

5 Environmental Defence Society Inc v The New Zealand King
Salmon Co Ltd

10 Supreme Court of New Zealand SC82/2013; [2014] NZSC 38
19, 20, 21, 22 November 2013; 17 April 2014
Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ

15 *Resource management – New Zealand Coastal Policy Statement – Interpretation – Apparently conflicting policies – Whether balancing approach appropriate – Duty of planning authorities to give effect to NZCPS – Interpretation of NZCPS – “Inappropriate” – NZCPS, policies 8, 13, 15 – Resource Management Act 1991, ss 55, 58.*

Resource management – Resource consents – Whether and when requirement
20 to consider alternative sites – Observations. – Resource Management Act 1991,
§ 32.

King Salmon applied for changes to the Marlborough Sounds Resource Management Plan to change salmon farming from a prohibited activity to a discretionary activity in eight locations and at the same time applied for resource consents to undertake salmon farming at those locations and one other for a term of 35 years. The Minister of Conservation decided that the application involved matters of national importance and should be decided by a Board of Inquiry. The Board considered the New Zealand Coastal Policy Statement and also Part 2 of the Resource Management Act 1991. Policy 8 of the NZCPS was intended to enable aquaculture subject to conditions while policies 13 and 15 required decision makers to avoid adverse effects of activities on the natural character of areas of outstanding natural character, outstanding natural features and outstanding natural landscapes in the coastal environment. The Board considered that these policies conflicted and that it was required to balance their requirements and make an overall judgment. It found that there would be adverse effects on areas of outstanding natural attributes but nonetheless decided to grant the applications for plan changes in respect of four sites and to grant the resource consents for those four sites, subject to conditions. The Environmental Defence Society and others appealed unsuccessfully to the High Court, arguing that the Board had wrongly taken an “overall judgment” approach to balancing the requirements of different policies. EDS and SOS then appealed to the Supreme Court under s 149V of the Resource Management Act.

Held: 1 (per Elias CJ, McGrath, Glazebrook and Arnold JJ) Section 5(2) of the Resource Management Act 1991 was to be read as an integrated whole. The word “while” did not indicate that the section addressed two different sets of interests but had its ordinary meaning of “at the same time as”. The word

“avoiding” in s5(2)(c) had its ordinary meaning of “not allowing” or “preventing the occurrence of” (see [24], [62], [96]).

2 (unanimously) Although a policy in the New Zealand Coastal Policy Statement did not come within the definition of a “rule” in the RMA, it could have the effect of what in ordinary speech would be a rule and prohibit particular activities in certain localities (see [10], [116], [182]). 5

3 (per Elias CJ, McGrath, Glazebrook and Arnold JJ) The NZCPS gave substance to the principles in Part 2 of the RMA in relation to New Zealand’s coastal environment by translating the general principles to more specific or focused objectives and policies. Therefore in principle, when considering a plan change in relation to the coastal environmental, a regional council was necessarily acting in accordance with Part 2 by giving effect to the NZCPS. No party had challenged the validity of the NZCPS or any part of it and there was no uncertainty in the meaning of the relevant policies of the NZCPS which required reference to Part 2 (see [85], [88], [90]). 10 15

4 (William Young J dissenting) The word “inappropriate” in the NZCPS emerged from the way particular objectives and policies were expressed and related to the natural character and other attributes that were to be preserved or protected and also emphasised that the NZCPS required a strategic, region-wide approach (see [102], [105]; compare [193], [194]). 20

5 (William Young J dissenting) Planning authorities were required to “give effect to” the New Zealand Coastal Policy Statement. “Giving effect to” meant “implement” and was a strong directive creating a firm obligation on the part of planning authorities. The NZCPS did not simply identify a range of potentially relevant policies to be given effect as policy makers considered appropriate on an overall judgment in the particular circumstances. Although Part 2 of the RMA did not give primacy to preservation or protection over other interests, this did not mean that the NZCPS could not do so in particular circumstances. There was no conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policy 8 provided for salmon farming in appropriate areas but salmon farming could not occur in breach of policies 13(1)(a) and 15(a) which directed authorities to avoid significant adverse effects on particular limited areas of the coastal region – areas of outstanding natural character, outstanding natural features or outstanding natural landscapes. The use of the word “avoid” in these policies was a strong direction, meaning they are not merely relevant considerations to factor into a broad overall judgment. It followed that given the Board’s findings that the Papatua site engaged policies 13(1)(a) and 15(a), the plan change should not have been granted in respect of that site. The overall judgment approach was inconsistent with the process by which an NZCPS was issued, would create uncertainty and had the potential to undermine the strategic, region-wide approach that the NZCPS required planning authorities to take (see [77], [124], [125], [127], [129], [130], [132], [135], [137], [139], [146], [147], [152], [153]). 25 30 35 40

New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC) discussed. 45

Result: Appeal allowed/dismissed.

background that the policies in the NZCPS are intended to implement the six objectives it sets out, so that reference to one or more of those objectives may well be sufficient to enable a purposive interpretation of particular policies.

5 [89] We do not see Mr Nolan's argument as falling within the third of these caveats. Rather, his argument is broader in its effect, as it seeks to justify reference back to Part 2 as a matter of course when a decision-maker is required to give effect to the NZCPS.

10 [90] The difficulty with the argument is that, as we have said, the NZCPS was intended to give substance to the principles in Part 2 in respect of the coastal environment by stating objectives and policies which apply those principles to that environment: the NZCPS translates the general principles to more specific or focussed objectives and policies. The NZCPS is a carefully expressed document whose contents are the result of a rigorous process of formulation and evaluation. It is a document which reflects particular choices. To illustrate, 15 s 5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) ... and the protection of [it] from inappropriate subdivision, use and development" as a matter of national importance to be recognised and 20 provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others. For these reasons, it is difficult to see that 25 resort to Part 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical 30 scheme of the RMA.

[91] We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional coastal 35 policy statements and plans. Many of the policies are framed in terms that provide flexibility and, apart from that, the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils. But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course, 40 that the scope is infinite. The requirement to "give effect to" the NZCPS is intended to constrain decision-makers.

Meaning of "avoid"

[92] The word "avoid" occurs in a number of relevant contexts. In particular:

- 45 (a) Section 5(c) refers to "avoiding, remedying, or mitigating any adverse effects of activities on the environment".
- (b) Policy 13(1)(a) provides that decision-makers should "avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character"; policy 15 contains