

## Significant change to assessing resource consents – King Salmon rationale applies to resource consent applications

1. Since the Supreme Court dismissed the "overall judgement" approach of analysing Part 2 when considering plan provisions there has been uncertainty about how to apply the *Environmental Defence Society Incorporated v New Zealand King Salmon*<sup>1</sup> (**King Salmon**) reasoning to resource consent decisions. The High Court has now answered and the *King Salmon* reasoning is to apply to resource consent applications.
2. The High Court's recent decision in *R J Davidson Family Trust v Marlborough District Council*<sup>2</sup> (**R J Davidson Family Trust**) has significant implications for what the consent authority is required to consider when determining applications for resource consents under the Resource Management Act (**RMA**). The High Court applied the Supreme Court's approach in *King Salmon*, which dealt with a plan change application, to resource consent applications under section 104 of the RMA. The consequences of this approach means that decision makers are not required (in most cases) to make a decision on a resource consent under Part 2. This is despite section 104 requiring a decision to be made "subject to Part 2".
3. The R J Davidson Family Trust (**the Trust**) applied for a consent to establish and operate a 7.372 hectare mussel farm in Beatrix Bay in Pelorus Sounds. The application also sought consent to disturb the seabed with anchoring devices, to take and discharge coastal sea water, to harvest the produce from the marine farm and to discharge biodegradable and organic waste during harvest.<sup>3</sup>
4. The application was declined by Marlborough District Council (**the Council**) and appealed to the Environment Court.<sup>4</sup> The majority decision refused the resource consent sought whereas the minority decision found that the resource consent should be granted.<sup>5</sup> Judge Jackson in the Environment Court held that the *King Salmon* reasoning should be applied to this resource consent application. Because no party argued that the New Zealand Coastal Policy Statement (**NZCPS**) was uncertain or incomplete Judge Jackson held that there was no need for Part 2 to be applied in section 104 of the RMA.<sup>6</sup>
5. The Trust appealed to the High Court on four grounds. The key ground this article focuses on was did the Environment Court err in failing to apply Part 2 of the RMA in considering this application for resource consent under section 104?<sup>7</sup>
6. The first ground centres on the interpretation of the Supreme Court's decision in *King Salmon*. *King Salmon* considered a plan change for marine farming in an outstanding natural landscape where the NZCPS was of particular relevance and had to be given effect to. In that case, the Supreme Court found that there was no need to refer back to Part 2 when considering a plan change because the NZCPS was intended to give substance to the provisions of Part 2 of the RMA.<sup>8</sup> In particular, the Supreme Court held:<sup>9</sup>

### Background

<sup>1</sup> *Environmental Defence Society Incorporated v New Zealand King Salmon* [2014] NZSC 38, (2014) 17 ELRNZ 442, [2014] 1 NZLR 593, [2014] NZRMA 195

<sup>2</sup> *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52

<sup>3</sup> *Ibid* at [9]

<sup>4</sup> *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81

<sup>5</sup> *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [6]

<sup>6</sup> *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [287]

<sup>7</sup> *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [61]

<sup>8</sup> *Environmental Defence Society Incorporated v New Zealand King Salmon* [2014] NZSC 38 [2014] NZSC 38, (2014) 17 ELRNZ 442, [2014] 1 NZLR 593, [2014] NZRMA 195 at [85]

<sup>9</sup> *Ibid*

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First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan “in accordance with” (among other things) pt 2, it is also directed by s 67(3) to “give effect to” the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA’s purpose in relation to New Zealand’s coastal environment. That is, the NZCPS gives substance to pt 2’s provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting “in accordance with” pt 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

7. The High Court had to determine whether the reasoning of *King Salmon* concerning a plan change under the RMA, also applies to an application for a resource consent under the RMA. For a plan change, the RMA requires the regional council to prepare and change any regional plan “in accordance with” (among other matters) the provisions of Part 2.<sup>10</sup> In comparison, for a resource consent application the consent authority must “have regard to” a number of matters, “subject to Part 2”.<sup>11</sup> Until now, the law has been unsettled and different divisions of the Environment Court had reached different outcomes as to the application of *King Salmon* to resource consent decisions.<sup>12</sup>

### What did the High Court decide?

8. In the High Court, Justice Helen Cull rejected the Trust’s submission that there is a different statutory directive in the context of the present case, limiting *King Salmon*’s

application.<sup>13</sup> The High Court also rejected the Trust’s submission that the majority of the Environment Court erred by failing to apply the plain statutory language of section 104(1) which requires a decision maker to have regard to the relevant matters prescribed by the section and is “subject to Part 2” when determining a resource consent application.<sup>14</sup>

9. Instead, the High Court decided that the reasoning in *King Salmon* does apply to section 104(1) of the RMA when considering a resource consent application. In particular, the Court decided:<sup>15</sup>

I find that the reasoning in *King Salmon* does apply to s 104(1) because the relevant provisions of the planning documents, which include the NZCPS, have already given substance to the principles in Part 2. Where, however, as the Supreme Court held, there has been invalidity, incomplete coverage or uncertainty of meaning within the planning documents, resort to Part 2 should then occur.

I also consider that the Environment Court’s decision was consistent with *King Salmon* and the majority correctly applied it to the different context of s 104. I accept the Council’s submission that it would be inconsistent with the scheme of the RMA and *King Salmon* to allow Regional or District Plans to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications. It could result in decision-makers being more restrained when making district plans, applying the *King Salmon* approach, than they would when determining resource consent applications.

<sup>10</sup> Section 66(1), Resource Management Act 1991

<sup>11</sup> Section 104(1), Resource Management Act 1991

<sup>12</sup> For example, see *Southland Fish & Game New Zealand v Southland Regional Council* [2016] NZEnvC 220 and *Prime Property Group v Wellington City Council* [2016] NZEnvC 146.

<sup>13</sup> *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [65], [76] and [77]

<sup>14</sup> *Ibid* at [61] and [77]

<sup>15</sup> *Ibid* at [76] and [77]

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10. From this reasoning, the decision maker should only resort to Part 2 of the Act when a planning document is invalid, has incomplete coverage, or is uncertain. Otherwise a decision is to be made under the relevant part of section 104A – D after having regard to the plans and any other relevant matter in section 104. There is no longer to be a broad overall judgement under Part 2.

### Implications of High Court decision for consent authorities

11. The decision has significant implications on both plan-making and resource consent application decision making. As plan-makers, the High Court has shifted the emphasis back on the contents of the applicable plan. The importance of *King Salmon* has been further reinforced with regard to the need for clear and meaningful plans which will ultimately guide resource consent decisions. There is also an issue for Councils with older plans that were drafted with the expectation that Part 2 would be an additional consideration. There is the possibility the decision will give rise to more disputes over whether the plan is invalid, has incomplete coverage or is uncertain.
12. For decision makers on resource consent applications, the High Court has confirmed that under section 104 of the RMA, the decision maker should not resort to Part 2 of the Act unless the planning document is uncertain, has incomplete coverage, or has uncertain meaning. This reasoning reinforces the importance of the drafting of the plan to ensure the plan is clear and complete.

### Implications of the High Court decision on resource consent applicants and submitters

13. When considering resource consent applications, decision makers cannot go back to rely on matters under Part 2. This includes section 5 purpose, section 6 matters of national importance, section 7 other matters and section 8 Treaty of Waitangi under the RMA. The reliance

on specific sections under Part 2, for example section 6(c) protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna, or section 5(a) sustaining the potential of natural and physical resources will no longer be able to be considered unless the plan is invalid, has incomplete coverage or is uncertain. This may result in more disputes over whether the plan is invalid, has incomplete coverage or is uncertain.

14. In many cases, applicants will be advised to seek plan changes rather than resource consents so that they can resort back to Part 2 of the RMA.
15. Overall this decision does represent a significant change to common practice and should be studied carefully. If you would like specific advice on this decision contact our resource management partners.