Davidson Court of Appeal Decision - Reviving Part 2

The Court of Appeal yesterday released its decision regarding the application of the Supreme Court's reasoning in King Salmon to resource consent applications. In the judgment delivered by Cooper J, the Court of Appeal overturned part of the High Court's judgment, reinstating the ability for consent authorities to have recourse to the purposes of the Resource Management Act in Part 2 in those instances "when it is appropriate to do so".

The Decision

The long awaited decision offers clarity (for now) on the "pre-eminence" of Part 2 in assessing resource consent applications following the Supreme Court's rejection of the overall broad judgment approach in the context of plan changes. Applying King Salmon the High Court determined that because Part 2 had found its expression in the higher order planning documents, recourse to those provisions directly was neither required nor authorised in consent decisions unless some invalidity, incomplete coverage or uncertainty of meaning in those documents could be identified. That finding, and the application of King Salmon to resource consent decisions, was the subject of the challenge before the Court of Appeal.

In brief the Court considered that the High Court's position did not find support in the plain language of section 104(1), its legislative context or history, or previous judicial interpretation of the purpose and function of Part 2 in consenting decisions. Nor did it find support in the judgment of King Salmon itself, or in consideration of the inherent differences between plan changes and resource consents as planning tools under the RMA. The Court identified that planning documents unlike consent applications are developed/amended through a legislative process and as part of a hierarchy which ensures implementation of higher order documents and Part 2. However, they cannot always furnish a clear answer as to whether consent should be granted or declined. In those instances the Court found that it is appropriate and indeed section 104(1) provides for, the ability for consent authorities to directly consult the purposes of the Act to reach a decision.

Further the Court of Appeal determined that if the Supreme Court intended its

approach to apply “across the board”, it is inevitable that the Court would have expressly said so given the wide reaching implications. In any event, the Supreme Court’s reasoning was expressly tied to the “plan change context under consideration”.

Those awaiting a return to pre-King Salmon days of the RMA may however be disappointed. While the Court of Appeal acknowledged the “pre-eminence” of Part 2 in resource consent decisions and reinstated the ability to consult it directly, it considered that the circumstances in which that would be required may be limited, particularly where the relevant plan “has been competently prepared under the Act”. In those instances where it is clear that a plan has been prepared having regard to Part 2 and contains a coherent set of policies leading toward clear environmental outcomes, reference to Part 2 is unlikely to add anything. In instances where the NZCPS is engaged, the Court goes as far to say that resort to Part 2 for the purposes of subverting clear restrictions in the NZCPS would expose the consent authority to being overturned on appeal. However absent assurance of the alignment between Part 2, the planning documents and the proposed consent decision, the Court considered that direct consideration of Part 2 is both appropriate and necessary. That, in the words of the Court, is the implication of the words “subject to Part 2” in section 104(1).

Implications

So while King Salmon no longer applies to resource consent decisions (at least for now), the Court of Appeal’s judgment is hardly a slam dunk on the Supreme Court’s broader rationale. While decision makers may now consult Part 2 directly on consent applications, the Court is clear that that exercise is unlikely to add anything to the evaluative exercise where the plan is clear on the way Part 2 is to be achieved. In what we would suggest is a cautionary warning shot, the Court adds that in those instances, reference to Part 2 cannot justify an outcome that is contrary to the thrust of the policies. However where it appears that a plan has not been prepared in a manner which appropriately reflects Part 2, or the objectives and policies are pulling in different directions, consideration of Part 2 is both appropriate and necessary.

We will be following how the Court of Appeal’s decision is interpreted in the coming months, and of course, an appeal of the Court’s decision to the Supreme Court remains a possibility. While the “pre-eminence” of Part 2 has (in our opinion, rightly) been restored for consent decisions, the Court of Appeal’s decision has not significantly eroded the renewed focus on the careful application of the plan provisions. We would therefore expect increased involvement in plan review processes to secure/protect desired planning and environmental outcomes.

For further information on this case, its implications or any resource management queries, please don’t hesitate to contact any one of our team.