IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-000724
[2013] NZHC 2104

BETWEEN	SAVE KAPITI INCORPORATED Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent
	THE BOARD OF INQUIRY INTO THE MACKAYS TO PEKA PEKA EXPRESSWAY PROPOSAL Decision-maker

CIV-2013-485-000744

BETWEEN	ALLIANCE FOR A SUSTAINABLE KAPITI INCORPORATED Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing: 10 July 2013

Appearances: RJB Fowler QC for Appellant Save Kapiti Incorporated
Dr M O'Sullivan for Appellant Alliance for a Sustainable Kapiti Incorporated
J Hassan and K Viskovic for Respondent
H C Andrews and J Duffin for Board of Inquiry into the Mackays to Peka Peka Expressway Proposal
D Gilbert for Board of Inquiry into the Peka Peka to North Otaki Expressway Proposal

Judgment: 19 August 2013

JUDGMENT OF D GENDALL J

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Introduction

[1] In April 2012, the New Zealand Transport Authority (NZTA) applied to the Environmental Protection Authority (EPA) for 29 resource consents and a notice of requirement to build north of Wellington the Mackays to Peka Peka Expressway project (the Expressway), a state highway. A Board of Inquiry (the Board) was appointed by the Minister for the Environment under s 149J of the Resource Management Act 1991 (the Act) and a hearing was held between November 2012 and January 2013. The Board issued their final report and decision on 12 April 2013, which confirmed the notice of requirement and granted the resource consents,

subject to certain conditions. Save Kapiti Incorporated (Save Kapiti) and Alliance for a Sustainable Kapiti Incorporated (Alliance) appeal against this decision.

[2] Section 149V of the Act provides that an appeal from the Board of Inquiry's decision may only be on a question of law.

Narrative

[3] The Kapiti Coast District Council (KCDC) had been developing plans for another road in this general area prior to this decision – the Western Link Road (WLR). In 1997 the KCDC issued a notice of requirement for a designation for the WLR along the "sandhills" route in the same area as the Expressway. This notice of requirement for a designation was for a four lane road, with two lanes in some parts. The notice of requirement was confirmed in 1998 by an independent hearing commission. Final confirmation of the designation didn't occur until July 2006 because of appeals. There were to be three stages of construction and seven sections. A number of regional consents were obtained for the construction of stage one. In 2008 the KCDC decided the WLR would be reduced in scope to just two lanes.

[4] In parallel with this development, the NZTA developed plans for the Expressway – a four lane road, passing through the middle of medium and high density housing and wetland areas, with a total of 1360 dwellings within 200 metres of the proposed route. The Expressway would pass through much of the same area as the WLR.

Procedural History

[5] The Resource Management Act sets out the procedure for applications of this kind.

[6] A requiring authority can give notice to a territorial authority of its requirement for a designation for a project or work.[1] A designation is a provision made in a district plan to give effect to a requirement made by a requiring authority.[2]

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1 Section 168(2) of the Act.
2 Section 166.

[7] As a requiring authority,[3] NZTA can give notice that it requires a designation – a provision in the district plan needed for a project. If a designation is included in a district plan, s 9(3) of the Act (which allows land to be used for a non-complying use if it is otherwise expressly allowed by a resource consent or under existing use rights) does not apply to a public work or project undertaken by a requiring authority under the designation.[4] No person can without the consent of the requiring authority, do anything in relation to the land subject to the designation that would prevent or hinder a public work, project or work to which the designation relates.[5] The provisions of a district plan shall apply in relation to any land that is subject to a designation only to the extent that the land is used for a purpose other than the designated purpose.[6] A designation can be removed on notice by a requiring authority if it is no longer required.[7] Designations lapse five years after the date they are included in a district plan unless they have already been given effect to or a territorial authority determines on application that substantial progress to give effect to them has been, and continues to be, made and fixes a longer period for their expiry.[8]

[8] As I have noted above, NZTA lodged their present application for one notice of requirement and 29 resource consents with the Environmental Protection Authority (EPA).[9] The EPA recommended to the Minister that a Board of Inquiry consider the matter.[10] The Minister made a direction to that effect because he thought the matter was of national significance.[11] The Minister, as required, gave detailed reasons for this direction:[12]

[9] Thus the matter was referred to the Board. It is necessary to set out what a Board must consider on such an application. Generally the Board must have regard

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3 NZTA is a requiring authority under the Act, approved as such under s 167(3) in 1994.
4 Section 176(1)(a).
5 Section 176(1)(b).
6 Section 176(2).
7 Section 182.
8 Sections 184 and 184A of the Act.
9 Section 145.
10 Section 146.
11 Sections 147, 142(3).
12 Section 147(5).

to the Minister's reasons for making a direction in relation to the matter; and consider any information provided to it by the EPA under s 149G of the Act.[13]

[10] If the application is for a resource consent, then s 149P provides that the Board must apply ss 104 – 112 of the Act as if it were a consent authority. Relevantly here, s 104 provides in part:

> **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, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
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> (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.
>
> (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.
>
> ...

[11] The Board, therefore, must consider the actual and potential effects on the environment, but may disregard the adverse effects of the activity on the environment if the plan permits an activity with that effect (known as the permitted baseline test). It also must consider the relevant provisions of a plan or proposed plan.

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[13] Section 149P(1).

[12] If the application is for a notice of requirement for a designation, then s 149P provides that s 171 applies. The relevant provisions provide:

> **171 Recommendation by territorial authority**
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> (1A) When considering a requirement and any submissions received, a territorial authority must not have regard to trade competition or the effects of trade competition.
>
> (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
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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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> (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

[13] Thus the Board must consider the effects of allowing the requirement on the environment, particularly considering provisions of a plan, and must also consider whether adequate consideration has been given to alternative methods if the requirements of s 171(1)(b) of the Act are met.

Decision of the Board of Inquiry

[14] The Board here issued an extensive report granting the resource consents and confirming the notice requirement.

[15] The Board began by outlining the proposal and the application before them. They outlined a brief history of the roading issues in the area, and the history of this particular project. They referred specifically to the reasons the Minister directed the application to the Board, and said that they have considered these reasons throughout the report.[14]

[16] They then dealt with a number of preliminary legal issues that arose during the hearing. The Board considered both whether the WLR should form part of the "environment" under ss 104 and 171 of the Act, and whether they should use their discretion to allow it to be part of the permitted baseline analysis (under s 104, and perhaps also s 171).

[17] The Board considered the environment first. They referred to the decision of the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Limited* (*Hawthorn*).[15] The Court of Appeal considered there that the "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out a permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears that those resource consents will be implemented. It found that the environment does not include the effects of resource consents that might be made in the future.

[18] The Board accepted that the WLR could form part of the existing environment as being a provision in the district plan for a permitted activity. However, they found the WLR was not a viable alternative to the expressway – there had been no request for funding, and it did not have all the regional consents

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14 At [50]

15 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299; [2006] NZRMA 424 (CA).

required. Furthermore, there was no prospect of the WLR proceeding if the present application was to succeed. It would not be credible to conclude that the future environment might be modified by utilisation of the WLR designation, if the expressway proceeded. Thus the Board held that they could not consider the WLR to form part of the environment.

[19] The Board also pointed out that, although a designation is included in a district plan as if it were a rule, that does not mean a designation is a rule and so it could be argued that the WLR does not amount to a permitted activity. Thus it would need to be considered as an unimplemented resource consent under *Hawthorn*. The test would be whether the WLR designation and remaining resource consents would be likely to be implemented if the Expressway project proceeds. For the reason that the Board considered the WLR was not viable, they considered it would not meet the test. They said this decision was consistent with the decision of the Environment Court in *Villages of NZ (Mt Wellington) Ltd v Auckland CC.*[16] There, the appellant challenging a notice of requirement already had a resource consent for a development on land required by the local authority for public playing fields. The Court accepted that the *Hawthorn* principle applied, that is, that the effects of the Council's proposal were to be measured against the "future environment". However, under *Hawthorn* it was necessary to consider whether the consented development was likely to proceed. The consented development would and could not proceed if the designation was implemented. Therefore the Court could not measure the effects of the Council's proposal against the "future environment".

[20] The Board then considered whether the WLR should form part of a permitted baseline test. They pointed out that such a test would not be helpful as the WLR and the expressway overlap. Furthermore, the law was unclear whether the permitted baseline test could be extended to apply to designations or requirements for regional resource consents under s 171 when the permitted baseline is not expressly included in that section, unlike s 104. They accepted that, as no submissions had been received on the issue, they should assume it could.

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16 *Villages of NZ (Mt Wellington) Ltd v Auckland CC* EnvC A023/09.

[21] The Board then said it could be argued that the WLR designation provides a permitted baseline on the basis that it enables construction of a highway on the designated route as a permitted activity under the plan. However, while a realistic and reasonable development of itself, the WLR was too fanciful because it could not co-exist with the Expressway. Alternatively, they could consider it as an activity authorised by an unimplemented resource consent, but again ruled that option out because there was no prospect of it being implemented if the current application succeeded. The Expressway, if granted, would supersede the WLR. They then considered that even if the WLR could form part of the permitted baseline, they would use their discretion to exclude it, for the reasons noted above.

[22] However, in saying that, the Board did make reference to the WLR throughout the report. They accepted the NZTA's position that the WLR designation to an extent was relevant because:

(a) It showed a four line highway had previous been found acceptable;

(b) It has influenced land use since 1956 and residents had developed their expectations to accommodate it and its likely effects;

(c) Residents considered the WLR designation as the first step in a development; and

(d) The WLR designation had acted as a barrier, creating a degree of severance along the line.

[23] The Board then said overall, however, that the particular fact of the WLR designation was of no great weight in their considerations.

[24] They then addressed whether the NZTA had considered alternatives, in accordance with s 171. On this aspect, the Board examined the consultation process the NZTA underwent in deciding on the Expressway. They found the NZTA considered a number of options, including the WLR. The Board concluded that the

consideration of alternatives had been sufficiently broad and varied to meet the test for adequate consideration.

[25] The Board then considered the effects of the expressway project, including the effect on public health, noise, culture and heritage and air quality (to name a few). In assessing the effect on noise levels, the Board referred to the evidence of Ms Wilkening, who completed a study and concluded that the effect on noise of the Expressway was no worse than that of the WLR. They also compared the proposed Waikanae bridge in the Expressway with the Waikanae bridge in the WLR, but explicitly said this was for context only, in considering the effect on hydrology and storm water. In considering the effect on culture and heritage, the Board summarised evidence that the Expressway was preferred for the purposes of wahi tapu than the WLR. However, the Board did not consider this expressly in their conclusion on this effect. Likewise, they referred to evidence of Professor Manning who considered the WLR would have been worse for climate change than the Expressway.

[26] However, at other points in the report the Board was at pains to say the WLR was not part of the permitted base line.

[27] Ultimately, the Board granted the application. They concluded the decision of which alternative to choose was NZTA's not the Board's, who had no jurisdiction to say which alternative was correct. They just needed to be satisfied that there had been adequate consideration of alternatives. The Board noted they were required to apply ss 104 and 171 of the Act, but both sections were subject to Part 2, and in the event of conflict, they were overridden by Part 2. And on this, the Board found the application met the requirements of Part 2.

Submissions

Submissions for Alliance for a Sustainable Kapiti Incorporated

[28] In this appeal the Alliance for a Sustainable Kapiti Incorporated (the Alliance) submits the Board made two errors of law – the decision not to include the WLR as part of the baseline, and the failure to consider the Minister's reasons for directing the matter to the Board.

[29] It is suggested here that the reasons for saying the WLR was not part of the "baseline" were wrong. The Board declined to consider the WLR as part of the permitted baseline as it said it was not a viable alternative. However, the Alliance contends this is a misinterpretation of *Hawthorn* which merely allows a permitted baseline analysis which removes certain effects from consideration. This is not the same as providing an alternative.

[30] The Alliance argues that there are inconsistencies in the Board's reasoning here. When considering whether the WLR designation formed part of the environment, the Board said the WLR could only become relevant if analogous to an existing but unimplemented resource consent. However, when considering whether the WLR formed part of the permitted baseline test, they preferred to consider it as a hypothetical activity rather than an unimplemented resource consent. The Alliance contends that the WLR should have been considered analogous to an unimplemented resource consent.

[31] The Alliance also submits that the Board misapplied *Beadle v Minister of Corrections*[17] as the question is whether the hypothetical activity was realistic in and of itself, not whether it was fanciful in relation to any other project. Furthermore, the Alliance says the WLR was not fanciful – resource consents had been granted and the release of funds was approved.

[32] Next, the Alliance contends the Board was wrong to consider that the WLR was not a viable alternative. It was not dependent on the Expressway – it had already been approved and was a permitted activity. They argue that actually the WLR supersedes the Expressway project as it had already been approved. And the Board, it says, was wrong as to funding – funding, it is claimed, had been released. Furthermore, this was an irrelevant consideration, and does not in any event discount the WLR as a baseline. The defining criteria for an activity to be part of the permitted baseline is that the project had received a resource consent, because the purpose of the test is to remove from consideration effects that have already been consented to. The WLR did have resource consents.

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[17] *Beadle v Minister of Corrections* EnvC A74/2002, 8 April 2002.

[33] The Alliance also argues that the Board's use of the WLR above was inconsistent with not using the WLR as a baseline. Furthermore, the WLR it used was the wrong one – a four lane road was not acceptable to the community. The resource consent for this would have lapsed after five years, so in 1961, and thereafter NZTA twice revisited the four lane WLR and rejected it because the community severance was seen as being too severe. Furthermore, the Alliance suggested the WLR has never been regarded as a barrier as the Board contended.

[34] The Board, according to the Alliance, also did not acknowledge the WLR as part of the existing environment, but incorporated other plan changes into the existing environment that only resulted from the WLR designation.

[35] Furthermore, the Board, it is said, then inconsistently used the WLR as a baseline later in their report. The Alliance accepts that the Board did not explicitly accept Ms Wilkening's evidence but they did draw heavily on it. They also used the WLR as a permitted baseline when considering specific sections of the Expressway and the Waikanae bridge.

[36] The Alliance argues this inconsistency must be resolved – the Board cannot refuse to use the WLR in the permitted baseline but then use it to discount serious adverse effects.

[37] Secondly, the Alliance submits the Board was required by the Act to have regard to the Minister's reasons for directing the matter to the Board, but they did not. They did not consider that the Expressway would represent a significant change in the use of land from its current state, a state that supports a number of different activities and land uses. The Expressway project, it is said, affects housing, food production, and equestrian activities. There will be a huge loss of amenity values, which, it is said, was only addressed by the Board in very broad terms.

[38] The Alliance asks that the decision be overturned and a new Board be appointed to reconsider the application.

Submissions for Save Kapiti Incorporated

[39] Save Kapiti submits the Board's decision placed pivotal emphasis and reliance on significant positive effects of the Expressway to the environment. However, it says the Board was wrong in its decision in excluding the WLR from the "environment". Including it as part of the environment would neutralise the positive effects of the Expressway.

[40] It argues the WLR is part of the "environment" in two ways:

(a) Because it is included in a district plan, it is a permitted activity. It does not need to be credible or viable, but it is anyway; or

(b) Designation is equivalent to a granted but unimplemented resource consent. So according to *Hawthorn*, likelihood of implementation is relevant. The WLR here was likely to be implemented.

[41] Section 175(1)(d) of the Act (which is now s 175(2)(a)) includes a designation as if it were a rule in a district plan. It is submitted the Board was wrong to draw a distinction between a deemed rule and an actual rule. A designation actually can proceed as of right without a resource consent under s 176, and is given exclusive priority and protection over other rules in a plan. Thus a designation can be considered as a permitted activity under *Hawthorn*. Furthermore, whether or not an activity is fanciful is not even a criterion. That aspect of whether an activity for which there is a designation is fanciful had already been considered when the designation was incorporated into the district plan.

[42] Even if it was, the WLR designation was not fanciful because of its exclusive priority and protection. The question of funding is irrelevant as the designation should be taken at face value as if it were a rule. The fact there were no regional consents was also irrelevant, as there was a finding by the Board that these would not be obtained, as the designation was only in stage one. The fact that the WLR could not co-exist with the Expressway is not the test. The Board relied on *Villages* (above) which is distinguishable as it concerned a resource consent, not a designation which is in a very different position. Furthermore, that case was wrong

because in *Hawthorn* the previous on-site unimplemented consent was incompatible with the application under consideration, but was taken into account. There is no principled reason why an inability to co-exist creates a lack of credibility, it just means that the WLR designation remains as a legitimate back up option. Section 177 of the Act expressly provides for overlapping designations. If the WLR designation was no longer credible, it could have been removed under s 182 of the Act.

[43] Even if designation was not equivalent to a permitted activity, it could be considered as an unimplemented resource consent. Save Kapiti submits the designation was likely to be implemented. It also highlights the same inconsistency the Alliance did of the use by the Board of unimplemented private plan changes around the WLR designation as part of the environment.

Submissions for NZTA

Environment

[44] The NZTA argue that the Board was correct to exclude the WLR from the "environment". In *Queenstown Central Limited v Queenstown Lakes District Council*[18] the High Court said a "real world" approach was required, without artificial assumptions, creating an artificial future environment. The appellant's submission that the Board was wrong in this "real world" assessment, excluding the WLR as non credible, is a matter of fact, not of law.

[45] The argument that the Board was required to discount the positive effects of the expressway project on the environment is contrary to what the RMA directs. Section 171 of the Act does allow for the consideration of alternatives, but it is said the WLR was not an alternative given the Project objectives. If the WLR designation were included, the true benefits to people would be artificially under-weighted simply because the designation remained in the district plan.

[46] Save Kapiti's submission that the Board gave undue weight to the Expressway's positive effects is a matter of fact and not of law. In any event NZTA

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[18] *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 1324.

maintains the Board did consider all the positive and negative effects of the Expressway.

[47] Furthermore, any alleged error was immaterial because the Board was more than satisfied that the requirements in Part 2 were met, and s 171 is subject to Part 2.

Permitted Baseline

[48] NZTA argues that s 171 does require the Board to have particular regard to provisions in a plan, which includes the designation pursuant to s 166. The Alliance does not take issue with this, but instead focuses on the permitted baseline test. NZTA submit that the Board did consider this anyway by holding that the WLR designation would no longer be required with the Expressway designation in place.

[49] There was no error of law in finding that the WLR was not part of the baseline. Under s 104(2), this is a matter of discretion for the decision maker. While there is no equivalent provision in s 171, NZTA accepts that a similar rationale applies. NZTA suggests the Board was entitled not to treat the WLR designation as part of the baseline as part of their discretion. This is not an error of law.

[50] In any event, according to NZTA, a finding the WLR was part of the baseline would have made no difference – the effect of the permitted baseline comparison is only to diminish the *adverse* effects of the project, not the positive effects. The Board did not do this exercise, and still approved the project.

Minister's reasons

[51] Finally, the Board is not directed to consider the Minister's reasons – they are to have regard to them. NZTA submitted the Board did consider the Minister's reasons, and they expressly said so. The Board found the project was essential to achieving the project's objectives of management of land use. The Board also considered amenity values generally, and specifically matters of noise, air quality, construction impacts, public health, water quality and social effects. They were not required to expressly record a disagreement with the Alliance's position.

[52] Furthermore, it is said this argument is about findings on the evidence, which again is outside the scope of the appeal.

[53] Finally, any error would be immaterial because the substantive content of the Minister's reasons were central to what the Board considered. The Board did consider the amenity values.

Submissions for the Board of Inquiry

[54] The Board submits generally that findings as to the relevance of the WLR were factual, based on the evidence before them, that the two roads could never co-exist. The WLR is only a backup-up option. And, finally, the Board noted that, like resource consents, designations are permissive, not mandatory, thus the existence of a designation does not mean that it will necessarily be pursued.

Analysis

[55] To begin it must be remembered that an appeal like the one before me can only be on a question of law.[19]

[56] The High Court in *Countdown Properties (Northlands) Limited v Dunedin City Council*[20] set out that an error of law will only arise if the lower court/tribunal:

(a) Applied a wrong legal test; or

(b) Came to a conclusion without evidence or one to which on evidence, it could not reasonably have come; or

(c) Took into account matters which it should not have taken into account; or

(d) Failed to take into account matters which it should have taken into account.

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19 Section 149V.

20 *Countdown Properties (Northlands) Limited v Dunedin City Council* (1994) 1B ELRNZ 150; [1994] NZRMA 145

[57] The principles to be applied are well known and dealt with by the Supreme Court in *Bryson v Three Foot Six Limited.*[21]

> An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly unsupportable.
>
> An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at 36 a state of affairs 'in which there is no evidence to support the determination' or 'one in which the evidence is inconsistent with and contradictory of the determination' or 'one in which the true and only reasonable conclusion contradicts the determination'. Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test...

[58] Any error of law must be material before an appellate court will grant relief.[22]

[59] In my view, it is important to note at the outset that any arguments on whether the WLR designation was credible and non-fanciful are questions of fact, not law.

[60] This appeal turns principally on three questions:

(a) Should the WLR designation have been considered as part of the "environment";

(b) Should the WLR designation have been included as part of the "permitted baseline";

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21 *Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721 at [25] – [26].

22 *RFBPS v With A Habgood Ltd* (1987) 12 NZTPA 76 (HC); *Falkner v Gibson DC* [1995] 3 NZLR 622; [1995] NZRMA 462 (HC); *Countdown Properties (Northlands) Ltd v Dunedin CC* [1994] NZRMA 145, partially reported at (1996) 1B ELRNZ 150 (HC); *BP Oil NZ Ltd v Whitaker CC* [1996] NZRMA 67 (HC); *Urawa Land Ltd v Auckland Council* (2011) 16 ELRNZ 417 (HC).

(c) Did the Board fail to consider the Minister's reason of considering this a proposal of national significance of a change in land use resulting from the expressway?

Should the WLR designation have been considered as part of the "environment"?

[61] As noted above, s 104 requires the Board to consider any actual and potential effects on the environment of allowing the activity, and s 171 requires the Board to consider the effects on the environment of allowing the requirement, having particular regard to any relevant provisions of a plan.[23]

[62] Environment is defined as including:[24]

(a) ecosystems and their constituent parts, including people and communities; and

(b) all natural and physical resources; and

(c) amenity values; and

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

[63] As stated above, the Court of Appeal decision in *Hawthorn* is the leading authority here. That case at [84] in defining the word "environment" seems to set up two limbs of the future state of the environment:

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[23] As to the different analysis required, see Broker's Resource Management at [A171.02] which says: The obligation to assess effects in the consideration of designation requirements is subtly different from the obligation applying to resource consent applications (under s 104). Firstly, under s 171(1), what is required is consideration of the effects on the environment having particular regard to the matters in paragraphs (a)-(d) (whereas s 104 requires regard to actual and potential effects of allowing the activity alongside regard to the other matters in s 104(1)(a)-(c)). Secondly, under s 171(1), the obligation is to consider the effects on the environment "of allowing the requirement" whereas s 104(1)(a) refers to "allowing the activity". However, unlike a resource consent, a designation itself has a restrictive effect on land use and subdivision as well as authorising the work.

[24] Section 2.

(a) as it might be modified by the utilisation of rights to carry out permitted activity under a district plan; and

(b) as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.

[64] In the present case the question arises as to what limb a pre-existing designation falls under. As noted above, Save Kapiti argues a designation falls under the first limb, as it is a superior right under a district plan. A permitted activity is one authorised by the district plan, that does not require a resource consent.[25] A designation is a special provision in a district plan to enable certain work or a particular activity to be undertaken on certain land, regardless of what the rules in the plan might otherwise say may be done on that land. A designation has the effect of not allowing anyone to undertake any activity that would prevent or hinder the designated work, without the prior written consent of the "requiring authority" which holds the designation. It is to be included in a district plan as if it were a rule.[26]

[65] If a designation is considered to be equivalent to a permitted activity, then the test is whether the environment "might be" modified by its use. In *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council*[27] Fogarty J said this notion of "might" applies only to permitted uses and has nothing to do with "likelihood". Likelihood only applies to whether existing resource consents, which are for activities not permitted, will be implemented.[28] Later the Judge said it should be understood that [84] of the *Hawthorn* decision leaves intact the qualification on taking into account permitted uses where the activity is only a very remote possibility, so long as it is not fanciful.[29]

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25 Section 87A(1).
26 Section 175.
27 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1324.
28 At [19].
29 At [56].

[66] If, however, however a designation is considered as an unimplemented resource consent, then the rationale in *Villages* referred to a [19] above could apply and an activity that could not co-exist with the activity under consideration would not form part of the future environment.

[67] However, recent case law has emphasised that [84] of *Hawthorn* is not to be read as a code.[30] In *Royal Forest and Bird Protection Society of New Zealand Inc v Buller*, Justice Fogarty highlighted the problem that the Courts are increasingly finding themselves asked to analogise a resource management problem to fit into the text of [84].[31] In *Queenstown Central Ltd* Justice Fogarty said in reference to *Hawthorn*.[32]

> That decision recognised the importance of context...[84] was a summary only, and itself should not be read out of context.
>
> Section 104D, and indeed the RMA as a whole, calls for a "real world" approach to analysis, without artificial assumptions, creating an artificial future environment...

[68] Those two cases involved an objective in the operative plan (which was considered part of the future environment) and a coal mining licence (which was not).

[69] Based on this "real world" approach, the question becomes why the Court of Appeal in *Hawthorn* said a permitted activity could be part of the future environment, but an unimplemented resource consent could not unless it was likely to be implemented. It depends on whether the distinction the Court of Appeal sought to draw was between activities that were likely to happen and those that were not, or whether it was between activities the effects of which had already been consented to and those that had not.

[70] I think logically it must be the former. As was said in *Queenstown Central Ltd*, it is not appropriate to consider a future environment that is artificial.

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30 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815; [2013] NZRMA 239 (HC); *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1324.

31 At [24].

32 *Queenstown Central Limited* at [84].

Incorporating a designation into the future environment, when it cannot co-exist with the Expressway, I am satisfied would be artificial. The Board was entitled to find the WLR was unlikely to be put into effect, so was entitled to exclude it from its environment.

[71] It is also important to remember that the Board is required to consider whether the requiring authority had given adequate consideration to the alternatives. The enquiry is not into whether the best alternative has been chosen.[33] I am satisfied here that the Board did make this enquiry, and that it has not been challenged in any real way on appeal.

Should the WLR designation have been included as part of the permitted baseline?

[72] When forming an opinion for the purposes of s 104(1)(a) of the Act a consent authority such as the Board here under s 104(2) may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

[73] As noted above, this is often referred to as the "permitted baseline" assessment. Its original is in a decision of the Court of Appeal which stated the appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right by the plan.[34]

[74] The test set out in *Bayley* was further explained by the Court of Appeal in *Smith Chilcott Ltd v Auckland City Council*[35] In particular, the Court explained the approach which should be taken to determining what could be done "as of right" (to use the words of *Bayley*) on a particular site. The Court of Appeal in *Smith Chilcott* said:[36]

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33 *Waimairi DC v Christchurch CC C030/82 (PT),* (under the similar s 118(1)(d) TCPA) applied in *Estate of P A Moran v Transit NZ EnvC* W055/99; *Quay Property Management Ltd v Transit NZ EnvC* W028/00.

34 *Bayley v Manukau City Council* [1999] 1 NZLR 568; [1998] NZRMA 513.

35 *Smith Chilcott Ltd v Auckland City Council* [2001] NZLR 473 (CA).

36 At [26].

> We begin with what is allowed under the relevant plan. In accordance with the purpose of the legislation anything that is permitted but fanciful does not provide a realistic indication of what is permitted and a proper point of comparison. There must be a practical fact specific assessment. The test is perhaps best captured in a single expression as the discussion at the hearing indicated. Of the various phrases used in *Barrett* and elsewhere, "not fanciful" appears to us to set the standard appropriately. It follows that any permissible use qualifies under the permitted baseline test unless in all the circumstances it is a fanciful use.

[75] The components of the permitted baseline test as set out in *Bayley* and *Smith Chilcott* were drawn together by the Court of Appeal in *Arrigato Investments Ltd v Auckland Regional Council*[37] as follows:

> Thus the permitted baseline in terms of Bayley, as supplemented by Smith Chilcott Ltd, is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[76] In that case the Court considered whether to include unimplemented resource consent activities in the permitted baseline comparison. On this, the Court went on to say:[38]

> ...Mr Brabant argued that following the granting of a resource consent, the holder has an equal right to do what is allowed as would have been the case had the plan allowed it. That is so but, as Mr Burns and Mr Loutit submitted, there is a material difference between what is allowed under a plan and what is allowed under a resource consent. The plan represents a consensus, usually after very extensive community and regional involvement, as to what activities should be permitted as of right in the particular location. There is therefore good reason for concluding, as was done in *Bayley*, that any such permitted activities should be treated as part of the fabric of the particular environment.
>
> Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand

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37 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323.

38 At [34] and [35].

> the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.

[77] If the WLR designation in the present case was considered as an unimplemented resource consent, the rationale in *Arrigato* applies. The Board found the WLR designation would be superseded by the Expressway designation, and so to discount the adverse effects of the Expressway would be incorrect.

[78] If the WLR designation was considered a permitted activity under the district plan, then to be included in the permitted activity it must be non fanciful. Addressing this aspect, in my judgment, the Board was entitled to make the factual finding that the WLR designation was fanciful.

[79] However, even if the WLR designation could have been included as part of the permitted baseline, then there would still be no error of law. The Board said they would exercise their discretion not to consider the WLR designation because of the above reasons, and I am satisfied here they were entitled to do this.

[80] Furthermore, I agree with the submission advanced by NZTA that it would have not made the difference the appellant contends. Positive effects of allowing the activity are not relevant to the assessment of the permitted baseline.[39]

[81] The Board was at pains to point out that the WLR designation was not part of the baseline throughout their report. Although they referred to evidence that used the WLR as a baseline, they came to no conclusion on that aspect, and it can only be assumed that in light of such comments, the Board did not in fact use the WLR as a baseline.

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[39] *Kalkman v Thames-Coromandel DC* EnvC A152/02, applied in *Rodney DC v Eyras Eco-Park Ltd* [2007] NZRMA 1 (HC). This is reinforced by s 104(2) which provides that a consent authority "may disregard an adverse effect on the environment if the plan permits an activity with that effect". (Emphasis added)

Did the Board fail to consider the Minister's reason of considering this a proposal of national significance of a change in land use resulting from the expressway?

[82] I am satisfied that this ground of appeal has no merit. Paragraphs [47] to [50] of the Board's decision set out the Ministers reasons for making the direction here in terms of s 139P(1) of the Act. And in paragraph [50], the Board records that in:

> The various sections of this report (the Board has) considered the Minister's reasons for directing this matter to us.

[83] I am satisfied here that the Board did turn their mind to the Minister's reasons – it is clear from the report. Their assessment of those reasons is not a matter for an appeal on a question of law.

Conclusion

[84] For the reasons I have outlined above, the appeal is dismissed on all grounds.

Costs

[85] No submissions were made to me at the hearing of this matter on the issue of costs. Costs therefore are reserved.

[86] If costs are in issue here and counsel are unable to agree between themselves on costs, they may file memoranda on costs (sequentially) and, in the absence of any party indicating they wish to be heard on the issue, I will decide the question of costs based on all the material before the Court and the memoranda filed.

.....
D Gendall J

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