IN THE SUPREME COURT OF NEW ZEALAND

SC 89/2013
[2013] NZSC 123

BETWEEN	SAVE KAPITI INCORPORATED Applicant	
AND	NEW ZEALAND TRANSPORT AGENCY Respondent	

Court: Elias CJ, William Young and Glazebrook JJ

Counsel: R J B Fowler QC for Applicant
J J M Hassan and K E Viskovic for Respondent
H C Andrews and J Duffin for Board of Inquiry into the MacKays to Peka Peka Expressway Proposal

Judgment: 14 November 2013

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay the respondent costs of $2,500 and reasonable disbursements to be fixed, if necessary, by the Registrar.

REASONS

[1] The proposed appeal concerns the decision of a Board of Inquiry which confirmed a notice of requirement (resulting in a designation) and granted resource consents associated with the proposed MacKays to Peka Peka Expressway. An appeal to the High Court was dismissed[1] and the applicant now seeks leave to appeal, an application that falls to be determined under subss 149V(6)–149V(7) of the Resource Management Act 1991.

1 *Save Kapiti Inc v New Zealand Transport Agency* [2013] NZHC 2104.

[2] The proposed Expressway will render redundant the earlier proposed Western Link Road (WLR) for which a designation and resource consents were already in place. The applicant sought to rely on what is known as the "receiving environment" principle which, along with the related "permitted baseline" principle, are discussed in a number of Court of Appeal judgments – including *Bayley v Manukau City Council*;[2] *Smith Chilcott Ltd v Auckland City Council*;[3] *Arrigato Investments Ltd v Auckland Regional Council*;[4] *Queenstown–Lakes District Council v Hawthorn Estate Ltd*;[5] and *Auckland Regional Council v Living Earth Ltd*.[6] These cases – and s 104(2) of the Act – deal with the extent to which decision-makers, when addressing the actual and potential effects on the environment of allowing a particular activity under s 104(1)(a), should allow for the future state of the environment, and thus its state as modified by activities already permitted by the relevant planning instruments or existing unimplemented resource consents.

[3] The argument for the applicant is that the WLR should have been taken into account as part of the environment. The underlying contention is that if the WLR was so taken into account, benefits attributed to the Expressway would no longer apply because they would already be provided for by the WLR. This argument was dismissed by the Board of Inquiry[7] and by the High Court.[8]

[4] Whether or not the jurisprudence concerning the permitted baseline or receiving environment requires reconsideration by this Court does not arise on the proposed appeal. The purpose of that jurisprudence is to exclude or limit arguments about effects on the environment which are already permitted. The approach of the applicant is entirely different. Its argument is that the benefits attributed to the Expressway should be ignored to the extent that the same benefits would be generated by the WLR if it was built. But if the WLR was in place, the Expressway would not be constructed. Therefore, any attempt to assess the impact on the

2 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA).
3 *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 (CA).
4 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).
5 *Queenstown–Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).
6 *Auckland Regional Council v Living Earth Ltd* [2009] NZRMA 22 (CA).
7 *Final Report and Decision of the Board of Inquiry into the MacKays to Peka Peka Expressway Proposal* (April 2013) at [163]–[187].
8 *Save Kapiti Inc*, above 1, at [59]–[81].

environment of the proposed Expressway on the assumption that the WLR was in place would be entirely artificial.

[5] For these reasons, we are not persuaded that a further appeal is justified either to the Court of Appeal or to this Court.

Solicitors:
Brandons, Wellington for Applicant
Chapman Tripp, Wellington for Respondent