IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA509/2023
CA510/2023
[2025] NZCA 154

BETWEEN	GLENPANEL DEVELOPMENT LIMITED Appellant
AND	EXPERT CONSENTING PANEL Respondent

Hearing:	20 November 2024
Court:	Mallon, Cooke and Collins JJ
Counsel:	V L Heine KC and D A C Bullock for Appellant S M Kinsler for Respondent M S Smith as counsel to assist the Court
Judgment:	8 May 2025 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The Panel is to reconsider its decision in accordance with the directions in [63].

C The appeal from the judicial review challenge is dismissed.

D Costs will lie where they fall.

REASONS OF THE COURT

(Given by Cooke J)

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[1] Glenpanel Development Limited (Glenpanel) appeals from a decision of the High Court dismissing its appeal from, and judicial review challenge to, a decision of an Expert Consenting Panel (the Panel) established under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (the Act).[1]

[2] The Panel declined Glenpanel's application for a resource consent permitting a medium-density residential housing development in an area between Shotover River (Kimiākau) and Lake Hayes (Waiwhakaata) in the Queenstown District known as Ladies Mile.[2] Glenpanel contended that the Panel misinterpreted the Act in declining the application, and that there was procedural impropriety, including because of apparent bias arising from the alleged conflicts of one Panel member. The High Court dismissed these arguments, and Glenpanel now appeals.

[3] Given that there was no party substantially opposing the applications before the Panel counsel to assist was appointed both in the High Court and this Court to advance opposing argument.

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1 *Glenpanel Development Ltd v Expert Consenting Panel* [2023] NZHC 2069 [judgment under appeal].

2 *Re Flint's Park, Ladies Mile — Te Pūtahi Project* Expert Consenting Panel (30 November 2022) [Panel decision].

Background

[4] The Act was passed in July 2020 as part of a series of reforms directed at enhancing economic recovery from the effects of the COVID-19 pandemic. At the introduction and first reading of the Bill, the responsible Minister referred to the legislation bringing forward significant investment in infrastructure and "speeding up resource consenting and designation processes" under the Resource Management Act 1991 (the RMA).[3] The Act operated for a short period only, and it automatically repealed itself under its own provisions on 8 July 2023.[4] Existing applications, including appeals, remain in effect notwithstanding that repeal.[5] Glenpanel's application and appeal are accordingly preserved, and if it succeeds it is entitled to have its application reconsidered under the Act's regime.

[5] Glenpanel's application related to a subdivision of 15.49 hectares of land on State Highway 6 between Shotover River and Lake Hayes. It involved the creation of approximately 179 residential units and a primary school, or up to 384 residential units without a primary school. The proposal was advanced on the basis that it would assist in addressing the significant housing pressure in the region and advance economic recovery from the effects of COVID-19 in a manner contemplated by the Act.

[6] Under the normal RMA rules, the activities for which Glenpanel sought consent were non-complying under the governing instrument, the Proposed District Plan. This was because the activities involved urban development on land that was outside a prescribed urban growth boundary, and because they involved some development on land classified as an "Outstanding Natural Feature".[6] Glenpanel argued, however, that a series of formal and informal planning documents identified this area as a site for urbanisation in the near future, and that the application should have been granted to enhance the purposes of the Act. Glenpanel particularly relied on the National Policy Statement on Urban Development 2020 (NPS-UD) which imposed obligations on councils to enable greater land supply for housing within two

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3 (16 June 2020) 746 NZPD 18532.
4 COVID-19 Recovery (Fast-track Consenting) Act 2020, s 3(1).
5 Schedule 1 cl 1.
6 Namely, the hillside, Slope Hill, albeit that Glenpanel says its visual intrusion into this area was very limited.

years of the policy's commencement.[7] The Queenstown Lakes District Council had amended its Proposed District Plan as a consequence. The amendment contemplated additional housing in the area over the short and medium term. A map of "Indicative Future Expansion Area(s)" included land along Ladies Mile to which the application related.

The statutory framework

[7] The overall framework for decision-making under the Act was recently addressed by this Court in *Greenpeace Aotearoa Inc v Hiringa Energy Ltd*.[8] The purpose of the Act is prescribed in the following terms:

> **4 Purpose**
>
> The purpose of this Act is to urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.

[8] Applications for resource consent were to be dealt with on a fast-track basis by an expert consenting panel. The provisions of sch 6 of the Act applied in place of the RMA resource consent provisions.[9] There were then two types of applications contemplated by the Act's procedures — "listed projects" and "referred projects". The application made by Glenpanel was a referred project.

[9] To be a referred project, there needed to be a Ministerial decision that the project would help achieve the purposes of the Act.[10] A referral order would be made by Order in Council.[11] An expert panel was then convened under the provisions of the Act. Only limited notification of applications was contemplated, but the expert panel was required to invite written comments on applications from specified persons.[12]

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7 National Policy Statement on Urban Development 2020, pts 1.2 and 4.1. Under pt 4, tier 2 authorities must comply with Policy 5 by notifying a proposed plan or plan change no later than 2 years after the commencement date of the National Policy Statement, which is 20 August 2020 (see pt 1.2). Queenstown Lakes District Council is a tier 2 local authority under this National Policy Statement: see Appendix.

8 *Greenpeace Aotearoa Inc v Hiringa Energy Ltd* [2023] NZCA 672, [2024] NZRMA 93.

9 COVID-19 Recovery (Fast-track Consenting) Act, s 12(2).

10 Section 18(2).

11 Section 27.

12 Schedule 6 cl 17.

[10] On 27 September 2021, the Minister for the Environment accepted Glenpanel's application that its proposal be treated as a referred project, and on 22 November 2021 an Order in Council was issued.[13] Amongst the reasons given by the Minister for referral were that the project would help achieve the purposes of the Act; that it would likely progress faster than would otherwise be the case under the RMA standard processes; and that the actual and potential adverse effects on the environment, and proposed measures to mitigate them, could be appropriately tested by an expert consenting panel.[14] The Minister had appointed former Chief Environment Court Judge Laurence Newhook as panel convenor,[15] who in turn appointed three members, Mr Mathew Allan, Ms Lisa Mein and Mr Hoani Langsbury to comprise the decision making Panel.

[11] The Panel's decision-making process is set out in sch 6 of the Act. It provides:

> **31 Consideration of consent applications for referred projects**
>
> *Matters to which panel must have regard*
>
> (1) When considering a consent application in relation to a referred project and any comments received in response to an invitation given under section 17(3), a panel must, subject to Part 2 of the Resource Management Act 1991 and the purpose of this Act, have regard to—
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> (a) any actual and potential effects on the environment of allowing the activity; and
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> (b) any measure proposed or agreed to by the consent applicant to ensure positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing the activity; and
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> (c) any relevant provisions of any of the documents listed in clause 29(2); and
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> (d) any other matter the panel considers relevant and reasonably necessary to determine the consent application.
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> …

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13 COVID-19 Recovery (Fast-track Consenting) Referred Projects Amendment Order (No 15) 2021.
14 COVID-19 Recovery (Fast-track Consenting) Referred Projects Order 2020, sch 35.
15 See COVID-19 Recovery (Fast-track Consenting) Act, sch 5 cl 2(1).

> **32 Further matters relevant to considering consent applications for referred projects**
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> (1) Sections 104A to 104D, 105 to 107, and 138A(1), (2), (5), and (6) of the Resource Management Act 1991 apply to a panel's consideration of a consent application for a referred project.
>
> (2) The provisions referred to in subclause (1) apply with all necessary modifications, including that a reference to a consent authority must be read as a reference to a panel.
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> (3) To avoid doubt, section 104E of the Resource Management Act 1991 does not apply to a panel's consideration of a resource consent for a referred project.

[12] It is to be noted that there is a difference between the provisions regulating referred projects and those regulating listed projects. Listed projects do not have the equivalent of cl 32(1). In fact, the Act specifically notes that s 104D does not apply to listed projects.[16]

[13] There is no dispute that for referred projects, the Act broadly preserves the two gateways for the grant of a resource consent for non-complying activities contemplated by s 104D the RMA — that the activities have no more than minor adverse effects on the environment,[17] or alternatively that the activities will not be contrary to the objectives and policies of the relevant planning instrument.[18] These gateways are as described by this Court in *Dye v Auckland Regional Council*.[19] There is dispute, however, over how these gateways apply to the Panel's decision-making under the Act.

[14] The Panel issued its decision declining consent on 30 November 2022.[20] The Panel concluded that it was obliged to apply the tests in s 104D of the RMA and that the application should be declined as:[21]

> (a) The project would have more than minor adverse effects on the environment. This was a consequence of adverse landscape, visual,

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16 Schedule 6 cl 30(7)(b).
17 Resource Management Act 1991, s 104D(1)(a).
18 Section 104D(1)(b).
19 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [5].
20 Panel decision, above n 2.
21 At [6(a)], [6(b)] and [7(a)].

traffic and transport effects, including after taking into account potential mitigation.

(b) The project was contrary to a set of objectives and policies in the Proposed District Plan, including the avoidance of urbanisation of rural land outside urban growth boundaries and the protection of landscape values of outstanding natural features.

(c) Even if the Panel had reached the view that the project's adverse effects were minor, consent would have been refused because of the lack of alignment with the provisions in the Proposed District Plan.

[15] Glenpanel appealed against the decision of the Panel to the High Court. Dunningham J dismissed the appeal.[22] Glenpanel contends the High Court erred in doing so by failing to apply "the crucial context of [the Act] and its purpose to the application of the s 104D gateway tests".

First issue: how do the tests of the RMA apply?

[16] The first issue is whether the High Court correctly concluded that the requirements in the RMA, and particularly s 104D, needed to be satisfied without modification. Glenpanel argued that they did not. Applications were granted under the Act and not the RMA. Whilst the provisions of the RMA were referred to, they applied in a modified way. This had particular significance in relation to the requirement of s 104D, which only allowed the grant of a consent for a non-complying activity if the Panel was satisfied that the adverse effects were minor, or if granting the consent would not be contrary to the objects and policies of the Proposed District Plan.

[17] The High Court did not accept Glenpanel's arguments. Dunningham J held:[23]

> [58] The … Act clearly distinguishes between listed and referred projects. In contrast to listed projects, I am satisfied the … Act intends to preserve the consequences of activity classification for referred projects, which is why sch 6 cl 32 says the relevant sections of the RMA dealing with activity classification "apply". If the sections of the RMA dealing with activity

22 Judgment under appeal, above n 1.
23 Judgment under appeal, above n 1.

> classification were not intended to apply in full, the Act would have specified this. This conclusion is reinforced by the fact the source of decision-making authority for referred projects is not found in the … Act, so it is necessary to rely on in ss 104A–104D of the RMA. If, as Glenpanel argues, s 104B (like s 104D) was simply a matter to be taken into account, this would negate the role of those sections as providing jurisdiction to the Panel to grant or decline consent. Unlike for listed projects where sch 6 cl 30 gives jurisdiction to grant consents, there is no alternative provision in the … Act dealing with jurisdiction to grant consent for referred projects.

[18] Ms Heine KC argues on appeal that the consents in question are granted under the Act, not the RMA, with s 12 of the Act deeming the consent to have the same force and effect as an RMA consent. The substantive decisions made by the Panel needed to be consistent with the broader purposes of the Act. Section 19 elaborated on those purposes. Under cl 32(2) of sch 6, the s 104D gateways were expressly incorporated with "all necessary modifications" which required the purposes of the Act to be applied. It followed that decision-makers had to consider issues of investment and employment as well as sustainability, as the purposes of the Act were anthropocentric as well as ecocentric. The Panel had to substantially engage with the principles of the Act and grapple with how they impacted on the gateway tests. The Panel had not done so, and neither did the High Court.

[19] In response, Mr Smith argued that both the Panel and the High Court correctly found that s 104D was required to be applied in its terms for the reasons that they gave.

Assessment

[20] We do not accept Glenpanel's arguments and instead agree with the High Court Judge that the provisions of the RMA, including the requirements of s 104D, applied to decisions made by the Panel under the Act without substantive modification.

[21] There is an important difference between the provisions of the Act concerning listed projects and those concerning referred projects. For listed projects, cl 30 of sch 6 expressly provides:

> (7) When considering a consent application for a non-complying activity,—
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> (a) a panel must grant consent unless any of the grounds described in clause 34 for declining an application apply; and

(b) to avoid doubt, the test under section 104D of the Resource Management Act 1991 must not be applied.

[22] By contrast, for referred projects, cl 32(1) provides that the relevant provisions of the RMA, including s 104D, apply. We consider that the different treatment of the two categories of application is significant. With listed projects, Parliament itself has identified the applications that will be addressed by a panel under modified RMA provisions.[24] Referred projects are treated differently. They must still meet the requirements in s 104D.

[23] That is also recognised in the broader scheme for referred projects. In deciding to refer a project to a panel, the Minister must be satisfied that the project will help achieve the purposes of the Act under s 18(2), with relevant considerations specified in s 19. Whilst the relevant matters include assessing whether the project may have "significant adverse environmental effects",[25] the provisions do not contemplate the Minister balancing the purposes of the Act against environmental effects when deciding whether to refer. We consider that the Act contemplates that an assessment of the environmental effects will be undertaken in the decision-making process by the Panel. This is consistent with the decision the Minister made in the present case, which records that the actual and potential effects on the environment can be "appropriately tested" by the Panel against the requirements of the RMA.[26]

[24] This approach also remains consistent with the purposes of the Act specified in s 4. The Act promotes recovery from the impacts of COVID-19 "while continuing to promote the sustainable management of natural and physical resources".[27] Given that the Act generally continues to promote sustainable management, we consider that the lack of any provisions specifying how a Panel would balance the positive economic advantages of the project against adverse environmental effects further counts against the approach contended for by Glenpanel. And given that the provisions of the RMA are expressly excluded for listed projects, but are directed to be applied to referred

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24 See COVID-19 Recovery (Fast-track Consenting) Act, sch 2, which sets out the listed projects.
25 Section 19(e).
26 See COVID-19 Recovery (Fast-track Consenting) Referred Projects Order, sch 35.
27 COVID-19 Recovery (Fast-track Consenting) Act, s 4.

projects, we consider it clear that these provisions of the RMA must be applied in the normal way.

[25] We do not agree that the reference in cl 32(2) to the provisions of the RMA applying "with all necessary modifications" dilutes the requirements of the RMA provisions. This statutory formulation does no more than attend to the technical adjustments that are required to make the legislation fit within the current regime, including the example specifically referred to in cl 32(2), where the "consent authority" must be read as a reference to a "panel". These are not statutory words that alter the substantive tests to be applied, at least in this statutory context. Nor is there any attempt in these words to identify what the altered substantive tests would be.

[26] We accordingly agree with the High Court Judge that the Panel correctly identified the need of the application to address the gateway tests in s 104D of the RMA in an unmodified way.

Second issue: was the application contrary to the objectives and policies of the Proposed District Plan?

[27] Glenpanel's further argument focuses on the second "gateway" for granting the application under s 104D(1)(b). In the High Court, Glenpanel argued that the Panel's approach was overly rigid, did not involve a fair reading of the objectives and policies of the Proposed District Plan as a whole, and that the Panel should have, but did not, address the purposes of the Act in interpreting s 104D(1)(b) and the relevant objectives and policies in the Proposed District Plan.[28]

[28] The Panel noted several provisions in the Proposed District Plan that referred to "avoidance" of urban development outside urban growth boundaries on rural land,[29] the need to "ensure" that urban development was in defined urban growth areas,[30] and the need to "protect" outstanding natural features.[31] The Panel ultimately concluded

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28 Judgment under appeal, above n 1, at [63].
29 Panel decision, above n 2, at [355].
30 At [358].
31 At [357].

that provisions of this kind in the Proposed District Plan did not permit Glenpanel's application to be granted.[32] For example, the Panel said:

> [390] As noted above, the term "avoid" is a strong and directive one. The Panel finds that the term, as used in the [Proposed District Plan], should be interpreted consistently with the Supreme Court's comments and findings in *King Salmon*, such that substantial urban development on rural land outside the [Urban Growth Boundary] (as proposed here) should not be allowed or should be prevented from occurring, until (in accordance with Policy 4.2.2.20) the [Proposed District Plan] has been changed to extend the [Urban Growth Boundary] and apply an appropriate urban zoning to the land. The Panel considers that this approach represents an orderly and strategic way of managing growth.

[29] The Panel later stated that this was an instance where "the text of the instrument (here the [Proposed District Plan]) dictates the result".[33]

[30] The High Court did not accept Glenpanel's criticism of this approach. Dunningham J held:[34]

> [76] I am not persuaded that the Panel was wrong to take the view that policies using directive terms such as "avoid", "protect" and "ensure" should be given greater weight than less directively worded policies. While the Panel relied on the Supreme Court's decision in *King Salmon* as supporting the principle that policies stated in directive terms will carry greater weight, they also noted that the High Court recently observed that the way policies are expressed is important when interpreting their meaning and applying them to consent applications. I agree that a policy worded in directive terms gives an indication of the weight to be given to it. Furthermore, if a proposal involves an activity which the plan directs should be avoided, it is more likely to be contrary to the objectives or policies of that plan than when the plan uses less directive language.
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> …
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> [78] In my view, there can be no doubt that the Panel has reviewed the objectives and policies as a whole. Furthermore, it has carefully considered Glenpanel's experts' views on the extent to which the Project aligns with the objectives and policies of the [Proposed District Plan] and rejects that analysis. In doing that, the Panel relied, in particular, on the statements in the [Proposed District Plan] as to how its objectives and policies are to be considered when determining resource consent applications. The analysis is thoughtful and the conclusions which it reaches are clearly open to it.

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32 At [404]–[405].
33 At [408].
34 Judgment under appeal, above n 1 (footnotes omitted).

[31] The High Court also concluded that Glenpanel's submissions overstated the certainty of future rezoning of land along Ladies Mile as the relevant provisions did no more than give an indicative identification of future housing areas.[35]

[32] On appeal, Glenpanel relies on the more recent authority of the Supreme Court in *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* (*East West Link*).[36] It argues that the policies in the instruments needed to be considered as a whole, with the facts and context important to that assessment. Such context included the fact that the NPS-UD was an important driver and necessitated the consideration of deserving exceptions to what the Proposed District Plan provided. This approach also meant that the policy of the Act had to be addressed.

Assessment

[33] When Glenpanel's application was assessed by the Panel and when the appeal was heard in the High Court, the leading authority on the relevant provisions of the RMA was the Supreme Court's decision in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*.[37] But since then the Supreme Court has released the *East West Link* decision. This further decision of the Supreme Court identifies a more nuanced approach to the application of the requirements of s 104D(1)(b).

[34] In relation to the relationship between district planning and national policy instruments (in *East West Link*, the instrument being the New Zealand Coastal Policy Statement (NZCPS)), the majority of the Supreme Court said:[38]

> [92] Section 104D(1)(b)'s exclusive focus on plans does not mean the NZCPS can be ignored when applying the gateway test. As noted, lower order plans must "give effect" to the NZCPS. If at all possible, therefore, the [plans within the Auckland Unitary Plan] must be construed as having that result. After the RMA itself, the NZCPS is the primary document in the hierarchy, so if it is not possible to reconcile the NZCPS with the [plans within the Auckland Unitary Plan], that raises the prospect that the latter is unlawful to that extent. The Court in *King Salmon* considered it "inconceivable" that regional councils

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35 At [98].

36 *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26, [2024] 1 NZLR 241 [*East West Link*].

37 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

38 *East West Link*, above n 36 (footnotes omitted).

> would, by resort to their own "overall judgment", be free to prepare policy statements and plans that were inconsistent with the national policy choices reflected in the NZCPS. So, analysis of the [plans within the Auckland Unitary Plan] for the purposes of the s 104D(1)(b) gateway must be undertaken with one eye on the NZCPS.

[35] In terms of the consequential interpretation of policies in a District Plan, the Court further said:[39]

> [101] The interpretive approach required here must reconcile the fact that policies mean what they say with the fact that they are still policies. A residual discretion to prevent outcomes plainly inconsistent with the purpose of the RMA must be preserved in order to ensure that, when applied to difficult cases, the policies do not subvert that purpose. Seen this way, recognising a residual discretion will ensure the policy will not be implemented unlawfully. …

[36] In terms of considering genuine exceptions, the Court also said:[40]

> [109] … a genuine, on-the-merits exception, by its nature, will not subvert a general policy, even a directive one. On the contrary, true exceptions can protect the integrity of the subject policy from the corrosive effect of anomalous or unintended outcomes. There is a fundamental difference between allowing consent authorities to routinely undermine important policy choices in the NZCPS (as rejected in *RJ Davidson*), and permitting true exceptions that will not subvert them. Of course, the more precise and sharp-edged the policy, the less room there will be for outcomes that can fairly be considered so anomalous or unintended that an exception is justified. Policies 19, 21–23 and 29 may be seen to fall into that kind of category. But Policy 11 does not.
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> [110] That is why the broad subject matter of Policy 11 admits of exceptions. A certain level of flexibility will assist in achieving its purpose and avoiding unintended outcomes at the margin that are inconsistent with Part 2 and the terms of Policy 11 itself. To put it another way, Policy 11 has a powerful shaping effect on all lower order decision-making, but "avoid" does not exclude a margin for necessary exceptions where, in the factual context, relevant policies are not subverted and sustainable management clearly demands it.

[37] We accept that the lines of analysis so identified by the Supreme Court affected the appropriate assessment of Glenpanel's application, and consider that they did so in two closely related ways.

[38] First, a more nuanced approach was required when assessing Glenpanel's application given the substantive nature of the wider planning instruments. The

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39 Footnotes omitted.
40 Footnotes omitted.

Queenstown Lakes District Council had identified the area of Ladies Mile as a priority future urban development area in non-statutory plans which had been established after community consultation.[41] In April 2023, it also proposed a variation to the Proposed District Plan to extend the urban growth boundary to include Ladies Mile.[42] This had been approved but not publicly notified, and was subject to Ministerial approval at the time the Panel considered the application.[43] Moreover, the NPS-UD imposed obligations on councils to address making available more land supply for housing.[44] The Queenstown Lakes District Council had consequently amended its Proposed District Plan. Under cl 4.1.2 of the varied Proposed District Plan, volumes of additional housing were identified in the short to medium term as a "bottom line", and Ladies Mile was identified as an "Indicative Future Expansion Area". Such variations reflected the need for additional housing in the Queenstown District.

[39] We consider that the Panel was in error in dismissing the application because of the wording of the Proposed District Plan provisions, without taking into account whether the intentions in the wider instruments meant that the application could be granted as an exception that gave effect to the broader intentions. The fact that the broader policy work had reached the point where there had been an amendment to the Proposed District Plan which had been approved, but not yet notified or approved by the Minister, potentially engaged the approach identified in *East West Link*. Furthermore, the NPS-UD had required changes to allow for greater urban development, and this had also been manifested in the amendment made to the Proposed District Plan identifying Ladies Mile as an indicative urban area.

[40] We accept Mr Smith's point that the Panel did turn its mind to the wider instruments, noting that it would be "too speculative" to treat the area as already urbanised,[45] and that it would be wrong to proceed on the basis that the proposed

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41 See Whaiora | Grow Well Partnership *The Queenstown Lakes Spatial Plan* (July 2021); and Queenstown Lakes District Council and Ladies Mile Consortium *Te Pūtahi Ladies Mile Final Masterplan Report* (June 2022).

42 See Queenstown Lakes District Council *Variation to Queenstown Lakes Proposed District Plan: Te Pūtahi Ladies Mile* (27 April 2023).

43 *Minutes of an ordinary meeting of the Queenstown Lakes District Council* (30 June 2022) at 16–18.

44 National Policy Statement on Urban Development, above n 7, at pts 2.2 (policy 2) and 4.1.

45 Panel decision, above n 2, at [78], citing *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [74].

variation to the Proposed District Plan would be approved by the Minister without variation. But we do not consider that the Panel decision can be said to have applied the *East West Link* approach. The Panel's ultimate conclusions were too squarely based on the wording of the more restrictive policies.

[41] We also do not accept Mr Smith's argument that the Panel did address the application in a manner consistent with *East West Link* by engaging in a "fair appraisal" approach. Whilst the Panel did seek to consider all the terms of the Proposed District Plan collectively, it ultimately held that the particular wording of the more directive policies was determinative. As it said in the conclusion:[46]

> [408] This is an instance where, as Palmer J put it in *Tauranga Environmental Protection Society*, the text of the instrument (here the [Proposed District Plan]) dictates the result.

[42] The more nuanced approach does not mean that Glenpanel's application should have been granted. But it does mean that the Panel was required to give substantive consideration to that possibility. This will not be the case with every RMA application considered before the *East West Link* decision was released, where a more nuanced approach may not have been applied. But the extent of the changes to the Proposed District Plan in the pipeline, and the response to the NPS-UD, required such a consideration in the present case.

[43] The second closely related point is that, just as a National Policy Statement is a higher-order instrument that has an influence on both the interpretation and application of the District Plan provisions, we consider that the Act itself has similar influence in relation to applications for consent under its provisions. The very purpose of the Act was to "fast track" projects that would otherwise take a longer time to be consented under a conventional RMA approach. We consider that the regime encompasses bringing forward projects that would otherwise likely be granted under the RMA in the future. The Act not only fast-tracked the grant of consents because of a more streamlined application procedure, but it also contemplated bringing forward in time planned projects. At introduction and first reading, the Minister referred to the

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[46] Referring to *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] 3 NZLR 882 at [79].

Act bringing forward significant investment in infrastructure.[47] This is most clearly seen for listed projects, but also potentially arises for referred projects. This is also consistent with the s 4 purpose of urgently promoting employment to support New Zealand's recovery whilst continuing to promote sustainable management of natural and physical resources.

[44] It is the combined effect of the approach in *East West Link* and the policy of the Act that is most significant in this case. The fact that this area had been identified as a likely location for future urbanisation in response to the NPS-UD, and the fact that the Act promotes the fast tracking of projects, means that the Panel should have considered whether granting the application facilitated the purposes of the Act, the objectives of the NPS-UD, and the objectives identified in the other instruments, whilst at the same time promoting sustainable management in the manner contemplated by the Proposed District Plan. That can be seen as the reason why the Minister had made the statutory decision to refer the question to the Panel. This is a line of analysis that the Panel did not undertake. Rather, the Panel concluded that the plain wording of the provisions of the Proposed District Plan prevented the application from being granted because urbanisation of this area was planned for a later time.

[45] Bringing forward projects in this way does not mean applications should be granted, however. The considerations referred to in cl 31 of sch 6 and arising under pt 2 of the RMA remain relevant. So environmental effects remain part of the required consideration. Moreover, the more nuanced approach does not dictate an outcome. By its nature the fast tracking may involve greater uncertainties. In that context, cl 31 of sch 6 provides:

> (8) A panel may decline a consent application on the ground that the information provided by the consent applicant is inadequate to determine the application.

[46] Under the more nuanced approach, uncertainties connected with where and how the urban development would take place, including uncertainties about exactly how such urbanisation would occur, would properly be taken into account by the Panel. The level of uncertainty surrounding the Minister's approval of the variation

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47 (16 June 2020) 746 NZPD 18532, above n 3.

to the Proposed District Plan would remain relevant. The "orderly and strategic" future growth planning referred to by the Panel could be as well.[48] Clause 31(8) is, in this sense, something of a safety valve to ensure that development under the Act remains appropriate and sustainable. The Panel might ultimately conclude that it did not have the information that it needs to allow decisions to be made in one of the ways described in *East West Link*. On the other hand, there may be sufficient information to allow the Panel to reach a decision on Glenpanel's application in a way that meets the purposes of the Act, and the provisions of the RMA instruments, in the way referred to in *East West Link*.

[47] In the end these questions are for the Panel. But we are satisfied that the Panel has not asked the questions that were required to be asked under the Act in the manner identified by the Supreme Court in *East West Link*. That is not a surprise, given that the more nuanced approach explained in that case was only identified in the Supreme Court's judgment released after the decisions of the Panel and the High Court.

Judicial review challenge

[48] Our conclusions in relation to Glenpanel's statutory appeal mean that it is not strictly necessary to address its appeal in relation to its judicial review challenges. But there are features of the judicial review challenges that may be of wider significance, and they may also affect the relief granted on the statutory appeal. So, we will address them, albeit we will seek to do so more concisely.

[49] Glenpanel advances two key arguments in its judicial review challenge.

Iterative process

[50] First, Glenpanel argues that the processes taken by the Panel were inadequate. In particular, it argues that the Panel should have engaged in a more iterative process, and that the issues the Panel ultimately considered to be determinative were not squarely raised during the process such that Glenpanel could respond. It compares

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[48] Panel decision, above n 2, at [390].

this approach with an alternative and more iterative approach that another panel had followed on another application Glenpanel had made in the District.[49]

[51] The High Court did not accept this argument. Dunningham J emphasised that the Panel only had 50 working days to make its decision, so it would have been quite impractical for the Panel to adopt the approach contended for.[50] Glenpanel argues that this conclusion is incorrect as there is an ability to suspend the processing time in cl 23 of sch 6, and that this approach fails to give sufficient weight to both the purposes of the Act and the statutory mandate in s 10.

[52] We agree with Glenpanel that the terms of cl 23 of sch 6 allows the Panel to delay processing an application, and that the applicant itself may seek such a delay. The prescribed timeframes are accordingly not a complete answer to Glenpanel's argument. But we nevertheless consider the timeframes to be significant as they emphasise the need for prompt decision-making. Under cl 10(1) of sch 5, a panel is empowered to regulate its own procedure as it thinks fit, without procedural formality, and in a manner that best promotes the just and timely determination of an application. This contemplates a balancing of considerations. A panel could adopt an iterative approach of the kind advocated by Glenpanel, and it might consider that approach to better serve the purposes of the Act under this power. But given that prompt decision making is to be given weight, there would need to be good reason for doing so. We accept Mr Smith's submission that there is no obligation on a panel to proceed in this way, however. There is no procedure of this kind prescribed in the legislation, and it is for a panel to decide how it should proceed when balancing timeliness and just decision-making. For this reason, this ground of challenge fails.

Apparent bias

[53] Glenpanel's second argument is that there was procedural impropriety in the Panel's decision-making process. It argues that the appointed Chair of the Panel, Mr Allan, did not properly or meaningfully disclose his conflicts of interest.

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49 *Re Proposal to Develop Flint's Park, Ladies Mile — Te Pūtahi* Expert Consenting Panel (28 August 2024). Somewhat ironically, and subsequent to the hearing before us, the High Court set aside this decision: see *Glenpanel Development Ltd v Expert Consenting Panel* [2025] NZHC 255.

50 Judgment under appeal, above n 1, at [168].

Remarkables Park Ltd (RPL) has been a client of Brookfields, Mr Allan's law firm, for about 30 years, and it is in competition with Glenpanel as a Queenstown land developer. Given Mr Allan's professional duties to RPL, Glenpanel argues a conflict of interest arose as it was in the best interests of RPL for the application to be declined. Moreover, Mr Allan had advised Auckland Council and Auckland Transport on other applications under the Act. These matters should have been disclosed by Mr Allan before being appointed to chair the Panel. He had simply advised that almost all of his work was in the North Island, and almost entirely in Auckland, and that there were no conflict issues.

[54] The challenge was advanced on the basis of apparent bias and predetermination. The High Court Judge rejected this challenge on the basis that the only real issue was whether there was a relevant conflict, which she concluded there was not.[51] Glenpanel argues that the High Court erred on the basis that a perceived conflict is just as relevant under the established legal principles, and the alleged conflicts were of real significance. A fair-minded, impartial and properly informed lay observer could reasonably think that Mr Allan might have been unconsciously biased.[52] Disclosure before a hearing is crucial to testing impartiality.[53] As Sir Terence Arnold has recognised, the risk of apparent bias is particularly important in the case of ad hoc lawyer decision-makers who, unlike Judges, retain a legal practice despite their decision-making role.[54]

Assessment

[55] As with all issues of procedural impropriety, the decision-making context is important.[55] In some statutory contexts an interested decision-maker is obliged to make the decision,[56] or it is apparent that Parliament cannot have intended previous

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51 At [153] and [160].

52 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [42].

53 *Davidson v Scottish Ministers (No 2)* [2004] UKHL 34, 2004 SLT 895; and *Halliburton Co v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48, [2021] AC 1083.

54 Terence Arnold "Judicial and Quasi-Judicial Decision Making" (paper presented to New Zealand Law Society Conflict, Governance and Professionalism seminar, April 2013) 1 at 6–7.

55 *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541, [2019] 2 NZLR 501 at [74].

56 *Jeffs v New Zealand Dairy Production & Marketing Board* [1967] NZLR 1057 (PC).

experience or previously expressed views to be disqualifying.[57] In *Lab Tests Auckland Ltd v Auckland District Health Board*, the Court addressed a challenge based on the fact that a decision-maker had been in possession of allegedly disqualifying information through his involvement in the sector.[58] After analysing the statutory scheme the Court rejected the criticism, as Parliament had wished to encourage practicing members of the relevant sector to make their expertise available to the decision-making bodies.[59] A similar point arises here. Under cl 7 of sch 5, a panel must collectively have knowledge, skills and experience of RMA issues, technical expertise relevant to the project applied for, and expertise in tikanga Māori and mātauranga Māori. Panel members must either have been accredited under s 39A of the RMA or meet the requirements under cl 7 of sch 5. Parliament anticipated that professionals with knowledge and experience of the operation of the Act would accordingly be appointed to decision-making panels. A fair-minded observer would recognise this when assessing whether suggested involvement with other activities would mean that a person should not be appointed.

[56] We reach that conclusion as a matter of statutory interpretation, and independently of the affidavit evidence that has been filed by the respondents. But that evidence supports the conclusion. Former Chief Environment Court Judge Laurence Newhook, who appointed Mr Allan to chair the Panel, refers to the significant constraints in the availability of current or retired judges, and to the fact that the pool of alternative duly qualified people to appoint to panels is "uncomfortably small", a position confirmed in other evidence filed.

[57] We see Mr Allan's involvement with Auckland Council and Auckland Transport as squarely falling within the expected levels of experience of panel members contemplated by the Act. It is plain that Mr Allan had been called upon to form a view as to the meaning and effect of the Act when acting as counsel for such bodies. But we consider this to be qualifying rather than disqualifying. It involves neither apparent bias nor predetermination. In his role for these bodies,

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57 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 179; *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203 (CA) at 207; and *Awatere Huata v Prebble* [2004] 3 NZLR 359 (CA) at [129].

58 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776.

59 At [214].

Mr Allan was doing no more than forming a view on what he thought the correct answer to the interpretation and application questions were. In doing so, he was in a similar position to a Judge who had previously been called upon to form a view of the meaning and effect of legislation in other cases. This is not disqualifying.

[58] The position concerning RPL is more complex. As a partner of Brookfields, Mr Allan has a professional duty to act in the best interests of RPL, as Ms Heine emphasised. But we do not accept that Mr Allan had a conflict of interest which prevented him from accepting instructions to be appointed to the Panel because of his firm's work for RPL. We agree that RPL and Glenpanel are competitors in a general sense.[60] Both Glenpanel and RPL were in the business of selling developed sections, and if Glenpanel's application had succeeded, that could indirectly have had adverse financial implications for RPL. But this potential financial implication did not engage Brookfields' professional obligations, let alone in a way that impacted on Mr Allan in any material way. The duty of loyalty — to act in the client's best interests — depends on the scope of the retainer.[61] There is no evidence that it was within the scope of RPL's instructions to Brookfields to oppose applications made by Glenpanel. Nor is there evidence that Brookfields had a professional duty to maximise RPL's financial position in some way, or to generally promote RPL's financial success in the Queenstown District. It is also not suggested that Brookfields or Mr Allan were in any position of conflict in relation to any particular client information: it is not said that there was any duty to disclose particular information confidential to one client because of a duty to act in the best interests of another.[62] There was no conflict of interest simply because RPL, as a client of Brookfields, would have preferred the

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60 We decline Glenpanel's application to adduce further evidence about the details of this on appeal under r 45 of the Court of Appeal (Civil) Rules 2005 given that the evidence does not alter the factual position in a cogent way — see *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

61 The duty is captured by rr 5.2 and 13 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. See *Tuiara v Frost & Sutcliffe (a firm)* [2003] 2 NZLR 833 (HC) at [42], citing *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384 at 402–403 where Oliver J held "[t]he extent of [a lawyer's] duties depends on the terms and limits of [the] retainer", and at [46], citing *Taylor v Schofield Peterson* [1999] 3 NZLR 434 (HC) at 440 where the High Court said "[t]he obligations between a solicitor and client are conditioned by agreement". See also *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 648, where the Privy Council held a lawyer's fiduciary duty "cannot be prayed in aid to enlarge the scope of contractual duties".

62 See *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 (CA).

application to be declined. We accordingly do not consider there was any relevant conflict of interest arising from RPL being a client of Mr Allan's firm.

[59] There would remain the possibility of apparent bias — of a perceived conflict of interest. We do not exclude the possibility of apparent bias operating in this statutory context. For example, there might be such an issue if a potential panel member had been involved in strongly expressed views about applications of the kind the Panel was addressing, potentially on behalf of a client. But that is not the case here. The alleged apparent bias is said to arise because of the professional role Mr Allan's firm had for a client. In the case of perceived conflicts of interest, the statutory context to which we have referred is important. Parliament intended that participants from the industry, such as lawyers or planning experts, could be appointed to panels, and that they would have knowledge and experience of such applications. That is what cl 7 of sch 5 required. A fair-minded observer would understand that context. This kind of knowledge and experience is not disqualifying in itself.

[60] We accept that Mr Allan's disclosure could have been more fulsome. Mr Allan could have referred to his firm's role for RPL given RPL was involved in similar activities in the Queenstown area to those applied for, whilst also explaining his lack of personal involvement. That would also have allowed appointment decisions to be made under cls 2 and 3 of sch 5 on a more fully informed basis. Mr Allan did not outline his personal involvement in and knowledge of RPL's activities in his affidavit but said the Chair of Brookfields' Board, Mr Andrew Green, would address this. Mr Green explained that Mr Allan had only been involved for RPL matters at the firm in late 2001 as a staff solicitor, and that he has never been an advisor to RPL. Neither Mr Green nor Mr Allan provided evidence of Mr Allan's personal knowledge of the activities of RPL, including matters he was aware of in his capacity as a partner, which might have been of assistance in addressing these issues.

[61] But there was no statutory process for disclosing potential conflict of interest issues, and notwithstanding the possible shortcomings in disclosure, we agree with the conclusions reached by the High Court Judge that there was no conflict of interest. We are also satisfied there is no issue of apparent bias given the statutory context, the

indirect nature of the associations between the activities of Glenpanel and RPL, and Mr Allan's lack of personal involvement in RPL's activities.

Conclusion

[62] For the above reasons we allow Glenpanel's statutory appeal but dismiss its appeal from its judicial review challenge.

[63] We direct the Panel to reconsider Glenpanel's application in light of this judgment. For the avoidance of doubt, Mr Allan may continue to be Chair of the Panel. It will be for the Panel to decide how to proceed with reconsidering the application, but to give effect to the legislative regime, the 50 working days referred to in sch 6 should be taken to have commenced from the date of this judgment.

[64] Glenpanel sought costs on its appeal in both this Court and the High Court. We do not consider that appropriate. Costs are not normally awarded against a body exercising adjudicative functions.[63] That must be particularly so when the body does not participate in the proceedings. Indeed, the Panel should not have been named as a respondent to the appeals.[64] We do not consider that the fact that Glenpanel brought judicial review proceedings alters this analysis.[65] In addition, Glenpanel has failed with its judicial review application, and its appeal from that decision. That could make it liable for costs.[66] Nevertheless, for these reasons we make no order for costs.

Result

[65] The appeal is allowed.

[66] The Panel is to reconsider its decision in accordance with the directions in [63].

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63 *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491 (CA) at [17]–[21].

64 See High Court Rules 2016, r 20.9A; and COVID-19 Recovery (Fast-track Consenting) Act, sch 6 cl 45(8).

65 See COVID-19 Recovery (Fast-track Consenting) Act, s 13.

66 See *Air New Zealand Ltd v Commerce Commission* [2007] NZCA 27, [2007] 2 NZLR 494.

[67] The appeal from the judicial review challenge is dismissed.

[68] Costs will lie where they fall.

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