

Court of Appeal decision on application of King Salmon reasoning to resource consents 'flip flops' RMA case law. Again.

Since the Supreme Court's foundational 'King Salmon' Decision in 2014¹, there has been an evolutionary approach in RMA case law as to whether Part 2 of the RMA remains an 'operative' provision or more of a 'back seat driver'.

The Court of Appeal recently released its decision in *R J Davidson Family Trust v Marlborough District Council*², disagreeing with the proposition from the preceding Environment and High Court decisions, that King Salmon prevents recourse to pt 2 of the RMA in the case of applications for resource consent under section 104. For now, this confirms the position that pt 2 (and consequently the 'overall broad judgement approach') is applicable and necessary in the context of section 104 decision making, subject to some caveats discussed by the Court of Appeal and as set out below.

Background

Our previous articles below provide significant background on the evolution of the King Salmon approach in the context of plan changes and resource consent decision making:

- [have the goal posts shifted? Implications of the Supreme Court King Salmon Decision](#); and
- [significant changes to resource consents - King Salmon rationale applies to resource consent applications](#)

In summary, the purpose of the RMA is to achieve 'sustainable management' and this is set out in pt 2. In

general terms the Courts have previously determined whether this 'sustainable management' purpose is met by taking an 'overall judgment approach' to the economic benefits and environmental effects of a plan or consent proposal. That approach was called into question by the Supreme Court in King Salmon (regarding a plan change and not a resource consent), rejecting the 'overall judgment' approach because of (among other reasons) the prescriptive nature of the relevant provisions of the New Zealand Coastal Policy Statement (NZCPS) and the statutory obligation to give effect to them:

[153] [The Board] considered that it was entitled, by reference to the principles in pt 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. ... The policies give effect to the protective element of sustainable management.

[154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.³

The consequence of King Salmon (which related to a plan change) in the context of resource consent decision making has been uncertain, as demonstrated through different approaches in different decisions of the Environment Court⁴, and as evidenced in the appellate R J Davidson litigation. Before understanding the Court of Appeal's reasoning in bringing back the pt 2 broad judgement approach to resource consent decisions, the

¹ Referring to *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (King Salmon)

² *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

³ *King Salmon*, above n1, at [153] – [154].

⁴ 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.

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Environment and High Court decisions are briefly addressed below.

R J Davidson – Environment Court

The R J Davidson Family Trust (**Trust**) applied for a non-complying resource consent to establish and operate a 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.

The application was declined by Marlborough District Council and appealed to the Environment Court.⁵ The majority decision refused the resource consent sought whereas the minority decision found that the resource consent should be granted.⁶ Judge Jackson in the Environment Court held that the *King Salmon* reasoning should be applied to the resource consent application. Because no party argued that the NZCPS was uncertain or incomplete, Judge Jackson held that there was no need for pt 2 to be applied in section 104 of the RMA.⁷

R J Davidson – High Court

The Trust appealed to the High Court on four grounds, including importantly, the question of whether the Environment Court erred in failing to apply Part 2 of the RMA in considering this application for resource consent under s104⁸. The High Court decided that the reasoning of King Salmon does apply to section 104, namely that where provisions of planning documents have already given substance to the principles in pt 2, it would be inconsistent with the scheme of the RMA to render those

ineffective by general recourse to pt 2 in deciding resource consent applications.⁹

The result of this reasoning, was that a decision maker should only resort to pt 2 of the Act in a resource consent decision where the relevant planning instrument in question was 'defective' by virtue of one or more of the King Salmon caveats, namely; 'invalidity, incomplete coverage or uncertainty'.

RJ Davidson – Court of Appeal

Turning to a more detailed examination of the recent Court of Appeal decision, the Court firstly agreed with the Appellant's submissions as to the importance of the statutory wording 'subject to Part 2' in the context of s104, as compared to the absence of the same in plan making provisions under the RMA, and this being evidence of Parliament's intention of the 'preeminent role of Part 2':

[47]...we are satisfied that the position of the words "subject to Part 2" near the outset and preceding the list of matters to which the consent authority is required to have regard, clearly show that a consent authority must have regard to the provisions of pt 2 when it is appropriate to do so...

The Court then turned to distinguish the legislative context of resource consent decision making with that of plan change decisions under the RMA:

[51] In the case of applications for resource consent however, it cannot be assumed that particular proposals will reflect the outcomes envisaged by pt 2. Such applications are not the consequence of the planning processes envisaged by pt 4 of the Act for the making of planning documents. Further, the planning documents may not furnish a clear answer as to whether consent should be granted or declined. And while s 104, the key machinery provision for dealing with applications for resource consent, requires they be considered having regard to the relevant planning documents, it plainly contemplates reference to pt 2.

⁵ *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81.

⁶ *Ibid*, at [6].

⁷ *Ibid*, at [287].

⁸ *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [61].

⁹ *Ibid*, at [65], [76] and [77].

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The decision further distinguishes the Supreme Court's reasoning from King Salmon to that generally applicable to resource consent decisions:

[66] ...Given the particular factual and statutory context addressed by the Supreme Court, we do not consider it can properly be said the Court intended to prohibit consideration of pt 2 by a consent authority in the context of resource consent applications.

Reasons for supporting that conclusion included:

- The Supreme Court made no express reference to s104 of the Act nor the wording 'subject to Part 2' in its decision. Given the previously frequently applied 'overall judgement' approach in resource consent decisions, it would have been surprising that the Supreme Court did not expressly reference this, had it had an intention to now reject that approach.¹⁰
- There was similarly no inference from the Supreme Court's decision that the overall judgement approach was to be rejected for resource consents. The Supreme Court's commentary that the overall judgement approach creates uncertainty was general in nature, but confined by the context of the case, relating to plan change applications.¹¹
- The statutory language of s104 plainly contemplates direct consideration of pt 2 matters, and there is no assurance outside of the NZCPS that plans will have reflected provisions of pt 2 of the Act (although that is desirable).¹²

The Court's approach in deciding that pt 2 provides 'strong directions, to be borne in mind at every stage of the planning process'¹³ does not necessarily permit unbridled 'overall judgement' but rather supports an approach that pt 2 should not be used to otherwise subvert or override what is otherwise a clear planning instrument, in a resource consent proposal:

¹⁰ *R J Davidson*, above n2, at [67].

¹¹ *Ibid*, at [68] – [69].

¹² *Ibid*, at [70].

¹³ *Ibid*, at [77].

[73] ... In all such cases the relevant plan provisions should be considered and brought to bear on the application in accordance with s 104(1)(b). A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side. Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies in a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole".

[74] It may be, of course, that a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself. Other cases will be more difficult. If it is clear that a plan has been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt 2 in such a case would likely not add anything. It could not justify an outcome contrary to the thrust of the policies. Equally, if it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt 2, that will be a case where the consent authority will be required to give emphasis to pt 2.

[75] If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.

[citations omitted]

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The implications of the Court of Appeal's decision are that, while pt 2 is necessary and appropriate to consider in the context of resource consents, this does not override the need to give genuine consideration to, and application of, relevant planning considerations. Nor does it allow for such plans to be 'rendered ineffective' by a general pt 2 analysis. Indeed if such a proper analysis is undertaken, the Court commented that this may leave little room for pt 2 to further influence the decision outcome. Evidence of when a plan might be considered to be 'coherent' and prepared having regard to pt 2 are not necessarily limited by the previous three King Salmon caveats, but require a more flexible approach.

Where to next?

For the time being, the position on King Salmon and relevance of pt 2 generally is as follows:

- Plan change decisions are not permitted recourse to pt 2, save for a 'defective' planning instrument, evidenced by; 'incompleteness, uncertainty, or invalidity';
- Notices of requirement (s171) are expressly subject to pt 2, which is to be considered as well as other listed considerations listed in s171;
- Resource consents are expressly subject to pt 2, which is to be considered as well as other listed considerations in s104.

The possibility of an appeal of the R J Davidson Court of Appeal decision to the Supreme Court remains live until mid-September 2018.

Want to know more?

If you have any questions about the implications of the R J Davidson litigation on you, please contact our specialist [Environment, planning and natural resources team](#)