IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-002259

UNDER	the Resource Management Act 1991 and its amendments
IN THE MATTER OF	an appeal under s 149V of the Act to the High Court on questions of law
BETWEEN	RATIONAL TRANSPORT SOCIETY INCORPORATED Appellant
AND	A BOARD OF INQUIRY APPOINTED UNDER S 149J OF THE RESOURCE MANAGEMENT ACT Decision-maker
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing: 7 December 2011

Counsel: T H Bennion for Appellant
J J M Hassan and M J R Conway for Respondent

Judgment: 15 December 2011

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 2.30pm on the 15th day of December 2011.

RESERVED JUDGMENT OF GENDALL J

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[1] The New Zealand Transport Agency (NZTA) is contemplating realigning State Highway 1 through what is known as "Transmission Gully", north of Wellington, between Linden and Paekakariki, via Pauatahanui. In order to do so it will require certain resource consents. Some of these relate to roading developments

that would affect waterways through that area. That is governed by the Regional Freshwater Plan for the Wellington region.

[2] The NZTA requested changes to be made to that Freshwater Plan because, as it presently stands, some of the activities for which resource consents may be required (if the project proceeds) are "non-complying activities", including reclamation activities. As such, they are only eligible for consent if either:[1]

- the environmental effects are "no more than minor"; or
- the activity would not be contrary to the Objectives and Policy of the Freshwater Plan.

[3] For such major construction works of State Highway 1 it is going to be difficult, if not impossible for the NZTA, to meet the test that any adverse effects were no more than minor. Further, the present policy framework of the Freshwater Plan potentially closes the door on the ability to obtain necessary consents unless the plan could be changed.

[4] As a consequence NZTA requested that certain changes be made to the Freshwater Plan for the Wellington region (Request). The Resource Management Act 1991 (Act) allows for any person to seek a change to a Regional, or District, Plan.

[5] Upon the Minister for the Environment determining the Request was part of a proposal of national significance, a Board of Inquiry (the Board) was set up pursuant to Part 6AA of the Act, with the conduct of the Inquiry taking place under ss 149L - 149P. The Board was directed to hear the Request, and determine it as if it were a regional authority. The Board of six members had particular expertise, knowledge and skill, being selected in part for their experience relating to the local community. The chair was a widely experienced Judge of the Environment Court. The process encouraged public submissions. The Board conducted a hearing over seven days

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[1] Resource Management Act 1991, s 104D.

between 6 – 13 July 2011; received extensive evidence, expert and lay, multiple submissions, and representations by "submitters" which although perhaps not formal evidence, were statements of their views. The Board delivered a final decision and report encompassing 337 paragraphs and 86 pages (together with five appendices). The outcome was that the Request to change the Regional Freshwater Plan was approved by the Board.

[6] Applications by NZTA for resource consents have been referred to the Board, constituting the same members of those who heard the Request. Those applications have been publicly notified and submissions closed, and a public hearing is scheduled to commence on 12 February 2012. Consequently, the Court has had to deliver its decision under severe time restraints given that the Court vacation is between 16 December 2011 and 1 February 2012.[2]

[7] In the time available to deliver this decision it is not possible to do more than summarise the essential features of the Board's decision.

[8] Unsurprisingly, the Board found that Transmission Gully was a project of regional and national significance. It found that the project was likely to have adverse effects which are more than minor on certain water bodies in its construction. The policy of the Freshwater Plan required that those adverse effects be avoided. The Board accepted however that avoidance was not the only appropriate method of achieving sustainable management of those water bodies. It was appropriate to include a wider range of management methods (i.e. remedy or mitigate) in the plan in relation to Transmission Gully. In terms of offsetting the effect on the water bodies, the Board rejected the argument that offsetting was an inappropriate management method. Rather, it was a possible form of remedy or mitigation, which could be considered on a case by case basis in relation to the actual water bodies concerned, when resource consent applications were made. The Board determined that the changes which it accepted were not inconsistent with the relevant national and regional policies and objectives, and that they did not preclude

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[2] See [83].

the Freshwater Plan from giving effect to such policies. The changes also met the purposes of the Act.

[9] The appellant does not want the Transmission Gully highway to be constructed. If it had been successful the NZTA would have probably failed to obtain necessary resource consents. It opposed the Request before the Board. It now appeals the Board's decision. If it fails in the appeal it may continue to oppose the application for resource consents.

Jurisdiction to appeal

[10] A right of appeal is provided in s 149V of the Act but only on a question of law. No appeal exists to the Court of Appeal from the determination of the High Court. A party may apply to the Supreme Court for leave to bring an appeal to that Court.

[11] The principles to be applied are well known and dealt with by the Supreme Court in *Bryson v Three Foot Six Ltd*:[3]

> An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.
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> An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test. ...

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[3] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25] – [26].

Background

[12] As mentioned, the Transmission Gully Project (TGP) involves the proposed construction of a 27 kilometre highway from Linden via Pauatahanui to Paekakariki. Its construction will require works affecting streams which will be subject to diversions, culverts and dams. The highway will have impact upon the waterways along its length. The NZTA lodged the Request for changes to the Regional Freshwater Plan because of its concern about policies 4.2.10 and 4.2.33 of the Freshwater Plan.

[13] Policy 4.2.10 provides that:

> To *avoid* adverse effects on wetlands, and lakes and rivers and their margins, identified in Appendix 2 (Parts A and B), when considering the protection of their natural character from the adverse effects of subdivision, use, and development. (Emphasis added)

[14] By way of contrast, policy 4.1.12 provides that:

> The adverse effects of the use and development of freshwater resources are *avoided, remedied, or mitigated*. (Emphasis added)

[15] In the "Explanation" to policy 4.2.10 the distinction is explained:

> Wetlands, and lakes and rivers and their margins, are identified in Appendix 2 as having a high degree of natural character ... The preservation of natural character in this policy is achieved by avoiding adverse effects. In this policy "to avoid adverse effects" means that when "avoiding, remedying or mitigating adverse effects", as identified in subsection 5(2)(c) of the Act, the emphasis is to be placed on avoiding adverse effects. "To avoid adverse effects" means that only activities with effects that are no more than minor will be allowed in the water bodies identified. Further elaboration on the meaning of "minor" is contained in Policy 4.2.33.

[16] Policy 4.2.33 provides that adverse effects are likely to be no more than minor if certain criteria are met. Amongst those criteria are that:

> ...
>
> (2) any adverse effects of plants, animals or their habitats are confined to a small area or are temporary, and the area will naturally re-establish [comparable] habitat values ... ; and
>
> (3) there are no significant or prolonged decreases in water quality; and

...

(7) there are no adverse effects on the natural character of wetlands, and lakes and rivers and their margins.

[17] As the TGP would inevitably affect waterways, and in particular three streams (Horokiri, Ration, and lower Pauatahanui) that fall within policy 4.2.10, the NZTA was concerned that the TGP, when seeking consents, would be unable to meet, or would require uneconomic engineering to meet, the absolute requirement for avoidance of more than minor adverse effects in policies 4.2.10 and 4.2.33. Consequently, applications by NZTA for resource consent for non-complying activities would fail because that consent could only be granted for a non-complying activity where the effects of it were likely to be no more than minor, or the activity would not be contrary to the objectives or policies of the relevant plan. Obviously, effects will be more than minor.

[18] It was for that reason that the NZTA sought an exception to the policies 4.2.10 and 4.2.33. It sought a change in the policy for an avoidance of adverse effects, to allow for remedy, mitigation and offsetting such effects where avoidance was impracticable or where it would impose uneconomic costs on the TGP.

The Board's decision

(a) Preliminary findings

[19] The Board made four preliminary findings that "inform[ed] and underpin[ned]" its consideration of the merits of NZTA's Request. Three are relevant and provide that:

- the Freshwater Plan, in its present form, potentially precludes consideration of the merits of any resource consent applications for TGP (particularly non-complying reclamation activities) because the project is likely to have adverse effects which are more than minor on relevant water bodies and because the Freshwater Plan policies lack flexibility in that situation;

- the condition of Horokiri, Ration and Pauatahanui Streams is such that avoidance of adverse effects is not the only way of ensuring their sustainable management (as a general rule). They have each experienced catchment forest clearance, farming, riparian degradation, water quality changes, sedimentation and large changes in species composition; and

- TGP is a roading project of national and regional significance, and accordingly it is appropriate to consider the changes to the Freshwater Plan as sought by the NZTA.

(b) Final conclusions

[20] First, the Board considered a range of alternatives for the purpose of s 32, one being the status quo and the other four being changes of some sort, and the benefits and costs of each. It concluded that a limited amendment of policy 4.2.10 (with consequential amendments) was the most appropriate way of achieving the overarching objectives of the Freshwater Plan. Relevantly, the Board concluded that:

- retaining the status quo is not the most appropriate way of achieving the plan's objectives:

    - policy 4.2.10 is more limited than the relevant objectives: the objectives require that important values are preserved and protected, and that adverse effects are avoided, remedied or mitigated (objectives 4.1.4 – 4.1.6 and 7.1.1); and

    - the qualities of the water bodies potentially affected by the TGP are not such that avoidance of adverse effects is the only way of sustainably managing those streams: remedy or mitigation would also be appropriate;

- limited amendment of policy 4.2.10 to remove avoidance as a mandatory requirement, but retaining it as the preferred requirement, for the water

bodies affected by the TGP, is the most appropriate means for achieving the objectives of the Freshwater Plan. In particular, the Board held that the objectives of protection and preservation of freshwater values require that avoidance be the preferred outcome in any situation, followed by remediation and mitigation.

[21] Second, the Board concluded that the changes to the Freshwater Plan would not preclude that plan from giving effect to the National Policy Statement for Freshwater Management (NPSFM), as required by ss 66 and 67 of the Act. The key aspects of the NPSFM related to water quality (Part A). In particular, objective A2 provides that:

> The overall quality of fresh water within a region is maintained or improved while:
>
> (a) protecting the quality of outstanding freshwater bodies;
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> (b) protecting the significant values of wetlands; and
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> (c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.

[22] Policy A2 provides that:

> Where water bodies do not meet the freshwater objectives made pursuant to Policy A1, every regional council is to specify targets and implement methods (either or both regulatory and non-regulatory) to assist the improvement of water quality in the water bodies, to meet those targets, and within a defined timeframe.

[23] The objectives and policies are set out in full:[4]

> A. Water quality
>
> Objective A1
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> To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the use and development of land, and of discharges of contaminants.

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[4] National Policy Statement Freshwater Management 2011.

Objection A2

The overall quality of fresh water within a region is maintained or improved while:

a) protecting the quality of outstanding freshwater bodies

b) protecting the significant values of wetlands and

c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.

Policy A1

By every regional council making or changing regional plans to the extent needed to ensure the plans:

a) establish freshwater objectives and set freshwater quality limits for all bodies of fresh water in their regions to give effect to the objectives in this national policy statement, having regard to at least the following:

    i) the reasonably foreseeable impacts of climate change

    ii) the connection between water bodies

b) establish methods (including rules) to avoid over-allocation.

Policy A2

[quoted at [22]].

Policy A3

By regional councils:

a) imposing conditions on discharge permits to ensure the limits and targets specified pursuant to Policy A1 and Policy A2 can be met and

b) where permissible, making rules requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.

Policy A4 and direction (under section 55) to regional councils

By every regional council amending regional plans (without using the process in Schedule 1) to the extent needed to ensure the plans include the following policy to apply until any changes under Schedule 1 to give effect to Policy A1 and Policy A2 (freshwater quality limits and targets) have become operative:

> *"1. When considering any application for a discharge the consent authority must have regard to the following matters:*
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> *a) the extent to which the discharge would avoid contamination that will have an adverse effect on the life-supporting capacity of fresh water including on any ecosystem associated with fresh water and*
>
> *b) the extent to which it is feasible and dependable that any more than minor adverse effect on fresh water, and on any ecosystem associated with fresh water, resulting from the discharge would be avoided.*
>
> *2. This policy applies to the following discharges (including a diffuse discharge by any person or animal):*
>
> *a) a new discharge or*
>
> *b) a change or increase in any discharge–*
>
> *of any contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.*
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> *3. ...."*

[24] The Board was of the opinion that the changes to the Freshwater Plan were not inconsistent with those objectives because:

- avoidance of adverse effects remained the first preference;

- the specific terms of new policy 4.2.33A and its explanation would ensure the safeguarding or life supporting capacity, ecosystem processes and indigenous species will be adequately achieved; and

- the consent authority retains an overall discretion to determine whether adverse effects have been adequately addressed by the NZTA. The proposed changes did not preclude a consent authority from determining that the concepts of safeguarding or protecting require the avoidance of adverse effects in any given case.

[25] Finally, the Board concluded that the changes to the Freshwater Plan were in accordance with Part 2 of the Act. This followed from earlier conclusions of the Board, and from its specific conclusions that:

- the TGP may potentially have downstream effects on the coastal environment by way of sediment discharge into Pauatahanui Inlet, however the consent authority will be in a position to assess whether such adverse effects are required to be avoided;

- the values of the relevant water bodies are not such that avoidance of adverse consequences is the only appropriate means of achieving sustainable management of those water bodies; and

- the water bodies in question are small, confined to a distinct geographic area, and have already been subject to considerable degradation. The management of those water bodies by means of remedial and mitigation measures may lead to better outcomes than current management of those water bodies.

[26] A full summary of the determinative findings and reasons of the Board follows:[5]

- TGP is a roading project which has been identified as nationally and regionally significant;[6]

- TGP is likely to have adverse effects which are more than minor on water bodies on its route;[7]

- The relevant policies of the Freshwater Plan require the avoidance of adverse effects on those water bodies, notwithstanding that avoidance of adverse effects is not the only appropriate method of achieving their sustainable management provided for by the Act;[8]

- The Freshwater Plan in its present form potentially precludes consideration of the merits of any resource consent applications for TGP in accordance with s 104 as a consequence of the operation of s 104D due [to] the lack of flexibility in the relevant policies;[9]

- Changing the Freshwater Plan to include provision for a wider range of management methods than just avoidance of adverse effects is the appropriate option to achieve sustainable management of the water

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5 At [332].
6 At [178] – [190].
7 At [98].
8 At [237].
9 At [162] – [166].

bodies and allow consideration of resource consent applications for TGP *on their merits*;[10]

- The appropriate form of the Request having regard to alternatives and to its efficiency and effectiveness in enabling the Freshwater Plan to achieve its Objectives, is that set out in Appendices 1 and 2 [accompanying the decision];[11]

- The changes to the Freshwater Plan contained in Appendices 1 and 2 do not of themselves give effect to any national or regional policy statements as they are limited in scope. The changes are not inconsistent with the relevant national and regional policy instruments and will not preclude the Freshwater Plan from giving effect to such instruments if they are incorporated into the Freshwater Plan;[12]

- The changes to the Freshwater Plan contained in Appendices 1 and 2 will enable Greater Wellington to carry out its functions;[13] and

- The changes to the Freshwater Plan contained in Appendices 1 and 2 are in accordance with Part 2[14] and meet the purposes of the Act.

and further:[15]

> Having regard to all of our findings above, we are satisfied that it is appropriate to approve the Request subject to the plan changes requested being in the form contained in Appendices 1 and 2. Changes should be made to the Freshwater Plan accordingly.

[27] Broadly, the effect of the Board's decision was to grant the exception sought by NZTA by amending policy 4.2.10 to exclude the TGP and by inserting policy 4.2.33A, which provides that:

> To manage adverse effects of the development of the Transmission Gully Project, in accordance with the following management regime: (1) Adverse effects are all avoided to the extent practicable; (2) Adverse effects which cannot be avoided are remedied or mitigated.

Consequential changes were also made to policies 7.2.1 and 7.2.2.[16]

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10 At [233] – [241].
11 At [242] – [252].
12 At [253] – [304].
13 At [316] – [317].
14 At [318] – [331].
15 At [333].
16 At [332].

Appellant's points of appeal

[28] Mr Bennion, on behalf of the appellant, provided extensive submissions which ran to 43 pages and 129 paragraphs. I mean no disservice to counsel by not referring in detail with every point advanced, because it is necessary for the Court to keep squarely in mind that an appeal such as this can only be on a point of law.

[29] The appellant's submissions focus on three aspects of the Board's decision, namely s 32 and Part 2 of the Act and the NPSFM.

Section 32

[30] First, the appellant contended that the Board erred in law in its application of s 32 of the Act, and consequently incorrectly concluded that the plan change was the "most appropriate" way to achieve the relevant objectives of the Regional Freshwater Plan. In particular, counsel argued that the Board:

(a) erred in law, by applying a wrong legal test, by considering that mitigation (to be contrasted with avoidance and remediation) could amount to protection in accordance with the objectives of the Freshwater Plan. Protection would not be satisfied where a residual unremediated impact remains (in the case of mitigation). The plan changes were not the optimum or superior method of achieving stream protection;

(b) failed to take into account detailed criteria in the Freshwater Plan (including policy 4.2.33) requiring adverse effects to be limited in time and space, and therefore failed to consider why those shorter and smaller temporal and spatial limits are not the most appropriate approach to protection, all being relevant factors. Instead, the Board simply preferred the longer and larger temporal and spatial requirements of the TGP, which were irrelevant factors;

(c) failed to take into account the adverse effects of stormwater discharges from the operation of the TGP, that being a relevant factor. Dr Keesing (an expert ecological witness called by the NZTA), whose evidence was accepted by the Board, stated that the proposal would have long-term high adverse impacts due to stormwater; and

(d) took into account irrelevant matters, namely the timing and spatial extent of TGP.

National Policy Statement for Freshwater Management

[31] Second, the appellant contended that, in concluding the plan change would not preclude the Regional Freshwater Plan giving effect to the NPSFM, the Board erred by failing to take into account the definition of "over-allocation" as it applies to streams to be affected by the plan change, and the implications in terms of policy A2 of the NPSFM. Counsel said that as the Board accepted that the condition of the Ration, Horokiri and the lower Pauatahanui Streams was not high and that substantial degradation had taken place, this led plainly to a situation of "over-allocation" as to water quality, the streams are being used to a point where a freshwater objective (i.e. protection) is no longer met. Counsel argued that in such a situation, the NPSFM requires, under policy A2, that methods be implemented to assist the improvement of water quality to specified targets within a defined timeframe. Counsel submitted that the Board accordingly needed to consider whether the plan change – including the adverse effects of the TGP (including stormwater discharges), with its greater temporal and spatial limits – would frustrate that requirement and erred in law in that respect.

Part 2 Resource Management Act

[32] Third, the appellant argued that the Board applied the wrong legal test in determining whether to grant the application under Part 2. He argued that it erred in its consideration of the benefits and costs of the changes for the purpose of s 5(2), and the significance of TGP, by failing to take into account relevant factors, taking into account irrelevant factors, and by making findings that were not reasonably

open on the evidence. Counsel said the Board erred by failing to assess the plan changes for their potential adverse and positive effects; took an overly passive approach by deferring specific assessments of adverse effects to the resource consent authority (demonstrated by the approach to the issue of sediment discharge in the Pauatahanui Inlet).

[33] The extensive adverse effects in this case were, counsel submitted, significant according to the evidence of Dr Keesing, which was accepted by the Board. Because the Board did not discuss the stormwater issues, it failed to take this into account as a relevant factor. Counsel submitted that whilst the Board accepted that the TGP was one of national and regional significance, the significance of that could not alone outweigh the significant potential adverse effects of the plan change and thus, counsel said, this consideration was irrelevant.

[34] Lastly, counsel submitted that the Board had a statement from a witness, Dr Nicholson, which it accepted for the purpose of s 5 on the basis that it was "not challenged", whereas counsel contends that that was an incorrect conclusion – in fact it was not "unchallenged evidence". In any event, the appellant submits that the Board had correctly earlier concluded that it did not have sufficient evidence of the proposal's benefits to justify a statement to that effect in the explanation to policy 4.2.33A. So, counsel argued the Board's finding about the benefits of the proposal – and the overall balance in favour of the plan changes – for the purpose of s 5 were not reasonably open to it.

Respondent's contrary arguments

Section 32

[35] Counsel contended that s 32(3) of the Act requires examinations of what objective would be "the most appropriate" to achieve the purpose of the Act, or whether other methods are the most appropriate. It does not require determination of what is the "superior method". Neither the Act nor the Freshwater Plan objectives required the Board to focus only on "stream protection". Counsel says the Board was entitled to consider the significance of the TGP but did not give it undue weight.

[36] "Protection" was neither an absolute nor sole objective, whether under the Freshwater Plan or the Act and "protection" does not equate with "avoidance".

[37] Counsel submitted the Board in any event did not confine its consideration to mitigation nor preclude protection or constrain other future decision-makers. Counsel submitted the appellant's interpretation of policy 4.2.33 is misleading and, in any event, did not apply because more than minor adverse effects were likely and the Board gave proper regard to the relevant Freshwater Plan policies.

National Policy Statement for Freshwater Management

[38] On this issue counsel submitted that the Freshwater Plan does not set "Freshwater Objectives" within the meaning of the NPSFM. That requires them to be set by Regional Councils through a process directed by the NPSFM which have not yet occurred. On the issue of "over-allocation", counsel submitted that the decision was not relevant to any risk of over-allocation because it:

- did not alter the Freshwater Plan's objectives, nor constrain resource consent decision-makers from giving effect to them, and to the intentions of the NPSFM, in their decision; and

- the Regional Council is not in any sense impeded or restrained in its capacity to further change its Regional Plans and/or make new Regional Plans in accordance with its functions and responsibility.

[39] Counsel submitted that the Freshwater Plan did not require the Board to specifically address stormwater discharges in its decision, yet in any event it did so, and it was entitled to reach the view that further consideration was a matter for the resource consent stage (when detailed proposal to deal with that would be presented). Counsel submitted that the Board properly weighed the options presented to it against the objectives in accordance with its discretion.

Part 2 issues

[40] The respondent contended that the Board was not making a decision about the Transmission Gully proposal and did not have obligations imposed upon it to undertake a detailed analysis of the potential effects. The Board could not make a decision about the proposal, nor remove any discretion that rested with decision-makers at the resource consent stage. Counsel submitted the Board was properly entitled to leave detailed consideration of the effects of the proposal to the decision-makers and the scheme of Part 2 enabled the Board to exercise informed and expert judgment about competing values and priorities. So the scheme of the Act is deliberately compartmentalised.

Discussion

Appellate approach of the Courts

[41] The law is well understood. It is discussed in *Contact Energy Ltd v Waikato Regional Council*:[17]

> The question of whether the Tribunal's conclusion is one to which it could not reasonably have come is not determined by asking whether it is a reasonable outcome. "Reasonable" refers to the quality of the reasoning, not the quality of the result. The task of this Court is to decide whether the decision "was one that could be arrived at by rational process": *Stark v Auckland Regional Council* [1994] 3 NZLR 614 at 617 per Blanchard J.
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> The careful scrutiny required of points of law of this nature was discussed by Fisher J in *NZ Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 at 426 as follows:
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> > *"[T]he Court should resist attempts by litigants disappointed before the ... Environment Court to use appeals to this Court as an occasion for revisiting resource management merits under the guise of questions of law: Sean Investments v MacKellar* (1981) 38 ALR 363; *Parkinson v Waimairi District Council* (1988) 13 NZTPA 244 at 245. *This includes attempts to re-examine the mere weight which the Tribunal gave to various conflicting considerations before it: Manukau City Council v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.

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[17] *Contact Energy Ltd v Waikato Regional Council* [2007] 14 ELRNZ 128 (HC) at [58] – [59].

> If an error of law is detected it will not warrant relief on appeal unless this Court is satisfied that the error materially affected the decision of the Environment Court: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82; *Countdown Properties* at 153.

and further:[18]

> In *Green and McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519, Salmon J said at 528:
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> > *No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise: J Rattray & Son Ltd v Christchurch City Council* (1983) 9 NZTPA 385. *The Environment Court's special expertise and experience enable it to reach conclusions based on the sound judgment of its members, without needing or being able to relate them to specific findings of fact. This is particularly so in cases of planning discretion: Lynley Buildings Ltd v Auckland City Council* (1984) 10 NZTPA 145 and *EDS v Mangonui County Council* (1987) 12 NZTPA 349.
> >
> > *Mr Bartlett for the appellants warned against the danger of accepting an Environment Court decision just because it was an expert Tribunal. It would, of course, be inappropriate to do so. Its expertise cannot save decisions which do not meet the principles set out above. However, it is important to bear in mind that the Court is required constantly to make decisions relating to planning practice, it is constantly required to assess and make decisions relating to conflicting expert opinion. Members of the Court are able to contribute to the formation of a judgment as a result of experience gained in other professional disciplines. These considerations and the fact that the Court is constantly exposed to litigation arising from the application of the Resource Management Act, justifies the respect which this Court and the Court of Appeal has customarily accorded its decisions.*

[42] The Board was required to consider the Request in terms of Part 2 of the Act, being "Purpose and Principles" (ss 5 – 8). The purpose of the Act is to promote the sustainable management of natural and physical resources.[19] Sustainable management means managing the use and protection of natural and physical resources in a way which enables people and communities to provide for their social and economic well being while safeguarding the life-supporting capacity of air, water, soil, and ecosystems and avoiding, remedying, or mitigating any adverse effects of activities on the environment.[20]

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18 At [63].
19 Section 5(1).
20 Section 5(2).

[43] Sections 6 and 7 provide certain principles relating to that balance. They are to be read as subject to s 5.

Section 32

[44] Section 32 requires that, before adopting any proposed changes to policies, the Board must evaluate and examine whether, having regard to the efficiency and effectiveness, the changes are the most appropriate way of achieving the objectives of the Freshwater Plan.[21] In making that evaluation the Board had to take into account the benefits and costs of the proposed policies (i.e. "benefits and costs of any kind, whether monetary or non-monetary");[22] and the "risk of acting or not acting, if there is uncertain, or insufficient information" about the subject matter of the proposed policies.[23]

"Most appropriate" test

[45] I do not accept the submission by the appellant's counsel that the policy "most appropriate" must be the superior method in terms of stream protection. Section 32 requires a value judgment as to what on balance, is the most appropriate, when measured against the relevant objectives. "Appropriate" means suitable, and there is no need to place any gloss upon that word by incorporating that it be superior. Further, the Freshwater Plan does not only have stream protection as a sole object; its objectives relate to preserving, safeguarding, and protecting identified values (objectives 4.1.4-6) and to avoid, remedying, or mitigating adverse effects (7.1.1).

[46] As to Mr Bennion's argument that s 32(3)(b) mandated that "each objective" had to be the "most appropriate way" to achieve the Act's purpose; i.e. it was an error to look at the combined objectives; I do not agree that the Board is to be constrained in that way. It is required to *examine* each, and every, objective in its process of evaluation – that may, depending on the circumstances result in more than

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21 Section 2(1).
22 Section 2(1).
23 Section 32(4).

one objective having different, and overlapping, ways of achieving sustainable management of natural and physical resources (the purpose of the Act). But objectives cannot be looked at in isolation, because "the extent" of each may depend upon inter relationships. Provided the Board examined, in its evaluation the *extent* of each objective's relationship to achieving the purpose of the Act, it complied with s 5(3).

[47] Mr Bennion relies for support upon *Orewa Land Ltd v Auckland Council*.[24] There the High Court found that the Environment Court had, wrongly, only considered one of three factors required under s 32(3)(b).

[48] The decision *Orewa Land Ltd* turned upon the Court finding that the Environment Court erred by only deciding on the actual or potential effects of a proposal, without analysing whether the proposal would avoid, or remedy, or mitigate the effects of any particular development. On the facts, there was no indication that the Environment Court gave consideration to the efficacy of the rules and their ability to achieve the objectives and Faire J said:[25]

> I am left in some doubt as to whether the Court, in fact, evaluated the complete package provided by [a set of district plan provisions that would overlay an existing high intensity residential zone] when it considered whether [it] was an appropriate method of achieving the objectives of the District Plan. ...

[49] That decision was entirely dependent upon the particular surrounding circumstances, which include a detailed set of rules for integrated residential development. It is clearly distinguishable, and I note that the Auckland Council one of the respondents, in fact, supported the appeal. The decision does not assist the present appellant.

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[24] *Orewa Land Ltd v Auckland Council* HC Auckland CIV-2010-404-6912, 21 April 2011.
[25] At [37] – [38].

Significance of the TGP

[50] Beyond doubt, s 32(3)(b) envisages a matter of judgment.[26] The Board carefully discussed the s 32 assessment in the course of 20 paragraphs,[27] and made it clear it was assessing whether the policies were the most appropriate for achieving objectives – when compared with other options.

[51] Read in its entirety the Board's decision balanced a range of matters. I do not accept that in placing the TGP on the scales, as it should, it elevated that beyond what was permissible. It was one factor, properly considered, but not to the exclusion of others. The TGP was relevant as the essential reason for the plan change Request to enable:[28]

> ... what NZTA contends to be a *more balanced* consideration of the management of the effects of TGP at the time resource consents are applied for.

Mitigation vs protection

[52] The appellant further says the Board erred in law by approving the plan change that allows for mitigation but not protection. That provides:

> 4.2.33A To manage adverse effects of the development of the Transmission Gully Project, in accordance with the following management regime:
>
> (1) Adverse effects are avoided to the extent practicable;
>
> (2) Adverse effects which cannot be avoided are remedied *or mitigated*.

[53] This submission revolves around an intricate, linguistic or semantic argument contrasting "protect" with "mitigate". Yet protection is not the sole objective of the Freshwater Plan. The Board as an expert body was aware of that. It summarised the relevant objectives as including:[29]

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[26] *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) and *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
[27] At [222 – [241].
[28] At [22].
[29] At [232].

> ... preserving, safeguarding and protecting identified values ... or avoiding, remedying or mitigating adverse effects.

[54] To mitigate is to alleviate. It may lessen, or it may reduce the severity of an impact – and it may as a consequence result in protection, or even removal of an unwanted effect, depending on its degree. The appellant submits that mitigation and protection are different and the Board misunderstood the difference. I do not agree. The term "protection" is used in Part 2 of the Act are, in ss 6 and 7, but is not expressed as an absolute, and those sections are subject to s 5, which refers to "avoiding, remedying, or mitigating any adverse effects on the environment".

[55] The Board is approving a policy framework which requires later decision makers to endeavour to avoid adverse effects to the extent practicable and to remedy or mitigate effects which cannot practicably be avoided. It balanced the Freshwater Plan's objectives, evaluated different options, and decided what was most appropriate to achieve those objectives. It had ample expert and other evidence, including its own specialist expertise.

[56] I am satisfied that the Board made no error of law in making its determination as to what was "most appropriate" and it did not apply a wrong legal test as the appellant contends in paragraph 5.1(a) of the submissions.

Stormwater discharges

[57] The evidence of an expert witness, Dr Keesing, accepted by the Board, included his opinion that the TGP would have long term high negative impacts in terms of stormwater in some parts of some catchments. He indicated a likelihood that they might be managed to a reasonable level in the long term. He considered that, after mitigation, the stormwater effects on "High Value Habitat" due to "Contamination from road runoff into stormwater into streams already highly modified by land use" would be "High negative long term" even with "Target treatment levels achieved through proprietary devices and wetland treatment prior to discharge".

[58] Counsel contended that the Board failed to directly address stormwater discharge, except by generally alluding to such matters being for consideration subsequently, when consents are applied for, and the possibility exists that such effects might not occur. Counsel says this was a failure by the Board to take into account a relevant factor and thus, was an error of law. I do not accept that argument.

[59] The Board accepted expert evidence which included that given as to potential stormwater effects. The Freshwater Plan's objectives do not specifically refer to stormwater discharges. Nothing in s 32(3)(b) required the Board to evaluate the policies by reference to that and reach any conclusions on the point. Nevertheless, the evidence of the possible effect of stormwater discharge was before the Board and of which it was aware when it made its decision. It not only must have had it, but it would unquestionably have known from its own expertise that management of stormwater runoff is always a feature when highways are constructed. As an expert Board, it was entitled to regard it as more relevant to later determination in the resource consent process when detailed proposals as to how stormwater discharges were to be arranged were before the consent authority.

[60] This challenge is not a sustainable point of law.

Temporal and spatial considerations

[61] The appellant then argued that the Board erred in law by failing to take into account:

> Detailed criteria in the freshwater plan as to the timing and spatial extent of adverse effects consistent with the Objectives of the Plan (in particular policy 4.2.33).

[62] The appellant also contended that by taking into account "the timing and spatial requirements for the Transmission Gully Project" (instead), the Board relied on an irrelevant matter, and thus erred in law.

[63] The submissions proceeded that the Board adopted the timing and site requirements preferred for the TGP and, consequently it failed to consider whether

they "better met the objective of protection" (i.e. as opposed to other options such as a shorter period and smaller geographical area); so that the required analysis under s 32 did not occur.

[64] The Freshwater Plan does not rest upon one "protection" objective. Section 32 does not prevent consideration of TGP as a relevant matter. I agree with the respondent's submission that simply by reference to timing and site requirements for TGP the Board was not constraining its decision-making. The five options identified as available to the Board, and its evaluation of those, are clearly recorded in [233] – [241] of the decision. It explicitly explains its approach and the reasons why it preferred a particular option. Timing and site requirements of the TGP did not fall outside relevant considerations, being several of many, to be factored into the evaluation under s 32(3)(b). And while the Board did not expressly refer to - and compare - the temporal and spatial requirements in policy 4.2.33, that is a policy (not an objective), that does not strictly apply in this case as adverse effects were always going to be more than minor.

[65] Accordingly, no error of law arises.

National Policy Statement for Freshwater Management

[66] The Board considered, having first determined that it was not necessary for the Request to give strict effect to the NPSFM, whether the Request was consistent with or precludes the Freshwater Plan from giving effect to the NPSFM. As discussed above, the Board concluded that the (revised) Request did not run counter to the objectives or the policies of the NPSFM and gave its reasons:[30]

> - Our suggested refinements to Policy 4.2.33A (and its attendant Explanation) would ensure that the safeguarding of life supporting capacity, ecosystem processes and indigenous species will be adequately achieved;
>
> - Avoidance of adverse effects is the first preference under the proposed (revised) policy framework;

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[30] At [282].

- When considering resource consent applications for TGP, the consent authority retains an overall discretion to determine whether adverse effects have been adequately addressed by NZTA. Nothing in the proposed policies precludes a consent authority from determining that the concepts of safeguarding or protecting provided for in Objectives A1 and A2, require the avoidance of adverse effects in any given case.

[67] That finding followed upon its "review of the evidence on the relevant objectives and policies".[31]

[68] The argument by Mr Bennion that the Board erred because it did not mention certain policies under, or the definition of "over-allocation" in, the NPSFM, and he sets out parts relating to "over-allocation" of water quantity and quality. He argued that the Board in its analysis failed to consider that there are existing Freshwater objectives required under the plan and on the evidence provided and recorded by the Board those objectives were not being met currently in relation to waterways and in particular the three main streams. Counsel deferred to the evidence of Dr Keesing and the Board's agreement with the view of the experts and argued that this was namely a situation of "over-allocation" as to water quality in that the streams are "being used to appoint where a freshwater objective is no longer being met". Counsel submitted that in such a situation the Board needed to consider whether the plan change would frustrate the requirements under policy A2 that targets must be specified, and that "methods implemented to assist the improvement of water quality in the water bodies, to meet those targets" within a defined timeframe. He argued that had the Board undertaken that assessment it would have concluded that the plan change did interfere with the ability of the Regional Council to give effect to the NPSFM and at the very least make adjustments to it to ensure that it did not conflict with the requirements of NPSFM; and because it did not consider that assessment and adjustment it made an error of law.

[69] This complex, and in parts convoluted, argument must fail. Essentially, that is because:

- there is no over-allocation unless a 'limit" is set to meet a "freshwater objective" which has been exceeded or a "freshwater objective" is not

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[31] At [291].

met. It is for the responsible Regional Council for the making and changing of plans which may be given effect progressively which establish freshwater objectives and set limits;

- the objectives identified in the Freshwater Plan could not be said to be "freshwater objectives" within the meaning of the NPSFM and none of the objectives in the Freshwater Plan can be treated as a basis for the argument that waterways impacted by the Request are "over-allocated" within the meaning of the NPSFM;

- the Regional Council's statutory responsibility to give effect to the NPSFM is not in any sense frustrated or interfered with by the decision; and

- the Board says its findings were from all the evidence and challenge to these in truth is a challenge to merits. As a specialist Board it was entitled to come to its conclusion.

[70] If it should be that the Regional Freshwater Plan objectives could as a matter of law be "freshwater objectives" for the purposes of the NPSFM, nothing in the Board's decision would alter that in any event. It does not alter the Freshwater Plan's objectives. Resource consent decision-makers may give effect to the objectives and to the intentions of the NPSFM when decisions come to be made by them.

[71] Apart from those points, the evidence of Dr Keesing and comments were not made referring to an allocation regime required to be implemented by the NPSFM, but in the context of describing the quality of waterways, which might more generally be impacted by TGP.

[72] No error of law existed.

Part 2

[73] The appellant's case was that the Board should have considered the many potential adverse effects and benefits of the TGP and weighed those up before deciding to change the policy framework in the Freshwater Plan and it was not sufficient to leave these issues to be considered by decision-makers at the resource consent (and notice of requirement) stage. Counsel contended the Board applied the wrong test in its consideration of the benefits and costs, and the significance of the TGP. But he was not able to articulate the precise test that it said was wrongly adopted. His complaint boiled down to that:[32]

> on the balancing of all ... matters that is required under Part 2:
>
> (a) The Board ... did not have necessary evidence to consider that balance;
>
> (b) The Board ... did not ... consider the benefits against potential effects, it only considered the "significance" of the TGP in a general sense;
>
> (c) In as far the TGP has "significance" arising from the Transmission Gully route being mentioned in the Regional Land Transport Plan and similar documents, the Board never weighed those against the evidence of disbenefits.

[74] Counsel argued that those are matters of law. I do not agree. They are complaints about outcome and the Board's conclusion that those factual matters were for ultimate determination on any resource consent application. They represent challenges to the factual approach the Board took in the exercise of its expert assessment, and within its discretion. I do not accept that the Board did not have sufficient evidence to undertake the task of assessing whether a plan change was required. There was ample evidence, reports and other material to enable the Board to balance what was required of it. It was not exercising the functions that a consent authority would have in hearing an application for resource consent.

[75] The Freshwater Plan change did not necessarily enable the TGP to proceed but simply allows consideration of a subsequent resource consent application to be

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[32] Applicant's submissions at paragraph 7.31.

made on its merit. Consideration of the TGP under Part 2 of the Act is a matter for the decision-maker at the resource consent stage. Part 2 provides ample scope for the decision-makers to weigh competing expert opinions and facts in the light of the values expressed in Part 2 and associated policies. This is obvious from the leading authority, namely *NZ Rail Ltd v Marlborough District Council*.[33]

[76] It would be wrong to require the Board to duplicate the resource consent stage, especially when it is unlikely to have all the relevant information. The respondent has satisfied the Court that in balancing competing factors and values the Board considered and applied the relevant Part 2 provisions in accordance with the discretion conferred upon it. The matter before it was not applications for consent for the TGP, but whether the Request to change some of the policies in the Freshwater Plan could be accepted. If the Board had applied the approach now advocated by the appellant there may have been error of law because its order would have been enlarged beyond what was proper or necessary. I am satisfied that under this head there is no error of law which would vitiate the Board's decision.

Evidence issue

[77] Finally, the appellant says that the Board was wrong to say that the evidence of a witness, Mr Nicholson, as to the benefits of the TGP "was unchallenged" in cross-examination or evidence, and consequently the Board erred in law because it could not reasonably have come to that conclusion.

[78] That part of Mr Nicholson's evidence related to his opinions as to a number of benefits he thought would follow from construction of TGP. They included, improved route security, reduction in journey times, lessening safety risks and reduction of adverse impact on communities through which State Highway 1 presently passes.

[79] Mr Bennion argued that this evidence was not unchallenged because Ms Warren, an ecological expert and submitter in her own right, had refuted in detail

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[33] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at [86].

each of the assertions of Mr Nicholson. Counsel said the Board was wrong not to say why it preferred the views of Mr Nicholson. He then went on to argue that the Board erred because it said it could reach its conclusions without issues raised in evidence of the wider benefits of TGP being finally determined.

[80] What the Board said was that it had no hesitation in finding that TGP was an important roading project at both a national and regional level.[34] It had regard to the Minister's assessment (that is why the Board was set up) as well as references to the proposed TGP development project as a long term solution in a statutory document prepared by the Regional Council;[35] and that State Highway 1 (and TGP as part of that road) was identified as a road of national significance in a document issued by the Minister of Transport pursuant to the Land Transport Management Act 2003. It also was entitled to take into account its own knowledge and expertise – in part common sense – in accepting what the benefits might be from rerouting State Highway 1.

[81] It may have been an overstatement to say that Mr Nicholson's benefits of TGP was "unchallenged" but the Board was *not* making findings on that specific issue, but rather on whether TGP was an important roading project – the evidence of which was extensive.

[82] No error of law arises from that statement in the Board. Nor does it arise from the Board not being drawn into considering, or deciding the benefits of TGP as a whole as against adverse effects on freshwater or otherwise. To do so it would have proceeded outside its mandated boundaries. I recognise that the appellant and others had the general aim of preventing TGP proceeding for various reasons, and the Board heard evidence and submissions aimed at the benefits – or not – of the proposal. But it was not required to determine those on their merits. It did not err in law in concluding that all those matters, as well as adverse effects, were to be determined by "the relevant consent authority or when resource consent applications are made to carry out TGP works in the water bodies concerned.[36]

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34 At [187].
35 Wellington Regional Land Transport Strategy 2010- 2040.
36 At [191].

And:[37]

> It will be apparent from our earlier summary of the submissions made to us that a number of parties to these proceedings challenged the concept that it was appropriate to make provision for roading projects such as TGP at all. We have made no determination on those issues which do not seem relevant to our considerations in this case. We are deciding the comparatively restricted issue of whether or not TGP is of such significance (whatever the views on its merits might be) that the policies of the Freshwater Plan ought to be changed in the manner requested by NZTA.

Conclusion

[83] As I commented to counsel, because of time constraints and the necessity of a decision on the outcome of this appeal being quickly delivered (there were seven working days before the Court closed for the vacation, and on reopening I am required to sit on a nine day civil case), I have had very limited time within which to write this reserved decision. As a consequence I have had to rely very much upon the submissions of counsel in my acceptance, or rejection, of them, as the case may be. It will be apparent that in many respects I have accepted as persuasive and valid the submissions made by counsel for the respondent. And have recorded these. That is because I agree with them. I am satisfied that there are no errors on points on questions of law, as required by s 149V, upon which the appellant can succeed.

[84] The reality is that the TGP for realigning State Highway 1 is a matter of national, and regional significance. The expert Board was set up by the Minister and conducted a six day hearing of evidence and submissions from many individuals and groups (33 in opposition, 22 in support). Its report of 86 pages was delivered on 5 October 2011, a consideration period of almost three months.

[85] Those who oppose the TGP for all manner of reasons (not just related to waterways) will disagree with the conclusions. The appellant is one of those. Its challenge to the outcome of the Board's inquiry in this Court, is however rejected. It should pursue its multiple challenges to the merits of any grant of resource consents for work proposed at the very extensive hearing to commence early February. There is no presumption that consent, with or without conditions, would be forthcoming or

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[37] At [192].

for that matter withheld. This decision and the dismissal of the appeal simply means that the process under which the Board conducted its inquiry and its findings and the reasons given by it do not comprise any errors of law, which entitles the appellant to a remedy from this Court.

[86] Although dressed up in the guise of points of law a substantial number of the appellant's submissions, when analysed, are challenges to factual findings, or the merits by the Board in the exercise of its expert judgment and discretion. Courts have repeatedly warned against this.

[87] I have a clear view that the appeal must fail, and the Board's decision to approve the Request for plan changes in the form contained in the decision and its determinative finds as summarised in [332] are unassailable on questions of law. Whether or not the Court agrees with conclusions of fact is immaterial. The respondent may proceed with its resource consent applications and objectors can be heard to oppose so that the outcome on the merits will be decided by the consent authority.

[88] The appeal is dismissed. The respondent is entitled to costs. The parties may submit memoranda on that issue.

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J W Gendall J

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