regard to" the relevant avoid polices. By way of examples of this, the Board discussed the policies at great length, and the terms of the consents that were granted and the conditions imposed were substantially influenced by those policies. This is apparent from the passage of the Report that I have set out below at [406].

[395] Similar considerations apply to the majority's proposition that "have regard to" obligations do not justify "outcomes that *subvert* applicable NZCPS policies".[496] In issue were what the policies were intended to achieve and the extent to which consent authorities are required to comply with them. That there was no subversion is apparent from the Board's conclusion, in the passage to which I have just referred,

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494 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [73].
495 See above at [108]–[109] and [169].
496 See above at [108] (emphasis in original).

that "the Proposal can be reasonably supported within the overall policy direction of the [AUP] … and NZCPS".[497]

"[C]ontrary to the objectives and policies"

[396] The phrase used in s 104D(1)(b), "contrary to the objectives and policies" of the relevant plan (here, the AUP), is consistent with the holistic approach adopted in *New Zealand Rail Ltd v Marlborough District Council*,[498] and *Dye v Auckland Regional Council*,[499] and more recently summarised in *Akaroa Civic Trust v Christchurch City Council*: [500]

> [73] When considering this second gateway test the local authority must apply … the word 'contrary' … as meaning "… opposed in nature different to or opposite, repugnant to or antagonistic". A proposal which simply fails to satisfy, or meet a policy is not necessarily contrary to it.
>
> [74] In all but the simplest cases the second gateway test is very difficult to apply because most district plans have a plethora of objectives and policies. We consider that if a proposal is to be stopped at the second gateway it must be contrary to the relevant objectives and policies as a whole. We accept immediately that this is not a numbers game: at the extremes it is conceivable that a proposal may achieve only one policy in the district plan and be contrary to many others. But the proposal may be so strong in terms of that policy that it outweighs all the others if that is the intent of the plan as a whole. Conversely, a proposal may be consistent with and achieve all bar one of the relevant objectives and policies in a district plan. But if it is contrary to a policy which is, when the plan is read as a whole, very important and central to the proposal before the consent authority, it may be open to the consent authority to find the proposal is contrary to the objectives and policies under section 104D. We add that it is rare for a consent authority, or the court, to base its decision either way, on a single objective or policy. The usual position is that there are sets of objectives and policies either way, and only if there is an important set to which the application is contrary can the local authority rightly conclude that the second gate is not passed.

[397] I accept that on this holistic approach, conclusions that the Proposal is inconsistent with the avoid policies and not in conformity with the pro-infrastructure policies such as Policy F2.2.3(1) would justify a finding that it was contrary to the policies in the plan for the purposes of s 104D. And likewise, I consider that a conclusion that the Proposal was broadly consistent with the infrastructure policies

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497 *Final Report and Decision of the Board of Inquiry into the East West Link Proposal: Volume 1 of 3 – Report and Decision* (21 December 2017) [Board Report] at [731].
498 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
499 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).
500 *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110.

would, in the circumstances of this case (which include only limited deviation from the avoid policies), open the way for a finding under s 104D that the Proposal was not "contrary to the objectives and policies" of the AUP.

[398] As I read the reasons of the majority, the decision to allow the appeal rests largely on its view that the Board's conclusion that the Proposal is consistent Policy F2.2.3(1) (and similar "no practicable alternative" criteria in other infrastructure policies) was affected by legal error. For reasons that I will come to, I disagree. But before I deal with all of this issue in detail, it is necessary to discuss the factual findings of the Board as to the relevant effects.

The factual findings of the Board as to relevant effects

[399] There are two relevant sets of adverse effects:

(i) first, effects on birds in the Māngere Inlet, Anns Creek estuary and Anns Creek wetland (avifauna effects); and

(ii) secondly, in relation to Anns Creek and particularly Anns Creek East, effects on rare lava shrubland, freshwater raupō and gradients between mangroves to saltmarsh to freshwater wetland (Anns Creek ecological effects).

Avifauna effects—Board assessment

[400] The Board referred to avifauna effects in two passages in its Report[501] that the majority sees as inconsistent.[502] The first of these was at [471] of the Report:

> The Board accepts that there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such effects must be considered significant. On the basis of the evidence, however, the Board concludes that the proposed coastal works will not result in loss of habitat that is sufficiently rare that it would impact on the overall populations of those species, or the presence of those species within the Māngere Inlet or adjacent coastal areas. …

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501 Board Report, above n 497.

502 See the reasons of the majority above at [166]–[167] and the reasons of Glazebrook J above at [319]–[321]. See also the HC judgment, above n 482, at [36]–[37].

[401] The second was at [645]:[503]

> *It is contestable whether the Proposal will have non-transitory or more than minor adverse effects on threatened or at-risk indigenous species (clause D9.3(9)(a)(i)), given that experts agreed that the Proposal would not adversely affect the populations of those species and that the shore birds would opportunistically feed elsewhere in the Māngere Inlet, Manukau Harbour or Tāmaki River.* Regarding clause D9.3(9)(a)(ii), the Proposal will result in non-transitory and more than minor effects on areas of habitat utilised by some rare species. It will not result in such effects on habitats of species that are at the limit of their natural range, or habitats that are at the limit of their natural range. Evidence received indicated that the habitats to be affected are important to shore birds, including rare and threatened species, but that the shore birds will roost and feed elsewhere.

[402] I see no inconsistency. In these paragraphs, the Board was addressing different (albeit overlapping) issues. The first passage deals with "loss of feeding and roosting areas for shore birds, including threatened and at-risk species" and the significance of this in relation to Policies D9.3(9)(a)(ii) and D9.3(b). The italicised part of the second passage is concerned with Policy D9.3(9)(a)(i) and "adverse effects on … threatened or at risk species". I have no difficulty with the logic of reasoning along the lines that there will be a significant effect on feeding and roosting areas, at least if those areas are narrowly defined, but this will not itself result in adverse effects on the relevant species (or local populations) as the birds will feed and roost elsewhere in the vicinity. When [645] is read in its entirety, it is clear that this is the point the Board was making. That said, I have reservations about whether an impact on habitat that does not have a corresponding effect on relevant populations is sufficiently material to be inconsistent with Policy D9.3(9)(a)(i). Further, I see the issue as essentially factual: whether a conclusion as to impact on habitat warrants an inferential conclusion of adverse effects on a species. For these reasons, I do not see the Board's conclusion as susceptible to challenge in the context of an appeal confined to points of law.

Anns Creek ecological effects

[403] The Board appears to have accepted evidence to the effect that:[504]

> Anns Creek East contains sensitive and unique ecological values with lava shrubland habitats, threatened plant habitats and gradients between mangroves to saltmarsh to freshwater wetland. The viaduct has been designed to be

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503 Emphasis added and footnote omitted.
504 Board Report, above n 497, at [592].

> located within the more modified northern edges of the creek which contain weed species, native plantings and areas of fill. The location of piers will be designed to avoid sensitive areas of lava shrubland.
>
> Construction of the Anns Creek viaducts, including access for temporary staging and location of a construction yard, however, will result in significant ecological effects:
>
> (a) disturbance and loss of lava shrubland ecosystems;
>
> (b) disturbance and loss of freshwater [raupō] wetland and saltmeadow communities;
>
> (c) disturbance and loss of ecological sequences from terrestrial to saline to freshwater;
>
> (d) loss of and impacts on a naturally uncommon ecosystem type.
>
> The viaducts will result in significant adverse effects on the north-eastern lava flow, and loss of [raupō] wetland and saltmarsh ecosystems. A total of 9,599m2 (18%) of vegetation communities in Anns Creek East will be adversely affected by the Great South Road intersection design.
>
> Ongoing operational effects of the Anns Creek viaducts will include shading and rain shadow effects on vegetation in Anns Creek, and increased weed invasion from the construction and staging footprint.
>
> …

[404] On the Board's approach:[505]

(a) It is "contestable" whether the Proposal is inconsistent with Policy D9.3(a)(i). This is the point that I have already discussed above at [402].

(b) The Proposal is inconsistent with Policy D9.3(9)(a)(ii) as creating non-transitory and more than minor effects on areas of habitat used by some rare species.

(c) The Proposal is inconsistent with Policy D9.3(9)(a)(iii) and (iv) in relation to the Anns Creek area.

(d) The Proposal is inconsistent with Policy D9.3(9)(b) because of the permanent displacement of birds from the areas of reclamation and some

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505 At [645]–[648].

ongoing disturbance from use of the proposed walkway that would extend further into the inlet than the current walkway.[506]

(e) The Proposal is contrary to Policy D9.3(9)(c) as it would result in deposition of material adversely affecting the natural ecological functioning of the area of deposition.

Relevance of offsets

[405] Section 104 provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must … have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; …
>
> …

[406] The Board's findings of fact set out above at [399]–[404] addressed adverse effects before any allowance was made for offsets under s 104(1)(ab). The Board's detailed discussion of the offsets was mainly in relation to s 104 (and the obligation to have regard to the NZCPS and the avoid policies in the AUP). As to this, its conclusion was:[507]

> … the Board finds that the Proposal achieves a level of consistency with the planning framework commensurate with the overall benefits of the Proposal, including those afforded by offsets. The Proposal responds in a strong positive manner to transport (including freight, public transport, walking and cycling), economic, and stormwater provisions … . The Proposal meets the multitude of other provisions that relate to the management of earthworks, contaminated land, and air quality. With respect to those elements of the Proposal that are inconsistent or contrary to provisions, and without reading down the strong directive of avoidance policies, the Board finds that adverse effects have been

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506 It added that it is "unclear whether it is contrary to that policy directive", as the affected birds could still feed and roost opportunistically elsewhere in the inlet: at [647].

507 At [731].

> avoided to the extent practicable in the context of the Proposal objectives and route, and residual effects (some of which are significant) will be mitigated or offset to the extent that the Proposal can be reasonably supported within the overall policy direction of the [AUP] … and NZCPS.

I see these conclusions as material to its earlier assessments in relation to s 104D(1)(b). The offsets recognised by the Board are, of course, material to the significance of the inconsistencies between the Proposal and Policy D9.3(9) and, as will be apparent, this was picked up when it dealt with s 104D(1)(b).[508]

The application of the s 104D(1)(b) "gateway test"

The statutory language

[407] As I have noted, the AUP classified as non-complying activities (such as reclamation) likely to produce effects that the NZCPS required to be avoided. For this reason, s 104D(1)(b) is engaged. Under paragraph (b), resource consents could only be granted if the activities that comprise the Proposal would "not be contrary to the objectives and policies of … the relevant plan …". For these purposes, the AUP can be treated as the "relevant plan".

[408] There is no mention of the NZCPS (or any other national instrument) and thus no express requirement under s 104D(1)(b) to give effect to, or have regard to, Policy 11(a) of the NZCPS. That said, on the basis that AUP Policy D9.3(9) does give effect to NZCPS Policy 11, this is of no moment. What is more significant is the statutory test—whether the Proposal is "contrary to" the AUP's "objectives and policies". This is to be determined on the basis discussed in *New Zealand Rail Ltd*, *Dye* and *Akaroa Civic Trust*.[509]

The Board's findings as to inconsistency with Policy D9.3(9)

[409] The Board's conclusions as to inconsistency with Policy D9.3(9) were summarised in this way:

> [605] … the Board accepts that there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such

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508 See below at [409].

509 *New Zealand Rail Ltd*, above n 498; *Dye*, above n 499; and *Akaroa Civic Trust*, above n 500.

> effects must be considered significant but … the proposed coastal works will not result in loss of habitat that is sufficiently rare that it would impact on the overall populations of those species, or the presence of those species within the Māngere Inlet or adjacent coastal areas. The Board is satisfied that the potential impacts that the Proposal will have on shore birds can be adequately mitigated and offset, with some modification of the design and construction methodology. … [E]xcluding sub-tidal dredging (with the exception of the Anns Creek tidal channel works) and removal or modification of the headlands will reduce ecological effects. The Board finds that those changes to the Proposal would positively influence the effects / mitigation balance. Consequently, it will become less finely balanced and less dependent on every element of the package having a direct ecological benefit with respect to marine ecology and avifauna.
>
> …
>
> [610] The Board accepts Ms Myers' evidence that the adverse effects within Anns Creek East have been avoided to the greatest extent practicable by pushing the Proposal alignment as far north as possible … so as to avoid the most intact lava shrubland habitats and the threatened plant habitats, and minimise construction access impacts. While experts agree that like-for-like mitigation of effects on the lava shrubland ecosystems is difficult, the Board accepts that restoration and enhancement of existing ecosystems is more likely to succeed than establishing new ecosystems.
>
> [611] The Board also finds that the mitigation and offsets now offered will adequately address the effects of that construction activity and the shading that will occur on completion of the works. This includes the additional planting in Anns Creek Reserve, additional pest control throughout Anns Creek and extending the management period for those areas as direct mitigation for terrestrial and coastal effects on those environments.
>
> …
>
> [1373] The Proposal does impact on feeding and roosting grounds of shorebirds, some of which are threatened or endangered. These effects challenge the biodiversity provisions of the [AUP] … The biodiversity provisions are also engaged by the effects of the Proposal through Anns Creek, and particularly Anns Creek East. This has required very careful consideration by the Board. For the reasons discussed in chapter 14.2 of this Report, the Board's finding is that the effects will be adequately avoided, mitigated or off-set and that the effects will not put at risk species populations, or types of habitat.

The Board's conclusions as to s 104D(1)(b)

[410] The Board's substantive assessment in relation to s 104D(1)(b) started with whether the Proposal complied with Policy F2.2.3(1) of the AUP and concluded that it did. Given that this aspect of the Report has attracted criticism by the majority, I will deal with it separately. Before I do, a brief summary of other the aspects of the Board's approach is appropriate.

[411] The Board concluded that the Proposal was also consistent with other relevant elements of chapter F of the AUP.

[412] The Board then turned to chapter D9 of the AUP and particularly the policies in D9.3(9). In passages which I have already set out, it concluded that implementation of the Proposal would cause some effects that were required to be avoided by Policy D9.3(9). It found no other inconsistencies with the AUP avoid policies that are said to be material for present purposes.[510]

[413] It expressed its conclusions in this way:[511]

> [662] The Board is persuaded … that the approach taken by the Environment Court in *Akaroa Civic Trust v Christchurch City Council* is appropriate to adopt. … In some consent applications a provision may be so central to a proposal that it sways the s104D decision, but generally the s104D assessment will be made across the objectives and policies of the plan as a whole and not determined by individual provisions. The Board finds that the latter applies in this case, notwithstanding that there are indeed some inconsistencies between the NZTA Proposal and relevant objectives and policies, particularly in the areas of reclamation and biodiversity. In doing so, the Board has given measured weight to the word "avoid", which is clearly not a direction to be ignored.
>
> [663] On balance, the Board finds that the Proposal is not contrary to the objectives and policies of the [AUP] when considered as a whole. Its consideration has given particular focus to the provisions most directly relevant to the activities with noncomplying status but has also recognised … broader planning assessments … . The Board is left in no doubt that its conclusion would be strengthened if it were to look in detail at every relevant objective and policy (of which there are many), rather than those provisions of most relevance, as it has done.
>
> [664] While the Proposal is concluded to be contrary to a small number of policies or sub-clauses of policies, the Board does not consider those individually or cumulatively as reason to conclude that the Proposal is repugnant to the policy direction of the [AUP] with respect to the resource consents sought. The Board's conclusion is that where the Proposal infringes policies, neither individually nor cumulatively do those infringements tilt the balance for s104D purposes against the Proposal as a whole.

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510 The Board found that there would be limited effects on views from a particular cemetery that possibly involved inconsistency with a policy protecting, inter alia, views from sites of historical significance: Board Report, above n 497, at [655].

511 Footnotes omitted.

The Board's discussion of Policy F2.2.3(1)

[414] Because the error attributed to the Board involves s 171(1)(b) of the RMA, it is appropriate to set that provision out. It relevantly provides:

> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
>
> …
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
>
> …
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; …
>
> …

[415] Given the significance of this to the outcome of the appeal, it is also appropriate to set out the relevant passage of the Report in full:[512]

> [621] Later in chapter 15.12 of this Report, the Board undertakes the statutory assessment required by s171(1)(b) of the RMA as to whether adequate consideration has been given to alternative routes or methods for undertaking the work. The Board explores the process used by NZTA for identifying and evaluating corridor and alignment alternatives using Multi Criteria Analysis (MCA) methodology, and briefly outline the "Long List" comprising 16 corridor options, the six options selected to the next stage of the MCA (alignment evaluation) plus the OBA option, which led to the selection of the preferred option.
>
> [622] It will become clear that the potential need for reclamations for the Proposal in locations of high environmental value were balanced against the potential opportunities for environmental betterment. A central component of NZTA's reasoning for accepting a foreshore alignment with the associated reclamations was that it would provide the most enduring transport benefit.
>
> [623] *In the context of its consideration of the [AUP] provisions most relevant to the proposed reclamations, it is critical for the Board to be satisfied that the EWL alignment is indeed the option that provides the most enduring transport benefits to the extent that those benefits are necessary and that there are no "practicable alternatives" to achieve that outcome.*
>
> [624] Mr Burns, when addressing the Board on Policy F2.2.3(1)(b) submitted:

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[512] Footnotes omitted and emphasis added. Emphasis and typographical error in [624] changed.

> "[T]he test is not whether this is the best, or cheapest, option for NZTA's road, or whether it is justified by transport outcomes, but simply whether there are any practicable ways of putting the road somewhere else."

[625] The Board disagrees. The analysis undertaken by Mr A Murray, which contributed to the balancing of all factors in choosing the proposed alignment, must be relevant to whether there is a practicable alternative. It is not appropriate, under the detailed and integrated option selection process undertaken, to apply such a simplified interpretation of "practicable alternative" i.e. whether any road can be located elsewhere, regardless of how inferior its transport, walking and cycling, or public transport benefits may be.

[626] *For these reasons, the Board is indeed satisfied that there is no "practicable alternative" to the route NZTA proposes.* The Board reaches this conclusion simply because it is satisfied that NZTA's scrutiny of alternative routes did not produce any enduring transport solution other than the selected route.

[627] In consideration of Policy F2.2.3(1), the Board finds:

(a) While some submissions considered that NZTA had selected the wrong alignment, and that the Proposal should not extend into the CMA, it was common ground that the EWL would provide significant regional benefit. The Board is also satisfied that given the significant contribution that the Penrose-Mt Wellington area makes to the Auckland economy and employment, the EWL can reasonably be concluded to have significant national benefit.

(b) If unencumbered by topography or development, it is intuitive that there will be a practical alternative landward route suitable for the provision of a road. However, the areas surrounding the Māngere Inlet are fully developed with industrial, commercial and residential land uses. As discussed in chapter 15.12 of this Report, the Board is satisfied with NZTA's evidence on the assessment of alternatives and enduring transport benefits conferred by the chosen alignment. Therefore, it finds that there are no "practicable alternative" ways of providing for the objectives of the Proposal in a manner that avoids the proposed reclamations and coastal occupation. The Board accepts that in refining the EWL alignment, NZTA has sought to balance a range of effects, including ecological, business disruption, cultural and social. In turn, that alignment has necessitated mitigation in the general form and scale of that proposed.

(c) As discussed in chapter 14.2 of this Report, the Board finds that efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use. The scale and form of the reclamations has been developed through an integrated design process and is now the minimum necessary to mitigate landscape, visual, severance and amenity effects. Additional efficiency has been achieved by using the wetlands within the reclamations to

> treat stormwater runoff from the developed hinterland, and to provide an alternative upgraded treatment option for landfill leachate.
>
> [628] As a result, the Board finds that the Proposal is generally consistent with, and not contrary to, Policy F2.2.3(1) of the [AUP]. …

The errors attributed to the Board

[416] The majority is of the view that the Board carried over its conclusions in relation to the assessment required by s 171(1)(b) of the RMA (which focused on the adequacy of NZTA's consideration of the alternatives) into its consideration of Policy F2.2.3(1). In this way it is said that the Board inappropriately jumped to the conclusion in relation to Policy F2.2.3(1)(b) that it was satisfied that there were "no practicable alternative ways" of providing for the activity, including locating it on land outside the coastal marine area.[513]

[417] The majority also criticises other broadly associated aspects of the Board's reasoning. Most particularly, the majority considers that the Board was required to, but did not, approach the case on the basis that the Proposal was "presumptively inconsistent with and contrary to relevant objectives and policies and should not be approved except in narrowly defined exceptional circumstances".[514] Associated with this, there is said to have been a "regression to overall judgment" on the part of the Board and there are also criticisms of the specificity or otherwise of the Board's reasons.[515]

Should the appeal be allowed on the basis proposed?

[418] In considering consistency with Policy F2.2.3(1), the Board took into account the exercise it had carried out under s 171(1)(b). This is unsurprising given that the evidence in relation to s 171(1)(b) was also relevant to Policy F2.2.3(1)(b). It would be remarkable if an expert Board, headed by a retired judge, had made the elementary error of conflating the two issues. Indeed, in the passage from the Report that I have

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513 At [1372].
514 Above at [168].
515 See the reasons of the majority above at [144]–[148].

set out,[516] the Board recognised the nature of the exercise that was required. I say this because:

(a) A comparison of [621] and [623] of the Report shows that the Board recognised that there was a clear distinction between its review function under s 171(1)(b), focused on the adequacy of NZTA's consideration of alternatives, and the related but separate question of whether it was, itself, satisfied that there were no practicable alternatives.

(b) The conclusion expressed in [626] confirms that the Board itself was satisfied as to the absence of practicable alternatives. The reference back to the s 171(1)(b) issue is not indicative of error. If detailed analysis revealed that there was no practicable alternative, the conclusion that there was indeed no such practicable alternative might be thought to reasonably follow.

(c) Although the Board put great weight on NZTA's analysis, the findings underpinning the conclusion expressed that are set out in [627] are expressed in terms that show that they represent the view of the Board and not NZTA.

[419] As I have noted, there were other associated criticisms by the majority of the Board's approach, namely that:

(a) it was required to but did not approach the case on the basis that the Proposal was "presumptively inconsistent with and contrary to relevant objectives and policies and should not be approved except in narrowly defined exceptional circumstances";

(b) it had "regressed" to an "overall judgment" approach; and

(c) its reasons were insufficiently detailed and specific.

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[516] See above at [415].

[420] I can most conveniently deal with these criticisms together:

(a) The criticisms are premised in large part on the view that the "have regard to" obligations in ss 104 and 171 meant that the Board was bound by the avoid policies.[517] However, the Board applied the "have regard to" language of the statute in accordance with the ordinary meaning of the words used and what must have been a deliberate decision by the legislature not to impose "give effect to" obligations. In my view, it was right to do so.

(b) As the majority notes, the Board was required to weigh incommensurables, an exercise that the majority recognises as requiring a "considered approach".[518] Such an approach necessarily requires an "overall judgment" as to the weight to be given to the competing incommensurables. I accept that it follows from *King Salmon* that if a particular consideration (such as an avoid policy) is of trumping effect, there is no scope for an overall judgment approach. But given that the majority recognise that a weighing exercise was required, I see no justification for criticising the Board for using the expression "overall judgment".

(c) The Board was required to approach the case in accordance with the statutory framework provided by s 104D and ss 104 and 171. That framework makes no reference to presumptions against the grant of consent to be displaced only "in narrowly defined exceptional circumstances". I think it inappropriate for the courts to impose what in effect are jurisdictional threshold requirements that are not firmly based in the legislation and I cannot interpret the AUP policies as imposing a threshold requirement expressed in that way.

(d) The reasons of the Board that are now said to be inadequate were not challenged by the parties before us. We do not have all of the relevant

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517 See above at [108]–[109] and [169].
518 Above at [143].

evidence given, and submissions made, to the Board that related to the issues in respect of which its reasons are now criticised. I am of the view that such criticisms ought not to be made in the absence of all relevant material.

[421] There are related issues that concern me:

(a) The issues on which the majority proposes to allow the appeal were not amongst the questions of law on which the appeal to the High Court was based. Further, they were addressed in neither the notice of appeal to this Court nor the written submissions of the appellant.

(b) I accept that in the course of argument, concerns were put to counsel along the lines that the Board's approach to Policy F2.2.3(1) may have been inappropriately based on its consideration of the separate s 171(1)(b) issue. However, those concerns were not picked up in a detailed way by counsel for the appellant who, in her reply, argued merely that the "no practicable alternative" conclusion of the Board warranted what she called "a hard look". The debate on this issue was necessarily at a high level as the printed record on the case did not include the evidence as to practicable alternatives that the Board had relied on. As well, and significantly to my way of thinking, no one in the course of argument before us identified a practicable alternative that the Board could fairly be said to have wrongly overlooked.

(c) More generally, the appeal succeeds on the basis of a legal approach that had not been identified prior to the hearing before us and was the subject of no more than cursory discussion at that hearing. The Report that is set aside was delivered more than six years ago, was the culmination of a streamlined process under Part 6AA of the RMA, and concerned a matter of national significance. The Court is remitting all issues to the Board. It is unclear, at least to me, whether the Board can legally or practically be reconstituted, whether the practical result will

be that the whole process must be repeated and, if not, how the reconsideration will be effected.

Conclusion as to s 104D(1)(b)

[422] I am of the view that the Board was entitled to conclude that the relatively limited and inconsequential inconsistencies with the D9.3(9) policies did not mean that the Proposal was contrary to the AUP objectives and policies, with the result that it was open to the Board to find that the s 104D(1)(b) gateway test was satisfied. As will be apparent, I see no relevant error of law by the Board.

The application of ss 104 and 171 of the RMA

[423] I can deal with this aspect of the case relatively briefly.

[424] The challenge to this part of the Board's conclusions rested primarily on contentions as to what was said to be the controlling effect of the NZCPS and AUP avoid policies—contentions that I have already rejected based on my interpretation of those policies and their significance in respect of the ss 104 and 171 decisions. As it happens, I see no error in the Board's approach.

Concluding remarks

[425] For the reasons given, I would dismiss the appeal.

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