IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2022-404-725
[2023] NZHC 948

UNDER	the Resource Management Act 1991
IN THE MATTER OF	An appeal under s 299 of the Resource Management Act 1991
BETWEEN	SOUTHERN CROSS HEALTHCARE LIMITED Appellant
AND	EDEN EPSOM RESIDENTIAL PROTECTION SOCIETY INCORPORATED First Respondent
	AUCKLAND COUNCIL Second Respondent
	KĀINGA ORA – HOMES AND COMMUNITIES Section 301 Party
	TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY Section 301 Party

Hearing:	12 and 13 September 2022
Appearances:	M Casey KC and B Tree for the appellant M Savage for the first respondent D Hartley and W Randal for the second respondent D Allan for Kāinga Ora – Homes and Communities
Judgment:	27 April 2023

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 27 April 2023 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Introduction [1]
Background and chronology [6]
The broad legal framework for the decisions below [18]
Planning documents in the Resource Management Act 1991 [18]
Procedure applying to requests for private plan changes [22]
Substantive requirements governing requests for private plan changes [25]
Appeals from local authority decisions on requests for private plan changes [28]
Environment Court's Interim Decision [30]
Environment Court's Final Decision [37]
The Court's opening observations [37]
The first core question [40]
Section 32 of the RMA [44]
The second core question [49]
Findings about special character [52]
Findings about planning, landscape and urban design issues [53]
Conclusion [55]
Appeals from Environment Court decisions on questions of law – the principles [57]
Southern Cross's appeal [60]
First error of law – giving effect to the NPS-UD [61]
Second error of law – failing to take into account the Enabling Housing Amendment Act [62]
Third error of law – wrong legal test in relation to directiveness of policies [63]
Fourth error of law – reaching a conclusion it could not reasonably have come to in relation to special character [64]
Fifth error of law – failing to take into account benefits of hospital expansion [65]
Sixth error of law – failing to have regard to pt 2 of the RMA [66]
Seventh error of law – alternative sites and assessment of costs and benefits – reaching a conclusion to which it could not reasonably have come [67]
Eighth error of law – planned built character – failing to take into account relevant considerations and taking into account irrelevant considerations [68]
Ninth error of law –failing to consider modifications to PPC 21 [69]
Issues on appeal [70]
Issue 1: Did the Environment Court err in holding that it was not required to give effect to objectives and policies in the NPS-UD that were not requiring "planning decisions" at that time? [72]
Did the Environment Court err? [74]
Did the error have a material effect? [89]
Issue 2: Did the Environment Court err by failing to take into account the Enabling Housing Amendment Act? [90]
Did the Environment Court err? [91]
Issue 3: Did the Environment Court err by finding that objectives and policies in the Auckland Regional Policy Statement to "maintain and enhance" and to "require" were strongly directive and therefore should be accorded quite significant weight over policies to "enable"? [102]
Did the Environment Court err? [105]
Did the errors have a material effect? [130]
Issue 4: Did the Environment Court err by failing to have regard to pt 2 of the RMA when assessing whether PPC 21 gave effect to the objectives and policies of the Regional Policy Statement? [131]

Issue 5: Did the Environment Court come to a conclusion it could not reasonably have come to, fail to take into account relevant matters, and take into account irrelevant considerations, in assessing the effect of PPC 21 on special character values? [134]
Did the Environment Court fail to take into account relevant matters? [136]
Did the Environment Court take into account irrelevant matters? [142]
Did the errors have a material effect? [145]
Issue 6: Did the Environment Court fail to take into account a relevant matter, namely the benefits of hospital expansion, in deciding whether to approve, decline or modify PPC 21? [146]
Issue 7: Did the Environment Court err in law by concluding that it was necessary and appropriate to consider alternative sites and locations, or by failing to take into account Southern Cross's assessment of alternatives, cost-benefit analysis and other options? [148]
Did the Court err by concluding that it was necessary and appropriate to consider alternative sites and locations? [150]
Did the Court err by failing to take into account Southern Cross's assessment of alternatives, cost-benefit analysis and other options? [155]
Did the errors have a material effect? [159]
Issue 8: Did the Environment Court, in relation to "planned built character" (in policy B2.4.2(10)), fail to consider relevant considerations and take into account irrelevant considerations in determining that the development enabled by PPC 21 could not be of a scale and form in keeping with the existing and planned built character of the area? [160]
Issue 9: Did the Environment Court err by failing to consider possible modifications to PPC 21 before refusing the request for PPC 21? [163]
Result [164]

Introduction

[1] Southern Cross Healthcare Ltd (**Southern Cross**) owns and operates Brightside Hospital at 3 Brightside Road, Epsom, and owns three adjacent properties at 149, 151 and 153 Gillies Avenue. Southern Cross sought to rezone all the properties and to remove the Gillies Avenue properties from a special character overlay. To that end, Southern Cross requested Private Plan Change 21 (**PPC 21**) to the Auckland Unitary Plan.

[2] After notification, submissions and a contested hearing, on 28 May 2020 Auckland Council (**Council**) approved PPC 21, with modifications. The Eden-Epsom Residential Protection Society Incorporated (**Protection Society**), which had opposed Southern Cross's request for PPC 21, appealed the Council's decision to the Environment Court.

[3] In an interim decision dated 9 June 2021 (**Interim Decision**),[1] the Environment Court held that it would not be giving effect in the appeal to objectives and policies in the National Policy Statement on Urban Development 2020 that were not requiring "planning decisions" at that time. In a decision dated 13 April 2022 (**Final Decision**),[2] the Environment Court refused Southern Cross's request for PPC 21.

[4] Southern Cross appeals the Environment Court's two decisions, saying the Court made nine errors of law.

[5] The Protection Society opposes the appeal. The Council opposes the appeal in respect of four of the alleged errors of law and abides this Court's decision in respect of the rest. Kāinga Ora – Homes and Communities (**Kāinga Ora**), a s 301 party, supports the appeal. Another s 301 party, Tūpuna Maunga O Tāmaki Makaurau Authority, did not wish to make submissions on the appeal and was excused from appearing at the hearing.

---

1 *Eden-Epsom Residential Protection Society Inc v Auckland Council* [2021] NZEnvC 82.
2 *Eden-Epsom Residential Protection Society Inc v Auckland Council* [2022] NZEnvC 60.

Background and chronology

[6] The property at 3 Brightside Road has been used for healthcare-related activities since the 1920s. The existing Brightside Hospital opened there in 1999. It was constructed by Southern Cross under a resource consent granted in 1996. The property is in the Residential – Mixed Housing Suburban Zone (**RMHS Zone**) in the Auckland Unitary Plan.

[7] Southern Cross purchased the three adjacent Gillies Avenue properties between 2015 and 2017, with a view to expanding Brightside Hospital. There is a guest house on one of those properties. There is a dwelling on each of the other two properties. All three properties are in the Residential – Single House Zone (**RSH Zone**) and are within the Special Character Areas Overlay – Residential (**SCA Overlay**).

[8] In requesting PPC 21, Southern Cross sought to rezone all four properties (together, **the Site**) to Special Purpose – Healthcare Facility and Hospital Zone (**HFH Zone**) and to remove the Gillies Avenue properties from the SCA Overlay. The stated objective of PPC 21 is to enable the efficient operation and expansion of Brightside Hospital, while managing the effects on the adjacent residential amenity.

[9] Southern Cross requested PPC 21 on 1 February 2019. On 5 March 2019, the Council accepted PPC 21 for processing. PPC 21 was publicly notified for submissions. The Council delegated authority to hearing commissioners to conduct a hearing into, and decide on, the request for PPC 21.

[10] The panel of commissioners held a hearing over four days in November 2019. They delivered a decision on 12 May 2020 (publicly notified on 28 May 2020). By a majority, the commissioners approved PPC 21 with modifications.

[11] The Protection Society appealed the decision to the Environment Court. Before that appeal was heard, the National Policy Statement on Urban Development 2020 (**NPS-UD**) came into force (on 20 August 2020). The NPS-UD sets out the objectives and policies for planning for well-functioning urban environments. Notably, it introduces intensification policies that were not in the national policy

statement that it replaced.[3] The NPS-UD categorises urban environments into three tiers informed by population size and growth rates. Auckland is a "tier 1 urban environment" and the Council is a "tier 1 local authority". The intensification policies are more directive for tier 1 urban environments than for tier 2 and 3 urban environments.

[12] The Environment Court heard the appeal in June 2021. At the start of the hearing the Court raised two questions of law relating to the NPS-UD, which the Court said should be the subject of submissions and an urgent decision. The questions were: Does the NPS-UD drive PPC 21? If the NPS-UD does drive PPC 21, how and in what ways would it drive it?[4]

[13] The Interim Decision is the Environment Court's oral decision on those questions, delivered on the second day of the hearing. The Court held that:[5]

> … it is not required to and will not be giving effect in this case to Objectives and Policies in the NPS-UD that are not requiring "planning decisions" at this time.

[14] On 17 December 2021, the Court issued a direction advising the parties that it had not been possible to complete work on the Court's decision. The Court said it felt the parties deserved to be told the likely outcome so they could plan ahead. The Court advised:

> [T]he outcome will be that [Southern Cross] gains little or nothing of the plan change requested. The likelihood is it could be refused in its entirety.

[15] Before the Environment Court delivered its Final Decision, the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Enabling Housing Amendment Act**) commenced (on 20 December 2021). The Enabling Housing Amendment Act requires specified territorial authorities, including the Council, to incorporate "Medium Density Residential Standards" into relevant residential zones in their districts. The Act also directs the initial process for territorial authorities to implement the intensification policies in the NPS-UD.

---

3 The National Policy Statement on Urban Development Capacity 2016.
4 Interim Decision at [3].
5 At [29].

[16] The Environment Court delivered its Final Decision on 13 April 2022. The Court refused Southern Cross's request for PPC 21.

[17] On the appeal to this Court, I was told about several further developments since the Final Decision. These included the Council publicly notifying proposed Plan Change 78, which is intended to meet the requirements of the Enabling Housing Amendment Act and give effect to the intensification policies in the NPS-UD. I consider that those further developments are not relevant to the appeal and I do not address them further.

The broad legal framework for the decisions below

Planning documents in the Resource Management Act 1991[6]

[18] Under pt 5 of the Resource Management Act 1991 (**RMA**), there is a three-tiered resource management system – national, regional and district – with an associated hierarchy of planning documents.

[19] Central government is responsible for national direction. This direction is made through, among other things, national policy statements.[7] The purpose of national policy statements is to state objectives and policies for matters of national significance that are relevant to achieving the purposes of the RMA.[8] Lower order planning documents (regional policy statements, regional plans and district plans) are required to give effect to national policy statements.[9]

[20] Regional councils and unitary councils are responsible for regional policy statements and regional plans. There must be a regional policy statement for each region.[10] Auckland Council is a unitary council. The Regional Policy Statement for Auckland is in the Auckland Unitary Plan.

---

6 This is adapted from the Supreme Court's overview in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [10]–[14].
7 Resource Management Act 1991 (**RMA**), ss 45–55.
8 RMA, s 45.
9 RMA, ss 55, 62(3), 67(3) and 75(3).
10 RMA, s 60.

[21] Territorial authorities (district and city councils) are responsible for district plans. There must be one district plan for each district.[11] Auckland Council is a territorial authority. The District Plan for Auckland is in the Auckland Unitary Plan.

Procedure applying to requests for private plan changes

[22] Any person may request a change to a district plan,[12] generally known as a "private plan change". The procedure applying to a request for a private plan change is set out in pt 2 of sch 1 of the RMA. The request must explain the purpose of, and reasons for, the proposed change and contain an evaluation report prepared in accordance with s 32 of the RMA for the proposed change.[13] Section 32 requires an evaluation report to examine the extent to which the objectives of the proposed change are the most appropriate way to achieve the purpose of the RMA and to examine whether the provisions in the proposed change are the most appropriate way to achieve those objectives.

[23] The local authority (here, the Council) may adopt, accept or reject the request. If, as in this case, the local authority accepts the request, it must publicly notify it.[14] Any person may make a submission on the request.[15] The local authority must hold a hearing on the request and on any submissions.[16] It may then decline the request, approve it, or approve it with modifications, and must give reasons for its decision.[17]

[24] A local authority may delegate most of its functions, powers and duties under the RMA to hearings commissioners.[18] Here, the Council delegated authority to four commissioners to conduct a hearing into, and decide on, the request for PPC 21.

Substantive requirements governing requests for private plan changes

[25] The substantive requirements governing the consideration of requests for private plan changes are found primarily in ss 74 and 75 of the RMA.

---

11 RMA, s 73.
12 RMA, s 73(2) and sch1, cl 21.
13 RMA, sch 1, cl 22.
14 RMA, sch 1, cl 25(2).
15 RMA, sch 1, cl 29(1A).
16 RMA, sch 1, cl 8B (which applies by virtue of sch 1, cl 29(1)).
17 RMA, sch 1, cl 29(4).
18 RMA, s 34(1).

[26] Section 74(1) provides that a territorial authority (here, the Council) must prepare and change its district plan "in accordance with", among other things, its functions under s 31, the provisions of pt 2, and any national policy statement.

[27] Section 75 addresses the contents of district plans. By s 75(3), a district plan must "give effect to", among other things, any national policy statement and any regional policy statement. "Give effect to" means implement. It is a strong directive, creating a firm obligation on the territorial authority.[19]

Appeals from local authority decisions on requests for private plan changes

[28] The person who requested the change, and any person who made submissions, may appeal the local authority's decision to the Environment Court.[20]

[29] On such an appeal, the Environment Court has the same power, duty, and discretion as the Council.[21] In this case, therefore, the Environment Court was bound by the same substantive requirements as the Council and was empowered to decline, approve, or approve with modifications the request for PPC 21. As noted, the substantive requirements included the requirement to change the district plan in accordance with any national policy statement and the requirement that the district plan give effect to any national policy statement. The NPS-UD was the only national policy statement that was potentially relevant to the Environment Court's consideration of PPC 21.[22]

Environment Court's Interim Decision

[30] At the start of the hearing of the Protection Society's appeal, the Environment Court placed five questions of law before the parties. The Court said the first two questions should be the subject of submissions by the parties at the outset "and perhaps

---

19 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [77].

20 RMA, sch 1, cl 29(6).

21 RMA, s 290.

22 The NPS-UD was not relevant to the commissioners' consideration of PPC 21, as it did not come into force until after their decision. At the time of their decision on PPC 21, the previous National Policy Statement on Urban Development Capacity 2016 was relevant.

an urgent decision of the Court, against the possibility it could inform the relevance (or not) of some topics in the substantive enquiry".[23] The two urgent questions were:[24]

> a) Does the NPS-UD apply yet? It is operative, but does it drive PPC 21; are we required to move ahead of decision-making by the Council on implementation of directive and urgent policies?
>
> b) If it does drive PPC 21 how and in what ways would it drive it?

[31] The Interim Decision is a record of the Environment Court's oral decision, delivered on the second day of the hearing, on these questions. The Court noted that the NPS-UD became operative on 20 August 2020 and that cl 1.3, entitled "Application", provided in sub-cl (1)(b) that the NPS-UD applied to "planning decisions by any local authority that affect an urban environment".[25] The Court said that the question arose as to whether a decision on the merits of a private plan change on appeal was a "planning decision".[26]

[32] After considering various provisions of the NPS-UD and the RMA, the Court found that a decision on the merits of a private plan change request, including on an appeal to the Environment Court, was a "planning decision". This meant that some provisions of the NPS-UD could be considered on the appeal.[27]

[33] The question that then arose, the Environment Court said, was: Which provisions of the NPS-UD could be considered on the appeal?[28] To answer that question, the Court said it was appropriate to "interrogate" pt 2 of the NPS-UD, which sets out the objectives and policies of the NPS-UD. The Court said that references to "planning decisions" among the eight objectives and eleven policies were limited, being found only in objectives 2, 5, and 7, and policies 1 and 6.[29] The Court said that Southern Cross's evidence had a focus on objective 3 and policy 3, but neither employed the term "planning decision".[30]

---

23 Interim Decision at [2].
24 At [3].
25 At [6].
26 At [8].
27 At [18]. The NPS-UD has, since the Interim Decision, been amended to expressly provide that a "planning decision" includes a decision on a request for a private plan change.
28 At [19].
29 At [20].
30 At [21]–[24].

[34] The Environment Court then said that pt 4 of the NPS-UD ("Timing") was important. It said cl 4.1 relevantly provided:[31]

> **4.1 Timeframes for implementation**
>
> (1) Every tier 1, 2, and 3 local authority must amend its regional policy statement or district plan to give effect to the provisions of this National Policy Statement as soon as practicable
>
> (2) In addition, local authorities must comply with specific policies of this National Policy Statement in accordance with the following table:

Local authority	Subject	National Policy Statement	By when
Tier 1 only	Intensification	Policies 3 and 4 (see Part 3 subpart 6)	Not later than 2 years after commencement date

[35] The unchallenged evidence of the Council (a tier 1 local authority) was that it was busy with workstreams on the matters in policies 3 and 4 that had to inform community consultation and the promulgation of changes to the Auckland Unitary Plan under sch 1 of the RMA.[32] The Environment Court considered these steps would be logically accomplished under sub-pt 6 of pt 3 of the NPS-UD ("Intensification in tier 1 urban environments"). This required very precise activity by the Council of identifying, by location, the building heights and densities required by policy 3, with information about these things to be publicly disseminated when notification of the plan change occurs. These things were yet to occur.[33]

[36] The Environment Court concluded:

> [29] The Court holds that it is not required to and will not be giving effect in this case to Objectives and Policies in the NPS-UD that are not requiring "planning decisions" at this time.

---

31 At [25].
32 At [25] and [26].
33 At [27].

> [30] We acknowledge the promulgation and operative status of the NPS overall but cannot pre-judge, let alone pre-empt, Schedule 1 [RMA] processes yet to be undertaken by the Council in implementation of it.

Environment Court's Final Decision

The Court's opening observations

[37] The Environment Court began its Final Decision by describing PPC 21 and the current zoning and features of the Site and its surrounds. The Court noted that both the RMHS Zone (in which 3 Brightside Road is located) and the RSH Zone (in which the Gillies Avenue properties are located) contained standards relevant to the permitted built form on the properties. The Court said these standards were generally quite modest height, coverage, yard and recession plane controls. The SCA Overlay also had permitted built form standards, which the Court again said were relatively modest in relation to building height, coverage, yard and recession planes.[34]

[38] The Court said the Site was located within a block of residential properties bounded by Owens Road, Brightside Road and Gillies Avenue. The properties adjacent to the Site were predominantly in the RSH Zone. Properties in the surrounding area were a mix of RSH with a SCA Overlay, MHS and some Mixed Housing Urban. There were some areas of the Terrace Housing and Apartment Building zone within 450 m of the Site.[35]

[39] The Court then referred to the evidence from Southern Cross about its request for PPC 21. This included evidence about the demand on Southern Cross's existing hospitals, issues faced by the health sector, potential shortcomings of the health sector to meet demand, the role of private hospitals and the benefits and importance of them, and the anticipated benefits from expanding Brightside Hospital. The Court said this evidence was not seriously challenged, "except in the area of cost-benefits, alternatives and other options".[36] The Court said there was no doubt about pressures on the health system and the part private hospitals needed to play in that, and that some

---

34 Final Decision at [19]–[22].
35 At [25]–[27].
36 At [33].

of that might play into the s 32 analysis. But, the Court said, the issues surrounding PPC 21 "quickly became focussed on the site and the locality in which it is found".[37]

The first core question

[40] The Environment Court said two questions remained of the five core questions that the Court had posed at the start of the hearing.[38] The Court articulated the first question as:[39]

> Extent to which [PPC 21] gives effect to the RPS [the Auckland Regional Policy Statement], in light of relevant directive policies and the reconciliation exercise anticipated by *King Salmon*;[40] whether there are directive policies that take precedence in relation to [PPC 21].

[41] In relation to this question, the Environment Court said that in *King Salmon* the Supreme Court held:[41]

> ... that objectives and policies can be expressed in deliberately different ways, which determines the degree of flexibility decision makers have in applying them; that policies expressed in more directive terms will carry greater weight than those expressed in less directive terms where policies "pull in different directions"; close attention should be paid to the way in which the policies are expressed; if conflict remains after this analysis has been undertaken, an analysis of the policy document informed by s 5 RMA could conclude that one policy prevails over another. In addition, where there is invalidity, incompleteness or uncertainty in relation to the statutory planning instrument being applied, recourse to Part 2 RMA will be appropriate.

[42] The Environment Court then referred to the following provisions of the Auckland Regional Policy Statement:

(a) Policy B2.4.2(10): "Require non-residential activities to be of a scale and form that are in keeping with the existing and planned built character of the area."

---

37 At [34].

38 The Environment Court said there was a third urgent question that did not have to be answered, given its answers to the first two questions in the Interim Decision: Final Decision at [4].

39 At [36].

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

41 Final Decision at [38] (footnotes omitted).

(b) Objective B5.3.1(2): "The character and amenity values of identified special character areas are maintained and enhanced."

(c) Policies B5.3.2(1) and (4), which employ the same language as objective B5.3.1(2) about special character areas and maintaining and enhancing their character and amenity values.

[43] The Court held that that objective and those policies were framed in strong directive language and that they therefore should be accorded quite significant weight over other policies that were framed less directively or more flexibly.[42] The Court contrasted the language of policies B2.8.2(1)–(4), on which Southern Cross relied. Those policies used the word "enable" (for example, "Enable social facilities …" and "Enable intensive use and development of existing and new social facility sites"). The Court rejected Southern Cross's submission that "enable" was a strong directive to do something. The Court held that none of the policies could be interpreted "to direct establishment or intensification of social facilities on any given site".[43]

Section 32 of the RMA

[44] Before the Court addressed its second core question (which was whether there was a need to consider alternative sites), the Court dealt with matters under s 32 of the RMA. The Court said it did this because the main matter in contention was whether examination was required of "other reasonably practicable options" (referring to s 32(1)(b)(i)).[44]

[45] The Court noted that the expert planning witnesses had achieved a measure of agreement about s 32 matters in a joint witness statement. The planners agreed that there was a need for healthcare and hospital facilities as enabled by PPC 21, and that the issue in contention was whether the proposed location for the change was appropriate given the SCA Overlay on the Site. The difference in opinion between the planners was the relative weight given to the SCA Overlay and the hospital activities

---

42 At [45], [51], [55], [94], [149], [153], [197], [231] and [233].
43 At [55].
44 At [56].

on the Site, the Court noting that its findings on the first core question were important on this matter.[45]

[46] The planners agreed there would be potential for regional-scale or positive benefits through the expansion of the hospital. Four of the planners considered that PPC 21 would protect the most visible special character features of the site. The Court said it made findings against that proposition. One of those planners opined that the positive benefits of the hospital expansion would outweigh the benefits of retaining the special character area and residential zoning. The Court said its findings on the first core question effectively ruled out such an analysis.[46]

[47] The Court referred to the opinion of one of the planners, Mr Putt. He considered that, while PPC 21 provided for positive healthcare outcomes in Auckland, the hospital could be located elsewhere with similar advantages in terms of centrality and public transport, whereas the same flexibility was not open to the SCA Overlay because it was specific to the existing special character values.[47]

[48] Next, the Court said that the planners agreed that the provisions of PPC 21 would be efficient and effective to achieve its objective "if the subject site is determined to be appropriate". The Court said that left it wondering what it should make of s 32(1)(b)(i), which requires that a report under s 32 must examine whether the provisions in the proposal are the most appropriate way to achieve the objectives of the proposal by "identifying other reasonably practicable options for achieving the objectives". The Court said it would consider that as part of the second core question. In the meantime, the Court held that on the matters discussed and recorded in the planners' joint witness statement "matters favour the appellant society to this point".[48]

The second core question

[49] The Environment Court said the second core question was whether "there is an obligation to consider alternatives to this private plan change request".[49] The Court

---

45 At [57]–[60].
46 At [62].
47 At [63].
48 At [67].
49 At [68].

addressed the Supreme Court's analysis of this question in *King Salmon*.[50] The Environment Court summarised the Supreme Court's findings:[51]

(a) There may be instances where a decision maker must consider the possibility of alternative sites when determining an application on the applicant's own land.

(b) Whether consideration of alternative sites may be necessary will be determined by the nature and circumstances of the particular site-specific plan change application.

[50] In respect of the second proposition, the Environment Court said that its findings under the first core question (about the directive language and therefore weighting of objectives and policies in the Auckland Regional Policy Statement) should be considered relevant "nature and circumstances".[52]

[51] The Court found that Southern Cross's evidence about cost-benefits, alternatives and other options was "distinctly lacking" and that on this aspect of s 32 Southern Cross had "not measured up".[53]

Findings about special character

[52] After reviewing the extensive evidence on special character, the Court held that PPC 21 was "strongly discordant" with objective B5.3.1(2) of the Regional Policy Statement. It said this was of considerable importance to the outcome of the appeal, given its earlier finding that that objective was framed "very directively" and accordingly had to be assigned greater weight than provisions that were more flexibly framed.[54]

---

50 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.
51 Final Decision at [86] and [88].
52 At [89].
53 At [92]–[93].
54 At [149].

Findings about planning, landscape and urban design issues

[53] The Court surveyed the evidence on planning, landscape and urban design issue. It referred again to the evidence of Mr Putt, who considered that the development enabled by PPC 21 could be located elsewhere with similar advantages of centrality and public transport, whereas the SCA Overlay on the subject area had no alternative location as it was specific to the special character values that were present. The Court accepted Mr Putt's advice.[55]

[54] In its conclusion on these matters, the Court said it could not help but come back to policy B2.4.2(1) "which requires non-residential activities to be of a scale and form that are [in] keeping with the existing and planned built character of the area".[56] The Court found that while the provisions of PPC 21 might assist in regard to "form" the provisions did not attend to "scale".[57]

Conclusion

[55] The Court said it was "plain" that its decision was directly at odds with the decision of the majority of the hearing commissioners. The Court referred briefly to the key reasons given by the majority.

[56] The Court concluded that on key issues its findings had been against Southern Cross. It said that in some measure those key issues were those advised to the parties at the outset of the hearing. The Court refused the request for PPC 21.

Appeals from Environment Court decisions on questions of law – the principles

[57] This appeal is not a general appeal. Under s 299 of the RMA, a party may appeal against any decision of the Environment Court to this Court on a question of law. There is no right of appeal on factual questions. This Court must be vigilant in resisting attempts by appellants to re-litigate factual findings made by the

---

55 At [173].
56 At [197] (underlining in original).
57 At [197].

Environment Court.[58] This Court will intervene on an appeal only where the Environment Court:[59]

(a) applied a wrong legal test;

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

(c) took into account matters that it should not have taken into account, or failed to take into account matters that it should have taken into account; or

(d) failed to apply the principles of natural justice.

[58] To be clear, the weight to be given to relevant considerations is a question for the Environment Court and is not a question of law that can be reconsidered by this Court on appeal.[60]

[59] Further, any error of law must have had a material effect on the Environment Court's decision before this Court will grant relief.[61]

Southern Cross's appeal

[60] Southern Cross appeals against both the Interim Decision and the Final Decision. Southern Cross says the Environment Court made nine errors of law.

First error of law – giving effect to the NPS-UD

[61] Southern Cross says the Environment Court erred in law in the Interim Decision in holding that it was not required to give effect to objectives and policies in the NPS-UD that were not requiring "planning decisions" at that time. Further,

---

58 *Guardians of Paku Bay Assoc Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [32].

59 For propositions (a)–(c): *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153. For proposition (d): *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) at [132]–[133] and [148].

60 *Guardians of Paku Bay Assoc Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [31].

61 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

Southern Cross says the Court also erred in the Final Decision by failing in any event to consider how PPC 21 would give effect to those objectives and policies in the NPS-UD that were requiring planning decisions.

Second error of law – failing to take into account the Enabling Housing Amendment Act

[62] Southern Cross says the Environment Court erred in law in the Final Decision by failing to take into account the Enabling Housing Amendment Act (which, it may be recalled, commenced after the hearing before the Environment Court but before the Final Decision was delivered).

Third error of law – wrong legal test in relation to directiveness of policies

[63] Next, it is said the Environment Court erred in law in the Final Decision by finding that objectives and policies in the Auckland Regional Policy Statement to "maintain and enhance" and to "require" (relating to special character and non-residential activities) were strongly directive and therefore should be accorded quite significant weight over policies to "enable" (relating to hospitals).

Fourth error of law – reaching a conclusion it could not reasonably have come to in relation to special character

[64] Southern Cross says in the Final Decision the Environment Court came to a conclusion it could not reasonably have come to, failed to take into account relevant matters, and took into account irrelevant considerations, in assessing the effect of PPC 21 on special character values.

Fifth error of law – failing to take into account benefits of hospital expansion

[65] Southern Cross says the Environment Court failed to take into account a relevant matter, namely the benefits of hospital expansion, in deciding whether to approve, decline or modify PPC 21.

Sixth error of law – failing to have regard to pt 2 of the RMA

[66] Southern Cross says that, as alleged in the third error of law, the objectives and policies in the Regional Policy Statement to "maintain and enhance" and to "require" do not have precedence over the policies to "enable". By reason of the consequent incompleteness or uncertainty in the Regional Policy Statement, the Environment Court was required (but failed) to have regard to pt 2 of the RMA when assessing whether PPC 21 gave effect to the objectives and policies of the Regional Policy Statement.

Seventh error of law – alternative sites and assessment of costs and benefits – reaching a conclusion to which it could not reasonably have come

[67] Southern Cross says that the Environment Court erred in law by concluding that it was necessary and appropriate to consider alternative sites and locations. Southern Cross also says the Environment Court failed to take into account Southern Cross's assessment of alternatives, cost-benefit analysis and other options in the evidence of its witnesses. For these reasons, Southern Cross says the Environment Court reached a conclusion to which, on the evidence, it could not reasonably have come.

Eighth error of law – planned built character – failing to take into account relevant considerations and taking into account irrelevant considerations

[68] Southern Cross says that the Environment Court, when interpreting "planned built character" (in terms of policy B2.4.2(10) of the Regional Policy Statement), gave incorrect weight to that policy (as set out in the third alleged error of law). Further, Southern Cross says the Court failed to consider relevant considerations and took into account irrelevant considerations in determining that the development enabled by PPC 21 could not be of a scale and form in keeping with the existing and planned built character of the area.

Ninth error of law –failing to consider modifications to PPC 21

[69] Finally, it is said that the Environment Court erred in law by failing to consider possible modifications to PPC 21 before refusing the request for PPC 21.

Issues on appeal

[70] The issues arising from the third and sixth alleged errors of law both relate to the interpretation of the objectives and policies in the Auckland Regional Policy Statement. I therefore consider them in that order (as the parties generally did at the hearing). The issues are:

(a) Did the Environment Court err in holding that it was not required to give effect to objectives and policies in the NPS-UD that were not requiring "planning decisions" at that time?

(b) Did the Environment Court err by failing to take into account the Enabling Housing Amendment Act?

(c) Did the Environment Court err by finding that objectives and policies in the Auckland Regional Policy Statement to "maintain and enhance" and to "require" were strongly directive and therefore should be accorded quite significant weight over policies to "enable"?

(d) Did the Environment Court err by failing to have regard to pt 2 of the RMA when assessing whether PPC 21 gave effect to the objectives and policies of the Regional Policy Statement?

(e) Did the Environment Court come to a conclusion it could not reasonably have come to, fail to take into account relevant matters, and take into account irrelevant considerations, in assessing the effect of PPC 21 on special character values?

(f) Did the Environment Court fail to take into account a relevant matter, namely the benefits of hospital expansion, in deciding whether to approve, decline or modify PPC 21?

(g) Did the Environment Court err in law by concluding that it was necessary and appropriate to consider alternative sites and locations, or

by failing to take into account Southern Cross's assessment of alternatives, cost-benefit analysis and other options?

(h) Did the Environment Court, in relation to "planned built character" (in policy B2.4.2(10)), fail to consider relevant considerations and take into account irrelevant considerations in determining that the development enabled by PPC 21 could not be of a scale and form in keeping with the existing and planned built character of the area?

(i) Did the Environment Court err by failing to consider possible modifications to PPC 21 before refusing the request for PPC 21?

[71] If I find on any issue that the Environment Court did err, a sub-issue will arise: Did the error have a material effect on the Court's decision to refuse the request for PPC 21?

Issue 1: Did the Environment Court err in holding that it was not required to give effect to objectives and policies in the NPS-UD that were not requiring "planning decisions" at that time?

[72] Southern Cross's position is that, under s 75(3)(a) of the RMA, the Auckland Unitary Plan is required to give effect to the NPS-UD. As PPC 21 was proposing to change the Auckland Unitary Plan, Southern Cross says the Environment Court had to give effect to the NPS-UD as a whole, and was not entitled to pick and choose the extent to which it would give effect to the NPS-UD. Southern Cross says the Court therefore erred when holding that it was not required to give effect to some of the NPS-UD's objectives and policies.

[73] Kāinga Ora agrees with Southern Cross's position. The Protection Society and the Council say that the Environment Court did not err.

Did the Environment Court err?

[74] Section 75(3)(a) of the RMA provides that a district plan must give effect to any national policy statement. Section 74(1)(ea) provides that a territorial authority (such as the Council) must prepare and change its district plan in accordance with

a national policy statement. The Environment Court, sitting on appeal from the Council's decision, had the same power, duty and discretion as the Council.[62] PPC 21 proposed changes to Auckland's district plan. It follows that, in considering the request for PPC 21, the Environment Court was required to consider the extent to which PPC 21's proposed changes to the district plan would give effect to the NPS-UD.

[75] In determining whether a district plan gives effect to a national policy statement, it is of course necessary to consider the particular provisions of that national policy statement. As Mr Savage, counsel for the Protection Society, put it, the obligation to give effect to the NPS-UD means that consideration must first be given to what the provisions of the NPS-UD require.

[76] There are two provisions in the NPS-UD of particular importance. These are those dealing with the scope of the NPS-UD's application. One, cl 1.3, identifies types of local authorities or decisions to which the NPS-UD applies. The other, cl 4, sets the temporal scope of the NPS-UD. These provisions were rightly the focus of the Environment Court in its Interim Decision.

[77] Clause 1.3 provides:

> (1) This National Policy Statement applies to:
>
> (a) all local authorities that have all or part of an urban environment within their district or region (ie, tier 1, 2 and 3 local authorities); and
>
> (b) planning decisions by any local authority that affect an urban environment.
>
> (2) However, some objectives, policies, and provisions in Parts 3 and 4 apply only to tier 1, 2, or 3 local authorities.

[78] The structure of cl 1.3(1) is important. Clause 1.3(1)(a) applies the NPS-UD to specified local authorities, regardless of the type of decision being made by the local authority. Clause 1.3(1)(b) applies the NPS-UD to specified decisions by local authorities, regardless of the type of local authority making the decision.

---

62 RMA, s 290(1).

[79] The Council is a tier 1 local authority. Under cl 1.3(1)(a), the NPS-UD applies to the Council. The NPS-UD therefore applied to the Environment Court, subject only to any question about the temporal scope of the NPS-UD (which I address shortly).

[80] In its Interim Decision, the Environment Court referred only to cl 1.3(1)(b) and not to cl 1.3(1)(a). I consider, with respect, that the Court erred in so doing.[63] This error led the Court to ask itself whether a decision on the merits of a request for a private plan change on appeal was a "planning decision".[64] That was an unnecessary question, given that cl 1.3(1)(a) applied the NPS-UD to the Council (and thereby the Court). Further, having answered that question in the affirmative, the Court asked itself which provisions of the NPS-UD could be considered on the appeal.[65] It answered that question in part by "interrogating" the objectives and policies in the NPS-UD to see which of those referred to "planning decisions". This was an irrelevant inquiry, given that cl 1.3(1)(a) applied the NPS-UD to the Council regardless of the type of decision the Council was making.

[81] I turn to the temporal scope of the NPS-UD. The NPS-UD came into force on 20 August 2020,[66] but cl 4 sets out timeframes for complying with different parts of it. Clause 4 includes:

> **4.1 Timeframes for implementation**
>
> (1) Every tier 1, 2, and 3 local authority must amend its regional policy statement or district plan to give effect to the provisions of this National Policy Statement as soon as practicable
>
> (2) In addition, local authorities must comply with specific policies of this National Policy Statement in accordance with the following table:

---

63 To be fair to the Court, this error may have reflected the submissions made to it. Before me, the parties' written submissions focussed, as the Court had done, solely on cl 1.3(1)(b). I raised cl 1.3(1)(a) during the hearing. All parties then accepted that cl 1.3(1)(a) applied the NPS-UD to the Council (subject to the question of temporal scope).

64 Interim decision at [8].

65 At [19].

66 NPS-UD, cl 1.2(1).

Local authority	Subject	National Policy Statement provisions	By when
Tier 1 only	Intensification	Policies 3 and 4 (see Part 3 subpart 6)	Not later than 2 years after commencement Date

...

[82] By cl 4.1(1), the Council must amend its district plan to give effect to the NPS-UD as soon as practicable.[67] What is a practicable time will depend on the circumstances. Clause 4.1(2) is expressed to be "in addition" to cl 4.1(1). It sets a two-year outer limit (that is, 20 August 2022) for complying with certain policies. Some of those policies require the Council to amend its district plan. To the extent that is so, the effect of cl 4.1(2) is to *add* that two-year outer limit to the Council's obligation under cl 4.1(1) to amend its district plan as soon as practicable. Importantly, cl 4.1(2) does not defer or diminish the Council's obligation under cl 4.1(1).

[83] It follows that the Council was required to amend its district plan to give effect to the NPS-UD as soon as practicable. The Environment Court, on appeal, had the same duty. The Court had to make a decision on the request for PPC 21. This meant it was, in terms of cl 4.1(1), practicable for the Court to amend the district plan to give effect to the NPS-UD when making its decision (assuming, of course, PPC 21's proposed changes gave effect to the NPS-UD). The Court's obligation to do so was not deferred or diminished by cl 4.1(2).

[84] The Environment Court considered otherwise. It noted the Council was busy with workstreams on the promulgation of changes to the district plan (to give effect to the NPS-UD) under sch 1 of the RMA. It said the timing of promulgation under cl 4, namely 20 August 2022, had not (at the time of its Interim Decision) been reached. It said promulgation would logically be accomplished through the process in subpt 6 of the NPS-UD (referred to in the table under cl 4.1(2) and quoted above) and that this had yet to occur. It concluded that it was not required to give effect to objectives and

---

[67] This mirrors s 55 of the RMA.

policies in the NPS-UD "that are not requiring 'planning decisions' at this time".[68] It explained that while it acknowledged the operative status of the NPS-UD overall it "cannot pre-judge, let alone pre-empt, Schedule 1 processes yet to be undertaken by the Council in implementation of it".[69]

[85] The Protection Society and the Council supported the Environment Court's reasoning. I respectfully consider that the Court was in error. First, it appears to have assumed that cl 4.1(2) defers or diminishes the obligation in cl 4.1(1). That is not so, for the reasons I have set out in [82] and [83] above. Secondly, that the Council was still engaged in the process in subpt 6 of the NPS-UD did not limit the Court's obligation to give effect to the objectives and policies of the NPS-UD. Subpart 6 sets out certain things that a local authority must do to give effect to policies 3 and 4 of the NPS-UD. Subpart 6 is contained in pt 3 of the NPS-UD. Part 3 commences:

> **3.1 Outline of part**
>
> (1) This part sets out a non-exhaustive list of things that local authorities must do to give effect to the objectives and policies of this National Policy Statement, but nothing in this part limits the general obligation under the [RMA] to give effect to those objectives and policies.

[86] This provision could not be clearer. That the NPS-UD stipulates the subpt 6 process, and that the Council was engaged in that process, did not limit the Council's (or the Environment Court's) obligation to give effect to the objectives and policies of the NPS-UD. Mr Allan, counsel for Kāinga Ora, submitted that the Court had, contrary to cl 3.1, treated the obligations in pt 3 as limiting the Council's and its obligation to give effect to the NPS-UD. I agree.

[87] Ms Hartley, counsel for the Council, submitted that the Environment Court's approach was at least broadly consistent with the High Court's decision in *Horticulture New Zealand v Manawatu-Wanganui Regional Council*.[70] In that case an issue arose as to whether the Environment Court had erred in failing to consider the extent to which a proposed plan gave effect to the National Policy Statement on Freshwater Management 2011 (**NPSFM**). The NPSFM was gazetted only after appeals had been

---

68 Interim decision at [29].

69 At [30].

70 *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492, (2013) 17 ELRNZ 652.

filed with the Environment Court. Kós J held the Environment Court was not bound to give effect to the NPSFM in the course of the appeal.[71] This was because the NPSFM had its own implementation timetable and anticipated decisions being made by regional councils.[72] I consider that decision is distinguishable. The timetable provisions in the NPSFM are not set out in the decision, but they appear to have been very different from those in the NPS-UD. Further, it appears that the timetable for the regional council to implement the NPSFM was exhaustive of the council's obligation – there is no suggestion that there was any equivalent to cl 3.1 in the NPSFM.

[88] For these reasons, I respectfully conclude that the Environment Court erred in holding that it was not required to give effect to objectives and policies in the NPS-UD that were not requiring "planning decisions" at that time. In considering the request for PPC 21, the Environment Court should have considered the extent to which PPC 21's proposed changes to the district plan would give effect to all the provisions of the NPS-UD.

Did the error have a material effect?

[89] This error had a material effect on the Environment Court's decision to refuse the request for PPC 21. The Court said that its Interim Decision addressed two "core questions". It gave an urgent decision on those questions because of the possibility that the decision "could inform the relevance (or not) of some topics in the substantive enquiry".[73] In refusing the request for PPC 21, the Court said its findings on key issues had been against Southern Cross and that in "quite some measure" those key findings emerged from a focus of the key issues advised to the parties at the outset of the hearing.[74]

Issue 2: Did the Environment Court err by failing to take into account the Enabling Housing Amendment Act?

[90] Southern Cross says the Environment Court was required, in its Final Decision, to take into account the Enabling Housing Amendment Act. The Protection Society

---

71 At [100].
72 At [100]–[101].
73 Interim decision at [2].
74 Final Decision at [236].

and the Council say the Court was not required to take that Act into account. Kāinga Ora expresses no position on this issue.

Did the Environment Court err?

[91] The Enabling Housing Amendment Act amended the RMA. It came into force on 21 December 2021. This was several months after the Environment Court heard the Protection Society's appeal, but before the Court delivered its Final Decision.

[92] To be clear, it does not appear that any party submitted to the Environment Court, once the Enabling Housing Amendment Act came into force, that the Court had to take that Act into account. This, however, does not affect the question whether, as a matter of law, the Court was required to take the Act into account.

[93] The issue is whether the amendments to the RMA made by the Enabling Housing Amendment Act affected the completion of the appeal before the Environment Court. Counsel for Southern Cross, the Protection Society and the Council all referred to s 33 of the Legislation Act 2019. Section 33 provides:

> **33 Effect of repeal or amendment on existing rights and proceedings**
>
> (1) The repeal or amendment of legislation does not affect—
>
> (a) the completion of a matter or thing that relates to an existing right, interest, title, immunity, duty, status, or capacity (a legal position); or
>
> (b) the commencing of a proceeding that relates to an existing legal position; or
>
> (c) the completion of a proceeding commenced or in progress under the legislation.
>
> (2) Repealed or amended legislation continues to have effect for the purposes stated in subsection (1) as if the legislation had not been repealed or amended.

[94] There is an initial question whether this issue is governed by s 33 or by its predecessor, s 18 of the Interpretation Act 1999.[75] That question arises because s 33 itself did not come into force until 28 October 2021, after the Environment Court heard

---

[75] The question is important, as s 18 of the Interpretation Act 1999 had no equivalent to s 33(1)(c) of the Legislation Act 2019.

the Protection Society's appeal.[76] On the same date, s 18 of the Interpretation Act was repealed.[77] Counsel did not address me on this. All assumed that s 33 governs. I consider their assumption is correct. This is because:

(a) Whether the repeal of s 18 of the Interpretation Act affected the completion of the appeal is governed by s 33.

(b) A repeal will affect the completion of an appeal (or other proceeding), unless one of s 33(1)(a)–(c) applies. Section 33(1)(a) and (b) do not apply, as the appeal did not relate to an existing legal position.[78] Section 33(1)(c) does not apply, because the appeal was under the RMA, not under s 18 of the Interpretation Act.

[95] Section 33 therefore governs whether the amendments to the RMA made by the Enabling Housing Amendment Act affected the completion of the appeal. Mr Casey submitted that although in general the amendment of legislation does not affect proceedings in progress, that general rule did not apply where there was no right or other legal interest involved. He relied on the Court of Appeal's decision in *Foodstuffs (Auckland) Ltd v Commerce Commission*.[79]

[96] The short answer to Mr Casey's submission is that *Foodstuffs* was a decision under s 18 of the Interpretation Act. Section 18 did not contain an equivalent to s 33(1)(c). Section 33(1)(c) applies here: the appeal was a proceeding commenced under the RMA, and so the amendments to the RMA made by the Enabling Housing Amendment Act did not affect the completion of the appeal.

[97] Section 33(1)(c), however, does not apply to legislation if the legislation provides otherwise or if the context of the legislation requires a different interpretation.[80] Schedule 12 of the RMA contains transitional provisions for various

---

76 Legislation Act 2019 Commencement Order 2021, cl 2.
77 Legislation (Repeals and Amendments) Act 2019, s 6.
78 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353 (CA).
79 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353 (CA).
80 Legislation Act 2019, s 9.

amendments that have been made to the RMA. The transitional provisions for the Enabling Housing Amendment Act are contained in pt 5 of sch 12. Clause 37 provides:

> **37 Plan change or private plan change notified before commencement**
>
> (1) Subclause (2) applies to a plan change or private plan change that, before the commencement date,—
>
> (a) was notified; and
>
> (b) was the subject of a decision under clause 10 of Schedule 1 that was publicly notified.
>
> (2) If this subclause applies, the plan change or private plan change may proceed as if the Amendment Act had not been enacted.

[98] Both elements of cl 37(1) were satisfied in respect of PPC 21. Clause 37(2) therefore applied. This means that PPC 21 "may proceed" as if the Enabling Housing Amendment Act had not been enacted.

[99] The words "may proceed" are peculiar. They contrast with other transitional provisions in sch 12 that say that evaluations or applications "must be determined" as if an amendment had not been made.

[100] Mr Casey submitted that cl 37(2) provided the Environment Court with a discretion whether or not to proceed with the appeal as if the Enabling Housing Amendment Act had not been enacted. He said the Court was at least required to turn its mind to that discretion, and it had not done so. I do not accept that submission. It would be surprising to confer on a court a discretion whether or not to apply an amendment to legislation. I consider that "may" is used in a permissive rather than discretionary sense. It reinforces, rather than overrides, s 33(1)(c) of the Legislation Act.

[101] I conclude that the Environment Court was not required to take into account the Enabling Housing Amendment Act.

Issue 3: Did the Environment Court err by finding that objectives and policies in the Auckland Regional Policy Statement to "maintain and enhance" and to

"require" were strongly directive and therefore should be accorded quite significant weight over policies to "enable"?

[102] Under s 75(3)(c) of the RMA, a district plan must give effect to any regional policy statement. In *King Salmon*, the Supreme Court held that "give effect to" means implement. It is a strong directive, creating a firm obligation on the part of those who are subject to it.[81]

[103] This meant that, in assessing the request for PPC 21, the Environment Court had to determine whether PPC 21 would give effect to the Auckland Regional Policy Statement. The first step in that determination was to interpret relevant objectives and policies of the Regional Policy Statement. In *King Salmon*, the Supreme Court explained that interpretative process in these terms (rejecting an "overall judgment" approach to giving effect to policy statements):

> [129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.
>
> [130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the [policy statement], albeit informed by s 5 [of the RMA]. As we have said, s 5 should not be treated as the primary operative decision-making provision.
>
> [131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them. …

[104] Before the Environment Court, and again on this appeal, the parties were agreed as to the objectives and policies of the Regional Policy Statement that were

---

81 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [77].

relevant to an assessment of PPC 21. The parties also agreed that the Environment Court had accurately summarised the principles in *King Salmon* before analysing the language of those objectives and policies. But Southern Cross and Kāinga Ora say the Environment Court misapplied *King Salmon* and consequently erred in its interpretation of those objectives and policies. The Protection Society and the Council say there was no such error.

Did the Environment Court err?

[105] Mr Casey's first submission was that the Environment Court had adopted an overall judgment approach (rejected in *King Salmon*), too readily concluding there was a conflict without first attempting to reconcile the objectives and policies. I do not accept that submission. The Court paid attention to the language of the relevant objectives and policies. It found that some were expressed in more directive terms than others. It did not say that this meant there was a conflict. Rather, it concluded that the policies that were expressed more directively should be accorded more weight than policies expressed less directively. This is the approach required by *King Salmon*, as [129] of the Supreme Court's judgment, quoted above, shows.

[106] Mr Casey's second submission was that the Court erred in finding that objective B5.3.1(2), policy B2.4.2(10) and policies B5.3.2(1) and (4) were expressed in strong directive language and that they therefore should be accorded quite significant weight over policies B2.8.2(1)–(4). To assess this submission, it is necessary to consider the language of the objective and policies.

[107] The provisions of a planning document must be interpreted in the context of the document as a whole.[82] This is reinforced in the Regional Policy Statement, which contains repeated reminders that its provisions must be read as a whole.[83] The planning experts before the Environment Court recognised this, agreeing in [15] of their joint witness statement that the Regional Policy Statement "needs to be read as a

---

82 *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA); *Equus Trust v Christchurch City Council* [2017] NZHC 224 at [68].

83 For example, cls B1.2, B1.5 and B2.9.

whole". The Environment Court disagreed with the planners' statement.[84] That was, with respect, an error on the Court's part.

[108] Two of the policies that the parties agree are relevant to an assessment of PPC 21 are contained in chapter B2: Urban growth and form. This identifies resource management issues as follows (noting that the reference to social facilities includes private hospitals):[85]

> **B2.1. Issues**
>
> Auckland's growing population increases demand for housing, employment, business, infrastructure, social facilities and services.
>
> Growth needs to be provided for in a way that does all of the following:
>
> ...
>
> (4) encourages the efficient use of existing social facilities and provides for new social facilities;
>
> (5) enables provision and use of infrastructure in a way that is efficient, effective and timely;
>
> (6) maintains and enhances the quality of the environment, both natural and built;
>
> ...
>
> (8) enables Mana Whenua to participate and their culture and values to be recognised and provided for.

[109] The language in which these issues are listed ("*all* of the following") does not indicate any hierarchy. Each issue appears to be of equal importance.

[110] The objectives sought to be achieved by the Regional Policy Statement for urban growth and form, and the policies for the issues and objectives, are then set out in several parts of chapter B2.[86] B2.4 addresses residential growth. It includes the following objective and policy:

> **B2.4.1. Objectives**
>
> ...

---

84 Final Decision at [153].
85 As required by s 62(1)(a) of the RMA.
86 As required by s 62(1)(c)–(d) of the RMA.

(5) Non-residential activities are provided in residential areas to support the needs of people and communities.

B2.4.2. Policies

...

(10) Require non-residential activities to be of a scale and form that are in keeping with the existing and planned built character of the area.

[111] B2.8 addresses social facilities. It includes the following objectives and policies:

B2.8.1. Objectives

(1) Social facilities that meet the needs of people and communities, including enabling them to provide for their social, economic and cultural well-being and their health and safety.

(2) Social facilities located where they are accessible by an appropriate range of transport modes. ...

B2.8.2. Policies

(1) Enable social facilities that are accessible to people of all ages and abilities to establish in appropriate locations as follows:

(a) small-scale social facilities are located within or close to their local communities;

(b) medium-scale social facilities are located with easy access to city, metropolitan and town centres and on corridors;

(c) large-scale social facilities are located where the transport network (including public transport and walking and cycling routes) has sufficient existing or proposed capacity.

(2) Enable the provision of social facilities to meet the diverse demographic and cultural needs of people and communities.

(3) Enable intensive use and development of existing and new social facility sites.

(4) In growth and intensification areas identify as part of the structure plan process where social facilities will be required and enable their establishment in appropriate locations.

[112] Chapter B2 concludes with the principal reasons for adopting the objectives and policies in the chapter. These reasons include:

With growth, new open spaces and social facilities will be required and the existing open space and social facilities will need to be expanded and upgraded to meet the needs of new residents and the increased level of use.

[113] The other chapter of relevance is B5: Historic heritage and special character. Its issues include:

B5.1. Issues

...

(2) Historic heritage needs active stewardship to protect it from inappropriate subdivision, use and development.

(3) Areas with special character should be identified so their particular character and amenity values can be maintained and enhanced.

[114] Chapter B5 is in two parts. B5.2 is concerned with historic heritage, B5.3 with special character areas. B5.2 is not directly relevant, other than in the contrast that its language (of "protection" and "avoidance") provides to the language in B5.3. Relevant objectives and policies for special character areas are:

B5.3.1. Objectives

...

(2) The character and amenity values of identified special character areas are maintained and enhanced.

B5.3.2. Policies

(1) Identify special character areas to maintain and enhance the character and amenity values of places that reflect patterns of settlement, development, building style and/or streetscape quality over time.

(2) Identify and evaluate special character areas considering the following factors:

(a) physical and visual qualities: groups of buildings, or the area, collectively reflect important or representative aspects of architecture or design (building types or styles), and/or landscape or streetscape and urban pattern, or are distinctive for their aesthetic quality; and

(b) legacy including historical: the area collectively reflects an important aspect, or is representative, of a significant period and pattern of community development within the region or locality.

...

(4) Maintain and enhance the character and amenity values of identified special character areas by all of the following:

(a) requiring new buildings and additions and modifications to existing buildings to maintain and enhance the special character of the area;

(b) restricting the demolition of buildings and destruction of features that define, add to or support the special character of the area;

(c) maintaining and enhancing the relationship between the built form, streetscape, vegetation, landscape and open space that define, add to or support the character of the area; and

(d) avoiding, remedying or mitigating the cumulative effect of the loss or degradation of identified special character values.

[115] Chapter B5 then concludes with the principal reasons for adopting its objectives and policies. These note that special character areas are dealt with differently from significant historic heritage. They also state:

> The identified character of these special character areas, [sic] should be maintained and enhanced by controls on demolition, design and appearance of new buildings and additions and alterations to existing buildings.

[116] I first consider policy B2.4.2(10) ("Require non-residential activities to be of a scale and form that are in keeping with the existing and planned built character of the area"). The Environment Court held this policy was framed in strong directive language.[87] I agree. That reflects the ordinary meaning of "require". This is so, even though the policy must be read in the immediate context of objective B2.4.1(5) ("Non-residential activities are provided in residential areas to support the needs of people and communities"). The provisions are not in conflict. The objective is to be achieved subject to the requirement expressed in policy B2.4.2(1).

[117] In the same chapter are the objectives and policies concerned with social facilities. These policies (B2.8.2(1)–(4)) all use the verb "enable". The Environment Court held that this word, and therefore the policies, did not provide a direction.[88] I respectfully disagree with that interpretation of the policies. In my view, the Court focussed unduly on the word "enable" and paid insufficient attention to context.

---

87 Final Decision at [45].
88 At [54]–[55].

[118] The use of the word "enable" does not mean that the policies provide no direction. It is not as if the Council is at liberty to ignore the policies. Ms Hartley, counsel for the Council, implicitly acknowledged this when she said that the Council "had to" make provision for the activities in the policies (more correctly, had to enable the activities).

[119] Many of the policies in the Regional Policy Statement are concerned with achieving positive outcomes rather than with controlling or restricting negative outcomes. Given that most positive outcomes will be achieved by private actors, rather than by the Council, it is only natural that these policies use verbs such as "enable", "encourage", or "promote" rather than a verb such as "require". It would be odd, for example, if policy B2.8.2(3) was expressed to be: "Require intensive use and development of existing and new social facility sites." I consider that there is some force in Mr Casey's submission that, on the Environment Court's approach, a negative direction would always be given more weight than a positive one.

[120] Further, all the policies in part B2.8 (which is concerned with social facilities) use the word "enable". The Environment Court's approach relegates the entirety of B2.8 to relative insignificance. That is at odds both with the statement of issues in B2.1 (which indicates that encouraging the efficient use of existing social facilities is of equal weight to maintaining and enhancing the quality of the built environment) and with one of the principal reasons for the policies in chapter B2 (existing social facilities will need to be expanded).

[121] I therefore consider that policies B2.8.2(1)–(4) are directive. I also consider the policies are expressed in strong directive language. The policies do not use weak directive language such as "take account of".[89] "Enable" is more directive than other verbs used in relation to positive outcomes, such as "encourage" or "promote". Strong direction is consistent with chapter B2's statement of issues and principal reasons, to which I have just referred.

---

89 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [129].

[122] Ms Hartley submitted that the Environment Court's interpretation of "enable" was consistent with Cull J's decision in *Equus Trust v Christchurch City Council*.[90] That decision concerned a very different planning instrument. Given the need to interpret planning documents in their own context, I do not find that decision of assistance in interpreting the policies in part B2.8.

[123] The final objective and policies that are relevant are those concerned with special character areas in chapter B5. Objective B5.3.1(2) is that "The character and amenity values of identified special character areas are maintained and enhanced." This objective is engaged only with respect to "identified" special character areas. Policies B5.3.2(1) and (2) reflect this. Policy B5.3.2(1) states that special character areas are to be identified so as to maintain and enhance the character and amenity values of places with particular qualities (for example, places that reflect patterns of settlement over time). Policy B5.3.2(2) states the factors to be considered in identifying and evaluating such areas.

[124] In respect of any special character areas that are identified, policy B5.3.2(4) specifies four ways to "maintain and enhance" the character and amenity values of the areas. These include requiring modifications to existing buildings to maintain and enhance the special character and restricting the demolition of buildings that define, add to or support the special character of the area.

[125] There are therefore two distinct parts to the special character area policies. First such areas are to be identified, and then the character and amenity values of those identified areas are to be maintained and enhanced. Mr Allan submitted that although the policies were directive in respect of maintenance and enhancement, they were not directive in respect of the initial step of identifying special character areas.

[126] I consider there is a difference in the directiveness of the special character area policies, though it is not quite as pronounced as Mr Allan would have it. The identification policies B5.3.2(1) and (2) have a directive aspect, as they require the Council to take action (rather than simply "have regard to" special character). But I agree that the language of those policies gives the Council some leeway in how it goes

---

90 *Equus Trust v Christchurch City Council* [2017] NZHC 224.

about identifying special character areas, and for that reason the policies are less directive than the other policies relevant to a consideration of PPC 21. I consider that the Environment Court erred in interpreting those policies (and the part of objective B5.3.1(2) concerned with the identification step) as being strongly directive. By contrast, policy B5.3.2(4) is expressed in language that is, as the Environment Court held, strongly directive.

[127] Mr Allan also submitted that there was an important distinction in chapter B5 between historic heritage (protected) and special character areas (maintained and enhanced). I accept that distinction, but I do not consider the Environment Court's interpretation was inconsistent with it. The Court said it stopped short of holding that the special character area policies "amount to a prohibition".[91]

[128] In summary, I conclude that the Environment Court erred in its interpretation of the relevant objectives and policies in the Regional Policy Statement:

(a) It found that the Regional Policy Statement did not need to be read as a whole (when it should have been).

(b) It concluded that policies B2.8.2(1)–(4) are not directive, let alone strongly directive (when those policies are strongly directive).

(c) It concluded that objective B5.3.1(2) (to the extent it concerns identification of special character areas) and policies B5.3.2(1) and (2) are strongly directive. These provisions are less directive, and should be accorded less weight, than the other relevant provisions of the Regional Policy Statement.

[129] The final question is whether the Environment Court erred in law by finding that it should accord quite significant weight to policy B2.4.2(10), objective B5.3.1(2) and policies B5.3.2(1) and (4) over policies B2.8.2(1)–(4). Mr Savage submitted that the weight to be afforded to the policies was a matter for the Environment Court and did not give rise to an error of law. I accept that the weight to be given to relevant

---

91 At [51].

considerations is a question for the Environment Court and is not a question of law that can be reconsidered by this Court on appeal.[92] But here the Court's weighting of the policies directly reflected its (incorrect) interpretation of those policies. It therefore did give rise to an error of law. This includes the Court's reference to policies B5.3.2(1) and (4) as setting a "very high" bar.[93] That wrongly assumes that those policies have precedence over the policies concerning social facilities.

Did the errors have a material effect?

[130] These errors plainly had a material effect on the Environment Court's decision. The Court's interpretation of the policies in the Regional Policy Statement was undertaken as one of its "core" questions. It repeatedly referenced its conclusion on interpretation when it assessed PPC 21 against the Regional Policy Statement. That assessment focussed on the policies that the Court had found should be given quite significant weight over the policies in B2.8 concerning social facilities. The Court made only passing reference to the planning experts having agreed that PPC 21 gives effect to B2.8.[94]

Issue 4: Did the Environment Court err by failing to have regard to pt 2 of the RMA when assessing whether PPC 21 gave effect to the objectives and policies of the Regional Policy Statement?

[131] Section 74(1) of the RMA provides that a territorial authority must prepare and change its district plan in accordance with, among other things, pt 2 of the RMA (which states the purpose and principles of the RMA). However, the parties were agreed that the effect of *King Salmon* is that, where a district plan has to give effect to a statutory planning instrument such as the Auckland Regional Policy Statement, there is generally no need to refer back to pt 2 unless there is invalidity, incompleteness or uncertainty (including a conflict between provisions) in relation to that instrument.[95]

[132] Mr Casey submitted that if the Environment Court had undertaken a proper assessment of the objectives and policies in the Regional Policy Statement, and found

---

92 *Guardians of Paku Bay Assoc Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [31].
93 Final Decision at [49].
94 At [154].
95 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [85], [88] and [130].

that a conflict arose, its analysis should have been informed by pt 2 of the RMA. In particular, the Court should have considered whether PPC 21 was the most appropriate way to achieve the purpose of the RMA set out in s 5.

[133] I consider the Court was not required to have regard to pt 2. The Court did not perceive there to be a conflict between the objectives and policies. Mr Casey did not, on this appeal, submit there was any conflict. Rather, Southern Cross's submissions with respect to the Regional Policy Statement were focussed on the relative directiveness of relevant objectives and policies and therefore their relative weighting. Further, Mr Casey did not explain how reference to pt 2 would have made a difference to the interpretation of the relevant objectives and policies or to any conflict between them.

Issue 5: Did the Environment Court come to a conclusion it could not reasonably have come to, fail to take into account relevant matters, and take into account irrelevant considerations, in assessing the effect of PPC 21 on special character values?

[134] Southern Cross says the Environment Court failed to take into account relevant matters, took into account irrelevant matters, and as a result came to a conclusion it could not reasonably have come to in assessing the effect of PPC 21 on special character values. The Protection Society says there was no error. The Council and Kāinga Ora abide this Court's decision on this issue.

[135] I deal with Southern Cross's arguments under the following headings:

(a) Did the Environment Court fail to take into account relevant matters?

(b) Did the Court take into account irrelevant matters?

Did the Environment Court fail to take into account relevant matters?

[136] Mr Casey submitted the Court failed to take into account six relevant matters.

[137] First, it is said that the Court failed to take into account that the physical attributes that contribute to the special character of an area include streetscape

qualities, vegetation and landscape features. Mr Casey submitted that the Court failed to give any or appropriate weight to the special character contribution made by trees and stone walls and the new protection of these features that PPC 21 would provide. I do not accept that submission. As Mr Savage said, the Court made extensive reference, in its assessment of special character, to the contribution made by trees and stone walls (and streetscape) to special character.[96] The weight to be given to that matter was for the Environment Court to determine.

[138] Secondly, Mr Casey submitted that the Court failed to consider that the boarding house at 149 Gillies Avenue (which makes up about half the SCA Overlay on the Site) could be demolished as of right and failed to consider the likelihood that the dwellings on 151 and 153 Gillies Avenue could be consented for removal. He referred me to the evidence of John Brown, a heritage specialist, that as at November 2019 the Council had granted 133 of 141 applications for demolition consents for properties in the SCA Overlay (throughout Auckland). I consider there is nothing in this point. It is clear the Court was aware of the lack of any demolition control on 149 Gillies Avenue and that the demolition control on 151 and 153 Gillies Avenue was not a prohibition. The Court referenced demolition several times, as well as Mr Brown's evidence.[97] Although the Court did not specifically refer to the likelihood that consent might be obtained for demolition of 151 and 153 Gillies Avenue, the Court was not required to traverse every matter in its reasons.

[139] Thirdly, Mr Casey submitted the Court failed to take into account that there are no other properties in the block on which the Site is situated subject to the SCA Overlay. He also submitted the Court was manifestly wrong to find that a "large gap" would be created along Gillies Avenue if the SCA Overlay were removed from the Gillies Avenue properties, because it failed to consider there is already a gap in the Overlay. I do not accept this submission. The Court was aware of, and referred to, the fact that three Gillies Avenue properties are an "isolated element" within the block.[98] Its conclusion that removal of those properties from the SCA Overlay would create a

---

96 At [103], [106], [107], [111], [113], [118], [133] and [145].
97 At [100], [101], [120]–[126], [131] and [133].
98 At [134].

large gap in the Overlay was one that was open to it. It does not give rise to a question of law.

[140] Next, Mr Casey submitted that two relevant matters arose from the NPS-UD and from the Enabling Housing Amendment Act: (i) these require the Council to change the Auckland Unitary Plan to allow greater intensification on and around the Site, and (ii) special character is not a listed "qualifying matter"[99] under the NPS-UD or the Amendment Act and so there is likely to be change to or consolidation of the SCA Overlay. Mr Casey submitted the Court should have considered these two matters as relevant factual (as well as legal) considerations. Given my conclusion on issue 1, I accept that the effects of the NPS-UD should have been considered by the Court. Its failure to do so was an error. I do not accept that the effects of the Enabling Housing Amendment Act were a relevant factual consideration for the Court. The Act came into force months after the hearing of the appeal, the Act was not legally relevant, and there is no suggestion that any party subsequently invited the Court to consider its (factual) effects.

[141] Finally, Mr Casey submitted the Court failed to consider that several properties in close proximity to the Site, and 149 Gillies Avenue itself, have no or low special character values. I do not accept this submission. The Court said that 149 Gillies Avenue lacked architectural qualities.[100] The Court was plainly aware that there were several properties close to the Site that were not included in the SCA Overlay.

Did the Environment Court take into account irrelevant matters?

[142] Mr Casey submitted that the Court took into account and compared the development that would be allowed if PPC 21 were approved with the development that would be allowed were the Site to remain in the RSH Zone and subject to the SCA Overlay. He said this was an irrelevant comparison and that, instead, the Court should have considered the effects of PPC 21 on the SCA Overlay as a whole.

---

99 That is, qualifying the call for intensification made by policy 3 of the NPS-UD.
100 Final Decision at [103].

[143] Mr Savage said Mr Casey's argument was circular. He said that if the SCA Overlay were removed from the Gillies Avenue properties, then its provisions in the Auckland Unitary Plan would no longer apply. But he said the evidence was clear that those properties have special character and qualify for the SCA Overlay. He submitted that, because PPC 21 sought removal of the Gillies Avenue properties from the Overlay, comparing the existing zoning provisions with the changes sought was an inevitable and essential part of the exercise.

[144] I accept, in part, Mr Casey's submission. I held earlier that there are two distinct parts to the special character area provisions: (i) identification of special character areas and then (ii) maintenance and enhancement of those areas' character and amenity values. The comparison undertaken by the Environment Court was relevant to the second part but not to the first.[101] The Court erred in not considering, with respect to the first part, the effects of PPC 21 on the SCA Overlay as a whole.

Did the errors have a material effect?

[145] I have found the Court erred in failing to consider the effects of the NPS-UD and in not considering the effects of PPC 21 on the SCA Overlay as a whole. For the reasons I expressed in relation to issue 1, the former error alone had a material effect on the Environment Court's decision.

Issue 6: Did the Environment Court fail to take into account a relevant matter, namely the benefits of hospital expansion, in deciding whether to approve, decline or modify PPC 21?

[146] Southern Cross says the Environment Court failed to take into account the benefits of the hospital expansion that would be enabled by PPC 21. The Protection Society says the Court took those benefits into account. The Council and Kāinga Ora abide this Court's decision on this issue.

[147] I can deal briefly with this issue. The Environment Court did refer to and take into account the benefits of the hospital expansion,[102] so there was no error as alleged.

---

101 It appears the Court rejected the submission that there were two distinct parts to the special character area provisions: Final Decision at [49].

102 Final Decision at [34], [168], and [171].

Southern Cross's real complaint is that the Court failed, because of its findings with respect to alternative sites and cost-benefit analysis, to give proper consideration to the benefits of hospital expansion. I consider those complaints below under issue 7.

Issue 7: Did the Environment Court err in law by concluding that it was necessary and appropriate to consider alternative sites and locations, or by failing to take into account Southern Cross's assessment of alternatives, cost-benefit analysis and other options?

[148] The Environment Court held that, with respect to the evaluation required under s 32 of the RMA, it was necessary for Southern Cross to consider alternative sites to PPC 21. The Court held that on this aspect of s 32, Southern Cross had not measured up.[103]

[149] Southern Cross says that the Court erred in holding that it was necessary for it to consider alternative sites. It also says that the Court ignored evidence that Southern Cross had considered alternatives and made a cost-benefit analysis. The Protection Society says the Court was correct to require an assessment of alternative sites, either under s 32 or under other provisions of the RMA, and that the Court correctly found there had been no such assessment. The Council and Kāinga Ora abide this Court's decision on this issue.

Did the Court err by concluding that it was necessary and appropriate to consider alternative sites and locations?

[150] In *King Salmon*, the Supreme Court said that the RMA does not require consideration of alternative sites as a matter of course and accepted the practical difficulties that such a requirement would bring.[104] Nonetheless, the Court said that there may be circumstances in which consideration of alternative sites might be necessary in relation to a request for a private plan change. The Court said this would depend on the nature and circumstances of the particular site-specific plan change application and the reasons advanced for it.[105] The Court instanced applications claiming that an activity needs to occur in the coastal environment.

---

103 At [68], [92] and [93].

104 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [167].

105 At [170] and [173].

[151] The Environment Court referred to the test in *King Salmon* and in particular to its holding that whether consideration of alternative sites was necessary depended on the nature and circumstances of the application.[106] It then said that its finding that certain objectives and policies in the Regional Policy Statement were to be accorded quite significant weight over other policies "should be considered relevant 'nature and circumstances'."[107] The Court added that an amendment to s 32(1)(b)(i) of the RMA post-*King Salmon* had sharpened the possible focus on alternative sites.[108] The Court concluded that consideration of alternative sites was necessary.

[152] I consider, with respect, that the Court erred in this conclusion. First, s 32(1)(b)(i) refers to "other reasonably practicable options for achieving the objectives" of the proposal. The objective of PPC 21 is to enable the efficient operation and expansion of the existing Brightside hospital, while managing the effects of that expansion and operation on the adjacent residential amenity. This objective is, by its nature, site-specific. It is not reasonably practicable to expand the existing hospital on any other site.

[153] Secondly, its conclusion rested in large part on its earlier finding that some objectives and policies were to be afforded quite significant weight over other policies. I have held that the Court erred in reaching that finding. Also, the policies to which the Court referred were a long way from embodying matters of national significance (in contrast to the matters in issue in *King Salmon*). Further, one of the relevant policies, B2.8.2, has a site-specific aspect: "Enable intensive use and development of existing … social facility sites."

[154] Mr Savage submitted that, if I were to conclude that the Environment Court erred in its consideration of s 32 and application of *King Salmon*, there was an alternative basis for requiring consideration of alternative sites. He referred to cl 6(1)(a) of sch 4 of the RMA. I do not accept that submission. Even if cl 6(1)(a) is triggered (a matter I do not have to decide) it merely requires consideration

---

106 Final Decision at [88].
107 At [89].
108 At [90].

of "possible alternative locations". There are no possible alternative locations for expanding the existing hospital.

Did the Court err by failing to take into account Southern Cross's assessment of alternatives, cost-benefit analysis and other options?

[155] Early in its Final Decision, when discussing the evidence from Southern Cross's witnesses, the Environment Court said that Mr Bennett (chief of property and development for Southern Cross) and Mr Williams (a consultant from EY) were "unable to offer much about" cost-benefits, alternatives and other options.[109] Later, in relation to the need to consider alternative sites, the Court said it found evidence about cost-benefits, alternatives and other options "distinctly lacking" and noted that Mr Williams had told the court that "they were not in his brief".[110]

[156] Mr Casey submitted that the Court had failed to take into account evidence that:

(a) Southern Cross had considered the options of expanding its two other hospitals in central Auckland, but identified development constraints.

(b) Southern Cross had commissioned EY to assess the options of doing nothing, building on a new site and retaining and expanding Brightside hospital. EY's report was in evidence through Mr Williams.

(c) Mr Shaw, an expert planner, addressed in his s 32 report the options of doing nothing, relocating the hospital elsewhere and retaining and expanding the existing hospital.

(d) Mr Shaw undertook a cost-benefit analysis of PPC 21, addressing the status quo and various possible alternative plan provisions.

(e) A cost-benefit analysis was submitted with PPC 21 and Mr Shaw provided a further cost-benefit analysis in his evidence.

---

109 At [33].
110 At [92].

(f) Mr Williams' evidence included the economic, efficiency and well-being benefits of expanding the existing hospital.

(g) Mr Bennett's evidence included the efficiency, economic, social, health and patient risk management benefits from the expansion of the existing hospital.

[157] I have considered this evidence. It is detailed. The weight to be given to it was, of course, a matter for the Environment Court. But I consider, with respect, that the Court came to a conclusion to which it could not reasonably come when it found that in the area of cost-benefits, alternatives and other options "Mr Bennett and Mr Williams were ... unable to offer much", Southern Cross's evidence was "distinctly lacking" and Southern Cross had not "measured up". The Court did not comment on or analyse the above evidence in coming to this conclusion, other than observing that Mr Williams had told the Court that these matters (cost-benefits, alternatives and other options) were not in his brief.[111] The Court appears to be relying on the following exchange in the cross-examination of Mr Williams:

> Q. Did you do a detailed cost benefit analysis of a build on a new site and place compared with the Brightside Road property?
>
> A. That was not part of our scope of work.

[158] That question was directed at a specific aspect of a cost-benefit analysis. Mr Williams did not say there was no cost-benefit analysis at all, nor that there had been no consideration of alternatives and other options.

Did the errors have a material effect?

[159] These errors related to one of the core questions that the Court raised at the outset of the hearing. In refusing the request for PPC 21, the Court said its "key findings" against Southern Cross emerged from those core questions. I consider therefore the errors plainly had a material effect.

---

[111] I acknowledge the voluminous evidence that the Court was faced with. The Court described this as "wildly excessive" (Final Decision at [8]), a description with which I agree, having been presented with the same evidence on this appeal.

Issue 8: Did the Environment Court, in relation to "planned built character" (in policy B2.4.2(10)), fail to consider relevant considerations and take into account irrelevant considerations in determining that the development enabled by PPC 21 could not be of a scale and form in keeping with the existing and planned built character of the area?

[160] Policy B2.4.2(1) requires non-residential activities to be of a scale and form that are in keeping with the existing and planned built character of the area. The Environment Court found that while the provisions of PPC 21 might assist in "form" being in keeping with the existing and planned built character of the area, it could not find the same about "scale".[112]

[161] In reaching this finding, the Court took into account that PPC 21 provides for buildings up to 25 m in height as a restricted discretionary activity. Mr Casey submitted this was an irrelevant consideration, as resource consent would be required and could be declined. I consider this submission overlooks how the Court took this consideration into account. The Court was aware of the implications of this being a restricted discretionary activity. The Court merely said that there would be an unacceptable risk that any application for consent would not be notified.[113] I agree with Mr Savage that this is unexceptional. Further, even if there was an error, I do not consider it was material. The Court expressed a range of other concerns in relation to policy B2.4.2(10).

[162] Mr Casey submitted that the Court failed to take into account a relevant consideration, namely how the "planned built character" might change under PPC 21, the NPS-UD and the Enabling Housing Amendment Act. Mr Casey said "planned" was used in contrast to "existing" and must be interpreted to be forward-looking. I do not accept that interpretation. I accept there is a contrast between "existing" and "planned" built character. But this does not mean that "planned" is forward-looking. "Planned" refers to the currently planned built character of the area.

---

112 Final Decision at [197].
113 At [193].

Issue 9: Did the Environment Court err by failing to consider possible modifications to PPC 21 before refusing the request for PPC 21?

[163] It was common ground between Southern Cross and the Protection Society (the Council and Kāinga Ora abiding on this issue) that the Court was empowered to decline, approve or approve with modifications PPC 21.[114] Mr Casey submitted the Court had failed to turn its mind to whether it could approve PPC 21 with modifications. I do not accept that submission. The Court referred to the independent hearing commissioners having modified the proposal and to additional modifications recommended by Council experts during the Court's hearing of the appeal.[115] I am satisfied the Court turned its mind to the possibility of modification. I accept Mr Savage's submission that the Court found so decisively against PPC 21 that it must have considered that no modifications could save it.

Result

[164] I allow the appeal. I set aside the Environment Court's Interim and Final Decisions. I refer the matter back to the Court for reconsideration in accordance with my findings at [88], [128], [129], [140], [144], [152], [153] and [157].

[165] Southern Cross is entitled to costs on the appeal. Counsel should be able to agree costs. If not, memoranda (each of no more than three pages, excluding relevant schedules or annexures) are to be filed and served as follows:

(a) Southern Cross by 19 May 2023.

(b) The other parties by 2 June 2023.

Campbell J

---

[114] RMA, sch 1, cl 29(4).
[115] Final Decision at [196].