BEFORE THE EXPERT PANEL

IN THE MATTER	of the Fast-track Approvals Act 2024
AND	
IN THE MATTER	of the Waihi North Project (FTAA-211-1042)

MEMORANDUM OF COUNSEL ON BEHALF OF THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INC

28 August 2025

Counsel: Sally Gepp KC
Shoshona Galbreath

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SALLY GEPP KC
BARRISTER

MAY IT PLEASE THE COURT

1. We act for the Royal Forest and Bird Protection Society of New Zealand Inc (**Forest & Bird)** which provided comments on the Waihi North substantive application.

2. The purpose of this memorandum is to bring to the Panel's attention the decision of the High Court in *Ngati Kupu Hapu Trust v Environmental Protection Agency* [2025] NZHC 2453; 27 August 2025 (see copy **attached**). This decision is relevant to the scope issues raised by Forest & Bird in their comments.[1] The decision was not released until after the deadline for comments which is why this is being raised now by way of memorandum.

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Sally Gepp KC / Shoshona Galbreath

Counsel for Royal Forest & Bird Protection Society of New Zealand Inc

[1] From paragraph 28.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2025-485-375
[2025] NZHC 2453

UNDER	the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules 2016
IN THE MATTER	of an application for judicial review in respect of the Fast-track Approvals Act 2024
BETWEEN	NGĀTI KUKU HAPŪ TRUST First Applicant
	TRUSTEES OF NGĀ HAPŪ O NGĀ MOUTERE TRUST Second Applicant
AND	ENVIRONMENTAL PROTECTION AGENCY First Respondent
	PORT OF TAURANGA LTD Second Respondent
	A PANEL CONVENOR APPOINTED UNDER THE FAST-TRACK APPROVALS ACT 2024 Third Respondent

Hearing:	19 August 2025
Appearances:	R B Enright and J Pou for Applicants R J B Fowler KC, T J Condor, C L Lipinski for Second Respondent No appearances for First and Third Respondent
Judgment:	27 August 2025

JUDGMENT OF BOLDT J

Introduction

[1] After decades of rapid growth, the Port of Tauranga is now New Zealand's largest shipping port. It handles around 25 million tonnes of cargo each year. Around 38 per cent of New Zealand's exports, and 39 per cent of the shipping containers that enter and leave the country, pass through it. The port represents a critical piece of infrastructure, both for the Bay of Plenty and for New Zealand as a whole.

[2] Sulphur Point is a peninsula which sits on almost 80 hectares of reclaimed land and juts northwards into Te Awanui, or Tauranga Harbour. The Port of Tauranga operates from two large but separate wharves, one on the eastern side of Sulphur Point and the other at Mount Maunganui. The wharves face each other across Stella Passage, a busy waterway within the harbour which is a little over 500 metres wide at its narrowest point. Sulphur Point houses New Zealand's largest container port, while the Mount Maunganui side of the port includes numerous bulk cargo wharves and extensive storage facilities.

[3] The port's ability to grow further is restricted by a number of factors. It is currently running at close to maximum capacity and is becoming congested. While the port can accommodate ships that are nearly 350 metres long, the length of the existing berths limits the port's ability to host even larger vessels. Some of the existing wharves are old and need to be upgraded.

The Stella Passage Development

[4] In order to address these constraints, the company which owns the port, Port of Tauranga Limited (PTL) proposes to extend the wharves on both sides of Stella Passage. PTL proposes a two-stage extension of the Sulphur Point wharf — 285 metres at first, followed in due course by a further extension of 100 metres. It also proposes to extend the Mount Maunganui wharf by 315 metres. If approved, the project — now called the Stella Passage Development — will involve reclamation of around 1.8 hectares of coastal marine area on the Sulphur Point side and 1.77 hectares on the Mount Maunganui side. PTL proposes to dredge around 10 hectares of the Stella Passage to facilitate the reclamations. The project, when completed, would ease

congestion, allow larger ships to berth and would permit around 24 extra ships to call at the port each month.

[5] As I explain in more detail below, PTL has been seeking approval for the planned extensions for several years. Its application for resource consent under the Resource Management Act 1991 (RMA) met with determined opposition and achieved only limited and conditional success.

The Fast-track Approvals Act 2024

[6] At PTL's request, its consent application under the RMA was referred directly to the Environment Court. Proceedings in that Court commenced in late 2021. They were complex, heavily-contested and at the end of 2024 were still far from complete. The Court indicated it would grant conditional consent to the first stage of the Sulphur Point extension,[1] but considered PTL had not yet provided it with sufficient information to allow it to consent either to the Mount Maunganui extension, or the second stage of the extension at Sulphur Point.[2] The Environment Court's conditional consent to stage one of the Sulphur Point extension was under appeal to this Court.

[7] PTL was thrown a lifeline with the introduction of the Bill which became the Fast-track Approvals Act 2024 (FTA). The FTA is designed to facilitate the delivery of infrastructure and development projects with significant regional or national benefits.[3] It promises to streamline and accelerate the approval process for major projects which may otherwise have spent years navigating the complexities of the RMA. Suitable projects are referred to expert panels. All those who perform functions under the FTA, including expert panels, are under a statutory duty to act promptly.[4] Panel conveners must set a time frame within which the panel will complete its work; if no time frame is set, the panel must issue its decision within 30 working days of receiving comments on the substantive application from interested parties.[5]

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1 *Port of Tauranga Ltd v Bay of Plenty Regional Council* [2023] NZEnvC 270 [*First Environment Court decision*] at [22]–[23].
2 At [24]–[27].
3 Fast-track Approvals Act 2024 [*Fast-track Act*], s 3.
4 Section 10(2)(a).
5 Section 79(1)(b).

[8] There are two ways a project may be considered for fast-tracking. The Government invited promoters of appropriate projects to apply to have them listed in the legislation while the Bill made its way through Parliament. The second schedule to the FTA lists a series of projects the relevant Ministers determined, during the legislative process, were suitable candidates for the new regime. Promoters of projects which are not listed in sch 2 may make a "referral application" under s 13; referral applications which are within scope are then provided to the Minister of Infrastructure, who may then decide to refer all or part of the project to the fast-track approvals process.[6]

[9] PTL applied for the Stella Passage Development to be included in the inaugural suite of projects listed in sch 2. In October 2024, the Ministers of Infrastructure and Regional Development issued a joint press release setting out 149 projects, including the Stella Passage Development, which they proposed to list in sch 2 when the Bill was reported back from the Environment Committee.[7] In a table appended to the press release, the Stella Passage Development was described as a project "for the *extension of the Sulphur Point (stage one) and Mount Maunganui wharves (stage two)* and to carry out the associated reclamation and dredging of the sea bed".[8]

[10] The FTA received its third reading in December 2024 and the Stella Passage Development was duly listed in sch 2. But the way the project was described had changed in the weeks since the Ministers issued their press release. The description of the project in the schedule reads:[9]

> In stages, *extend the Sulphur Point wharf*, including associated reclamation and dredging of the seabed.

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6 Section 21.

7 Hon Chris Bishop and Hon Shane Jones "Fast-track projects released" (press release, 6 October 2024).

8 Emphasis added.

9 Fast-track Act, sch 2. Emphasis added.

[11] The schedule listed the "approximate geographical location" of the project as "8.5 hectares of the coastal marine area within Tauranga Harbour at Sulphur Point and Mount Maunganui".

[12] The EPA's role is to receive applications under the FTA and refer them to an expert panel for consideration. Section 46(2)(b) provides that the EPA may accept an application as complete and within scope if it "relates *solely* to a listed project".[10] Despite the listing in the schedule referring only to the Sulphur Point wharf, PTL's application sought approval to extend both the Sulphur Point and Mount Maunganui wharves. The EPA decided the application complied with s 46(2). An expert panel was appointed and will shortly begin its consideration of PTL's application.

[13] The applicants in this Court are hapū who have opposed the development since its inception. The first applicant, the Ngāti Kuku Hapū Trust, represent Ngāti Kuku, a hapū of Ngāi Te Rangi. The second applicants are the trustees of Ngā Hapū o Ngā Moutere Trust.

[14] The applicants seek judicial review of the EPA's decision that the Stella Passage application was within scope. They say the EPA was wrong in law, as the application does not relate solely to a project listed in sch 2.

Interim orders decision

[15] On 24 July 2025, Gendall J dismissed an application for interim orders that would have directed the EPA, the panel convener and the panel to take no further steps in progressing PTL's application until the present proceedings are resolved.[11]

[16] The applicants' case, as presented to Gendall J, was broader in scope than it is today. While they challenged the correctness of the EPA's decision to declare the application within scope, they pursued a number of additional grounds, including a challenge to the adequacy of the consultation the EPA undertook. They alleged the EPA took account of irrelevant considerations, such as the history of the project, and failed to take account of relevant considerations such as the Treaty of Waitangi |

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10 Emphasis added.

11 *Ngāti Kuku Hapū Trust v Environmental Protection Agency* [2025] NZHC 2046.

Te Tiriti o Waitangi (the Treaty) and the prejudice they would suffer if the application were referred to a panel.[12] They also asserted the decision was unlawful because the EPA did not give any reasons for its decision to accept the application, and argued the EPA had applied the wrong legal test.

[17] The applicants' challenges were either premature — in that they sought to impugn decisions which did not determine either the substantive application or the applicants' rights — or were unlikely to succeed.[13] Justice Gendall noted, for example, that there is no duty on the EPA to give reasons for a decision to accept an application; s 46(4) required reasons only if an application is rejected.[14] Prejudice from a failure to take account of relevant considerations will generally crystallise in the panel's assessment of the substantive application and not as part of the preliminary "gateway" decision.[15] Justice Gendall declined to make interim orders.[16]

[18] At the same time, Gendall J dismissed an application by PTL to stay the proceeding, noting that while it will be relatively rare for the Court to intervene before the panel is convened, the FTA does not constrain an affected party's right to challenge a decision that the application is complete and within scope.[17] Instead of issuing interim orders or staying the proceeding, Gendall J directed a priority fixture.

[19] By the time the substantive application was argued, the only ground that remained for consideration was whether the EPA made an error of law when it decided PTL's application related "solely" to a listed project.

Summary

[20] The issue before me is whether, despite the apparently clear description of the project in sch 2, the phrase "extend the Sulphur Point wharf" should be read — as the EPA apparently did — to mean "extend the Sulphur Point *and Mount Maunganui*

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12 At [42] and [46].
13 At [43]–[46] and [51].
14 At [43].
15 At [51].
16 At [53].
17 At [51] and [55].

wharves". Only if those additional words can be read into the description will the EPA's decision to accept the application comply with s 46(2)(b).

[21] Compliance with s 46(2)(b) is a mandatory threshold for acceptance of an application under the FTA. No question of discretion arises. If the application did not comply with s 46(2)(b), it could not lawfully be referred to the panel.

[22] PTL submitted that those who drafted sch 2 omitted the reference to the Mount Maunganui wharf in error, and that in any event the generic reference to the Stella Passage Development is sufficient to incorporate all aspects of its application into the sch 2 description. I do not agree.

[23] It is possible the reference to the Mount Maunganui wharf was omitted by mistake, but that is far from the only available conclusion. As is described in more detail below, a thoughtful Minister (or ministerial adviser) may well have reconsidered the decision to include the Mount Maunganui extension in the listing. That part of the project raises discrete environmental issues and gives rise to complex cultural concerns.[18] The Environment Court considered there was good reason to distinguish between the two extensions.[19] The re-wording of the description between October and December 2024 is consistent with the Minister reaching the same conclusion.

[24] Sometimes, especially in cases of obvious error, the courts may be prepared to depart from the clear wording of a statutory provision.[20] The meaning of legislation is ascertained from its text and in light of its purpose and its context.[21] But I am not persuaded the change in wording between the listing the Ministers foreshadowed and the final listing in the schedule was an obvious mistake. The changes — from wharves to wharf, from Sulphur Point and Mount Maunganui to Sulphur Point alone — appear deliberate, and there are good reasons why the Minister may have decided the proposed Mount Maunganui extension was not well suited to an accelerated process.

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18 First Environment Court decision, above n 1, at [16]–[17] and [484].

19 At [25] and [617].

20 *Transpower New Zealand Ltd v Commerce Commission* HC Wellington CIV-2011-485-1032, 4 November 2011 at [17] citing *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530, *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC).

21 Legislation Act 2019, s 10.

[25] If the description in sch 2 was a drafting error, PTL has other remedies available to it, most obviously a further application to the Minister for referral under s 13. As matters stand, however, s 46(2)(b) does not permit the EPA to accept an application which includes the extension of the Mount Maunganui wharf. The EPA was wrong in law to do so, and its decision is set aside.

History

[26] The proposed wharf extensions and the associated dredging and reclamations have been controversial since their inception. Opposition to the proposal has principally come from tangata whenua, who say the proposed development disregards the relationship of local hapū with their culture, ancestral lands and water, wāhi tapu and other taonga. They contend the development will further degrade Te Awanui, of which they are kaitiaki. Opponents argue the Mount Maunganui extension will damage the habitats of red-billed gulls and little blue penguins and that further dredging and reclamation will accelerate the decline in the abundance, size and health of kaimoana, especially pipi and tuangi (or cockles).

[27] Whareroa Marae lies just south of the port on the Mount Maunganui side. The proposed extension will mean the end of the wharf and any ships which berth there are little more than a block away from the marae. Tangata whenua say the marae is already badly affected by port-related activities, which have damaged air quality and had the effect of enclosing the marae. They say these effects will only increase as the wharf encroaches more closely upon it.

[28] PTL sought to have the project included among those approved for fast-track consenting under the COVID-19 Recovery (Fast Track Consenting) Act 2020. On 15 March 2021, the then-Minister for the Environment declined, concluding it would be "more appropriate for the Project to go through a standard consenting process under the Resource Management Act 1991".[22]

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[22] "Port of Tauranga Stella Passage Wharves and dredging project" (15 March 2021) Ministry for the Environment < https://environment.govt.nz/ >.

[29] PTL then applied for a resource consent under the RMA, and asked the consenting authority, the Bay of Plenty Regional Council, to allow the application to be determined by the Environment Court.[23]

The Environment Court

[30] The application, as presented to the Environment Court in October 2021, broke the proposal to extend the wharves into three stages. The first, Sulphur Point stage one, proposed a 285 metre extension to the Sulphur Point wharf; PTL proposed that that extension proceed immediately. The second, Sulphur Point stage two, proposed a further 100 metre extension of the Sulphur Point wharf, taking the total length of the extension to 385 metres. The third part of the project initially proposed a 918 metre extension to the wharf on the Mount Maunganui side. That proposal was later scaled back to an extension of 315 metres.

First interim decision

[31] The Environment Court heard three weeks of evidence in February and March 2023. On 13 December 2023, the Court issued a comprehensive interim decision, which ran to almost 200 pages.[24] It indicated it proposed to grant consent for stage one of the Sulphur Point extension on the conditions PTL had proposed, subject to PTL satisfactorily fulfilling a number of additional directions the Court set out in its judgment.[25]

[32] The Court's directions included a requirement that PTL file a Harbour Health Plan, prepared co-operatively with tangata whenua, within six months.[26] Other directions required PTL to provide a meaningful role for tangata whenua as kaitiaki of the coastal environment, to undertake a series of surveys of kaimoana, and to prepare a comprehensive "state of the environment report" addressing all effects of port operations.[27] PTL was also required to submit a blue penguin and avian management

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23 Resource Management Act 1991 [RMA], s 87D.
24 First Environment Court decision, above n 1.
25 At [616]–[619].
26 At [618(1)].
27 At [618(2)], [618(4)] and [618(6)].

plan in consultation with the Department of Conservation (DOC) and tangata whenua.[28]

[33] The Court reserved its decision on stage two of the Sulphur Point extension and the Mount Maunganui extension.[29] Its conclusions about the proposed extension of the Mount Maunganui wharf included the following passages:

> [25] We have concluded that it would be inappropriate to grant consents for further activities on the Mount Maunganui side which cause adverse cultural effects cumulative to existing effects on Whareroa Marae, unless appropriate remedies, mitigation, restoration or compensation are in place first. We consider that POTL's original proposal did not give any serious consideration to the cumulative adverse cultural effects of its activities and proposed development on the Marae. The hearing will need to be reconvened once POTL has addressed this matter appropriately.
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> …
>
> [411] … Any further expansion of the Port on the Mount Maunganui side, even if it is only one additional large vessel berth located closer to the Marae as now proposed, will adversely affect the relationship of Ngāti Kuku and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. They will be unable to be avoided and the evidence provides no clear assurance that they will be remedied, mitigated or compensated for.
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> …
>
> [413] Until existing adverse effects are avoided, remedied or mitigated appropriately, authorising new activities that would result in any further cumulative effects could be contrary to the purpose of the Act. Any cumulative adverse effects arising from further activities on the Mount Maunganui side, beyond those which are de minimis, on nearby sensitive activities such as the homes and the school at the Marae would be unacceptable. Any cumulative effects arising from further and more distant activities on the Sulphur Point side could potentially be acceptable provided they have been avoided, remedied, or mitigated appropriately.

[34] The Court's concerns about the encroachment of the Mount Maunganui extension on the marae included a finding that the adverse effects from the surrounding industrial operations, including the port, were already at a level which compromised the health and safety of the people and communities at the marae and adversely affected their social, economic and cultural wellbeing.[30]

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28 At [618(8)].
29 At [617].
30 At [396].

[35] The air quality in the area surrounding the marae is already compromised.[31] The Court indicated it would also be necessary to preserve the red-billed gull nesting area on the Mount Maunganui side.[32] It held that if the purpose of the RMA were to be met, it would be necessary to mitigate or compensate for any further cumulative effects, no matter how minor they might be considered to be.[33]

Second interim decision

[36] The Environment Court issued a second interim decision on 16 December 2024.[34] The second decision was issued after the FTA was passed and could not have influenced the way the project was described in sch 2. Nonetheless, by the end of 2024 PTL had made reasonable progress towards compliance with the directions in the Court's 2023 interim decision. For example, it had completed its kaimoana surveys and the state of the environment report, had updated its blue penguin and avian management plan and incorporated feedback from DOC and tangata whenua where possible.[35]

[37] The Court recorded that PTL had made efforts to engage with tangata whenua, but that significant and deep-seated mistrust between the port and local Māori remained.[36] The Court appointed a facilitator to mediate, and observed that despite some positive engagement, that mistrust, combined with differing expectations, had hindered progress, and that there had been no meaningful improvement in the relationship.[37]

[38] The second interim decision set out a series of new conditions to address the issues that remained.[38] These included the establishment of an advisory group, designed to facilitate tangata whenua participation in the management and monitoring of PTL's activities under the consent.[39] Its role would include managing a fund that

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31 At [472].
32 At [570].
33 At [71].
34 *Port of Tauranga v Bay of Plenty Regional Council* [2024] NZEnvC 337.
35 At [61], [72], [79] and [93].
36 At [31].
37 At [18] and [27]–[28].
38 At [94]–[110].
39 At [106].

would be established to benefit the health of Te Awanui or that would directly benefit iwi and hapū that have a relationship with Te Awanui.[40] PTL undertook to provide $25,000 each year to Whareroa Marae, but the Court noted that for any future expansions beyond Sulphur Point stage one, "a significantly different level of mitigation of effects on Whareroa Marae will need to be demonstrated."[41]

[39] In light of the progress PTL had made, the Court confirmed it would consent to stage one of the Sulphur Point extension would be granted, subject to PTL submitting amended conditions and the Regional Council confirming it accepted the amended conditions as final and appropriate.[42]

[40] The Court's decision on the other parts of the application — stage two of Sulphur Point and the Mount Maunganui extension — remained reserved. It reiterated its direction that PTL provide visual simulations that would "demonstrate the full effect of increased visual enclosure on Whareroa Marae that would result from structures, vessels and stacked containers on the Sulphur Point side, and from the proposed development on the Mount Maunganui side".[43]

[41] Many tangata whenua were unhappy with even the limited and heavily conditional consent the Court had signalled; two hapū and two other groups representing Māori lodged appeals to this Court.

Fast track application

[42] Against that background, in February 2024 the newly-elected coalition Government announced it planned to introduce legislation that would establish a "one-stop-shop fast-track consenting regime" for major infrastructure projects.[44] It indicated its broad objective would be to ensure "more rapid and less costly consenting projects for major projects, simpler and less burdensome application processes … [to provide] an increase in favourable decisions for major projects that have regionally or

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40 At [106].
41 At [109]–[110].
42 At [111].
43 At [77].
44 Hon Chris Bishop and Hon Shane Jones "Fast track consenting in the fast lane" (press release, 2 February 2024).

nationally significant benefits" and to "uphold all existing treaty settlements and other legislative arrangements."[45]

[43] The Government invited organisations that might wish to seek approval under the new regime to apply even while the new legislation was still under consideration by Parliament.[46] It indicated that a tranche of qualifying projects would be listed in the legislation itself. Once the Act was passed, it was envisaged that an application to approve a listed project would be checked for completeness, then referred directly for consideration by an expert panel without further Ministerial involvement.

[44] PTL applied to have the Stella Passage Development considered for inclusion in the Act. In May 2024 it lodged an application which was then referred to the Fast-track Projects Advisory Group for consideration. PTL's application included all three stages of the proposed wharf extensions.

[45] The Advisory Group sought feedback from DOC, the Ministry for the Environment (MfE) and the Ministry for Primary Industries. The "key messages" section of the MfE report began:[47]

> 1. The project is for extension of the Sulphur Point (stage one) and Mount Maunganui wharves (stage two), and to carry out the associated reclamation and dredging of the sea bed.
>
> 2. The purpose of this project is to increase the Port's capacity to manage growth in cargo volumes and vessel sizes without changing its overall footprint. The applicant states this will ensure the port can continue to meet New Zealand's demand for export and import cargo volumes.
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> 3. The Sulphur Point wharf, on the west side of the channel, will be extended by 385 metres and will require 1.8 hectares reclamation. The Mount Maunganui wharf, on the east side, will be extended by 920m [*sic*][48] and will require 2.9ha reclamation.

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45 *Supplementary Analysis Report – Fast-track Approvals Bill* (Ministry for the Environment, February 2024) at [36].

46 Hon Chris Bishop and Hon Shane Jones "Fast-track to accelerate economic growth starts today" (press release, 7 February 2024).

47 *FTA#72: Application for listed project under the Fast-track Approvals Bill — Stella Passage Development — Project for Schedule 2A* (Ministry for the Environment, June 2024).

48 The reference to 920 metres was an error, which reflected the initial extension PTL sought in its application to the Environment Court. PTL's application for inclusion in the FTA made it clear it sought only a 315 metre extension to the Mount Maunganui wharf.

4. The sea bed in the shipping channel between the wharves will be dredged to accommodate the increase in shipping that will be enabled by the wharf extensions. The area covers 8.5 ha and involves up to 1,800,000 metres cubed of dredged material, in addition to a further area of 5.9ha and 800,000m3 that is already consented.

[46] After considering the Advisory Group's report, the relevant Ministers decided the Stella Passage Development should be listed in sch 2. On 6 October 2024, the Ministers issued a press release announcing that once the Bill was reported back to the House by the Environment Committee, 149 named projects would be listed.[49] The press release set out a summary of each. The description of the Stella Passage Development read:

Port of Tauranga Limited	Stella Passage Development	Bay of Plenty	Infrastructure	The project is for extension of the Sulphur Point (stage one) and Mount Maunganui wharves (stage two), and to carry out the associated reclamation and dredging of the sea bed.

Schedule 2

[47] The Fast-track Approvals Bill was considered by the Committee of the whole House on 10 and 11 December 2024, and was read a third time the following week. The Committee stage provided Parliament with its first opportunity to scrutinise the projects proposed for listing in sch 2. In each case the "project description" section of the schedule summarised the outcomes the listed projects sought to achieve. The Minister successfully moved amendments to a handful of projects, while the opposition unsuccessfully moved to delete around a third of them. The Stella Passage Development was not mentioned.

[48] The description of the Stella Passage Development in sch 2 reads:

Authorised person	**Project name**	**Project description**	**Approximate geographical location**
Port of Tauranga Limited	Stella Passage Development	In stages, extend the Sulphur Point wharf, including associated reclamation and dredging of the seabed	8.5 hectares of the coastal marine area within Tauranga Harbour at Sulphur Point and Mount Maunganui

[49] Hon Chris Bishop and Hon Shane Jones "Fast-track projects released" (press release, 6 October 2024).

[49] The reference to the Mount Maunganui wharf, which featured in the application and the press release, was omitted. On its face, the listed project includes only the two-stage extension to the Sulphur Point wharf. The description no longer refers to the extension of *wharves*. Counsel were unable to assist with when the description was redrafted. Nor did they know who decided the wording should change, or why.

The EPA's decision

[50] Section 46 of the FTA relevantly provides:

> **46 EPA decides whether substantive application is complete and within scope**
>
> (1) The EPA must, in consultation with the relevant administering agencies and relevant consent authorities, decide whether a substantive application complies with subsection (2) within 15 working days after receiving it.
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> (2) A substantive application complies with this subsection if—
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> …
>
> (b) the application relates solely to a listed project or a referred project; and
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> (3) If the EPA decides that the substantive application complies with subsection (2), the EPA must—
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> (a) give written notice of the decision to the applicant; and
>
> (b) provide the application to the panel convener.

[51] PTL's substantive application sought consent for both the Sulphur Point and Mount Maunganui extensions. In a memorandum to the EPA, PTL said the project involved reclamation of land and associated dredging "to extend the Sulphur Point wharf by 385m (in two stages) and the Mount Maunganui wharf by 315m."

[52] In a "completeness and scope" decision dated 8 May 2025, the EPA's delegate recorded that in consultation with all relevant administering agencies and relevant consent authorities he had determined that PTL's application "complies with all the requirements of section 46(2) of the Act".

[53] A panel convener promptly held two conferences with representatives of PTL, tangata whenua, the Regional and City Councils, DOC and MfE. The convener has appointed a panel to determine the substantive application. Unless the Court intervenes, the panel is scheduled to commence its work on 1 September. The convener has determined that the panel's decision will be due by 25 February 2026.

[54] In light of the development's inclusion in sch 2 of the FTA, PTL withdrew its application for resource consent, bringing the Environment Court proceedings, and the extant appeals, to an abrupt end.

Discussion

[55] Mr Fowler KC, on behalf of PTL, acknowledged the summary in sch 2 may be regarded as "Delphic". Nonetheless, he submitted that if the description is considered in light of PTL's application and the history of the development, it is tolerably clear the drafter intended the listing to encompass the proposed extensions to both wharves.

[56] Mr Fowler relied heavily on s 10(1) of the Legislation Act 2019, which provides that the meaning of legislation is to be "ascertained from its text and in light of its purpose and its context". He drew my attention to a number of cases, including *Transpower New Zealand Ltd v Commerce Commission*, *Inco Europe Ltd v First Choice Distribution, Progressive Meats Ltd v Ministry of Health* and *Agnew v Pardington.*[50] Those authorities broadly hold that it is open to the Court to depart from the apparently-plain wording of a statute if doing so is necessary to correct an obvious drafting error.[51] Departure from the plain wording of a statute may also be necessary

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50 *Transpower New Zealand Ltd v Commerce Commission*, above n 20. *Inco Europe Ltd v First Choice Distribution* [2000] 2 All ER 109 (HL). *Progressive Meats Ltd v Ministry of Health* [2008] NZCA 162, (2008) 5 NZELR 457. *Agnew v Pardington* [2006] 2 NZLR 520 (CA).

51 *Transpower New Zealand Ltd v Commerce Commission*, above n 20, at [17].

to ensure a provision is interpreted in the way Parliament intended or to avoid an absurd or unreasonable outcome.[52]

[57] None of those principles is controversial, though it is rare to read words into a statute when Parliament has not thought fit to include them. As the Court of Appeal observed in *R v Steigrad*, "adding words is very rarely legitimate".[53] The requirement, in s 46(2)(b), that applications relate *solely* to a listed project indicates Parliament intended the schedule would determine the scope of the projects the EPA could consider.

[58] Courts are always slow to conclude that unexpected or difficult statutory wording is the product of a drafting error. Statutes are constructed with the greatest care, not only on the part of the responsible Government department and Parliamentary counsel but also throughout the legislative process. I accept that in the present case, where the project description was one of many, inserted at the committee stage without select committee scrutiny, the potential for error may have been greater. Nonetheless, it would be wrong to find there has been a drafting mistake unless that is the only available conclusion.

[59] Mr Fowler submitted that a drafting error is the only possible explanation for the fact the project description is confined to the Sulphur Point wharf. He pointed to a number of indications. First, he noted that the project is named as the Stella Passage Development. The Stella Passage Development, as defined by PTL in its application, includes the extension of both wharves. Second, the project refers to the extension of the wharf "in stages". The press release, and the MfE report before it, described the Sulphur Point extension as stage one, and the Mount Maunganui extension as stage two. It follows, he submitted, that the reference to stages implied the Mount Maunganui wharf would be extended as well.

[60] Third, Mr Fowler placed considerable emphasis on the "approximate geographical location" section of the listing. He drew my attention to two points. The reference in that column to "approximately 8.5 ha of the coastal marine area" is

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52 *Agnew v Pardington,* above n 50, at [32].
53 *R v Steigrad* [2011] NZCA 304, [2011] NZCCLR 24 at [61].

undoubtedly a mistake. It does not refer to the area of dredging that will be required in Stella Passage (around 10.55 hectares).[54] The mistake appears to have been lifted directly from the MfE report.[55] Mr Fowler submitted the significance of the error is that despite the Minister assuring the House that the schedule had been "triple-checked", it is clear the Stella Passage listing contained at least one mistake. It follows, he submitted, that the description may not have been scrutinised as carefully as the Minister believed.

[61] More importantly, Mr Fowler noted that the approximate location of the project is described as "8.5 hectares of the coastal marine area within Tauranga Harbour at Sulphur Point *and Mount Maunganui*".[56] He submitted the reference to Mount Maunganui is decisive. There would, he submitted, have been no need to mention Mount Maunganui at all if the project were confined to the Sulphur Point side of the port.

[62] Mr Fowler submitted those contextual clues combine to show the omission of the Mount Maunganui wharf from the project description was an error, which may have arisen from a careless attempt to abridge the description before including it in the schedule.

[63] I agree the Mount Maunganui wharf may have been left out of the project description by mistake, but that is far from the only possible explanation.

[64] The RMA remains the default consenting regime for major projects in New Zealand. Sections 5, 6, 7 and 8 of that Act set out a range of principles and considerations which guide decision-makers. Sustainability is the RMA's touchstone.[57] In addition, decision-makers are required to "recognise and provide for" factors such as preservation of natural character of coastal environments and the relationship of Māori with their ancestral lands, water, sites, wāhi tapu and other

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54 The best explanation for the figure of 8.5 hectares is that the project, as originally envisaged in 2020, would have required 14.4 hectares of dredging. PTL already had consent to dredge 5.9 hectares, meaning consent for a further 8.5 hectares would be required.

55 See [45] above.

56 Fast-track Act, sch 2. Emphasis added.

57 RMA, s 5.

taonga.[58] Decision-makers are required to "have particular regard to" matters including kaitiakitanga, the ethic of stewardship and the maintenance and enhancement of amenity values,[59] and must take into account the principles of the Treaty.[60]

[65] FTA applications must include an assessment of the activity against ss 5, 6 and 7 of the RMA,[61] but decision-makers are not directed to recognise and provide for s 6 factors, nor are they required to have particular regard to the factors listed in s 7. They are not required to consider the principles of the Treaty.

[66] In enacting the FTA, Parliament made a deliberate decision to de-emphasise factors which might militate against approval. For example, the cabinet minute which approved the inclusion of the 149 listed projects noted it was the Government's intention to establish a consenting and permitting process that "makes it substantially easier for projects to be approved than the status quo, with a high bar needing to be reached for a panel to decline a project". The premium the FTA places on speed and the reduced emphasis on cultural and environmental considerations means fast-tracking may be inappropriate where complex countervailing factors are present. The FTA provides that the Minister may decline a referral application if the project is more appropriately dealt with under another Act, such as the RMA.[62]

[67] In this case, a Minister or adviser who read the Environment Court's first interim decision would have been aware of the Court's outstanding reservations about the Mount Maunganui extension. Among other things, significant concerns about the loss of amenity values for those at the marae remained unaddressed. Before the RMA application was discontinued, the Court was attempting to craft a solution which accommodated the port's interests while addressing the legitimate concerns of tangata whenua, particularly in light of the proximity of the Mount Maunganui extension to the marae. The Court made it clear that reconciling the interests of the port and tangata whenua would require a careful and collaborative process.[63]

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58 Section 6.
59 Section 7.
60 Section 8.
61 Fast-track Act, sch 5, cl 5(1)(g).
62 Section 21(5)(b).
63 First Environment Court decision, above n 1, at [567]–[568].

[68] In light of those unresolved issues, it would have been understandable if the Minister, mindful of the interests of local Māori, decided the Mount Maunganui extension required the nuanced balancing that accompanies an application under the RMA. Similar concerns led the former Minister to reject PTL's application under the COVID-19 Recovery (Fast-Track Consenting) Act.[64]

[69] In any event, there is no evidence the omission of the Mount Maunganui wharf from sch 2 was a mistake. The name of the project — the Stella Passage Development — is not determinative; there would have been no need to describe each sch 2 project if a simple reference to its name were sufficient bring the entire application within the scope of the FTA. Mr Fowler acknowledged it would have been open to the Minister to decide that only part of the wider project should be referred for fast-tracking.

[70] Similarly, I do not consider the description of the development's "approximate geographical location" indicates an intention to include the Mount Maunganui wharf. It is clear that Port of the listing — including the erroneous reference to 8.5 hectares — was lifted from para [4] of the MfE report set out above.[65] The "location" it refers to is the area where dredging is to occur, namely the seabed between the Sulphur Point and Mount Maunganui wharves. That description says nothing about which wharf or wharves are to be extended.

[71] Nor does the reference to the extension of Sulphur Point "in stages" imply an intention to include the Mount Maunganui wharf as the second phase of the project. The description makes sense either way. PTL has always proposed a staged extension of the Sulphur Point wharf, 285 metres immediately, a further 100 metres sometime later.

[72] The suggestion the removal of the reference to the Mount Maunganui wharf might have been the result of a clumsy attempt at abridgement is equally unconvincing. The description in the press release, which referred to both wharves, was already succinct, far shorter than many that made their way into sch 2. There was no need to make it shorter.

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64 "Port of Tauranga Stella Passage Wharves and dredging project", above n 22.

65 See above para [45].

[73] It follows there is simply no basis, when reading the description of the Stella Passage Development, to look beyond the words in the schedule. They could not be clearer. The extension of the Sulphur Point wharf is included; the extension of the Mount Maunganui wharf is not.

[74] I am satisfied, as a result, that PTL's substantive application to the EPA did not comply with s 46(2)(b); the inclusion of the Mount Maunganui extension meant it did not relate "solely" to a listed project. The EPA's decision that the application was within scope was wrong in law, and I set it aside.

Conclusion

[75] The parties helpfully proposed an agreed series of interim orders that should follow in the event I set the EPA's decision aside. They agree permanent orders are to be agreed among the parties if possible. In the meantime I direct:

(a) No further work is to be undertaken on PTL's Stella Passage Development application under the fast-track approvals process. In particular, the panel (including the panel convener) is directed not to commence its consideration of the application.

(b) The parties are to use their best endeavours to agree upon any further consequential relief; in the absence of agreement, any further orders that may be necessary will be determined by the Court on the basis of written submissions.

(c) The parties are directed, within three weeks of the delivery of this judgment, to file a joint memorandum either setting out the further orders they seek, or proposing a timetable for an exchange of written submissions.

(d) Both parties have leave to apply for any further directions, or any additional time, they might require.

(e) Costs are reserved.

Boldt J

Solicitors:
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