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# Attorney-General v Hull

Court of Appeal Wellington
18 April; 29 June 2000
Richardson P, Keith and Tipping JJ

*Public works – Compulsory acquisition of land – Land acquired for state housing purposes – Meaning of "state housing purposes" – Whether land no longer required for such purposes – Public Works Act 1981, s 40 – Housing Act 1955, s 2 – Housing Corporation Act 1974, s 18(1).*

The Crown intended to develop land for a new town and by *Gazette* notice in 1976 compulsorily acquired the Hulls' land under the Public Works Act 1928 for state housing purposes. The Hulls' claimed that by 1979 the Crown had decided to use the land for industrial development instead and that under s 40 of the Public Works Act 1981 they were entitled to repurchase the land at its 1982 or 1983 value. The Crown argued that it only decided that the land was no longer required in 1989. The High Court in granting judgment for the Hulls' held that the definition of "state housing purposes" in s 2 of the Housing Act 1955 permitted limited ancillary commercial development to state housing rather than large-scale industrial development intended by the Crown. The Crown appealed to the Court o Appeal.

**Held:** "State housing purposes" included the development of a new urban community including industrial and commercial components: s 2 of the Housing Act 1955 defined "state housing purposes" only for the purposes of that Act; at the time the land was acquired the 1955 Act had been replaced by the Housing Corporation Act 1974 which by s 18(1) included urban development and renewal as functions of the Housing Corporation; and such an interpretation accorded with the known factual and legal context of the wide-ranging character of the proposed development. The definition therefore embraced the proposed activities in developing the new urban community including its industrial and commercial components and it followed that the land was being held for state housing purposes throughout the relevant period (see paras [22], [23], [24], [29], [30]).

*Appeal allowed.*

*Observations:* (i) There is considerable force in the argument that the Crown's proposed industrial development amounted to "ancillary commercial buildings" within s 3 of the 1955 Act (see para [31]).

(ii) Under s 40(1)(a) of the 1981 Act it is a question of objective fact whether land is no longer required for a public work; this can be proved by an affirmative decision or by inference from the conduct of the body holding the land; alternatively, land may be required for a public work if the body is in a

state of genuine indecision unless any reasonable person would undoubtedly conclude that the land was no longer required (see para [41]).

(iii) If the facts establish that the original purpose has been clearly abandoned, the Chief Executive of Land Information New Zealand may be under an enforceable duty to consider whether: s 40(1)(b) and (c) are satisfied in which case an offer back to the original owner should be made unless it is impracticable, unreasonable or unfair to offer the land back to the person from whom the land was purchased (s 40(2)); or the land is to be sold to an adjacent owner (s 40(4)) (see paras [43], [44], [48]).

**Cases mentioned in judgment**

*Attorney-General v Horton* [1999] 2 NZLR 257 (PC).
*Horton v Attorney-General* (Court of Appeal, Wellington, CA 43/97, 3 December 1997).
*Macfie v Callander and Oban Railway Co* [1898] AC 270.
*Manukau City v Attorney-General, ex rel Burns* [1973] 1 NZLR 25 (CA).
*Rowan v Attorney-General* [1997] 2 NZLR 559.
*Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA).
*Simpsons Motor Sales (London) Ltd v Hendon Corporation* [1963] Ch 57; [1962] 3 All ER 75 (CA).
*Slough Estates Ltd v Slough Borough Council (No 2)* [1971] AC 958; [1970] 2 All ER 216.

**Appeal**

This was an appeal by the Attorney-General from the judgment of Randerson J (High Court, Auckland, M 1181/89, 27 November 1998) in an action taken under s 40 of the Public Works Act 1981 against the Attorney-General acting on behalf of the Chief Executive of Land Information New Zealand as successor to the Chief Executive of the Department of Lands and of The Queen as registered proprietor of the land (together referred to as the Crown) by Peter Abe Hull, first respondent, and John William Hull and Peter Abe Hull, second respondents, to enable them to purchase land compulsorily acquired by the Crown.

*Colin Carruthers QC* and *Lisa Hansen* for the Crown.
*David Williams QC* and *Christopher Allan* for the Hulls.

*Cur adv vult*

The judgment of the Court was delivered by
**KEITH J.**

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*The proceedings and the result*

**[1]** The law has long empowered the state to acquire land for public works, at current market value, by purchase or taking. When in 1981 Parliament last revised and consolidated the principal statutory provisions in the Public Works Act it required the state to offer the land back to the person from whom it had been taken if the land was no longer required for public works. The previous owner is to have the opportunity to buy the land at current market value: see s 40 set out in para [33] below.

**[2]** The respondents (the Hulls) say that their Albany farmland acquired from them in 1976 for "state housing purposes" was no longer required for those purposes by the time the new Act came into force on 1 February 1982 and that they should be able to buy it back at 1982 values, or 1983 values because a year was a reasonable time to have elapsed before the offer back was made. The Attorney-General, on the other hand, says that the obligation to offer the land back did not arise until 15 May 1989 when it was no longer required and when it was in fact offered back. The parties agree that the critical date is either: (a) some time before 1 February 1982 in which event 1983 values apply; or (b) 15 May 1989: no intermediate date is suggested. The Attorney-General was sued on behalf, first, of the Chief Executive of Land Information New Zealand, who with his predecessors was the statutory officer required under s 40 to make the offer, and, second, of the Queen as registered proprietor of the land.

**[3]** In the High Court (Auckland, M 1181/89, 27 November 1998) Randerson J found in favour of the Hulls, concluding that:

1. at the time the new provision came into force the land was not held for "state housing purposes"; and
2. the Court had the power to make that decision even though the relevant officials had not so decided at the relevant time.

In a second judgment concerned with relief, he declared that the Crown had breached its statutory duty to offer the land back to the Hulls at the appropriate time and that it ought to have offered the land back no later than 1 February 1983. The price to be paid by the Hulls was to be determined at that date.

**[4]** The Crown challenges both of Randerson J's conclusions and also the relief he awarded. Because we conclude that the land continued to be held for "state housing purposes" after 1982 and 1983, we disagree with Randerson J's first conclusion and allow the appeal. It follows that we need not rule on the second substantive issue and the matter of remedies. We do however comment on them.

*Urban development in the Albany Basin*

**[5]** The Hulls acquired the land in issue, totalling about 47 ha, in 1963 and used it for a dairy farm. From 1963 the Crown began buying land for further urban development in the Albany Basin. By 31 July 1974 the Associate Minister of Works and Development was writing to the Hulls about the proposed taking of their land. He referred to the fact that the government, with the active cooperation of the Waitemata County Council and the Auckland Regional Authority, had been engaged in the planning of the Albany Basin as a major extension to the Auckland metropolitan area. He continued:

> "As part of this programme of land acquisition to meet future needs in the Auckland metropolitan area for rental house construction, land for sale

for private selection and to implement other aspects of development policy. Government has already acquired some 1600 acres of a total of 5400 acres in the Basin.

To ensure the orderly development of the Basin as a new urban community with shopping, commercial and recreational facilities as well as places of work for future residents, in step with population growth, Government now intends to acquire a further 423 acres of land which includes property owned by you as described below."

He then mentioned that he had signed a notice of intention to take the land under the provisions of the Public Works Act 1928. The Hulls would receive formal notification and be approached by the Ministry of Works and Development with the purpose of purchasing from them the land required on mutually satisfactory terms. Only if agreement could not be reached by negotiation would consideration be given to the use of the compulsory powers of acquisition.

"The total project [he continued] is a large one which will take a considerable number of years to complete. According to their location therefore some properties will not yet need to be acquired and will in the meantime be able to be retained in their present use and occupation subject to right of entry for survey and investigation. None of the properties subject to the Notice will be required for at least two years."

**[6]** The *Gazette* notice of 1 August 1974, scheduling the Hulls' two pieces of land and the 24 others making up the 423 acres mentioned by the Minister, was in these terms:

"*Notice of Intention to Take Land in Blocks III, IV, VII, and VIII, Waitemata Survey District, Waitemata County, for Development.*

---

NOTICE is hereby given that it is proposed under the provisions of the Public Works Act 1928, to take *for development* the land described in the Schedule hereto and *to develop such land for a new town*; and notice is hereby further given that the plan of the land so required to be taken is deposited in the post office at Albany and is there open for inspection; that all persons directly affected by the taking of the said land should, if they have any objections to the taking of the said land, not being an objection to the amount or payment of compensation, make a written objection and send it within 40 days after the first publication of this notice, to the Town and Country Planning Appeal Board at Wellington; and that, if any objection is made in accordance with this notice a public hearing of the objection will be held unless the objector otherwise requires and each objector will be advised of the time and place of the hearing." (Emphasis added.)

**[7]** The Hulls' notices of objection under the 1973 amendments to the 1928 Act were resolved by the Crown entering into an agreement under s 32 of the Public Works Act to acquire the land for about $1m. The ministerial notice of intention to take the land which led to that agreement "confirm[ed] the intention of taking the land for development". The covering letter somewhat more specifically confirmed the government's intention to purchase land for "further urban development in the Albany Basin". The agreements themselves are not in evidence.

**[8]** The course of action involving the Hulls and the Crown is to be seen in the context of the Crown's wider plan for the development of the Albany area. A steering committee consisting of representatives of the Waitemata County Council, the Auckland Regional Authority, the University Grants Committee and the Ministry of Works prepared an outline development plan "taking a long look ahead" and "recommending the direction and form of urban growth for the Basin as a whole". Its report of December 1973 (released at the time of the approaches to the Hulls and the other owners) to the Minister of Works and Development and the Minister of Housing ranged very widely as indicated by the headings to its chapters (each including proposals): employment, commercial development, industrial development, residential development, recreation and transportation, among others.

**[9]** The committee recommended to the two Ministers that 200 acres of land be set aside as a sub-regional centre. Preliminary steps were being taken for the Housing Division of the Ministry of Works to acquire all privately owned land within that area under the 1928 Act. The report proposed that 350 to 400 acres of land be allocated for industrial development and that the government secure the industrial land into public ownership as soon as possible. Again preliminary steps were being taken by the Housing Division. (That the *Housing* Division had this broad role is relevant to the contemporary understanding of that word.) Of that land 200 acres, including the Hulls' land, would be allocated:

> ". . . for the development of general manufacturing and assembly plants, distribution warehouses and similar uses, as well as extensive yard-type industries. This area would be visually screened from adjoining residential areas by ridges, which should also give a fair degree of noise screening. Again the ridgelines should be heavily planted with trees."

The area including the Hulls' land was to be developed later and the type of industry was described as general. Two small areas of the Hulls' land were intended for residential use and open space.

**[10]** Residential development was to be the largest single user of land in the Albany Basin, taking approximately 3200 of the 5500 acres available. The report envisaged a range of housing types, including both state and private housing. Randerson J summarised the steering committee's recommendations in this way at p 6:

> "In summary, the technical report recommended the comprehensive development of the Albany Basin and the establishment of a sub-regional centre at Albany. The land was to be used predominantly for housing purposes which would include a mix of state and private housing. Industrial uses were also proposed in order to support the development of the Basin and to provide employment opportunities. *The subject land was included in land proposed to be acquired under the 1928 Act for future industrial purposes. There is no evidence that it was contemplated even at this early stage that the subject land would be used for housing whether state or otherwise other than the two small areas earlier indicated.* The acquisition of land by the Crown was seen as a means of ensuring the comprehensive development of the Albany Basin as a whole. That would be achieved by compulsory acquisition under the 1928 Act or on a voluntary basis." (Emphasis added.)

*The taking of the Hulls' land for "state housing purposes"*

**[11]** The *Gazette* notice of 12 February 1976, declaring the taking of the land, is at the base of the Hulls' claims. While all the references through 1974 and 1975 were to "development", "urban development" or a "new town", or were to a wide range of uses for the land, the *Gazette* notice introduced an arguably more limited statement of purpose, the purpose which the Hulls say the government abandoned some time before 1 February 1982. The notice read as follows:

> "*Declaring Land Taken for State Housing Purposes in the City of Takapuna*
>
> PURSUANT to section 32 of the Public Works Act 1928, the Minister of Works and Development hereby declares that, a sufficient agreement to that effect having been entered into, the land described in the Schedule hereto is hereby taken for State housing purposes from and after the 12th day of February 1976."

**[12]** The compensation certificates prepared for registration against the titles similarly referred to the agreements as ones under which "the Crown (Housing Corporation)" acquired the land for "state housing". The land was leased back to the Hulls who continued to use it for dairy farming.

**[13]** The change in purpose, claimed by the Hulls, appeared, they said, from changes in the zoning of the land and the Crown's participation in the steps which led to those changes. For Randerson J too the change in the zoning of the land after it was acquired was of "critical importance". In late 1976 or early 1977, the Takapuna City Council publicly notified a proposed change to its district scheme called Scheme Change W99. As had been anticipated by the steering committee, the zoning of the subject land would be changed from "rural residential deferred" to "rural industrial deferred". The Planning Tribunal confirmed the substance of Change W99 on 20 June 1979.

> "There is [said Randerson J] no evidence that the Housing Corporation or the Ministry of Works had any difficulty with the proposed zoning for the subject land. Indeed, it is reasonable to infer that they supported the proposed new zoning. The Council's Chief Planner at the time, Mr L A O'Donnell, has deposed that he was in frequent contact with representatives of the Housing Corporation at the time Change W99 was developed and made operative, and he could not recall any suggestion that the subject land would be required for housing purposes. Attention had switched to the possibility of using the subject land and adjoining land for industrial development purposes with various proposals being canvassed from time to time. As his affidavit records, none of these ideas ever came to anything although the land has remained zoned for future industrial purposes.
>
> While the future use of the subject land for residential purposes was not precluded by Change W99, it was in my view a clear signal, with the express or implied assent of the Housing Corporation and the Ministry of Works and Development, that the land was intended for future industrial purposes and not for housing. Plans for large scale state housing in the Albany Basin had been abandoned but plans nevertheless remained for the development of other parts of the corporation's holdings for residential purposes in the future" (pp 11 – 12).

**[14]** At the end of his review of the facts, Randerson J stated his conclusions on factual matters. They include the following at pp 24 – 25:

> "1. From around 1963 the Crown began acquiring land in the Albany Basin on a large scale with the intention of establishing a major new town in an area then substantially rural in character. It was intended that land would be made available for state housing on a major scale, along with appropriate commercial and industrial development to serve the new town and to provide employment opportunities.
> 2. The public acquisition of the land was seen as strategically important to control the land so that development could proceed on a planned and comprehensive basis in close consultation with the local and regional authorities of the day. To the extent that purchases could not be made voluntarily, compulsory acquisitions using the powers available under the 1928 Act were to be used.
> . . .
> 4. By the time the Takapuna City Council publicly notified Scheme Change W99 in late 1976 or early 1977, the Housing Corporation had clearly signalled its intention that any future use of the land would be for industrial purposes. Those changes were confirmed by the decision of the Planning Tribunal on 20 June 1979 from which point the zoning of rural industrial deferred was confirmed.
> 5. From that point onwards, there is no evidence that the corporation ever contemplated the use of the subject land for residential or housing purposes of any kind. Indeed, there is no specific evidence that the corporation ever intended using any but a small portion of the subject land for housing other than the intention stated in the formal documents at the time of the acquisition which referred to 'state housing purposes'."

The Hulls, on appeal, endorsed those conclusions.

**[15]** Once Randerson J had found that industrial purposes were not included within "state housing purposes", as he interpreted the phrase, he reached this overall conclusion at pp 39 – 40:

> ". . . I consider that by the time of the introduction of Scheme Change W99 in late 1976 or early 1977 or, at the latest, by the date of the confirmation of the proposed scheme change by the Planning Tribunal on 20 July 1979, a fact situation had clearly arisen which demonstrated that the subject land was no longer required for the public work for which it was then held, ie, for state housing purposes. By its close involvement in the statutory planning process (including its formal involvement through the Ministry of Works in the resulting appeals before the Planning Tribunal), the [Housing] Corporation was signalling that the land was no longer required for residential purposes and that it was comfortable with the rural industrial deferred zoning of the land. The approach by the corporation in relation to zoning of the land and its future intentions must have been adopted by a conscious and considered decision. Thereafter, there is no evidence that the corporation ever considered using the land for residential purposes."

**[16]** Before we consider the meaning of the phrase "state housing purposes", we note a problem for the Hulls arising from the conclusions, especially conclusion 5, set out in para [14] above. In that conclusion the Judge found that the land (except for a small portion of it) was not taken originally for housing

and that the purpose never changed. It follows that identifying the time at which the land was "no longer required" for housing is impossible. Section 40 appears to have no moment of change to which to attach. There arises the prospect – not pursued by either party at any stage – that on the Hulls' view of the meaning of "state housing purposes" the original taking was itself flawed.

*The meaning of "state housing purposes"*

**[17]** If the point just made about the Crown's consistency of purpose is put to one side, the Hulls' case appears to be straightforward and compelling: the land was obtained in 1976 for state housing purposes, by 1979 the Crown's clear purpose had changed and it was "no longer" to use the land for that purpose but rather to use it for industrial development, and, accordingly, when s 40 came into force on 1 February 1982, the Crown was obliged to offer the land back. Essential to that argument is the proposition that the industrial purpose in question does not come within "state housing purposes" as that term appears in the *Gazette* notice. It is that proposition which we now examine.

**[18]** Randerson J began his discussion of that matter with the definition of "state housing purposes" to be found in the Housing Act 1955. The Crown, he said, submitted that the use of that expression in the *Gazette* notice did not necessarily correspond to that statutory definition:

> "I do not accept that submission. In my view, it is highly improbable that the Crown did not intend the expression to conform with the definition in the Act which was undoubtedly one widely used by the relevant government departments and agencies at the time" (p 31).

The definition is as follows:

> **2. Interpretation** – (1) In this Act, unless the context otherwise requires, –
>
> . . .
>
> "State housing purposes" means the erection, acquisition, or holding of dwellings and ancillary commercial buildings by the Crown under this Act for disposal by way of sale, lease, or tenancy; and includes the acquisition of land by the Crown –
>
> (a) As sites for dwellings and ancillary commercial buildings:
>
> (b) For schemes of development and subdivision into sites for dwellings:
>
> (c) For motorways, roads, streets, access ways, service lanes, reserves, pumping stations, drainage and water works, river and flood protection works, and other works upon or for the benefit of the land so acquired or the occupiers thereof.

**[19]** The Judge ruled that the large-scale industrial activity contemplated by the Crown for the Albany Basin did not come within the terms of the definition. He reached that conclusion by reference not just to the definition but also to other provisions of the Act, the Housing Act 1919 which it replaced and, by way of contrast, to "the far broader functions and powers enacted by the Housing Corporation Act 1974." If "state housing purposes" under the Housing Act 1955 was intended to permit the development of entire towns, it would not have been necessary, he said, to expand the corporation's powers in the 1974 Act. Finally, he called attention to a power added to the 1928 Act by the Finance Act (No 2) 1945 enabling the taking of land among other things for its improvement and development for industrial, commercial, residential and

recreational purposes. The provision differentiated between setting the land apart as state housing land under the Housing Act 1955 and other government works:

> "Thus, the Crown had the power available to take the land for much wider purposes than state housing purposes had it chosen to do so. Instead, it adopted the narrow rubric of state housing purposes and did not change that purpose under the available procedures at any time before the land was formally declared to be surplus" (p 35).

**[20]** Mr Carruthers QC, for the Crown, argued that whatever meaning the expression "state housing purposes" had in the Housing Act, the expression in the *Gazette* notice must be interpreted against the background of the notices and other communications to the Hulls identifying the general nature of the development proposed for the Albany Basin and the precise purpose for which the land was to be taken. He drew our attention to the particular features of the new town development. Nor was there any logical reason to limit the meaning of the expression to that in the Housing Act. By the time the land was taken the Housing Corporation Act 1974 was in force and that Act plainly contemplated that the corporation would hold land for the development of urban communities, including related commercial, industrial, recreational and other facilities. He also argued that in any event the 1955 definition was wide enough to encompass the Crown's purpose.

**[21]** Mr Williams QC, for the Hulls, contended that the Judge's reasoning and statutory analysis were sound in all respects. Given the seriousness and invasiveness of compulsory land dispossession and the fact that a formal legal process is involved, which yet leaves a former owner with an "inviolate right" to repurchase, the former owner is entitled to rely on the formal instrument which effects the taking. A former owner would indeed be imprudent and remiss to rely on any mere informal indication of the Crown's purpose. To adopt the Crown's approach would introduce great uncertainty. Citizens should not have to rely upon general and somewhat vague language such as that in the Associate Minister's letter of 31 July 1974 (para [5] above) to ascertain the purpose for which their land is taken. Lord Reid in *Slough Estates Ltd v Slough Borough Council (No 2)* [1971] AC 958 at p 962 was cited in support.

**[22]** We begin, as the Judge did, with his linking of the expression "state housing purposes" to the definition in the Housing Act 1955. The first point to be made about the linking is that the definition is of course a definition "for the purposes" of the 1955 Act. It does not purport to have any broader purpose. It may also be relevant that, although the 1955 Act conferred on the Governor-General a distinct power to take land under the 1928 Act for state housing purposes (s 5), that particular power had not been used in this case. Rather the land was taken under the general public works powers.

**[23]** A second difficulty with the Judge's equation is more substantial. The linking to the 1955 definition appears to have been influenced by the Judge's statement earlier in his judgment at p 7 that "the Housing Corporation Act was not in force at the time the [Hulls'] land was acquired. The significance of the differences in the legislation is considered later." We have already recorded the contrast he drew in his judgment between the 1955 definition and "the far broader functions and powers" conferred by the 1974 Act (para [19] above). Contrary to what the Judge says, the 1974 Act was also in force when the land was taken in 1976; indeed, as appears from the formal documentation (para [12] above), it was the Housing Corporation, established by the 1974

Act, which held the land from the outset – and throughout. If anything is to be borrowed from the statute book the new statement of the functions and powers of the body which holds the land and which indicates the contemporary parliamentary understanding of the role of the state in respect of "housing" is much more appropriate, especially in the absence of any evidence supporting the link to the 1955 definition. We accordingly turn to the 1974 Act.

**[24]** The 1974 Act gives a clear sense of what is to be understood by "state housing purposes". According to s 18(1), the Housing Corporation has two "general functions":

> (a) To undertake housing and other urban development and renewal, both on its own account and on behalf of Government departments, and other persons and bodies; and
> (b) To give assistance to any persons in respect of any matters relating to housing and other urban development and renewal.

**[25]** That legislative statement of the functions of the Housing Corporation extends across the whole range of urban development and renewal including housing. The word *housing* when used alone (as in the title of the new corporation) is used as a shorthand, including the other aspects of urban development and renewal. That breadth of function and usage is confirmed in the statement of the other functions of the corporation set out in s 18(2):

> (2) Without limiting the generality of subsection (1) of this section, the Corporation shall have the following functions:
> (a) To select and acquire land for the purposes of housing and other urban development and renewal:
> (b) To develop land for such purposes by providing housing, commercial, industrial, recreational, and related facilities, amenities, works, and services:
> (c) To sell, lease, and otherwise dispose of land in the course of housing and other urban development and renewal:
> (d) To make loans for any purposes that are for the time being approved in writing by the Minister:
> (e) To make loans for any other purposes that are authorised by this Act or by any other enactments.

**[26]** That broad parliamentary understanding, especially as seen in para (b), of the role of the state during that period in relation to "housing" is confirmed by the activity of the Housing Corporation as recorded in its annual reports around the time of the taking of the Hulls' property. In its annual reports at the relevant times the corporation mentioned among its functions urban development generally, for residential, commercial and industrial purposes. In its first report (for 1974 – 1975) it recorded that it had reviewed its landholdings and "will in future sell directly its residential, commercial, and industrial land." The third report (for 1976 – 1977) recorded (significantly under the heading "Publicly Owned Housing") that:

> ". . . most corporation land disposals have been in the housing field, although substantial industrial land sales have been achieved in the Wellington district. Currently a major development is taking place in the Kenepuru (Porirua) area and will result in the establishment of the first comprehensive industrial development undertaken by the corporation. Other similar developments are being planned."

**[27]** The broad comprehensive view of "housing" to be seen in the Act and in those reports helps explain the use in this particular case of the expression "state housing purposes" in the 1976 *Gazette* notice and the compensation certificates. The usage also strongly suggests that those involved would not have sensed any significant change, in the sense of a narrowing of purpose, when the expression "state housing purposes" was used in the *Gazette* notice. That expression was to be understood in the broad terms indicated in the new legislation and in its administration. The development of a "new town" in the way contemplated in the period in question potentially involved the full range of developmental activities as listed in s 18(2)(b) of the 1974 Act (para [25] above), in the absence at least of any ministerial direction under s 20.

**[28]** That broad reading is also completely consistent with the course of events involving the Hulls as they evolved in the period preceding the taking. They could have been in no doubt about the broad purposes the Crown was pursuing.

**[29]** We conclude that in its context the expression "state housing purposes" as used in the *Gazette* notice embraced the various proposed activities involved in the development of the new urban community in the Albany Basin including its industrial and commercial components. The expression covered the proposed activities as contemplated in the new zoning which was effected by 1979. It follows that throughout the whole of the relevant period the land was being held for "state housing purposes".

**[30]** We should make it clear that we are not giving precedence over the formal *Gazette* notice to the earlier correspondence with the Hulls. We must give priority to, and find the meaning of, the formal declaration contained in the *Gazette* notice. But that declaration is to be read in the factual and legal context in which it was written. The facts about the wide-ranging character of the proposed development of the Albany Basin were well known and the broad legislative statement of the functions of the corporation – not merely a matter of the definition of words for the purpose of a particular Act – provide a strong context for the broader reading. To recall what Randerson J said (of course about the 1955 rather than the 1974 Act), it is probable that officials worked with that broad role and with that wide meaning of "housing" in mind (see para [19] above). He had indeed acknowledged on the previous page of his judgment (p 30) that "It may be that the use of the expression 'state housing purposes' was regarded as embracing the wider type of urban development contemplated." We should perhaps add that in the circumstances of this case we do not see any risk to the public of the kind which concerned Lord Reid in the *Slough Estates* case (para [21] above). No indication was given of how that would occur: the land remained in the Crown's hands, and in any event, as indicated, our immediate concern is the determination of meaning in context rather than the alteration of apparent meaning which was Lord Reid's concern.

**[31]** It follows that we need not consider Mr Carruthers' alternative argument under this head – that even if the meaning of "state housing purposes" in the Housing Act 1955 were to be applied the purposes contemplated by the Crown would have come within it. We do note however that the argument has considerable force. The definition (para [18] above) includes acquiring land for, and acquiring and holding for disposal, commercial buildings ancillary to dwellings. Each of the powers conferred by ss 3 – 6 extends to those "ancillary commercial buildings". It may well be that the expression is sufficiently broad to encompass the industrial developments contemplated in the Albany Basin.

They might properly be considered to be "ancillary" to the dwellings in that they support those who live in them by providing for employment. Certainly the Minister of Housing, when moving the second reading of the Bill which became the 1955 Act, saw the role as not simply helping to provide dwellings but promoting self-sustaining communities:

> "[The Bill] is a consolidation of the Housing Act of 1919, and is largely a redraft of that measure, *with some important amendments.* It sets out to establish a Ministry of Housing, and provides for all the duties the Minister may perform in the way of purchasing land, and carrying out the building of houses thereon, also the setting aside of the necessary *industrial areas, commercial areas, recreational areas, and sites for schools and other reserves.* The actual development of the land will still remain with the Ministry of Works. It has the staff and organization to do that, and it will carry on with the general development of land purchased for housing" (307 *New Zealand Parliamentary Debates*, p 2883, emphasis added).

**[32]** But, as we say, we need not take that matter further, given the conclusion we have reached about the meaning to be given to the 1976 *Gazette* notice when it is read in context.

*Processes under s 40 of the Public Works Act 1981*

**[33]** Section 40, as enacted, read as follows:

> **40. Disposal to former owner of land not required for public work** – (1) Where any land held under this or any other Act or in any other manner for any public work –
>
> (a) Is no longer required for that public work; and
>
> (b) Is not required for any essential work; and
>
> (c) Is not required for any exchange under section 105 of this Act –
>
> the Commissioner of Works or local authority, as the case may be, shall endeavour to sell the land in accordance with subsection (2) of this section, if that subsection is applicable to that land.
>
> (2) Except as provided in subsection (4) of this section, the Commissioner or local authority shall, unless he or it considers that it would be impracticable, unreasonable, or unfair to do so, offer to sell the land by private contract to the person from whom the land was acquired or to the successor of that person, at a price to be fixed by a registered valuer, or, if the parties so agree, at a price to be determined by the Land Valuation Tribunal.
>
> (3) Subsection (2) of this section shall only apply in respect of land that was acquired or taken –
>
> (a) Before the commencement of this Part of this Act; or
>
> (b) For an essential work after the commencement of this Part of the Act.
>
> (4) Where the Commissioner or local authority believes on reasonable grounds that, because of the size, shape, or situation of the land he or it could not expect to sell the land to any person who did not own land adjacent to the land to be sold, the land may be sold to an owner of adjacent land at a price negotiated between the parties.
>
> (5) For the purposes of this section, the term "successor", in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date

of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person.

Changes have been made since 1981 consequential on the removal in 1987 of "essential work" from the Act and the widening of s 40(1)(b) to "any other public work", and on changes in government administration with the Commissioner of Works being replaced by the Chief Executive of the Department of Lands.

**[34]** Randerson J, it will be recalled, both decided that the Court could determine whether the conditions stated in s 40(1) were satisfied and ruled that in the circumstances of this case they had been satisfied by the time that provision came into force. It followed that the Crown was obliged to offer the land back at the 1983 valuation.

**[35]** His route to that conclusion began with these questions at pp 37 – 38:

> "Is the statutory officer entitled simply to await advice from the relevant landholding agency that the land is surplus to requirements or is there some obligation on the part of the statutory officer to make inquiries from time to time as to the status of lands of the Crown in terms of s 40? An associated question is whether a formal decision is required by the landholding agency that the land is no longer required for the public work or may that be established by other means?"

**[36]** The Judge gave these answers to those questions at pp 38 – 39:

> "In my view, there is much to be said for the view that the landholding agency must generally have given proper consideration to the question at the appropriate level of authority and reached the conclusion that the land is no longer required for the public work for which it is held. On the other hand, injustice could arise to a dispossessed landowner if the landholding agency delayed making any formal decision for a lengthy period (whether deliberately or through inadvertence or lax procedures) after some circumstance or event which made it plain that the land was no longer required for the relevant public work. Where land prices were rising during the relevant period, the failure to make a formal decision could result in significant prejudice to the former owner in that, by the time a formal offer was made, the value of the land might be beyond the reach of the former owner or at a much higher price than would have applied if the offer had been made timeously.
>
> That situation would be met by Hammond J's conclusion [in *Deane v Attorney-General* [1997] 2 NZLR 180] that there is a duty upon the landholding agency to take a decision that the land is no longer required for a public work within a reasonable time after a fact situation arises as a result of which the relevant land is not thereafter required. I respectfully adopt that conclusion which, in my view, should be necessarily implied in order to provide an effective remedy to the former owners. Where a factual situation has clearly arisen which indicates that the land is not required, the Crown (through the relevant landholding agency) will be in breach of duty if it does not make a decision, within a reasonable time thereafter, that the land is no longer required.
>
> I do not consider it unreasonable to impose such a requirement given the evident statutory purpose of the section and the need to return land to the former owners as soon as it is no longer required."

Those answers related to the landholding officer. The statutory officer, when notified that the land was no longer required, would then undertake the inquiry into the two circumstances in s 40(1)(b) and (c). It was not in dispute that the statutory officer was then obliged to follow the statutory procedure and to exercise due diligence in doing so.

**[37]** Randerson J then moved to his conclusion that, although there was no evidence of any formal decision being taken by the corporation before 1 February 1989 (when it advised the Department of Lands that the land was surplus to requirements) by the time of the scheme change the fact was that the land was no longer required for the public work for which it was held; para [15] above).

**[38]** Mr Carruthers contended that for four reasons the landholding agency cannot be under the obligation which Randerson J found:

1. The Act does not explicitly impose that obligation and it is unlikely to have done so implicitly.
2. Such a duty implies that the landholding agency was bound to have a clear plan for the use of particular land at all times. But nothing in the Act prevents the agency from holding land and not using it. Section 45 allows land to be leased for an unspecified period.
3. The decision is not consistent with the reasoning of the Privy Council in *Attorney-General v Horton* [1999] 2 NZLR 257 (decided after Randerson J gave judgment in this case).
4. The prerequisites in s 40(1)(a) – (c) cannot be decided as a matter of objective fact and in the absence of any decisions by the landholding agency and Chief Executive.

**[39]** In response, Mr Williams emphasised the judicial statements that there is an absolute or mandatory duty on the Crown once the lands cease to be required for the public work; eg *Rowan v Attorney-General* [1997] 2 NZLR 559 at p 571 and *Horton v Attorney-General* (Court of Appeal, Wellington, CA 43/97, 3 December 1997) at p 18. The contention that a formal decision is required was, he said, met by:

1. The lack of any such requirement in the three paragraphs of s 40(1); other provisions of the Act, such as ss 20 and 42(3) expressly require formality when it is called for.
2. The concept of s 40 as an inchoate right which crystallises when the expropriated land is no longer required.
3. Situations where land has become surplus without any actual decision being involved, as envisaged in *Simpsons Motor Sales (London) Ltd v Hendon Corporation* [1963] Ch 57 at pp 82 – 83.
4. This Court's holding in *Manukau City v Attorney-General, ex rel Burns* [1973] 1 NZLR 25 that whether or not land is required for a public work is a question of fact.

Mr Williams also emphasised statements in a number of cases about the character of the right of the former owner under s 40 – a right of preemption, an option, an inchoate right, and a strong legislative policy to preserve the rights of an owner subject to the continuing needs of the state (statements conveniently collected in the Privy Council judgment in *Horton* at p 261).

**[40]** Because of our earlier conclusion it is not necessary to express a final view on this difference. But in view of their practical importance to those concerned with this branch of the law, we comment briefly on interrelated

matters: the significance of different factual circumstances, the wording of the different elements of s 40(1), (2) and (4), and the differing character of the assessments to be made under them by the relevant officials and by any Court on review. We also comment very briefly on the character of the entitlement of the former landowner under s 40.

**[41]** The first, and usually determinative criterion in s 40 is satisfied when in terms of subs (1)(a) the land is no longer required for the purpose for which it was taken. Whether that is so is a question of fact involving an assessment of intention in the light of objective circumstances. Proof that the land is no longer required for the relevant public work may be achieved by demonstrating an affirmative decision to that effect. The point can also be established by examining the conduct of the body holding the land and, if appropriate, drawing an inference that the body has concluded that it no longer requires the land for that work. Alternatively, the evidence may establish that that was not the case and, for instance, that the landholding agency remained in a state of genuine indecision. But if any reasonable person would undoubtedly have concluded that in all the circumstances the land was no longer required for the relevant public work, the agency may well have difficulty asserting that it had not so concluded, and therefore had not come under any obligation to proceed in terms of the section.

**[42]** The circumstances of this case emphasise the critical role of the facts. For instance, had we accepted the interpretation of "state housing purposes" proposed by Mr Williams, the facts satisfying para (a) of s 40(1) would have been established, but they would have been established in essence by reference to an unequivocal public act by the Crown – its support for the zone change. The situation would then have been that identified by the Privy Council at the end of its judgment in *Horton*: "there was on the facts of this case no distinction between Coal Corp not requiring the land and it deciding that it did not require the land" (p 262).

**[43]** Once para (a) of s 40(1) is satisfied, we consider that the landholding agency, the Chief Executive of the Department of Lands or both are obliged to take reasonable steps to ascertain whether the land is or is not required in terms of paras (b) and (c). If, after reasonable inquiry, no such requirement emerges, the Chief Executive must act in respect of the land in accordance with s 40(2).

**[44]** The Chief Executive must give bona fide and fair consideration to whether the statutory course of offer back would be impracticable, unreasonable, or unfair under subs (2) or whether in terms of subs (4) the land is instead to be sold to an adjacent owner. Unless one of those exceptions applies, the Chief Executive must offer the land back to the original owner.

**[45]** Individual cases may present particular difficulties but the foregoing approach should be of assistance in resolving the usual issues which arise under s 40. Our comment is of course limited to land held by central government or its agencies. The process relating to land held by local authorities would differ in detail.

**[46]** Again, the circumstances of this case are illustrative. Even were para (a) satisfied in 1982 or 1983, the fact that the conditions of paras (b) and (c) of s 40(1) were satisfied in 1989 in the mind of the relevant officials (including the second official involved in s 40(1): the Chief Executive of the Department of Lands) does not mean that they would have been similarly satisfied were the critical date to have been in 1983 or 1982. By contrast, in *Horton*, on the trial

Judge's findings, Coal Corp had acted for a time as if the land were for sale (p 261). It could therefore not deny that s 40 was satisfied.

**[47]** One difficulty for the Hulls' argument in this case is indicated by the contrast between determinations under s 40 and statutes which provide a more specifically defined condition the satisfaction of which requires an offer to the previous owner. An instance of such a condition is provided by the statute discussed in the case which was distinguished in *Horton*: *Macfie v Callander and Oban Railway Co* [1898] AC 270. The question raised by that statute was whether the land was superfluous on a particular date, the tenth anniversary of the date fixed by the special Act for completing the railway. A railway company had taken the land for the building of a railway. The issues presented by that statute were much more confined than those arising under subss (1) and (2) of s 40. A related significant difference is that when s 40 is being applied to land by agencies of central government it involves at least two different agencies or officials: first, the landholding agency, second, the Chief Executive of the Department of Lands and possibly, as well, other agencies which may require the land for another public work.

**[48]** We are not of course saying that the relative width and complexity of the assessments that s 40 calls for mean that Court review is excluded. For instance, were the facts to establish that the original purposes had clearly been abandoned (as perhaps envisaged in the *Hendon* case, para [39] above), the Chief Executive of the Department of Lands might well come under an enforceable duty to consider whether paras (b) and (c) of subs (1) and subs (2) are satisfied and whether subs (4) does not apply to prevent the offer, with the consequence that an offer back to the original owner should be made. As we have already indicated, a formal recorded decision by the landholding agency in terms of s 40(1)(a) may not be required in such circumstances.

**[49]** Our final comment relating to s 40 concerns the various descriptions or characterisations given by Courts of the former owner's right under that provision. We do not consider that it is useful to try to compare the position under s 40 with conventional property law concepts. It might be better simply to allow the provisions of s 40 to speak for themselves in their historical and legislative context.

*Relief*

**[50]** In his first judgment, Randerson J indicated his preliminary view that the Hulls were entitled to declaratory relief to the effect that the land ought to have been offered back to them no later than 1 February 1983 subject to the exercise of the statutory officer's discretion under s 40(2) and (4). He was not aware of any circumstances that would entitle the statutory officer to rely upon any of the exceptions in those provisions. Subject to those matters the offer back would be the current market value as at 1 February 1983. He reserved the issue of relief for further submissions. Following the receipt of those submissions he made a declaration that the defendant promptly offer the land back to the Hulls at a price to be fixed as at 1 February 1983.

**[51]** The Crown's argument under this head related in part to the issues touched on in the previous part of this judgment about the various assessments and decisions to be made under s 40(1)(a), (b) and (c), (2) and (4). Those matters are better seen as distinct from the technical issues about the availability of relief. They go to the substantive grounds for review. To the extent that the Crown argument is limited to the technical issues we would not have considered that it should prevail.

**[52]** Were that argument to succeed, assuming of course that the grounds for relief were made out, there would be, as Randerson J said, a triumph of form over substance. Overall, in our view the Crown plainly had powers of decision under s 40 within the meaning of the Judicature Amendment Act 1972 and, again if the grounds were established, the Hulls had rights which could be declared. As this Court said in *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 at p 11:

> "One broad purpose of the 1972 Act, especially when taken with the 1977 amendments, was to remove technical problems which had until that time bedevilled applications for judicial review by way of the prerogative writs and declarations. Rather, the attention of the parties and of the Court should be focused on the issues of substance, especially the issues of what actual exercises of power are reviewable and on what grounds."

*Result*

**[53]** The appeal is allowed and the declaration made is set aside. The appellant is entitled to costs of $5000 and reasonable disbursements including the travel and accommodation costs of counsel to be fixed by the Registrar if the parties cannot agree. Costs in the High Court are to be fixed by that Court in the light of the result of the appeal.

*Appeal allowed.*

Solicitors for the Crown: *Crown Law Office* (Wellington).
Solicitors for the Hulls: *Rudd Watts & Stone* (Auckland).

*Reported by:* Stewart Benson, *Barrister*

| | |
|---|---|
| **Plaintiff** | **THE CANTERBURY REGIONAL COUNCIL** |
| **Defendants** | **CHRISTCHURCH CITY COUNCIL; KAIKOURA DISTRICT COUNCIL; BANKS PENINSULA DISTRICT COUNCIL; ASHBURTON DISTRICT COUNCIL; HURUNUI DISTRICT COUNCIL; WAIMAKARIRI DISTRICT COUNCIL; CHRISTCHURCH INTERNATIONAL AIRPORT LTD; THE MINISTER FOR THE ENVIRONMENT** |
| High Court No | CA 99/95 |
| Tribunal | Cooke P, Hardie Boys J, Gault J, McKay J, Blanchard J |
| Judgment Date | 4/7/1995 |
| Counsel/Appearances | Fogary JR, QC; Venning GJ; Milligan JR; Owen CCM; Arthur BH |
| Quoted | An application by Canterbury Regional Council and others A089/94 4 NZPTD 41 |
| Statutes | Resource Management Act 1991, 1991/69, s5(1), s9, s10, s11, s24, s30, s30(1)(c), s31, s75(2), s311, s338; Judicature Act 1908, s64; Declaratory Judgments Act 1908 |

**Keywords**

declaration; regional plan; jurisdisdiction; point of law; district plan; objectives and policies; regional rule; natural hazard

***Significant in law - s30 and s31***

*Neither a regional council nor a territorial authority has power to make rules for purposes falling within the functions of the other except to the extent that they fall within its own functions and for the purpose of carrying out its own functions. To that extent they have overlapping rule making powers, but the powers of a territorial authority are also subject to s75(2).*

*The control of the use of land for the avoidance or mitigation of natural hazards is within the powers of both regional and territorial councils, inconsistencies between controls are precluded by s75(2).*

## SYNOPSIS

The Tribunal decision A089/94 must now be read subject to certain rulings made by the Court of Appeal, in the following context:

The Canterbury Regional Council lodged an appeal to the High Court against the Tribunal's refusal of one of the declarations it had sought on the application ENF 62/94, and against the declaration made on the cross-application of the Banks Peninsula District Council.

But because it appeared that the High Court had no power to remove that appeal into the Court of Appeal for decision, the regional council also sought declarations under the Declaratory Judgments Act. The High Court ordered

that the regional council's application for declarations be removed into the Court of Appeal for decision.

In the Court of Appeal, the first declaration sought by the regional council was:

> *"Territorial authorities do not have authority to provide in district plans for the control of effects of the use of land for the purposes of soil conservation, water quality and water quantity [those purposes defined in s30(1)(c) (i)-(iii)] except insofar as such controls are incidental to the district council's primary purpose or function".*

The Court said that the Act provides what may be described as a hierarchy of instruments. But it does not follow that there can be no overlap between the functions of regional councils and territorial councils. To the extent that matters have been dealt with by an instrument of higher authority, the territorial council's plan must not be inconsistent with the (higher) instrument. Beyond that, the territorial council has full authority in respect of matters set out in s31, subject to contest before the Planning Tribunal under the First Schedule. Referring to the wording of s31(b), the Court said that the control of the effects of land use must involve some degree of control of the use itself.

The Court considered several drafts (tendered by counsel) of the first declaration sought. To put matters beyond doubt, the Court made the following declaration:

> *"A regional council may, to the extent allowed under section 68 of the Resource Management Act, include in a regional plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under section 30(1)(c) to (h). A territorial authority may, to the extent allowed under section 76, include in a district plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under section 31. Neither a regional council nor a territorial authority has power to make rules for purposes falling within the functions of the other, except to the extent that they fall within its own functions and for the purpose of carrying out its own functions. To that extent only, both have overlapping rule making powers, but the powers of a territorial authority are also subject to section 75(2)."*

The second declaration sought by the regional council was:

> *"That (it) has the power to prohibit or restrict activities such as residential occupation and the erection of buildings in the Waimakariri Flood Plain, for the purpose of avoiding or mitigating natural hazards."*

The Court said that what can be avoided or mitigated is not the occurrence of the natural hazard, but its effect. Neither s30 nor s31 refers to "the effects of" natural hazards; that would be otiose, because the definition of 'natural hazard' incorporates a reference to effects. It follows that the control of the use of land for the avoidance or mitigation of natural hazards is within the powers of both regional councils and territorial authorities. "There will no doubt be

occasions where such matters need to be dealt with on a regional basis, and occasions when this is not necessary, or where interim or additional steps need to be taken by the territorial authority. Any controls imposed can be tested by appeal to the Planning Tribunal, and inconsistencies are precluded by section 75(2)."

The Court made the second declaration in the form sought by the regional council.

**FULL TEXT OF CA 99/95**

This case raises issues as to the relationship between regional plans and district plans under the Resource Management Act 1991, and as to the extent of the powers of Regional Councils. The issues arose in the course of preparation by the Canterbury Regional Council of a proposed land and vegetation management plan. The Council applied to the Planning Tribunal under s311 of the Act for declarations as to the jurisdiction and powers of the Council. An amended application was later filed, and this was served on the Minister for the Environment and on 12 territorial authorities in the region. One of these, the Banks Peninsula District Council, made a cross-application for a declaration in different terms. The applications were heard by two Planning Judges sitting as the Tribunal, and certain declarations were made. The Canterbury Regional Council lodged an appeal to the High Court against the Tribunal's refusal of one of the declarations it had sought, and against the declaration made by the Tribunal on the cross-application of the Banks Peninsula District Council.

The Canterbury Regional Council then issued proceedings in the High Court under the Declaratory Judgments Act 1908, raising the same issues and claiming declarations. This was done on the basis that the appeals raised questions of law which might affect the validity and effect of various notified and proposed regional plans, these questions being of sufficient importance, novelty and urgency to justify their removal into the Court of Appeal. There appeared to be no power under section 64 of the Judicature Act 1908 to remove the appeal from the Planning Tribunal into this Court. On 18 May 1995 Fraser J ordered that the proceeding under the Declaratory Judgments Act 1908 be removed into this Court for determination, and ordered that the appeal from the Planning Tribunal be stayed until the final determination of this proceeding.

Before considering the particular issues raised by the declarations sought in this proceeding, it will be convenient to set out the general structure of the Resource Management Act 1991 and the respective functions of regional councils and territorial authorities under it.

**The Resource Management Act 1991**

The Act is a comprehensive one which replaces a mass of previous legislation, including the Town and Country Planning Act 1977, the Water and Soil

Conservation Act 1967 and the Clean Air Act 1972. Its purpose and principles are set out in Part II. Section 5(1) states:

> *"The purpose of this Act is to promote the sustainable management of natural and physical resources."*

The term "sustainable management" is defined in subsection (2). In effect, it means the management of the resources in such a way as to enable people and communities to provide for their well-being while sustaining the potential of the resources to meet future needs. This involves safeguarding their life-supporting capacity and avoiding or mitigating adverse effects on the environment. Sections 6 to 8 apply to all persons exercising functions and powers under the Act. They must recognise certain matters of national importance relating to the protection of the environment. They must have regard to certain particular matters specified, and must take into account the principles of the Treaty of Waitangi.

Part III of the Act sets out the duties and restrictions which it imposes. By section 9, no person is to use land in a manner which contravenes a rule in a district plan or regional plan, unless a resource consent has been obtained or unless the activity is an existing use allowed by section 10. Section 11 prohibits subdivision, except where allowed by a rule in a district plan or by a reserve consent, and in certain other specified situations. The following sections restrict the use of coastal marine areas, river and lake beds and water, and the discharge of contaminants into the environment, unless allowed by a rule in a regional plan or by a resource consent. There are exceptions in the case of existing uses, and the discharge of contaminants may be permitted by regulations. Breaches of these provisions are made offences by section 338. Thus rules in regional or district plans are enforceable by criminal sanctions.

Part IV sets out the functions, powers and duties under the Act of central and local government. The Minister of the Environment is given various functions under section 24, including the making of recommendations for the issue of national policy statements and for the making of regulations. Certain other powers are conferred by following sections. Section 28 gives certain functions to the Minister of Conservation, principally in relation to coastal policy statements and coastal plans. Section 30 sets out the functions of regional councils, and section 31 those of territorial authorities.

In summary, regional councils have the task of establishing and implementing policies and methods to achieve the integrated management of the reserves of the region, and of preparing policies as to any effects of the use of land which are of regional significance. They also have responsibility for controlling the use of land for the purpose of soil conservation and the maintenance of quantity and quality of water, for the control of other activities relating to water and for the control of discharges of contaminants. Territorial authorities have the functions of establishing and implementing policies to

achieve the integrated management of the effects of the use of land and resources in their district, and the control of the actual or potential effects of use, including the avoidance or mitigation of adverse effects. Their responsibilities also include the control of subdivision, and of matters relating to noise and to activities in relation to the surface of rivers and lakes.

Regional policy statements are then dealt with in sections 59 to 62. Their purpose is to provide "an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region" (section 59). Each region is required to have a regional policy statement (section 60) and in preparing such a statement the regional council is required to consider, inter alia, the extent to which the statement needs to be consistent with those of adjacent regional councils (section 61). The contents of regional policy statements is then prescribed (section 62).

Provision is then made for regional plans (section 63), but only coastal plans are made mandatory (section 64). Other plans may be prepared in respect of any aspect of any function for which the regional council is responsible, and may apply to the whole or any part of a region (section 65). In preparing a regional plan, the council must have regard to certain matters, including the extent to which the plan needs to be consistent with the actual or proposed policy statements and plans of adjacent regional councils (section 66). The matters which may be provided for are set out in Part I of the Second Schedule to the Act, but certain matters must be stated, including policies in regard to the plan's objectives and any rules to be used as a method of implementing those policies (section 67). The regional council is given express rule making power, within certain limits (section 68 to 71).

The next group of sections deal with district plans. Their purpose is to assist territorial authorities to carry out their functions under the Act (section 72). Each territorial authority must have one district plan for the district (section 73). It must consider certain prescribed matters, including the extent to which the district plan needs to be consistent with the actual or proposed plans of adjacent territorial districts (section 74). The matters which may be provided for are set out in Part II of the Second Schedule to the Act, but certain matters must be stated, and the district plan must not be inconsistent with any national policy statement; water conservation order or regional policy statement, nor with any regional plan of the region of which the district forms part in regard to matters of regional significance or for which the regional council has primary responsibility (section 75). A territorial authority may, for the purpose of carrying out its functions and achieving the objectives and policies of the plan, include in the plan rules which prohibit, regulate or allow activities (section 76).

**The Present Proceeding**

The declarations sought by the Canterbury Regional Council in its statement of claim under the Declaratory Judgments Act were the following:

*"i That in preparing its land and vegetation management plan and in considering submissions on it the Canterbury Regional Council has jurisdiction to the exclusion of District Councils within the Canterbury Region to provide for the control of the use of land for the purposes specified in section 30(1)(c)(i-iii) of the Resource Management Act 1991.*

*ii That the Canterbury Regional Council does have power to include in part of its regional Waimakariri Flood Plain Management Plan rules to control any actual or potential effects of the use, development or protection of land for the purpose of the avoiding or mitigation of natural hazards."*

The first declaration was sought in the earlier proceedings, but was refused by the Planning Tribunal. The second declaration is a counterpart to the declaration made by the Tribunal on the cross-application by the Banks Peninsula District Council, which was in the following form:

> *"That a regional council does not have power to include in any part of a regional plan having effect in other than the coastal marine area rules to control any actual or potential effects of the use, development, or protection of land for the purpose of the avoidance or mitigation of natural hazards."*

**The First Declaration**

In this Court, the first declaration sought by the Canterbury Regional Council was reworded as follows:

*"A. Territorial Authorities do not have authority to provide in District Plans for the control of effects of the use of land for the purposes of soil conservation, water quality, and water quantity (those purposes identified in 30(1)(c)(i-iii), except in so far as such controls are incidental to the District Council's primary purpose or function."*

Mr Fogarty, for the Regional Council, submitted that the Act created a range of instruments designed to achieve the objective of integrated management of natural and physical resources. The structure was a hierarchical one, the instruments in descending order being the legislative purpose of the Act (section 5), followed by national environmental standards (section 43), national policy statements and the New Zealand coastal policy statement (sections 45, 46), water conservation orders (section 200), regional policy statements (section 62), regional plans (section 67) and finally district plans (section 75). This did not create a hierarchy as between Government agencies, regional councils and territorial authorities, as each was given its own area of authority, but it provided a hierarchy of instruments. This is reflected, he submitted, in the respective functions of regional councils and territorial authorities as set out in sections 30 and 31. The more significant portions of these sections are as follows:

*"30(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:*

*(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:*

*(b) The preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:*

*(c) The control of the use of land for the purpose of—*

*(i) Soil conservation:*

*(ii) The maintenance and enhancement of the quality of water in water bodies and coastal water:*

*(iii) The maintenance of the quantity of water in water bodies and coastal water:*

*(iv) The avoidance or mitigation of natural hazards:*

*(v) The prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:*

*(d) .....*

*31. Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:*

*(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:*

*(b) The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:*

*(c) ....."*

The further functions in section 30(d) to (h) and section 31(c) to (f) are not material to the present case.

Mr Fogarty submitted that these sections gave to regional councils the control of the use of land for certain fundamental purposes, of a higher order, to achieve integrated management of the resources of the region. Territorial authorities, on the other hand, were given the function to control the effects of the use of land as they apply to amenities associated with the land. Soil conservation and water quantity and quality issues, he said, transcend territorial authority boundaries and need to be addressed across areas of natural catchments. Such issues, and also natural hazards, tend by their nature to be regional. He submitted that the Act provided a clear division of functions in relation to soil conservation and water quantity and quality issues, and section

31 should in this context be read as being limited by the specific functions given to regional councils under section 30(1)(c)(i) - (iii). These overrode the more general powers given to territorial authorities in section 31 in relation to controlling the effects of the use of land.

We agree that the Act provides what may be described as a hierarchy of instruments, to the extent that regional policy statements must not be inconsistent with national policy statements and certain other instruments (section 62(2)), and district plans must not be inconsistent with national policy statements and the same other instruments, nor with a regional policy statement or regional plan (section 75(2)). It does not follow, however, that there can be no overlap between the functions of regional authorities and territorial authorities. The functions of the latter are set out in section 31, and there is no need to ready that section in any restricted way. To the extent that matters have been dealt with by an instrument of higher authority, the territorial authority's plan must not be inconsistent with the instrument. Beyond that, the territorial authority has full authority in respect of the matters set out in section 31. Its decisions can, of course, be contested by appeal to the Planning Tribunal under the provisions of the First Schedule.

Reliance was placed on the wording of section 31(b), which refers to control only of "the effects" of use of land, but it is difficult to see how a territorial authority could control the effects of use without regulating the use itself. We think Mr Milligan is correct in his submission that what is limited is not so much what can be controlled, but the purpose for which it can be controlled. The control of the effects of land use must involve some degree of control of the use itself.

A similar view was taken by the Planning Tribunal, which refused the first declaration sought. In its now amended form, however, the declaration sought no longer claims an exclusive jurisdiction for the Canterbury Regional Council. It states only that territorial authorities do not have authority to control the effects of the use of land for purposes falling within the functions of regional authorities under section 30(1)(c)(i)-(iii), except in so far as such controls are incidental to the primary purpose or function of the territorial authority. Mr Milligan accepted that a territorial authority could not control the use of land for the purpose of soil conservation, which is a function of the regional authority under section 30(1)(c)(i). But it could, he said, exercise such a power for any of the purposes set out in section 31(b), even if an incidental result turned out to be the promotion of soil conservation. At the request of the Court, Mr Milligan supplied us with a draft declaration in a form which he submitted would be appropriate if the Court were minded to make a declaration in respect of this issue.

Comment on this draft has since been received from counsel for the plaintiff, together with an alternative draft. Counsel for the Minister supports this

alternative. There appears to be little if any real difference between the parties, or between the effect of the respective drafts. The difference is one of emphasis. Mr Milligan's draft emphasises the overlapping functions of regional councils and territorial authorities. He seeks a declaration that notwithstanding the functions and rule making powers of the former, the latter may also make rules to similar effect, but only if they are within their powers under section 76 and their functions under section 31. Mr Venning and Miss Owen, on the other hand, seek a declaration in negative form. They ask for a declaration that territorial authorities have no power to provide controls of the effects of land use for the purposes in section 30(1)(c)(i) - (iii), which are there identified as functions of regional councils, except in so far as such controls are incidental to the primary purposes or functions of territorial authorities. Although the difference may be largely semantic, it is desirable that the matters argued before us be put beyond further doubt. We make a declaration in the following terms:

> A regional council may, to the extent allowed under section 68 of the Resource Management Act, include in a regional plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under section 30(1)(c) to (h). A territorial authority may, to the extent allowed under section 76, include in a district plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under section 31. Neither a regional council nor a territorial authority has power to make rules for purposes falling within the functions of the other, except to the extent that they fall within its own functions and for the purpose of carrying out its own functions. To that extent only, both have overlapping rule making powers, but the powers of a territorial authority are also subject to section 75(2).

**The Second Declaration**

The second declaration sought was reworded at the hearing into the following form:

> *"That the Canterbury Regional Council has the power to prohibit or restrict activities such as residential occupation and the erection of buildings in the Waimakariri Flood Plain, for the purpose of avoiding or mitigating natural hazards."*

Natural hazards are referred to in both section 30 and section 31. The respective provisions are as follows:

*"30(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:*

*(a)* .....

*(c) The control of the use of land for the purpose of—*

*(i)* ....

*(iv) The avoidance or mitigation of natural hazards:*

*(v) The prevention or mitigation of any adverse effects of the storage,*

*use, disposal, or transportation of hazardous substances:*

*(d)* .....

31. *Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:*

*(a)* ....

*(b) The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:*

*(c)* ....."

The term "natural hazard" is defined in section 2 in terms consistent with its ordinary meaning. The Planning Tribunal held that the regional council's function described in section 30(1)(c)(iv) was to be read in the context of the powers given to territorial authorities by section 31(b). The Tribunal said it was inherently unlikely that Parliament would have intended both classes of local authority to have identical functions in respect of the avoidance or mitigation of natural hazards. That would scarcely be consistent with efficiency or integrated management, and the difference in the language used in the case of each kind of authority should be taken as deliberate, and as indicating a difference in function. Paragraph (b) of section 30(1) speaks of the "effects of the use of ... land", but paragraph (c) refers simply to "the control of the use of land". Section 31(b) speaks only of the "effects of the use .. of land". The Tribunal accordingly accepted the submission that the subject of the regional council's control function was the hazard itself, and that the effects of the land use were a matter for the territorial authority. It accordingly made a declaration in the form set out earlier in this judgment.

Mr Fogarty pointed out that the definition of "natural hazard" in section 2 limited the term to occurrences which could have adverse effects:

*"'Natural hazard' means any atmosphere or earth related occurrence ... the action of which adversely affects or may affect human life, property, or other aspects of the environment."*

The Act, said Mr Fogarty, did not require regional councils to control the occurrence itself. Earthquakes, tsunami and volcanic eruptions, which are examples given in the definition itself, cannot be controlled. The regional council is rather given the power to control the use of land for the purpose of avoiding or mitigating the natural hazard, which means avoiding or mitigating the effects of the occurrence. One way of doing this would be by the control of the erection of buildings or structures in a flood plain. A function of the regional council is to achieve integrated management of the resources of the region. It would be consistent with that function for the investigation of the flood plain and the decision as to the appropriate controls to be carried out

where appropriate on a regional basis, rather than by individual territorial authorities. Mr Fogarty did not seek to exclude the role of territorial authorities in respect of natural hazards, other than to the extent of the requirement of section 75(2) that a district plan must not be inconsistent with a regional plan in regard to matters of regional significance.

This argument was rejected by the Tribunal, but in our view it is soundly based. It is true, as Mr Milligan pointed out, that natural hazard is not defined as being the consequence of the occurrence, but as the occurrence itself which has or potentially has the adverse consequence. What can be avoided or mitigated, however, is not the occurrence but its effect. Neither in section 30 nor in section 31 are the words "effects of" used in connection with "natural hazards". This is for the simple reason that they would be otiose, as the definition of "natural hazard" incorporates a reference to effects. The word "effects" would also be inappropriate in respect of section 30(1)(c)(i)-(iii). It is unnecessary and inappropriate to explain the language by reference to some subtle distinction between the respective functions of regional councils and territorial authorities.

It follows that the control of the use of land for the avoidance or mitigation of natural hazards is within the powers of both regional councils and territorial authorities. There will no doubt be occasions where such matters need to be dealt with on a regional basis, and occasions where this is not necessary, or where interim or additional steps need to taken by the territorial authority. Any controls imposed can be tests by appeal to the Planning Tribunal, and inconsistencies are precluded by section 75(2).

We make a declaration in respect of this second issue in the form proposed in this Court by the Canterbury Regional Council. As it was in the interests of all parties to have these issues clarified, and as the Canterbury Regional Council has been only partially successful, there will be no order as to costs.

BOARD OF INQUIRY

East West Link Proposal

# Final Report and Decision

of the Board of Inquiry into the

# East West Link Proposal

Volume 1 of 3 - Report and Decision

**Produced under Section 149Q of the Resource Management Act 1991**

Prepared December 2017
By the Board of Inquiry into the East West Link Proposal

**BEFORE THE BOARD OF INQUIRY CONCERNING NOTICES OF REQUIREMENT AND APPLICATIONS FOR RESOURCE CONSENT REGARDING THE EAST WEST LINK PROPOSAL**

**IN THE MATTER** of the Resource Management Act 1991 (RMA)

**AND**

**IN THE MATTER** of a Board of Inquiry appointed under s149J of the RMA to consider notices of requirement and applications for resource consent made by the New Zealand Transport Agency in relation to the East West Link roading proposal in Auckland

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# FINAL DECISION AND REPORT OF THE BOARD OF INQUIRY

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| | |
|---|---|
| **Hearing:** | Held in Auckland from 27 June 2017 to 15 September 2017 |
| **Board**: | Dr John Priestley CNZM, QC (Chairperson) |
| | Alan Bickers MNZM, JP (Deputy Chairperson) |
| | Michael Parsonson (Board Member) |
| | Sheena Tepania (Board Member) |
| **Counsel:** | P Mulligan, V Evitt, M Gribben and K Wilson for NZTA |
| | G Lanning and W Bell for Auckland Council |
| | N Garvan for Auckland Transport |
| | R Devine, C Sinnott and A Gilbert for Mercury |
| | H Andrews and S Berry for Heliport |
| | G Hewison and J Burns for TOES and Others |
| | G Hewison for Jackson Electrical Industries Ltd and The Local Lockup Limited / Scott Palmer |
| | D Sadlier for Sanford |
| | B Carruthers and S Pilkinton for T&G Global, Fonterra, POAL, KiwiRail and Spark |
| | B Matheson for Jaafar and Mount Wellington Highway Limited |
| | R Enright for Ngāti Whātua Ōrākei and Te Kawerau ā Maki Iwi Tribal Authority |
| | J Gardner-Hopkins for Transpower |
| | B Tree for Stratex |
| | A Arthur-Young and A Cameron for KiwiRail |
| | K Littlejohn for TR Group and Dilworth Trust Board |
| | D Allan for Kiwi and Syl Park |
| | M Williams for EnviroWaste |
| | R Bartlett QC and A Thorn for Ward Demolition |
| | A Warren for Ngāti Maru and Others |
| | P Anderson for Forest and Bird |
| **Representatives:** | G Turner, National Road Carriers Inc. |
| | A Kinzett, OBA |
| | K Rich, for herself and Onehunga Mall Cul-de-Sac Residents |
| | C Pitches, Campaign for Better Transport |
| **Other appearances:** | [Appendix 1: List of Appearances at the Hearing]. |

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# GLOSSARY OF TERMS

| Abbreviation | Description |
|---|---|
| 42A Report | S104D Gateway Test and Related Matters |
| ACRP:C | Auckland Council Regional Plan: Coastal |
| AEE | Assessment of Effects on the Environment |
| AMETI | Auckland Manukau Eastern Transport Initiative |
| AOS Report | Analysis of Submissions Report |
| Applicant / NZTA / Requiring Authority | New Zealand Transport Agency |
| ARI | Average Recurrence Interval |
| ARP:C | Auckland Regional Plan: Coastal |
| Auckland Plan | Auckland Plan (2012) prepared by Auckland Council |
| AUP:OP | Auckland Unitary Plan: Operative in Part |
| AUP:OP$^{DP}$ | Auckland Unitary Plan: Operative in Part – District Plan Chapter |
| AUP:OP$^{RCP}$ | Auckland Unitary Plan: Operative in Part – Regional Coastal Plan Chapter |
| AUP:OP$^{RP}$ | Auckland Unitary Plan: Operative in Part – Regional Plan |
| AUP:OP$^{RPS}$ | Auckland Unitary Plan: Operative in Part – Regional Policy Statement Chapter |
| Board | Board of Inquiry |
| CBD | Central Business District |
| CEMP | Construction Environmental Management Plan |
| CESCP | Construction Erosion and Sediment Control Plan |
| CIA | Cultural Impact Assessment |
| CLMP | Contaminated Land Management Plan |
| CMA | Coastal Marine Area |
| CNVMP | Construction Noise and Vibration Management Plan |
| CTMP | Construction Traffic Management Plan |
| CVR | Cultural Values Report |
| ECOMP | Ecological Management Plan |
| EnviroWaste | EnviroWaste Services Limited trading as ChemWaste |
| EPA | Environmental Protection Authority |
| ESCP | Erosion and Sediment Control Management Plan |
| Fonterra | Fonterra Brands (New Zealand) Limited |
| GDP | Gross Domestic Product |
| HGMP Act | Hauraki Gulf Marine Park Act 2000 |
| Heliport | Auckland Heliport Limited Partnership |

| | |
|---|---|
| Hirepool site | 1-7 Sylvia Park Road |
| HNZPTA | Heritage New Zealand Pouhere Taonga Act 2014 |
| HNZPT | Heritage New Zealand Pouhere Taonga |
| Ibid | Reference for a source that was cited in the preceding note |
| Inlet | Māngere Inlet |
| Inter alia | Among other things |
| Jaafar | Jaafar Holdings Limited and Mount Wellington Highway Limited |
| Jafaar site | 430 Mt Wellington Highway |
| Jackson Electrical | Jackson Electrical Industries Limited |
| JWS Reports | Joint Witness Statement Reports |
| Key Issues Report | Section 149G(3) RMA "key issues" report prepared by Auckland Council |
| Kiwi | Kiwi Property Group & Sylvia Park Business Centre Limited |
| KiwiRail | KiwiRail Holdings Limited |
| Local Lockup | The Local Lockup Limited / Scott Palmer |
| LTMA | Land Transport Management Act 2003 |
| MACA | Marine and Coastal Area (Takutai Moana) Act 2011 |
| Makaurau Marae | Makaurau Marae Māori Trust |
| Mana Whenua Group | For the purpose of this report defined as the iwi and hapū engaged with NZTA to provide input into the Proposal (Ngāi Tai Ki Tāmaki, Ngāti Maru, Ngāti Paoa, Ngāti Tamaoho, Ngāti Te Ata Waioha, Ngāti Whātua Ōrākei, te Ahiwaru, Te Ākitai Waiohua, Te Kawerau ā Maki and Te Rūnanga o Ngāti Whātua). |
| Mana Whenua Tribes | Defined as the five Tribes party to the Mana Whenua Tribes Agreement (Te Ākitai Waiohua, Ngāti Tamaoho, Ngāti Maru, Te Rūnanga o Ngāti Whātua and Ngāi Tai ki Tāmaki). |
| Mana Whenua Tribes Agreement | An agreement between NZTA and the Mana Whenua Tribes |
| MCA | Multi Criteria Analysis (NZTA project term for option evaluation) |
| Mercury | Mercury NZ Limited |
| MHWS | Mean High Water Springs |
| Ministers | The Minister for the Environment and the Minister of Conservation |
| MRT | Mass Rapid Transport |
| MVA | Māori Values Assessments |
| NES – Electricity | National Environmental Standard for Electricity Transmission Activities 2009 |
| NES – Air Quality | National Environmental Standards for Air Quality |
| NES – Drinking Water | National Environmental Standard for Sources of Human Drinking Water |
| NES – Electricity Transmission | National Environmental Standards for Electricity Transmission Activities |

| | |
|---|---|
| NES – Soil Contamination | National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health 2011 |
| Ngā Rango e Rua o Tainui and Ngarango Otainui Island | Nga Rango Erua o Tainui (also known as Ngarango e rua o Tainui incorrectly described in the Cultural Values Report as Ngā Rano e Rua o Tainui). |
| Ngāti Maru | Ngāti Maru Runanga |
| NoR | Notice of Requirement |
| NPS | National Policy Statement |
| NPS – Electricity Transmission | National Policy Statement on Electricity Transmission 2008 |
| NPS – Freshwater Management | National Policy Statement for Freshwater Management 2014 (updated 2017) |
| NPS – Renewable Electricity Generation | National Policy Statement for Renewable Electricity Generation 2011 |
| NPS – Urban Development Capacity | National Policy Statement on Urban Development Capacity 2016 |
| NUMP | Network Utilities Management Plan |
| NZCPS | New Zealand Coastal Policy Statement 2010 |
| NZTA | New Zealand Transport Agency |
| OBA | Onehunga Business Association Incorporated |
| ONF | Outstanding Natural Feature |
| OPW or Outline Plan | Outline Plan of Works |
| POAL | Ports of Auckland Limited |
| Proposal / EWL / Project | East West Link – NZTA's proposal to designate land and obtain resource consents for the construction, operation, and maintenance of a new four-lane highway and associated works between SH20 in Onehunga and SH1 in Penrose / Mt Wellington, including reclamation of the Māngere Inlet (Manukau Harbour), and associated works on SH1 between Mt Wellington and the Ōtāhuhu Interchange at Princes Street. |
| PWA | Public Works Act 1981 |
| Report | This Draft Decision and Report |
| RMA | Resource Management Act 1991 |
| s and ss | Section and sections |
| Sanford | Sanford Limited |
| SEA | Significant Ecological Area |
| SH | State Highway |
| SH1 | State Highway 1 |
| SH20 | State Highway 20 |
| Spark | Spark NZ Trading Limited |
| SSESCP | Site-Specific Erosion and Sediment Control Plans |

| | |
|---|---|
| SSTMP | Site-Specific Traffic Management Plan |
| Stratex site | 19-21 Sylvia Park Road |
| Syl Park | Syl Park Investments Limited and 8 Sylvia Park Road Body Corporate |
| T&G and T&G Global | T&G Global Limited |
| Te Ākitai | Te Ākitai Waiohua Waka Taua Society |
| Te Kawerau ā Maki | Te Kawerau ā Maki Iwi Tribal Authority |
| TOES and Others | The Onehunga Enhancement Society Incorporated, Re-think the East West Link Society Incorporated and the Manukau Harbour Restoration Society Incorporated. |
| Transpower | Transpower New Zealand Limited |
| TSS | Total Suspended Solids |
| ULDF | The Urban and Landscape Design Framework |
| VPH | Vehicles per Hour |
| WAI 8 | Waitangi Tribunal on the Manukau Claim 1985 |
| WETSACC | Wet Surface Air Cooled Condenser |
| WTP | Wastewater Treatment Plant |

# 1. INTRODUCTION

[1] This Draft Decision and Report (Report) determines the suite of applications by the New Zealand Transport Agency (NZTA, the Transport Agency, the Applicant, the Requiring Authority) for two Notices of Requirement (NoRs) and a number of resource consents relating to the East West Link Proposal (the Proposal, the Project, EWL, EWL highway).

[2] This Report has been prepared by the Board of Inquiry (the Board) in accordance with its obligations under s149Q(1)[1] of the Resource Management Act 1991 (the RMA, the Act).

[3] In accordance with s149Q(2)(a)–(d) of the RMA, this Report sets out the Board's decision and reasons. It includes a statement of the principal issues that were in contention and the main findings on these issues. The Board's decision on the NoRs and applications for resource consent for the Proposal can be found in chapter 18 of this Report.

## 1.1 OUTLINE OF THE PROPOSAL

[4] NZTA's application documents lodged with the Environmental Protection Authority (EPA) describe in detail the roading and reclamation aspects of the Proposal, except as modified by NZTA during the course of these proceedings.[2] A number of aspects of the design of the Proposal, including walking and cycling infrastructure, safety design measures and the final layout of the reclamation and activities on the new land, are to be refined through detailed design if the designation is confirmed and the resource consents granted[3].

[5] The Proposal is for the construction, operation, and maintenance of a new four-lane arterial road and associated works between State Highway (SH) 20 in Onehunga, and SH1 in Penrose / Mt Wellington, including reclamation of the Māngere Inlet (Manukau Harbour), and associated works on SH1 between Mt

---

[1] Amendments to the RMA by the Resource Legislation Amendment Act 2017 to repeal the requirements for a draft decision and report under s149Q do not apply in this case due to transitional and savings provisions.

[2] For example, see:

Statement of Primary Evidence, Nancekivell, Annexure E (List of Design Changes Since Lodgement);

Statement of Primary Evidence, Rickard, para 22 onwards;

Statement of Rebuttal Evidence, Nancekivell, Attachment A (List of Design Changes); and

Subsequent documents and drawings submitted during the NZTA's closing on Day 48 of the Hearing.

[3] AEE, Section 6.3.5, p47; Section 6.8.1.2, p78; and Section 6.4, p48.

Wellington and the Ōtāhuhu Interchange at Princes Street. The Proposal area is shown in map in [Figure 1].


**Figure 1: Map of the Proposal area**

[6] The key elements of the EWL include:

(a) A new four-lane arterial road between the existing SH20 Neilson Street Interchange in Onehunga and SH1 at Mt Wellington; and connection of the new arterial road to SH1 via two new ramps south of Mt Wellington Interchange ("A" on the map);

(b) The widening of SH1 and an upgrade of the Princes Street Interchange ("B" on the map);

(c) Reconfiguration of the Neilson Street Interchange and surrounding roads including a trench on the southern side of the Interchange, with a local bridge connecting Onehunga Harbour Road to Onehunga Wharf ("C" on the map);

(d) New commuter and recreational cycle paths along the EWL connecting into the local Onehunga, Penrose and Sylvia Park communities; and a new pedestrian and cycle connection across Ōtāhuhu Creek ("D" on the map);

(e) New local road connections to and from the EWL Main Alignment; and local road improvements including extensions to Galway Street, Captain Springs Road and Hugo Johnston Drive ("E" on the map);

(f) A new grade-separated intersection at Great South Road / Sylvia Park Road ("F" on the map);

(g) Reclamation of part of the Coastal Marine Area (CMA) along the northern foreshore of Māngere Inlet to construct parts of the EWL Main Alignment, and to construct stormwater treatment areas, headlands to form a naturalised coastal edge, and recreational space ("G" and "H" on the map).

## 1.2 REASONS FOR THE PROPOSAL

[7] The Proposal objectives as stated by NZTA are as follows: [4]

(a) To improve travel times and travel time reliability between businesses in the Onehunga–Penrose industrial area and SH1 and SH20;

(b) To improve safety and accessibility for cycling and walking between Māngere Bridge, Onehunga and Sylvia Park, and access into Ōtāhuhu East; and

(c) To improve journey time reliability for buses between SH20 and Onehunga Town Centre.

[8] To deliver the EWL, two NoRs and a number of resource consents have been sought under the Auckland Unitary Plan: Operative in Part (AUP:OP). Resource consents are additionally sought under the legacy Auckland Regional Plan: Coastal (ARP:C).

[9] The Proposal in essence is to establish a new four-lane arterial road on the northern side of the Māngere Inlet, including connections with SH20 and SH1. The design of the Proposal also presents an opportunity for NZTA to provide stormwater treatment for an adjacent 611 ha of developed urban catchment in the wider Project area, as well as leachate management from adjacent landfills. The resource consents sought include those activities.

[10] The strategic need for the Proposal was discussed in detail in the application documents, evidence, and cross–examination and questioning by the Board. The Board addresses this later in this Report. It is helpful to identify upfront that threading through the entirety of NZTA's evidence and submissions were a number

[4] AEE, Section 3, p19.

of claimed benefits. Such benefits, of course, must be assessed and weighed by the Board when it comes to its evaluation and overall decision on the notices and applications.

[11] Notwithstanding this, the application documents set out four expected benefits of the Proposal, which broadly include: [5]

(a) Improved and more reliable travel times;

(b) Accessibility that supports businesses for growth and economic prosperity;

(c) Improving safety and connected communities; and

(d) Enabling and providing environmental improvements and social / community opportunities to the local area.

## 1.3 PROPOSAL HISTORY

[12] The concept behind the EWL dates back to as early as the 1960s when a link between SH20 and SH1 was first proposed. The Proposal before the Board has evolved in more recent times. The Proposal corridor selection process began in 2012 through a collaboration between NZTA, Auckland Council and Auckland Transport. This was to identify the need for transport investment in response to the Auckland Plan (2012) *Strategic Business Case*.

[13] At that time the Proposal was known as, and included as part of, the *East West Connections* Strategic Business Case, which focused on the high level transport problems within the wider "east-west" area (being the areas of Onehunga, Penrose, Mt Wellington and East Tāmaki to Auckland International Airport).[6] This included public and stakeholder engagement in 2013.[7]

[14] During this time the Proposal was identified as a priority by the former National Government in June 2013 (and again in January 2016).[8]

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[5] AEE, Section 3, p23.

[6] Ibid, p21.

[7] Ibid, p161.

[8] During addresses given by former Prime Minister, the Rt Honourable Sir John Key, to the Auckland Chamber of Commerce on 28 June 2013 and 27 January 2016.

### Programme Business Case

[15] Following the Strategic Business Case, NZTA and Auckland Transport progressed the development of a more detailed investigation of transport problems and potential "interventions", referred to as a Programme Business Case, which reported the following key outcomes relevant to the Proposal in early 2014:[9]

(a) The confirmation that additional transport infrastructure would be required in the Proposal area (for example, policy change would not be sufficient to address the problems identified); and

(b) That the priority for infrastructure connections to address transport problems in the area included:

(i) A transport link in the Onehunga-Penrose area; and

(ii) A transport link between Māngere, Ōtāhuhu and Sylvia Park.

### Indicative Business Case

[16] In 2014 an Indicative Business Case was prepared by NZTA in collaboration with Auckland Transport. The investigations included:[10]

(a) Evidence of the transport problems in the area;

(b) Identification of investment options to address the problems (for example, specific investment options of new infrastructure and corridors for infrastructure investment); and

(c) Quantification of potential benefits to be achieved from addressing these problems.

[17] The Indicative Business Case identified and assessed six shortlisted options (along with other works identified to address other priority issues in the east-west corridor).[11]

[18] Engagement with affected land owners and the public occurred during the later stages of the Indicative Business Case, from mid-2014 to late-2015, in relation to the shortlisted transport solutions. The preferred corridor was identified as the EWL with NZTA seeking an "enduring transport solution" to address the transport problems.

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[9] AEE, Section 3.2.2, p21.

[10] Ibid, Section 3.2.3, p21.

[11] Ibid, Section 9.4.2, p161.

## Detailed Business Case (and Applications)

[19] The final step in the process to confirm the need for transport investment was the Detailed Business Case for the EWL. This was completed in December 2015, and the outcome identified the preferred road alignment along the Māngere Inlet foreshore.[12]

[20] The key outcomes of the business case process led by NZTA was the identification of two preferred transport investment opportunities, being:

(a) The EWL road corridor along the northern edge of the Māngere Inlet, which NZTA developed into this Proposal; and

(b) Bus Frequent Network 32, a separate Auckland Transport led project to improve public transport connections between the Māngere Town Centre, Ōtahuhu, and Sylvia Park.

[21] According to NZTA, both of these projects were developed to respond to and integrate with other transport projects in Auckland, in particular the Western Ring Route, which includes the Waterview Tunnel[13] that opened to traffic during the early stages of the Hearing for this Project, and the Auckland Manukau Eastern Transport Initiative (AMETI).

[22] The above history and the evolution of the various business cases is helpful. The Board notes that there is no statutory requirement for NZTA to carry out a business case analysis. Nonetheless, a business case development is prudent, particularly where public funds are involved. We note Mr Wickman's evidence that the process adopted by NZTA and Auckland Transport has been adapted from Treasury's *Better Business Case* model.[14]

[23] These other projects and their interaction with the EWL is shown in [Figure 2].

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[12] Ibid, Section 3.2.4, p21.

[13] The Waterview Tunnel is part of the Waterview Connection, a proposal of national significance under Part 6AA of the RMA directed to, and approved by, a Board of Inquiry in 2012.

[14] Statement of Primary Evidence, Wickman, para 4.5.

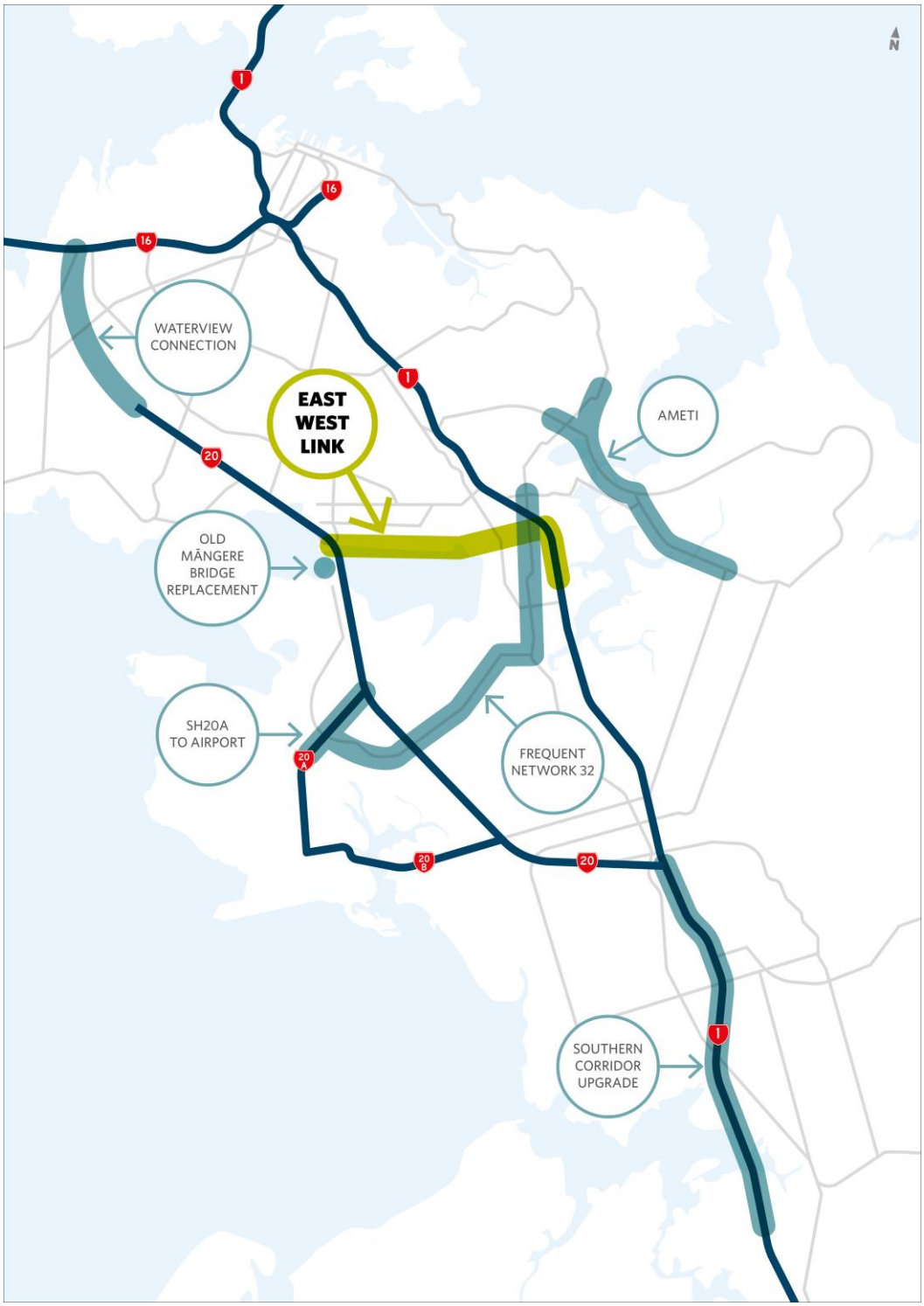


**Figure 2: Interaction of the EWL with other related Auckland transport projects[15]**

[15] AEE, Figure 6-10, p77.

[24] At the conclusion of the Detailed Business Case in December 2015, the scope and nature of the Proposal was confirmed by NZTA, and specific Proposal objectives to be used for the RMA process were developed (as mentioned earlier in this Report).[16]

## Strategic Context and Public Engagement

[25] The Business Case process described above was in response to, and informed, the directions contained in a number of national and regional strategic documents, including:

(a) The Auckland Plan (2012);

(b) The 2015 – 2018 National Land Transport Programme;

(c) NZTA's Statement of Intent 2015 – 2019, which identifies the Proposal as part of the Accelerated Auckland Transport Programme; and

(d) The Auckland Transport Alignment Programme (2016).

[26] Mana Whenua for their part have been engaged in the development of the Proposal. The outcome of this engagement was the Cultural Values Report (CVR).

[27] From December 2015, through to lodgement of the applications with the EPA in December 2016, NZTA has advanced a programme of investigation, design and community engagement. This included inputs from various specialists, stakeholders, iwi, local authorities and members of the communities within which the Proposal is located. Detailed assessment of alternative alignments and methods for undertaking the EWL (within the preferred corridor) and environmental and related assessments were undertaken by NZTA.

[16] Chapter [1.2].

# 2. STATUTORY APPLICATIONS, NOTICES AND APPROVALS NEEDED

[29] In accordance with Part 6AA of the RMA, NZTA lodged the notices and applications with the EPA on 16 December 2016. A succinct summary of the NoRs and resource consents applied for by NZTA follows, with a full and detailed list attached to this Report in [Appendix 2: List of Applications and Notices for the Proposal].

[30] Under s145(3) of the RMA, NZTA lodged the following two NoRs:

(a) **NoR1** – The construction, operation and maintenance of a State Highway, being the EWL between Onehunga and Ōtāhuhu, and associated works; and

(b) **NoR2** – The alteration of SH1 designation 6718 for maintenance, operation, use and improvement of the state highway network. The alterations are associated with the proposed EWL between Onehunga and Ōtāhuhu, and associated works.

[31] Under s145(1)(a) of the RMA, NZTA also lodged 24 applications for resource consent. These relate to activities restricted by the RMA under s9 (land use), s12 (coastal activities), s13 (works in watercourses), s14 (water) and s15 (discharges to air, land and water). The activities to which they relate can be summarised as follows:

(a) **One land use consent** – For activities on new land created by the reclamations under s89 of the RMA. This is for new land to be created between Mean High Water Springs (MHWS) and future MHWS for road, pedestrian, cycle path, amenity areas and associated infrastructure and activities;

(b) **Seven land use consents** – Relating to works (Proposal-wide) on contaminated soils, earthworks, vegetation alteration and removal, new network infrastructure, and construction of new impervious surfaces for roads. Of the seven land use consents applied for, three are for activities outside the proposed designation footprint (NoR1) and are for activities such as earthworks and vegetation removal, and stormwater detention and retention specifically within the Miami Stream, (a stream connected to the Māngere Inlet) and within Southern Reserve adjacent to Southdown Stream, Anns Creek Reserve, Gloucester Park and the Manukau Foreshore Walkway;

(c) **One further land use consent** – For the operation of a concrete batching plant, which is solely for construction and is temporary, as sought in the evidence of Ms Rickard.[17] The Board accepts that this additional land use consent is within the scope of the Proposal. It is ancillary and anticipated by the Proposal. No prejudice arises and there was no challenge to its inclusion.

(d) **Four coastal permits** – For the road construction activities plus related construction activities including reclamations, deposition of material in the CMA, disposal of waste or other matter in the coastal marine area and temporary and permanent occupation of the CMA by structures. This work includes reclamation in the Māngere Inlet, works in Onehunga Bay associated with public access and declamation in the Ōtāhuhu Creek, being:

(i) The construction of permanent structures in the CMA, including bridge structures and stormwater outfalls;

(ii) Dredging;

(iii) Retaining walls; and construction of new infrastructure; and

(iv) Demolition or removal of any existing buildings or CMA structures and seawalls.

(e) **Six water permits** – For works in watercourses and associated drainage and diversion activities such as:

(i) Depositing of substances;

(ii) Channel clearance;

(iii) Extraction of material and mangrove removal;

(iv) Take and use of surface water; take and diversion of groundwater;

(v) Damming and diversion of surface water; and

(vi) Permanent damming of surface water.

(f) Of the water permits applied for, two include areas outside the proposed designation footprint, including activities within the Miami Stream; and

(g) **Five discharge permits** – For discharge of contaminants into air or on to land or water; discharges of contaminants during construction; discharges

[17] Statement of Primary Evidence, Rickard, para 22.4-22.6. This relates to a Regional Land Use consent for a new High Risk ITA (Industrial or Trade Activity) under Rule E33 of the AUP:OP for the concrete batching plant. This is a Controlled Activity.

to air; and discharges of stormwater from permanent impervious surfaces to land, freshwater and coastal water including discharges involving a stormwater network.

[32] There was agreement by NZTA that the activities for which resource contents are sought are to be bundled and assessed as a **non-complying activity** under s104D of the RMA. Thus, the "gateway test", as it is commonly known, will apply in terms of the Board's overall jurisdiction to make a determination on the resource consent components of the Proposal. The Board returns to this later in this Report.

[33] NZTA in its AEE sought:[18]

(a) A 15-year lapse period for the designations relating to the NoR1 and NoR2;

(b) A 10-year lapse period for each of the resource consents, with the following durations:

(i) Unlimited duration in respect of the coastal permits for reclamation;

(ii) 35 years from the date of commencement in respect of all other consents required for the long-term operation of the Proposal; and

(iii) The expiry date for each consent as detailed in the consent conditions (however, as a notable oversight, they were not included).[19]

[34] Other legislation will apply to the Proposal, which will require NZTA to invoke other processes unrelated to this Board's jurisdiction. These include:[20]

(a) **Public Works Act 1981 (PWA)** – The acquisition of land required for the Proposal;

(b) **Heritage New Zealand Pouhere Taonga Act 2014** – Archaeological sites affected by the Proposal;

(c) **Reserves Act 1977** – Reserves affected by the Project;

(d) **Wildlife Act 1953** – The relocation of protected species;

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[18] AEE, Section 5.2.4, p42. The lapse period durations for the resource consents varied somewhat as NZTA filed updated sets of conditions. This is discussed further in chapter [16] of this Report.

[19] Discussed further in chapter [16] of this Report.

[20] AEE, Section 5.3, p42.

(e) **Freshwater Fisheries Regulations 1983** – The provision of fish passage in waterways affected by the Proposal;

(f) **Marine and Coastal Area (Takutai Moana) Act 2011** – Ownership of reclaimed land; and

(g) **Te Kawerau ā Maki Claims Settlement Act 2015** – Parts of the Project are within the coastal area shown on OTS-106-1430.

[35] To the extent necessary, the Board accepts that NZTA would apply for any other statutory approvals required for the Proposal after the matters that are the subject of this Report have been determined. Such is common practice in resource management.

[36] The following documents were provided by NZTA in support of the Proposal at the time of lodgement:

(a) Assessment of Environmental Effects (AEE) Report;

(b) Technical reports and supporting documents;

(c) Draft conditions; and

(d) A plan and drawing set.

[37] A summary list of the suite of NZTA's applications, notices, AEE and supporting documentation can be found in [Volume 2, Appendix: Summary of Application Documentation] of this Report.

# 3. THE BOARD'S ESTABLISHMENT, FUNCTION AND JURISDICTION

## 3.1 PART 6AA

### Background and Lodgement

[38] Following lodgement of the applications on 16 December 2016, the EPA accepted the applications for processing on 20 December 2016 in accordance with the "completeness test" prescribed by ss145 and 88, and the Fourth Schedule of the RMA. The notices, although not subject to a "completeness test", were also received.

### EPA Recommendation

[39] For applications lodged directly with the EPA, s146 of the RMA requires the EPA to recommend a course of action to the Minister for the Environment, and in this case, because of the proposed works in the CMA, the Minister of Conservation (the Ministers).

[40] On 20 December 2017, after accepting the application for processing, the EPA recommended to the Ministers that the EWL be declared a proposal of national significance and referred to a Board of Inquiry for streamlined consideration and decision-making.

## 3.2 MINISTERS' DIRECTION AND REASONS

[41] The Ministers accepted the EPA's recommendation and on 8 February 2017 jointly directed that the matters be referred to a Board of Inquiry under s147(1) of the RMA. The Ministers have appointed this Board under s149J of the RMA to hear and decide the merits of the Proposal. That is the task before the Board and the focus of this Report.

[42] In accordance with s149A of the RMA, the EPA served a copy of the Ministers' direction on Auckland Council, being the relevant local authority with jurisdiction over the Project area, and NZTA as the Applicant.

[43] In considering the matters before it, the Board must, in accordance with s149P(1)(a) of the RMA, have regard to the Ministers' reasons for making their direction. The Ministers' reasons follow:

> "***National Significance***
>
> *The Board consider the matters are a proposal of national significance because the proposal:*

- *Involves significant use of natural and physical resources (including approximately 18.3 hectares of reclamation of the Māngere Inlet), to construct much of the proposed four-lane arterial road linking State Highways 1 and 20.*
- *Is likely to result in and contribute to irreversible changes to the environment, in particular the loss of bird feeding areas in the Māngere Inlet; changes to coastal processes by re-contouring, and addressing legacy groundwater contamination issues by effectively 'bunding' the northern shoreline of the Māngere Inlet.*
- *Includes relocating regionally and nationally important infrastructure, including electricity, gas, and crossing over bulk water supply.*
- *Has, and is likely to continue to, aroused widespread public concern or interest regarding actual or likely effects on the environment.*
- *Relates to an area that may be of national interest to Māori and a number of sites in and around the proposal area are classified as outstanding natural features within the Auckland Unitary Plan.*
- *Would assist the Crown in fulfilling its public health, welfare, security and safety obligations or functions.*
- *Relates to a network utility operation (the State Highway network) that when viewed in its wider geographic context extends to more than one district or region.*"

[44] The Board will return to the Ministers' reasons when undertaking its evaluation of the merits of the Proposal later throughout this Report, and in particular in chapter 17.2 of this Report.

## 3.3 FUNCTION AND JURISDICTION

[45] The Board must determine the applications in accordance with s149P of the RMA, which sets out the statutory framework that the Board is confined to in making its decision on the matters before it.

[46] Section 149P relevantly provides:

> "*(1) A board of inquiry considering a matter must—*
>
> *(a) have regard to the Minister's reasons for making a direction in relation to the matter; and*
>
> *(b) consider any information provided to it by the EPA under section 149G; and*
>
> *(c) act in accordance with subsection (2), (3), (4), (5), (6), (7), (8), or (9) as the case may be.*
>
> *(2) A board of inquiry considering a matter that is an application for a resource consent must apply sections 104 to 112 and 138A as if it were a consent authority.*
>
> *…*
>
> *(4) A board of inquiry considering a matter that is a notice of requirement for a designation or to alter a designation—*

*(a) must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority; and*

*(b) may—*

*(i) cancel the requirement; or*

*(ii) confirm the requirement; or*

*(iii) confirm the requirement, but modify it or impose conditions on it as the board thinks fit; and*

*(c) may waive the requirement for an outline plan to be submitted under section 176A.*"

[47] The Board notes here for completeness that while an alteration to an existing designation falls under s181 of the RMA, that section refers to s171. Thus, the Board is bound by the same as if the alteration was a new designation. This is relevant for NoR2.

[48] As if the Board is a territorial authority, under s176A of the RMA the Board may waive the requirement for an outline plan to be submitted in relation to a NoR. NZTA has not sought nor applied for an outline plan waiver for the Proposal. The Board briefly returns to this in chapter 6.1 and elsewhere in this Report where it is helpful to do so.

[49] A NoR for a designation in respect of a public work can only be issued by an approved Requiring Authority. Section 166 of the RMA defines a Requiring Authority as:

(a) A Minister of the Crown; or

(b) A local authority; or

(c) A network utility operator approved as a Requiring Authority under s167 of the RMA.

[50] NZTA and its predecessor Transit New Zealand were both approved as Requiring Authorities under s167 of the RMA. The approvals were notified in the *Gazette* on 3 March 1994 and 19 November 2015:[21] [22]

> "*… for its particular network utility operation being the construction and operation (including the maintenance, improvement, enhancement, expansion, realignment and alteration) of any State highway or motorway pursuant to the Transit New Zealand Act 1989.*
>
> *… for the purpose of constructing or operating (or proposing to construct or operate) and maintaining cycleways and shared paths in New Zealand*

[21] Resource Management (Approval of Transit New Zealand as Requiring Authority) Notice 1995.

[22] Resource Management (Approval of NZ Transport Agency as a Requiring Authority) Notice 2015.

*pursuant to the Government Roading Powers Act 1989 and the Land Transport Management Act 2003.* "

[51] The Board will return to this in chapter 15.1 of the Report.

# 4. PROCEDURE

## 4.1 NOTIFICATION

[52] The applications were notified by the EPA in the *New Zealand Herald*, *Dominion Post*, *Christchurch Press* and *Otago Daily Times* on 22 February 2017. A condensed version of the public notice was also notified in the *Manukau Courier* (23 February 2017), *Onehunga Community News* (2 March 2017) and *Central Leader* (22 February 2017).

[53] Information was available for viewing at a number of Auckland Libraries, Auckland Council service centres, the EPA Wellington office, and on NZTA's website.

[54] In addition, the EPA identified approximately 2,400 distinct land owners and occupiers of land to which the matter relates and land adjoining. Each was sent a notification pack containing a cover letter, a copy of the public notice, and a Friend of Submitter flyer. A number were not delivered and returned by New Zealand Post. The EPA took reasonable steps to follow up. In any case, the matters were publicly notified.

[55] Submissions were open for 20 working days and subsequently closed on 22 March 2017.

## 4.2 SUBMISSIONS

[56] The EPA received a total of 685 submissions during the submission period. After the close of submissions, the EPA also received four late submissions. NZTA did not oppose these late submissions, and the Board accepted them.[23] Of the total 689 submissions, a large number of submissions were received by the EPA on a third-party submission form designed and co-ordinated by The Onehunga Enhancement Society Incorporated (TOES) and others related parties

[57] The EPA prepared a useful Analysis of Submissions Report (AOS Report). This was updated on several occasions as the number of submitters and their position changed.[24] Of the 685 submissions received by the EPA by the close of submissions (this excludes the four late submissions the Board subsequently accepted):

(a) 582 submitters (85 percent) opposed the Proposal in full, or in part;

[23] Refer Board Minute and Direction 02.

[24] AOS Report, dated April 2017 (Version 3).

(b) 94 submitters (13.7 percent) supported the Proposal in full, or in part; and

(c) Nine (9) submitters (1.3 percent) indicated they were neutral toward the Proposal.

[58] The majority of submitters were from the general Proposal area. A large number of submitters did not specify their location in their submission, which can be attributed largely to the third-party submission form as it did not include a section for a physical address. Thus, a more accurate geographic analysis was not possible.

[59] Approximately one-third of submitters who did specify their location identified as being from Onehunga. Of these, the majority opposed the Proposal.

[60] Initially just over half of the submitters wished to be heard on their submissions. This number dropped considerably prior to the Hearing.

[61] Some submitters[25] described themselves as trade competitors of NZTA. The Board returns to this later to clarify the criteria for a trade competitor at chapter 6.4 of this Report.

[62] A wide range of concerns were raised in the submissions. The majority related to access or severance concerns and the consideration of alternatives, with noise and vibration, visual amenity and character effects, followed by a suite of other environmental, social, economic and cultural concerns. There was also a focus on appropriate conditions.[26]

[63] A list of all submitters on the Proposal is attached to this Report in [Appendix 4: List of Submitters].

## 4.3 INQUIRY PROCEDURES

[64] The Board issued an approved Inquiry Procedures that was amended from time to time. This is attached in [Appendix 5: Board's Inquiry Procedures]. These procedures, among other things, included a timetable of key dates and guidance on procedural matters relating to evidence exchange and the Hearing. They were often referred to.

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[25] J Hughes (Submission No. 126025), R Dibley (Submission No. 126120), M F & J K Khan (Submission No. 126139), G Page (Submission No. 126227), S Hood (Submission No. 126231), S Bateman (Submission No. 126248), R Lacey (Submission No. 126249), W Wallace-Warahi (Submission No. 126266), and D Benson (Submission No. 126361).

[26] See Addendum to AOS Report: Conditions Requested, dated April 2017.

## 4.4 EVIDENCE

[65] The exchange of evidence occurred as follows:

(a) NZTA's primary evidence (or evidence in chief) was received by the EPA on 12 April 2017.

(b) Evidence on behalf of the submitters was received by the EPA in two stages:[27]

(i) Group 1 (a number of Government and non-Government submitters) by 10 May 2017; and

(ii) Group 2 (all other submitters) by 22 May 2017.

(c) NZTA, and a number of submitters whose witnesses participated in expert witness conferencing, filed rebuttal evidence with the EPA by 20 June 2017.

[66] The Board received new or supplementary evidence at the Hearing from NZTA and Mercury NZ Limited (Mercury) in relation to the Southdown site, and from TOES, Re-think East West Link Incorporated, and Manukau Harbour Restoration Society (TOES and Others) in relation to visual photosimulations presented as part of opening submissions.

[67] Copies of statements of evidence were posted on the EPA website as they became available.

## 4.5 FIRST PRE-HEARING CONFERENCE

[68] A pre-hearing conference was held on 15 May 2017 to discuss the procedures and timetable for expert witness conferencing. A number of preliminary procedures relating to the Hearing were also covered, including arrangements for the first two weeks of the Hearing.[28]

## 4.6 WITNESS AND NON-EXPERT CONFERENCING

[69] The Board directed expert conferencing on selected topics, which was arranged by NZTA with the agreement of those at the first pre-hearing conference. The EPA engaged independent facilitators from FairWay Resolution Limited to run the

[27] Board Minute and Direction 06, dated 3 May 2017, in particular the updated timetable at para 9.

[28] Minutes of the First Pre-Hearing Conference: 15 May 2017.

conferencing sessions, which were initially scheduled to run from 23 May to 6 June 2017. A number of facilitated meetings for non-experts and Parties were also held.

[70] Invariably further conferencing was required, including during the Hearing.

[71] Conferencing occurred for the following topics:

(a) Southdown site (expert and facilitated non-expert);

(b) Proposed land bridge Onehunga Harbour Road;

(c) EnviroWaste / ChemWaste site;

(d) Noise and vibration;

(e) Cultural values and effects (facilitated non-expert);

(f) Onehunga Mall (facilitated non-expert);

(g) Stratex site – Asbestos and vibration;

(h) Construction management;

(i) Neilson Street and Neilson Street Interchange area;

(j) Geological heritage;

(k) Traffic and transport – Mercury Southdown site;

(l) Reclamations;

(m) Waikaraka Park and Cemetery;

(n) Stormwater;

(o) Urban design and landscape;

(p) Coastal processes;

(q) Planning;

(r) Access to properties;

(s) Economics;

(t) Built heritage;

(u) Air quality;

(v) Closed landfills;

(w) Traffic and transport; and

(x) Ecology.

[72] This amounted to a total of 32 Joint Witness Statement Reports (JWS Reports). The Board is grateful that most expert witnesses were able to attend conferencing.

[73] Copies of the JWS Reports were posted on the EPA website shortly after they became available. A full list of JWS Reports filed with the EPA is attached in [Appendix 6: List of Joint Witness Statement Reports].

## 4.7 SECOND PRE-HEARING CONFERENCE

[74] A second pre-hearing conference was held on 15 June 2017. The purpose of this conference was to outline procedures for the Hearing and to allow NZTA and submitters to raise any issues they had with the Hearing procedures and any other procedural matters including those arising from the first pre-hearing conference.[29]

## 4.8 COUNSEL AND PLANNER TO ASSIST THE BOARD

[75] The Board retained the services of Wynn Williams Lawyers of Christchurch and Scott Wilkinson Planning of Auckland. Legal advice was received from Mr Maw and planning advice from Mr Scott.

[76] This included a report under s42A of the RMA on the s104D gateway test and other related matters, including the ability to impose conditions on an existing designation.[30] To the extent necessary, the Board waived the statutory time limit imposed for providing the report to parties on the basis that there is no apparent material prejudice.[31] The report was made available on the EPA website on 16 June 2017. It was frequently referred to by various witnesses and by counsel.

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[29] Minutes of the Second Pre-Hearing Conference: 15 June 2017.

[30] Memorandum of Counsel and Planner to the Board of Inquiry relating to section 104D of the RMA and other matters, dated 9 June 2017.

[31] Board Minute and Direction 15, dated 16 June 2017.

## 4.9 ADJOURNMENT APPLICATION

[77] Shortly before the Hearing counsel for TOES and Others presented the Board with an adjournment application based on Transpower Tower 31, in the vicinity of the Neilson Street Interchange, and the need for a dispensation from Transpower New Zealand Limited (Transpower) that might be required.[32] NZTA opposed the adjournment application, as did Transpower. It is sufficient to say here that the Board considered and declined the application and proceeded on to the Hearing.[33]

## 4.10 FORMAT OF THE HEARING

[78] The Hearing was held at the Ellerslie Events Centre in Auckland, between 27 June and 15 September 2017, and formally closed on 7 November 2017. Actual sitting days amounted to 49 days, over some 12 weeks. The significant number of issues the Proposal presented and its overall complexity were reflected in the length of time occupied by the Hearing and the cross-examination that occurred.

[79] All evidence, documents and exhibits produced and referred to at the Hearing have been made available on the EPA website, along with a daily transcript of proceedings.

## 4.11 TIME EXTENSION

[80] On 15 August 2017, following discussions with EPA and Wynn Williams, the Board made a formal request under s149S of the RMA (via the EPA) to the Ministers to grant a one calendar month extension to the time by which the Board must issue its final decision and report. The Board was concerned that the statutory nine-month time constraints that the Board is under would compromise a full and fair Hearing and the delivery of a robust decision.[34] The Hearing had run for much longer than anticipated.

[81] The Ministers granted the Board's request. The new date on which the Board must deliver its final decision and report and provide it to the EPA is 22 December 2017.

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[32] Under NZECP 34:2001, in particular clause 2.4.1.

[33] Board Minute and Direction 17, dated 23 June 2017, with reasons delivered later in Board Minute and Direction 24, dated 11 July 2017.

[34] Board Minute and Direction 37, dated 5 September 2017.

## 4.12 OPENINGS AND CLOSINGS

[82] The Board received opening and closing submissions from a number of the more active participants at the Hearing. These included:

(a) NZTA – the Requiring Authority responsible for lodging the NoRs and the applicant in relation to the applications for resource consent that relate to the Proposal;

(b) Auckland Transport – a Council Controlled Organisation of the Auckland Council, which was able to resolve its concerns with NZTA through agreed amendments to proposed conditions, or through a separate agreement;

(c) Auckland Council – the local authority with jurisdiction over the Proposal area, which, subject to some modifications and acceptable conditions, supports the Proposal;

(d) KiwiRail Holdings Limited (KiwiRail) – which generally supports the Proposal as it relates to its interface with the regionally and nationally important rail network. KiwiRail was particularly concerned about adverse effects on the continuity and consistency of electricity supplied to its rail network from the Southdown substation;

(e) Fonterra Brands (New Zealand) Limited (Fonterra) – which owns and operates the Tip Top ice cream facility and 113 Carbine Road (Tip Top site). Provided adverse effects on its site were appropriately avoided, remedied or mitigated through conditions, Fonterra is not opposed to the Proposal;

(f) Spark NZ Trading Limited (Spark) – which is not opposed to the Proposal overall, provided that there is appropriate reconfiguration / relocation of its affected assets at:

(i) The AHAM Hamlins Hill Cellular Site located southeast of the corner of Sylvia Park Road and Great South Road; and

(ii) The AOHB Ōtāhuhu Cellular Site located on land owned by Transpower on the corner of Princes Street and Frank Grey Place.

(g) Transpower – which is neutral and whose interests relate to national grid infrastructure that may need to be realigned or modified by the Proposal;

(h) Mercury – which opposes the Proposal and considers it as presented would negatively impact on the Southdown site's potential ability to support Auckland's security of electricity supply;

(i) National Road Carriers (Inc) – a freight industry body representing some 1,500 businesses in the North Island, which supports the Proposal;

(j) Auckland Heliport Limited Partnership (Heliport) – which operates a helicopter charter operation from a site it leases at 59 Miami Parade, Pikes Point (the site is owned by the Ports of Auckland Limited (POAL));

(k) POAL – broadly supports the Proposal, but has a number of concerns relating to effects on its assets and properties in the area, which include:

  (i) The Port of Onehunga (at 55 and 57 Onehunga Harbour Road);

  (ii) Heavy-industrial zoned land at 39 and 59 Miami Parade, Pikes Point; and

  (iii) Opposition to the creation of the Port Link Road, which bisects one of its properties.

(l) T&G Global Limited (T&G) – a global grower, marketer and exporter of fruit and vegetables that has operated from its site bound by SH1, Clemow Drive, Mt Wellington Highway and Monahan Road (T&G site) since 1993, recently investing over $7.2 million in upgrading the site. T&G Global considers the Proposal will have significant adverse effects on part of its T&G site and seeks that the Proposal be declined to the extent that it would affect the T&G site;

(m) Kiwi Property Group and Sylvia Park Business Centre Limited (Kiwi) – which owns and operates the Sylvia Park Shopping Centre and whose concerns primarily relate to increased traffic “rat-running” and congestion effects resulting from the Proposal;

(n) Tram Lease Limited (Tram Lease) – which owns the properties at 1-7 Sylvia Park Road (Hirepool site) and 19-21 Sylvia Park Road (Stratex site). Tram Lease is primarily concerned about its interests relating to the Stratex site, alternative options, and the effects of the Proposal, including safe and efficient access to the Stratex site;

(o) Syl Park Investments Limited and 8 Sylvia Park Road Body Corporate (Syl Park) – considers the Proposal will have significant implications for access to and from 8 Sylvia Park Road, and seeks mitigation through formalisation of existing informal vehicular access across 1 Pacific Rise in the form of a best endeavours condition;

(p) Sanford Limited (Sanford) – an Auckland-based member of the fishing industry, and New Zealand’s only publicly listed seafood company, which

seeks to maintain safe and efficient 24-hour access to the Port of Onehunga Wharf during construction of the Proposal;

(q) Jaafar Holdings Limited and Mount Wellington Highway Limited (Jaafar) – owns the land at 430 Mt Wellington Highway (Jaafar site), where the proposed on- and off-ramps from the Proposal to SH1 will traverse;

(r) K Rich on behalf of herself and Onehunga Mall Cul-de-Sac Residents' submissions – who expressed concern about the level of engagement by NZTA and sought a number of construction and operational conditions;

(s) EnviroWaste Services Limited, trading as ChemWaste (EnviroWaste) – operates a site at 19–21 and 39 Miami Parade (ChemWaste site), which deals with the receipt, temporary storage, handling and treatment of liquid and solid wastes. This site is leased from POAL;

(t) Ngāti Whātua Ōrākei and Te Kawerau ā Maki Iwi Tribal Authority (Ngāti Whātua Ōrākei and Te Kawerau ā Maki) – who oppose the Proposal in full because of significant adverse effects on cultural values, and who are opposed in principle to any reclamations of the Manukau Harbour;

(u) TOES and Others[35] (as well as Jackson Electrical and The Local Lockup) – who support, in principle, the idea of an east-west transport connection in Auckland, but do not support the EWL option that has been selected by NZTA, particularly the design at the Onehunga / Neilson Street Interchange end. TOES together with the Onehunga Business Association Incorporated (OBA) were also the proponents of an alternative design for the Project referred to as the "OBA Option". TOES and related parties were particularly concerned with the physical effect of severance were the EWL highway to be created between the Onehunga community and the Manukau Harbour foreshore;

(v) Jackson Electrical Industries Limited (Jackson Electrical) – an occupier of the land at 18 Gloucester Park Road, Onehunga (the Jackson Trust owns the land through its proxy Selwyn St Properties), which comprises some 8,500 $m^2$ over seven separate titles. Jackson Electrical's concerns relate to the Proposal's construction and operational effects on the Jackson Electrical site;

(w) The Local Lockup Limited / Scott Palmer (The Local Lockup) – which owns the land at 11 Gloucester Park Road, Onehunga (operating as The

[35] TOES, Re-think East West Link Incorporated, and Manukau Harbour Restoration Society.

Local Lockup site), which is proposed to be fully acquired as part of the Proposal;

(x) OBA – which opposes the Proposal in its current form and sought modifications;

(y) Ward Demolition – which operates one of the largest demolition and recyclers of building waste operations in the region at 13–17 Miami Parade, Onehunga, with one of the main activities on the site being concrete crushing, and will be impacted by the Proposal; and

(z) A number of other iwi groups, including Te Ākitai Waiohua, Ngāti Tamaoho, Ngāti Maru, Te Rūnanga o Ngāti Whātua, Ngāti Paoa, and Ngāi Tai ki Tāmaki – who have various positions. Some are opposed to the Proposal on similar grounds to those advanced by Ngāti Whātua Ōrākei. Others have entered into an agreement with NZTA. The Board returns to this later in chapter 13.4 of this Report.

[83] Some submitters chose to make what were effectively opening and/or closing statements when they appeared. The above list, however, lists those parties who either opened or closed in a formal sense.

## 4.13 SUBMITTER REPRESENTATIONS

[84] The Board has been particularly conscious of the concerns of the many submitters in the Onehunga area, as well as those that use the area, including the residents of Māngere Bridge. At the first pre-hearing conference the Board emphasised that it would do its best within the constraints of law to ensure submitters (including community groups) would have every opportunity to express concerns, whether represented or not.[36]

[85] The Board has put a high value on ensuring procedural flexibility to ensure that all Parties expressing some interest in the EWL have the opportunity to be heard, and further to ensure that constraints of cost and time did not inhibit submitters or cause prejudice.

[86] Representations were presented on behalf of some 46 submitters. Most submitters, or their representatives, who appeared before the Board spoke effectively in support of their submissions. The Board would like to thank all submitters for their efforts to assist the Board in gaining a broader perspective and understanding of the many and varied issues arising from the Proposal. For those

[36] Minutes of the First Pre-Hearing Conference: 15 May 2017, in particular para 38.

who did not wish to speak at the Hearing or were unable to attend for various reasons, the Board has given due consideration to their submissions in reaching its decision.

[87] Mr Campbell, the EPA-appointed "Friend of Submitter", was available to assist lay submitters on process and procedural issues. Mr Campbell provided support to a number of submitters prior to the Hearing, and at the request of the Board he assisted several submitters to group together to present joint cases. In the end it was not necessary for him to attend or provide further assistance during the Hearing.

## 4.14 PARTIES WITHDRAWING AND RIGHT TO BE HEARD

[88] A number of submitters indicated on their submission forms that they wished to be heard by the Board. In the event, most of these submitters did not avail themselves of the opportunity. The EPA on behalf of the Board extended several opportunities to this category of submitters to appear if they wished (refer to [Appendix 7: Copy of Email Correspondence to Submitters]). They did not do so. Nonetheless the Board has considered the various submissions in this category.

[89] NZTA also undertook direct discussions with individual submitters throughout these proceedings. As a result of that a number of Parties were able to reach agreement with NZTA. The Board returns to briefly discuss these agreements in chapter 10 of this Report.

## 4.15 SITE VISITS

[90] A preliminary site visit was undertaken by the Board on 11 April 2017, broadly covering the Proposal area. The Board was accompanied by a guide and driver from NZTA. EPA staff also accompanied the Board on this site visit to maintain appropriate separation.

[91] At the suggestion of various parties during the course of the Hearing, the Board conducted a series of further site visits of the Proposal area and were accompanied by relevant counsel or representatives (some in support and some opposed to the Proposal) and an EPA staff member.

[92] These further site visits were as follows:

(a) Mercury Southdown site – 14 August 2017;

(b) The Local Lockup site, Jackson Electrical site, and a number of locations suggested by TOES and Others and/or NZTA both in and around

Onehunga, including Onehunga Wharf, Waikaraka Cemetery and Waikaraka Park – 28 August 2017; and

(c) Cultural sites of importance to Mana Whenua, and sites relating to T&G Global, TR Group, and 8 Sylvia Park Road, Onehunga Mall and residences at Onehunga Mall Cul-de-Sac – 11 September 2017.

[93] The Board wishes to thank all those who facilitated those site visits. The Board found the site visits particularly useful to draw attention to both general and specific sites and to illuminate the submissions and evidence.

## 4.16 THE REFINING PROCESS FOR CONDITIONS

[94] Throughout the Hearing, NZTA, as a result of its consultation with other parties, revised the various conditions it proposed. The Board found this process helpful. Conditions were progressively updated and refined as a result of conferencing and cross-examination.

[95] The following are the various iterations of conditions that the Board was provided:

(a) Proposed conditions as notified — February 2017,[37]

(b) Evidence in chief — 12 April 2017,[38]

(c) Rebuttal evidence — 20 June 2017,[39]

(d) Applicant's witness appearance – 19 July 2017,[40]

(e) Closing submissions – September 2017,[41] and

(f) Post hearing version – 27 September 2017.

[96] Unless otherwise discussed later in this Report,[42] and subject to any modifications made by the Board, it has assessed the Proposal against the final set of proposed conditions submitted by NZTA following their closing (dated 27 September 2017).

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[37] Application documents.

[38] Statement of Primary Evidence, Hopkins, Attachment A.

[39] Statement of Rebuttal Evidence, Hopkins, Annexure A (Changes to NoR Boundary) and Annexure B (Changes to Proposed Conditions).

[40] Hopkins, Appearance – Amended Draft Designation and Resource Consent Conditions.

[41] Closing Statement, Mulligan, Amended Draft Designation and Resource Consent Conditions.

[42] In particular refer to chapter [16].

# 5. REPORTS TO THE BOARD AND INFORMATION PROVIDED BY THE EPA

## 5.1 KEY ISSUES REPORT

[97] In accordance with s149G(3) of the RMA, the EPA commissioned Auckland Council to prepare a Key Issues Report (Key Issues Report) and provided a copy of that report to the Board on 28 February 2017. The EPA also provided a copy to the Applicant, and submitters once known, via its website.

[98] The Key Issues Report is distinct from any role Auckland Council subsequently takes as a submitter or advocate. To this end the Key Issues Report addressed the following as required by the RMA:

(a) Any relevant provisions of a national policy statement, a NZ coastal policy statement, a regional policy statement or proposed regional policy statement, and a plan or proposed plan;

(b) A statement on whether all required resource consents in relation to the Proposal to which the matter relates have been applied for; and

(c) If applicable, the activity status of all proposed activities in relation to the matter.

[99] While constrained by the above scope, the Key Issues Report helpfully highlighted the complexity of the Proposal from a planning perspective. To assist the Board, the authors applied a thematic approach in their assessment. In doing so they identified a number of planning issues relating to the Proposal, falling under seven general themes:

(a) Relevance of appeals against the AUP:OP;

(b) Appropriateness of reclamations in the CMA;

(c) Other infrastructure, including electricity transmission;

(d) Relationship of Māori with the Proposal area;

(e) NoR and designations;

(f) Resource consents; and

(g) Gateway test (s104D of the RMA).

[100] A summary of the key planning issues relating to the Proposal is attached in [Appendix 8: Key Planning Issues Identified in the Key Issues Report].

[101] Section 149P(1)(b) of the RMA requires the Board to consider the Key Issues Report when making its decision. The Board will return to these key issues throughout its evaluation.

## 5.2 PLANNING / LEGAL REPORT

[102] The Board, through the EPA, commissioned a report under s42A of the RMA relating to the s104D gateway test and related matters (42A Report).[43] That report was jointly authored by Mr Scott (who provided planning opinion) and Mr Maw (who provided legal advice).

[103] The timing of the report was such that the authors' review was limited to:

(a) The relevant application documents;

(b) The Key Issues Report; and

(c) The primary evidence of NZTA's planning witnesses and in particular Ms Rickard and Ms Hopkins.

[104] To the extent necessary, under s42A(5)(a) of the RMA, the Board waived the time limit imposed under s42A(3)(a) for providing the report to Parties on the basis that there is no apparent material prejudice.[44] The EPA provided a copy to the parties via its website.

[105] At the heart of the s42A Report was the issue of the s104D gateway test, of which the authors opined:[45]

> "*The s104D(1)(b) test is very finely balanced, particularly with the regard to Policy F2.2.3.1(c) [of the AUP:OP]. If the Board is satisfied that the Proposal is not contrary to this specific and directive policy, then the s104D gateway will be passed.*"

[106] While the focus here was squarely on the extent of the coastal reclamations that are necessary for the Proposal, the Board is also conscious of the relevant stringent

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[43] Memorandum of Counsel and Planner for the Board of Inquiry, dated 9 June 2017.

[44] Board Minute and Direction 15, dated 16 June 2017.

[45] At [Para 88].

policies relating to biodiversity as modified by the High Court, in particular Policy D9.3(1)(a) of the AUP:OP.[46] Legal and factual issues surrounding s104D, together with the reach and effect of relevant AUP:OP objectives and policies and the weighing required, were central to much of the evidence of planning expert witnesses and to counsel's submissions.

## 5.3 SUMMARY OF INFORMATION CONSIDERED BY THE BOARD

[107] Under s149P(1)(b) of the RMA, the Board is required to consider any information provided to it by the EPA under s149G of the RMA. The Board has done this.

[108] Under s149G(2) of the RMA, the EPA has provided to the Board NZTA's application, including the AEE and all supporting documentation,[47] and all submissions received on the applications. The information received in this regard is commented on in the earlier chapters of this Report. The Board has considered all of this material in coming to its conclusion. The documents filled a large number of ring binders.

[109] The EPA commissioned a Key Issues Report, under s149G(3) of the RMA, from Auckland Council. That report is commented on above and considered throughout this Report. It has thus been considered and all matters raised therein addressed.

[110] The Board, through the EPA, commissioned one 42A Report relating to the s104D gateway test and related matters. The 42A Report and the evidence presented to the Board throughout the Hearing on the same have been considered throughout this Report and were of great assistance.

[111] The Board also considered all of the submissions and evidence given on behalf of the parties and the JWS Reports described above.

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[46] Refer to the amendments to the Unitary Plan made by Whata J in *Royal Forest and Bird Protection Society Incorporated v Auckland Council* [2017] NZHC 980 issued on 15 May 2017.

[47] Contained in a number of volumes comprised of multiple folders.

# 6. STATUTORY CONTEXT

[112] This chapter expands on the high-level overview of the statutory framework set out in chapter 3 of this Report. This chapter also sets out in some detail the statutory context relevant to the Board's decision-making with respect to the NoRs and applications for resource consent relating to the Proposal.

[113] While not exhaustive, the commentary that follows focuses on the most relevant provisions. These include:

(a) Provisions relevant to NoRs and designations;

(b) Provisions relevant to applications for resource consent;

(c) Other relevant matters; and

(d) Part 2 of the RMA.

## 6.1 PROVISIONS RELEVANT TO NORS AND DESIGNATIONS

[114] In undertaking its functions under s149P of the RMA in relation to NoRs, the Board is required to have regard to the matters set out in s171(1) and comply with s171(1A) as if it were the territorial authority. The Board may then cancel, confirm, confirm but modify or impose conditions on the NoRs as it thinks fit, in accordance with s149P(4)(b).

### Relevant considerations — s171

[115] Section 171(1) of the RMA provides that:

> "*When considering a requirement and any submissions received, the territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to —*
>
> *(a) any relevant provisions of -*
>
> *(i) a national policy statement;*
>
> *(ii) a New Zealand coastal policy statement;*
>
> *(iii) a regional policy statement or proposed regional policy statement;*
>
> *(iv) a plan or proposed plan; and*
>
> *(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking work if -*
>
> *(i) The requiring authority does not have an interest in the land sufficient for undertaking the work; or*
>
> *(ii) It is likely that the work will have a significant adverse effect on the environment; and*

*(c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and*

*(d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.*"

[116] In short, the Board is required to consider the effects on the environment of allowing the NoRs, having particular regard to:

(a) Relevant national, regional and district planning instruments;

(b) Whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work; and

(c) Whether the work and designation are reasonably necessary for achieving NZTA's objectives for which the designations are sought.

**Definitions of "environment" and "effect" — Section 171(1)**

[117] In considering effects under s171 of the RMA, the Board is mindful of the very broad definition of both the terms "environment" and "effect" in ss2 and 3 of the RMA.

[118] The term "environment" (s2) is defined as including:

(a) Ecosystems and their constituent parts, including people and communities; and

(b) All natural and physical resources; and

(c) Amenity values; and

(d) The social, economic, aesthetic, and cultural conditions that affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

[119] The Board must have regard to effects on the environment, including the potential effects of the Proposal, both positive (benefits) and adverse, on the people and communities along the proposed route or otherwise affected by the Proposal.

[120] The term "effect" is defined in s3 of the RMA, unless the context otherwise requires, as including:

(a) Any positive or adverse effect; and

(b) Any temporary or permanent effect; and

(c) Any past, present, or future effect; and

(d) Any cumulative effect which arises over time or in combination with other effects regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) Any potential effect of high probability; and

(f) Any potential effect of low probability which has a high potential impact.

[121] The Board is therefore entitled to consider not only potential adverse effects of the Project but also any positive effects (benefits) of the Proposal. These include broad issues relating to the benefits of such infrastructure in terms of safety and capacity improvements, decreased travel times and alleviation of traffic congestion, alongside commendable aspects such as addressing legacy groundwater issues and improving the treatment of catchment-wide stormwater in the wider Proposal area.

[122] This, of course, extends to the Board's consideration of the resource consents in chapter 6.2 of this Report.

### Consideration of alternatives — s171(1)(b)

[123] In terms of s171(1)(b) of the RMA, there is a significant body of case law[48] that addresses the scope of the Board's jurisdiction in relation to the consideration of alternatives. The Board examines this issue in greater detail in chapters 12 and 15.12 of this Report.

[124] The relevant legal principles can be briefly summarised as follows:

(a) The requirement to consider alternatives only arises where the Requiring Authority does not have an interest in the land required for the work, or where the Proposal is likely to have a significant adverse effect on the environment;

(b) The purpose of this requirement to consider alternatives is to ensure that the Requiring Authority has not acted arbitrarily in its selection of the site or route. The focus is on the process undertaken by the Requiring

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[48] Re *Queenstown Airport Corporation Limited* [2012] NZEnvC 206;
*Waimari District Council v Christchurch City Council* C30/83;
*Estate of P Moran v Transit New Zealand* W55/99;
*Te Runanga o Te Atiawa ki Whakarongotai Inc v Transit New Zealand* W23/2002; and
*Wymondley Against the Motorway Action Group v Transit New Zealand* A22/2003.

Authority and whether or not realistic alternatives have been considered; and

(c) The relative merits of the alternatives are not relevant and it is not within the Board's powers to find that the Requiring Authority has selected the "wrong" alternative or to substitute its own selection for that of the Requiring Authority.

### Outline Plan of Works — s176A

[125] Section 176A of the RMA is relevant in the context of the Board's decision. That section obliges the Requiring Authority to submit an outline plan of work (Outline Plan) to the territorial authority (in this case, Auckland Council) to enable the Council to request changes before construction of a Proposal commences.

[126] The Outline Plan must show specific details of the work (such as height, bulk, location, contour, access and parking, landscaping) and any other matters to avoid, remedy or mitigate adverse effects of the work. In this case, Auckland Council is entitled to request changes to the Outline Plan, and has a right to appeal to the Environment Court if those changes are not accepted by NZTA as the Requiring Authority.

[127] The Board has the power under s149P(4)(c) of the RMA to waive the requirement for an Outline Plan. NZTA has not applied for a waiver. The Board has not granted one.

## 6.2 PROVISIONS RELEVANT TO RESOURCE CONSENTS

### Non-complying activities — s104D

[128] There was no contest to the resource consent activities relating to the Proposal being bundled and assessed as a non-complying activity. The Board agrees.

[129] The Board is also mindful that the RMA precludes it from granting consent unless the Proposal can pass at least one of the two limbs of the "gateway test" under s104D of the RMA. The Board set out that test in full below:

> "*(1) Despite any decision made for the purpose of section 95A(2)(a) in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either —*
>
> ***[Adverse effects limb]***
>
> *(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or*
>
> ***[Objectives and policies limb]***

*(b) the application is for an activity that will not be contrary to the objectives and policies of—*

*(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or*

*(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or*

*(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.*"

[130] A full analysis of the Proposal against the gateway test is addressed later in the Report, both in terms of the legal issues arising and in the Board's evaluation. It was common ground that the EWL cannot pass the adverse effects limb of the gateway test. Thus, the focus is on the objectives and policies limb. It is sufficient to indicate at this stage that the extent of the proposed 18.3ha reclamation of the Māngere Inlet required the Board's close attention. The Board will return to this matter in chapter 14.3 of this Report.

## Relevant considerations — s104

[131] Section 104B provides the jurisdiction to grant or decline an application for a resource consent.

[132] The starting point for the Board's consideration of the applications for resource consent is s104 of the RMA (although, as mentioned earlier, there is invariably some overlap between s104 and the s104D gateway test). The relevant aspects of s104 are:

"***104 Consideration of Applications***

*(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to:*

*(a) any actual and potential effects on the environment of allowing the activity; and*

*(b) any relevant provisions of—*

*(i) a national environmental standard:*

*(ii) other regulations:*

*(iii) a national policy statement:*

*(iv) a New Zealand Coastal Policy Statement:*

*(v) a regional policy statement or proposed regional policy statement:*

*(vi) a plan or proposed plan; and*

*(c) any other matter the consent authority considered relevant and reasonably necessary to determine the application.*"

[133] The AUP:OP has, unsurprisingly, been a central s104(1)(b)(vi) matter that the Board has had to consider. Many of its policies are engaged by the Proposal.

[134] Section 104(3) of the RMA prevents the Board from granting a discharge consent contrary to s107 (addressed below).

[135] Section 104(3) also prevents the Board from having regard to trade competition or the effects of trade competition (addressed below).

[136] The Board notes that one of the matters it is required to have regard to under s104 is the New Zealand Coastal Policy Statement 2010 (NZCPS). The Supreme Court decision in *Environmental Defence Society v King Salmon*[49] is relevant in that regard and is discussed in more detail in other chapters of this Report.

[137] During the Hearing, Mr Mulligan offered an alternate view, with the "ethos" of "particularisation", submitting that the newly-minted AUP:OP avoided any need to circle back to the NZCPS or indeed Part 2 of the RMA [50] [51]. The Board will return to this matter later throughout this Report.

## Matters relevant to discharge consents and reclamations — ss105 and 107

[138] Sections 105(1) and 107 of the RMA are relevant to the Board's consideration of the discharge consents relating to the Proposal. Section 105(2) is relevant to the reclamations.

[139] Section 105 states:

> "*(1) If an application is for a discharge permit or a coastal permit to do something that would contravene section 15 or section 15B, the consent authority must, in addition to the matters in section 104(1), have regard to—*
>
> *(a) the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*
>
> *(b) the applicant's reasons for the proposed choice; and*
>
> *(c) any possible alternative methods of discharge, including discharge into any other receiving environment.*
>
> *(2) If an application is for a resource consent for a reclamation, the consent authority must, in addition to the matters in section 104(1),*

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[49] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* – [2013] NZSC 101.

[50] Transcript, Mulligan, p224 to 228. Mr Mulligan also noted a number of other approaches as outlined in paragraphs [163-165].

[51] Closing Statement, Mulligan, para 21.43, citing *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 and *Appealing Wanaka Incorporated v Queenstown Lakes District Council* [2015] NZEnvC 139.

*consider whether an esplanade reserve or esplanade strip is appropriate and, if so, impose a condition under section 108(2)(g) on the resource consent.*"

[140] Section 107 relevantly provides that:

> "*(1) Except as provided for in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would contravene section 15 or section 15A allowing—*
>
> *(a) The discharge of a contaminant or water into water; or*
>
> *(b) A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or*
>
> *…*
>
> *if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar or other contaminants or water) is likely to give rise to all or any of the following effects in the receiving waters—*
>
> *(c) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials;*
>
> *(d) Any conspicuous change in the colour or visual clarity;*
>
> *(e) Any emission of objectionable odour;*
>
> *(f) The rendering of freshwater unsuitable for consumption by farm animals;*
>
> *(g) Any significant adverse effects on aquatic life.*
>
> *(2) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—*
>
> *(a) That exceptional circumstances justify granting the permit; or*
>
> *(b) That the discharge is of a temporary nature; or*
>
> *(c) That the discharge is associated with necessary maintenance work —*
>
> *and that it is consistent with the purpose of this Act to do so.*"

[141] The Board has considered these matters in the context of the discharge of contaminants required by the Proposal, in particular in relation to stormwater and leachate and dredging of the Māngere Inlet. This is dealt with in more detail in various resource consent chapters that follow throughout chapter 14 of this Report.

## 6.3 OTHER RELEVANT MATTERS

[142] Under ss104(1)(c) and 171(1)(d) of the RMA, the Board is required to have regard or particular regard to any matters beyond those specified in those sections that the Board considers "relevant and reasonably necessary" to determine the NoRs and

applications for resource consent, respectively. The AEE[52] sets out a large number of other relevant matters, some of which received considerable attention at the Hearing.

[143] A number of documents were also produced during the Hearing or presented to the Board as being relevant to the Proposal. Many of these other documents are listed in [Appendix 9: List of Documents and Exhibits Produced at the Hearing].

[144] The Board has reviewed these documents and has considered them to the extent that they are relevant and reasonably necessary to its evaluation under ss104 and 171. It is not necessary to specifically address each of these documents in detail.

## 6.4 TRADE COMPETITION

[145] Sections 104(3)(a)(i) and 171(1A) of the RMA prevent the Board from having regard to trade competition or the effects of trade competition. These require that the Board must not have regard to trade competition or the effects of trade competition when considering the application or NoR and any submissions received in relation to the Proposal.

[146] What constitutes "trade competition" under the RMA was considered by the Environment Court in *General Distributors Limited v Foodstuffs Properties (Wellington) Limited.*[53] The Court noted in that case that "trade competitor" and "trade competition" are not defined in the Act. Taking guidance from the Concise Oxford Dictionary, it held that trade competition occurs where, "*two or more organisations [are] striving to establish superiority over other(s) in the buying and selling of (in this case) goods*".

[147] As mentioned in chapter 4.2 of this Report, a small number of submitters identified themselves as trade competitors of NZTA. The Board is satisfied that no Parties are trade competitors of NZTA in terms of the intended meaning of that term in the RMA. It is self-evident from the submission forms of these submitters that they are not trade competitors as that term is correctly understood.

[148] There was occasional reference in evidence or submissions relating to the Port Link Road that Ports of Auckland Limited (POAL) was a trade competitor of Port of Tauranga. While that is true, the Board is satisfied that POAL's relevant submissions were motivated by its status as a land owner and not for competitive reasons and is directly affected by an effect of the activity in terms of s308B of the

[52] AEE, Section 15.8, in particular Table 15-2.

[53] [2011] NZEnvC 112.

RMA. The Board has been governed by ss104(3)(a)(i) and 171(1A) throughout and had no regard to any trade competitor considerations.

## 6.5 CONDITIONS

[149] The Board is entitled to impose conditions, although the power to impose such conditions is not unrestrained. Accordingly, the Board is limited by the established *Newbury*[54] principles. It is well settled that these principles set out that conditions are to:

(a) Be for a resource management purpose, not an ulterior one;

(b) Fairly and reasonably relate to the development authorised; and

(c) Not be so unreasonable that a reasonable planning authority, duly applying its statutory duties, could not have approved it.

[150] Conditions imposed by the Board must also be certain and enforceable.[55]

[151] Section 108(1) of the RMA and s149P(2) of the RMA establishes the Board's jurisdiction to impose conditions on resource consents. Section 108(1) provides as follows:

> "*Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).*"

[152] Similarly, s149P(4)(b) of the RMA establishes the Board's jurisdiction to impose conditions on an NoR and designation as follows:

> "*A board of inquiry considering a matter that is a notice or requirement for a designation or to alter a designation—*
>
> *…*
>
> *(b) may—*
>
> *…*
>
> *(iii) confirm the requirement, but modify it or impose conditions on it as the board thinks fit ...*"

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[54] *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 at pp599 – 600, 607 – 608, 618 – 619, as applied by *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, at [para 66].

[55] *Bitumix Ltd v Mt Wellington Borough Council* [1979] 2 NZLR 57.

[153] In light of earlier commentary in chapter 3.3 of this Report, this also gives the Board jurisdiction to impose conditions on an altered designation (NoR2), attaching to both land already designated and land subject to the altered designation. The Board accepts the qualifier that any such conditions, however, should fairly and reasonably relate to works proposed by the notice to alter the existing designation.[56]

## 6.6 PART 2 OF THE RMA

[154] The assessment of NoRs and applications for resource consent are expressed to be "subject to Part 2" of the RMA. As mentioned later, the application of Part 2, in the context of applications for resource consent, is currently before the Court of Appeal.[57] Notwithstanding this, Part 2 is set out in full below because it is important. It commences with the purpose of the RMA, which is set out in s5 of the RMA.

[155] Section 5 states that:

> "*(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.*
>
> *(2) In this Act, 'sustainable management' means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while —*
>
> *(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonable foreseeable needs of future generations; and*
>
> *(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
>
> *(c) avoiding, remedying or mitigating any adverse effects of activities on the environment.*"

[156] Section 6 of the RMA sets out the matters of national importance, which the Board must "recognise and provide for" to the extent that they are relevant:

> "*(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development;*
>
> *(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development;*
>
> *(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;*

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[56] Memorandum of Counsel and Planner for the Board of Inquiry, dated 9 June 2017, para 89–97.

[57] *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52. The Board analysis is due to be heard in November 2017. The Board goes on to analyse and consider *Davidson* and its effect later in a subsequent chapter [12] of this Report.

> *(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers;*
>
> *(e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;*
>
> *(f) The protection of historic heritage from inappropriate subdivision, use, and development; and*
>
> *(g) The protection of protected customary rights.*"

[157] Section 7 identifies other matters to which the Board is to "have particular regard to". The aspects of s7 that the Board considers to be relevant in terms of the Proposal are:

> "*(a) Kaitiakitanga:*
>
> *(aa) The ethic of stewardship:*
>
> *(b) The efficient use and development of natural and physical resources:*
>
> *…*
>
> *(c) The maintenance and enhancement of amenity values:*
>
> *(d) Intrinsic values of ecosystems:*
>
> *…*
>
> *(f) Maintenance and enhancement of the quality of the environment.*"

[158] Section 8 of the RMA addresses Treaty of Waitangi issues. It provides that:

> "*In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*"

[159] Prior to the High Court's decision in *Davidson*, it was well settled that, in making a decision, a board is to apply an "overall broad judgment" having regard to various competing considerations that might arise in any given set of circumstances. The classic enunciation of that proposition is contained in *North Shore City Council v Auckland Regional Council,*[58] which was affirmed on appeal to the High Court in *Green & McCahill Properties Limited v Auckland Regional Council*, which set out the following:[59]

> "*The method of applying section 5 … involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. This recognises that the Act has a single purpose. Such an approach allows for the comparison of conflicting considerations and the scale and degree of them, and also their relative importance or proportion in the final outcome.*"

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[58] [1997] NZRMA 59; [1996] 2 ELRNZ 305.

[59] [1997] NZRMA 519.

[160] Whether *Davidson* has really altered this approach and the extent to which Part 2 guides decision-makers under s104 is currently a complex legal issue. The Board analyses this in greater detail in chapter 12.5 of this Report.

[161] Mr Mulligan assisted the Board by submitting that, in light of the uncertainty under the case authority, there appears to be two broad options available to the Board:[60]

(a) Apply an overall broad judgment under Part 2 in relation to the consideration of the NoRs under s171 but only consider the resource consent applications under s104; or

(b) Apply the "exceptions" within the *Davidson* case that outline when recourse to Part 2 is appropriate, on the grounds that the plans have incomplete coverage as they do not cover a situation of an integrated proposal for a NoR and resource consents or a proposal that sits across both district and regional coastal plan areas. The appropriateness of recourse to Part 2 is reinforced by the fact that Part 2 provides an integrated decision-making framework across resource consents and NoRs.

[162] Counsel further submitted that the High Court's decision in *Basin Bridge* provides a clear and binding authority that Part 2 remains relevant to decision-making on NoRs (under s171), but the law has not yet been settled with respect to the role Part 2 should play for resource consents (under s104).[61] The Board see pragmatic sense in that submission.

[163] The Board acknowledges that there is a third option[62], supported by two recent Environment Court decisions in *Pierau v Auckland Council* [63] and *Save Wanaka Lakefront Reserve Inc v Queenstown Lakes District Council,*[64] a sort of "cover all bases approach" whereby the Court adopted both a Part 2 assessment and a *Davidson* approach in the alternative when assessing resource consents. Notably, in both of these decisions the separate assessments undertaken resulted in the same outcome.

[164] The Board is appreciative of the assistance provided by all counsel on this arguably unsettled and still evolving area of the law.

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[60] Opening Statement, Mulligan, para 25.69.

[61] Closing Statement, Mulligan, para 22.2.

[62] Closing Statement, Mulligan, para 22.5 – 22.6

[63] [2017] NZEnvC 90.

[64] [2017] NZEnvC 88.

[165] It is sufficient to say at this stage that the Board has reached its overall assessment and appraisal of the Proposal under the statutory requirements set out above in this chapter.

# 7. RELEVANT PLANNING INSTRUMENTS

[166] The previous chapter of this Report provides an overview of the statutory context applying to the Board. This chapter provides an overview of the cascading framework of planning instruments relevant to the Board's consideration of the Proposal. It therefore addresses, at a relatively high level, the planning instruments that the Board is required to have regard to under ss104(1)(b) and 171(1)(a) of the RMA.

[167] The various statutory planning documents and instruments set out in this chapter have all been considered and weighed by the Board. This is reflected in the findings and conclusions that are discussed in detail in the subsequent chapters of this Report, in particular in chapters 14.4 and 15.11. The Proposal invoked a great many provisions.

[168] The Joint Witness Statement (JWS) Report of the planners agreed that the documents listed in s14 of the AEE should form part of the common bundle (with the addition of the National Policy Statement for Renewable Electricity Generation).[65] The Board agrees. The hierarchy of the relevant planning instruments and documents is usefully illustrated below in [Figure 3]:

[65] JWS Report – Planning, para 3.1.

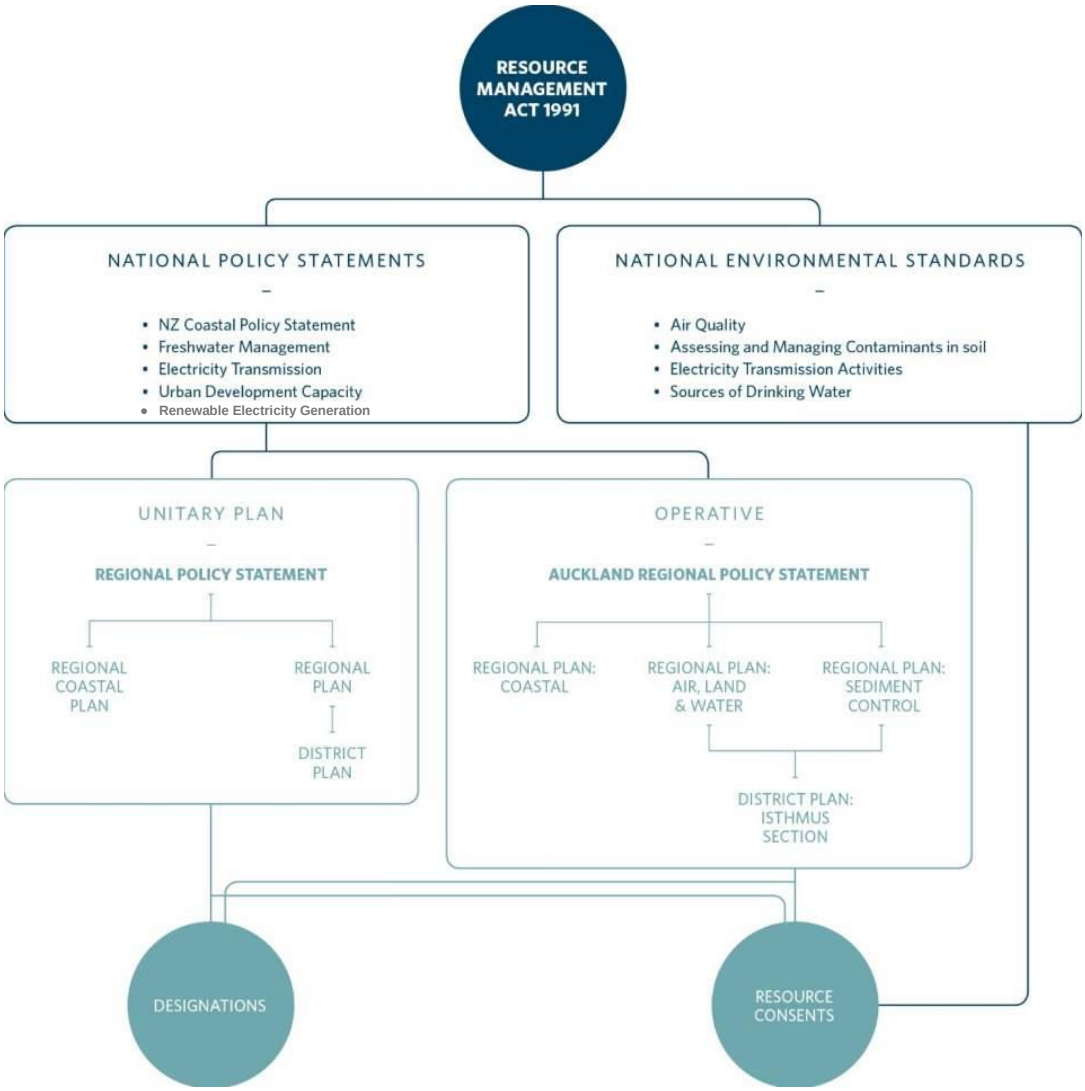


**Figure 3: Wiring diagram of relevant provisions (annotated).**[66]

[169] It is not necessary to undertake an analysis of all of the relevant planning provisions and the evidence that the Board heard relating to them. The Board has considered all of the relevant instruments addressed below in coming to its decision. The Board will address specific planning instruments or provisions where necessary or desirable to assist in providing reasons for its findings and conclusions.

## 7.1 NATIONAL PLANNING INSTRUMENTS

[170] Central government has issued a number of national policy documents and standards that are relevant to the Proposal. These planning instruments are addressed in turn below, some of which the Board has already mentioned earlier in this Report.

[66] Reproduced from AEE, Figure 14-1 (with necessary modifications).

## New Zealand Coastal Policy Statement 2010 (NZCPS)

[171] The New Zealand Coastal Policy Statement is a national policy statement under the RMA. The purpose of the NZCPS is to state policies in order to achieve the purpose of the RMA in relation to New Zealand's coastal environment.

[172] The Board is required to "have regard" or "particular regard" to the relevant provisions of the NZCPS. The Board has already noted that it must do so in the context of all of the relevant considerations provided for in ss104 and 171 while attributing the appropriate weight to those provisions, particularly in light of the *King Salmon* decision. In that regard, various aspects of the NZCPS are relevant, particularly to the proposed reclamations of the Māngere Inlet that traverse the coastal environment and to the discharges to the CMA that will result from the construction and operation of the Proposal.

[173] The Supreme Court in *King Salmon* was considering plan changes to facilitate the development of a marine farm in an area of outstanding natural character and outstanding natural landscape. The Court was, therefore, required to address the provisions of the NZCPS relating to those aspects of the coastal environment, namely Policies 13(1)(a) and 15(a). A key issue was whether those policies established "environmental bottom lines" that needed to be strictly applied or whether an "overall broad judgment" in accordance with hitherto accepted practice needed to be exercised. The Court concluded that the policies in question require the avoidance of adverse effects on areas of the coastal environment that have outstanding natural character, outstanding natural features and outstanding natural landscapes. In those circumstances, where the regional coastal plan was required to "give effect to" the NZCPS, strict adherence to directive policies contained in the NZCPS was required. It was not appropriate for decision-makers on plan changes to make an "overall broad judgment" in terms of Part 2 of the RMA.

[174] Of particular importance, the majority considered the use and relevance of the verb "avoid" in relation to Policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS:

> "*[96] … We consider that 'avoid' has its ordinary meaning of 'not allow' or 'prevent the occurrence of'. In the sequence of 'avoiding, remedying, or mitigating any adverse effects of activities on the environment' in s 5(2)(c), for example, it is difficult to see that 'avoid' could sensibly bear any other meaning. Similarly in relation to policies 13(1)(a) and (b) and 15(a) and (b), which also juxtaposed the words 'avoid', 'remedy' and 'mitigate'. This interpretation with objective two of the NZCPS which is, in part, '[t]o preserve the natural character of the coastal environment and protect natural features and landscape values through … identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities'.*
>
> *…*

> *[97] However, taking that meaning [of avoid] may not advance matters greatly: whether 'avoid' (in the sense of 'not allow' or 'prevent the occurrence of') bites depends on whether the 'overall judgment' approach or the 'environmental bottom line' approach is adopted under the 'overall judgment' approach, a policy direction to 'avoid' adverse effect is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to greater weight; under the 'environmental bottom line' approach, it has greater force.*"

[175] The Board has given careful consideration to these dicta relating to NZCPS by New Zealand's final appellate court. It is clear from the Supreme Court decision that the NZCPS, particularly the directive policies such as Policies 13(1)(a) and 15(a), are clearly entitled to very significant weight. The Board has accorded those policies such weight in deference to the Supreme Court's decision. However, as already noted, the Board is required by s104 to "have regard to" and s171 "to have particular regard" only (not to "give effect to") the NZCPS. It is required to consider that instrument alongside other factors made relevant by those sections in making a balanced judgment taking account of all such factors. That is the approach it has adopted, as will be apparent from its specific consideration of this issue in the context of the applications before the Board. As discussed later, it is the AUP:OP that has given effect to the NZCPS. The overlap and duplication is considerable and highly relevant.

[176] In that regard, the Māngere Inlet and Ōtāhuhu Creek are covered by the NZCPS. They fall short of being sites of outstanding natural character and are already crossed by SH1 (Ōtāhuhu Inlet) and SH20 (Māngere Inlet). The Māngere Inlet is located adjacent to outstanding natural features identified in the AUP:OP, in particular the Te Hōpua a Rangi explosion crater and tuff exposure and Southdown pahoehoe lava flows including Anns Creek. It also traverses and impacts on marine Significant Ecological Areas (SEAs) that echo biodiversity values protected under the NZCPS.

[177] In looking at the NZCPS more broadly, the Key Issues Report prepared by Auckland Council usefully identified eight key themes relating to the coastal environment:[67]

(a) Limiting reclamations to instances where other practicable options are unavailable;

(b) Ensuring that any reclamation minimises its footprint within the coastal environment;

[67] At [Para 46].

(c) Preserving natural ecosystems and their biological functions;

(d) Preserving coastal landscape values;

(e) Maintaining and enhancing public access to the coastal environment;

(f) Enabling use of the coastal environment to support the community;

(g) Recognising coastal hazards, including sea level rise; and

(h) Taking into account the Treaty of Waitangi and cultural values.

[178] The authors go on to say that:[68]

> "*These themes are initially identified through the NZCPS and flow through to the regional planning provisions, which identify Auckland's coastal environment as a fundamental part of the region's identity and the need for any development within the coastal environment to be of an appropriate form in appropriate locations. NZCPS policy 10 also identifies that reclamation in the CMA is to [be] avoided unless:*
>
> *a. Land outside the coastal marine area is unavailable for the activity;*
>
> *b. The activity which requires the reclamation can only occur adjacent to or within the coastal marine area;*
>
> *c. There are no practicable alternative methods for providing the activity; and*
>
> *d. The reclamation will provide significant regional or national benefit.*"

[179] The Board returns later in chapter 12 of this Report to the recent *Davidson* law and its interaction with *King Salmon* and the Board's application of the NZCPS. As briefly mentioned earlier, the Board will also return to address the proposition of "particularisation" submitted by counsel for NZTA in light of the recent *Davidson* case.

### Hauraki Marine Park Gulf Act 2000

[180] In accordance with s10 of the Hauraki Gulf Marine Park Act (HGMP Act), ss7 and 8 of the HGMP Act must be treated as a New Zealand coastal policy statement issued under the RMA in relation to the coastal environment of the Hauraki Gulf. The HGMP Act provides that if there is a conflict between those provisions and the NZCPS, the NZCPS prevails.[69] The relevance of the HGMP Act is limited to the proposed declamation and bridging works in the Ōtāhuhu Creek.

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[68] At [Para 47].

[69] Section 10(2) of the HGMP Act.

**National Policy Statement Freshwater Management 2014 (Updated August 2017 to incorporate amendments from the National Policy Statement for Freshwater Amendment Order 2017)**

[181] The National Policy Statement for Freshwater Management 2014 (NPS – Freshwater Management) came into effect on 1 August 2014. It replaced the first generation NPS – Freshwater Management, which came into effect earlier in 2011.

[182] During the course of the Hearing the NPS – Freshwater Management was updated. These changes came into effect on 7 September 2017. There are no transitional provisions in relation to the amendments, therefore the Board must consider the updated version. The Board has examined the updated version and the changes relevant to the Board's consideration are not significant (particularly in the context of Policy A4 mentioned below).

[183] A key change to the NPS – Freshwater is the management of freshwater through a framework that considers and recognises Te Mana o te Wai – the integrated and holistic wellbeing of a freshwater body.

[184] The NPS – Freshwater Management sets out objectives and policies in relation to the management of freshwater quality and quantity and is therefore relevant to aspects of the Proposal that affect freshwater, such as discharges to freshwater and stream diversions.

[185] The provisions of the NPS – Freshwater Management establish national bottom lines for the identified compulsory national values, being ecosystem health and human health (contact). Regional councils are to establish planning regimes within specified timeframes in order to ensure that those national bottom lines are met over time. The amended version has also introduced national targets for water quality improvement (to be developed and finalised by regional councils by 31 December 2018).[70]

[186] In the interim period, while regional councils are establishing the required planning framework to implement the objectives and policies of the NPS – Freshwater Management, it directs regional councils to include specific policies in regional plans that require decision-makers to consider freshwater management issues. In that regard, Policy A4 in particular requires the Board:

> "*1. When considering any application for a discharge the consent authority must have regard to the following matters:*
>
> *a. the extent to which the discharge would avoid contamination that will have an adverse effect on the life-supporting capacity of fresh water including on any ecosystem associated with fresh water and*

[70] Policy A6.

*b. the extent to which it is feasible and dependable that any more than minor adverse effect on fresh water, and on any ecosystem associated with fresh water, resulting from the discharge would be avoided.*

*2a. … health of people and communities as affected by their contact with fresh water; and*

*b. the extent to which it is feasible and dependable that any more than minor adverse effect on the health of people and communities as affected by their contact with fresh water resulting from the discharge would be avoided.*"

[187] The Board has done so. The potential effects of the Proposal on freshwater resources are addressed later in chapter 14.4 of this Report. This includes the development of innovative solutions to reduce long-term discharge of contaminants to the environment (e.g. stormwater and leachate) put forward by NZTA as part of the Proposal.

### National Policy Statement Urban Development Capacity 2016

[188] The relevance of the National Policy Statement on Urban Development Capacity (NPS – Urban Development Capacity) to the Proposal received some attention. The authors of the Key Issues Report did not consider it relevant.[71] The planners at conferencing disagreed.[72] Advice from the Board's counsel and planner had this to say:[73]

> "*We consider that the NPS-UDC is a relevant document to be considered in the Board's assessment. While on its face the NPS-UDC is concerned with urban development capacity and the availability of land to meet housing and business demand, it is also designed to provide direction to decision-makers making planning decisions that affect urban environments.*"

[189] The Board agrees. The Board returns to address this later in chapter 15.11 of this Report.

### National Policy Statement for Renewable Electricity Generation 2011

[190] The National Policy Statement for Renewable Electricity Generation (NPS – Renewable Electricity Generation) came into effect on 31 May 2011 to set out the objective and policies for renewable electricity and recognise the benefits of

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[71] At [Para 29].

[72] JWS – Planning, para 3.12.

[73] Memorandum of Counsel and Planner to the Board of Inquiry relating to section 104D of the RMA and other matters, dated 9 June 2017, para 7.

renewable energy. The planners agreed that the NPS – Renewable Electricity Generation is relevant to the Proposal.[74] It was advanced by Mr Grala, planning witness for Mercury, in relation to the potential for reverse sensitivity effects on the Southdown site, the relevance of which was disputed by NZTA.[75] The Board will return to this later in chapter 15.11 of this Report.

### National Policy Statement Electricity Transmission 2008 and National Environmental Standard for Electricity Transmission Activities (2009)

[191] The National Policy Statement on Electricity Transmission (NPS – Electricity Transmission) came into effect on 10 April 2008, and acknowledges the national significance of the national grid. This is through objectives and policies for managing the electricity transmission network that seek to achieve the efficient transmission of electricity while managing adverse effects of the network and of other activities on the network.

[192] The National Environmental Standard for Electricity Transmission Activities (NES – Electricity) contains regulations for the relocation of existing transmission lines.

[193] The Proposal requires the relocation of some transmission towers and lines, on both public and private land. NZTA has progressed its application in consultation with Transpower as owner and operator of the national grid assets. The evidence presented by Transpower, and summarised in the closing submissions of Mr Gardner-Hopkins, gives the Board a high level of confidence that the Proposal is compatible with safeguarding the national grid. The Board returns to this later in chapter 15.11 of this Report.

### National Environmental Standard for Sources of Human Drinking Water 2008

[194] The National Environmental Standard for Sources of Human Drinking Water (NES – Drinking Water) came into effect on 20 June 2008, with the intent of reducing the risk of contaminating drinking water sources such as rivers and groundwater. The NES – Drinking Water requires decision-makers to ensure that effects on drinking water sources are considered in decisions on resource consents and regional plans. As highlighted in the Ministers' reasons, the Proposal crosses over bulk water supply for the Auckland Region (the Hunua 4 bulk watermain). The EWL does not directly affect the Hunua 4 bulk watermain and no evidence was put before the Board that identified any conflict with the NES – Drinking Water. There is no need to comment further.

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[74] JWS – Planning, para 3.12.

[75] Opening Statement, Mulligan, para 24.9–24.14.

### National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health 2011

[195] The National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (NES – Soil Contamination) came into effect on 1 January 2012, and provides a nationally consistent set of planning regulations and contaminant values and thresholds, with a particular focus on human health.

[196] The application identifies a number of contaminated sites in the Proposal area and wider catchments, which are indicative of its long history of land use and development.[76] The potential level of contamination and the volume of soil disturbance proposed exceeds the permitted activity thresholds and resource consent is required. NZTA proposes to manage risk and uncertainty relating to contamination along the Proposal area through a suite of management plans as discussed later in chapter 14.2 of this Report under the sub-heading *Contaminated Land*. Further consideration of the NES – Soil Contamination is provided in chapter 14.4 of this Report.

### National Environmental Standard for Air Quality 2004

[197] The National Environmental Standard for Air Quality (NES – Air Quality) came into effect on 8 October 2004 to guarantee a minimum level of health protection through a set of nationally consistent regulations for managing the effects of air quality, including setting ambient air quality standards. While no resource consents have been applied for under the NES – Air Quality, there was no contest that it has some relevance to the Proposal. The Board returns to this to the extent that it is necessary to its findings on the resource consents in chapter 14 and NoRs in chapter 15 of this Report.

## 7.2 REGIONAL AND DISTRICT PLANNING INSTRUMENTS

[198] There are a range of regional and district planning instruments, both operative and proposed, which are relevant to the Proposal. These documents are briefly addressed below and have been considered throughout the Board's deliberations. The Board will return to the specific aspects of those documents where necessary later in this Report.

### Auckland Unitary Plan: Operative in Part

[199] The newly-minted AUP:OP is operative in part. The AUP:OP is the first planning instrument promulgated by the Auckland Council following the amalgamation of the regional and various district councils in the Auckland Region. The AUP:OP

[76] Contaminated Land Assessment in Volume 3 of the AEE.

contains all planning instruments required to be promulgated under the RMA. It combines into one single document:

(a) The Regional Policy Statement (AUP:OP$^{RPS}$);

(b) The Regional Coastal Plan (AUP:OP$^{RCP}$)

(c) The Regional Plan (AUP:OP$^{RP}$); and

(d) The District Plan (AUP:OP$^{DP}$).

[200] There are a number of appeals outstanding on the AUP:OP – some have been resolved since the applications were notified, including amendments to the provisions stemming from the recent decision in *Royal Forest and Bird Protection Society Incorporated v Auckland Council*[77] mentioned earlier in this Report. It was common ground that those appeals remaining have little relevance to this Proposal.

[201] While the AUP:OP$^{RCP}$ section has been submitted to the Minister of Conservation for approval, the transition from the legacy policy statement and plans, to the AUP:OP, is not quite complete. During conferencing the planners provided a useful overview of the status of the AUP:OP provisions.[78] The Board agrees with their assessment, and summarises as follows:

(a) The AUP:OP is the dominant planning document for the Proposal;

(b) The AUP:OP$^{RPS}$ can be given most weight and the legacy Regional Policy Statement can be given limited weight (unless otherwise stated). Outstanding appeals on the AUP:OP$^{RPS}$ relate to discrete minor provisions, none being relevant to the Proposal. The AUP:OP$^{RP}$ provisions can be given considerable weight and limited weight given to the legacy Regional Plans (except where noted otherwise);

(c) On 15 May 2017, the High Court released its judgment on the plan-wide appeal by Forest and Bird alleging an error of law regarding the NZCPS and the AUP:OP$^{RCP}$ [79]. Other outstanding appeals on the AUP:OP$^{RCP}$ relate to discrete minor provisions; none are relevant to the Proposal. The new plan is thus the predominant regional coastal planning document and the old Coastal Plan, while still relevant, has little weight;

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[77] [2017] NZHC 980.

[78] JWS Report – Planning, para 3.6–3.11.

[79] As a consequence of the appeal, additional policies were added to D9 Significant Ecological Areas Overlay (Policies 9.3.(9) and (10). See *Royal Forest and Bird Protection Society Incorporated v Auckland Council* [2017] NZHC 980.

(d) Outstanding appeals for the AUP:OP$^{DP}$ are discrete and mostly site specific. The overall "shape" of Auckland, including the zoning framework, is essentially settled. The AUP:OP$^{DP}$ can be given considerable weight; and

(e) The AUP:OP$^{DP}$ contains a National Grid Corridor Overlay applicable to the Proposal subject to the Court's consideration of a draft consent order. The final overlay provisions will be relevant insofar as any restrictions they may place on sites where national grid assets are being relocated.

[202] The Board has applied the provisions of the AUP:OP$^{RCP}$ outlined in the High Court decision. Those provisions are yet to be approved by the Minister of Conservation, but the Board has still applied them.

## Legacy Policy Statement and Plans

[203] For the reasons above relating to the status of the AUP:OP, and for the sake of brevity, the relevant legacy policy statement and plans are listed below. It is not necessary nor helpful to the Board's decision to cover these in any great detail. These are:

(a) Auckland Regional Policy Statement;

(b) Auckland Council Regional Plan(s):

(i) Coastal;

(ii) Sediment Control;

(iii) Air, Land and Water; and

(c) Auckland District Plan: Isthmus Section.

[204] The Board has considered and had regard to these instruments to the extent necessary.

## Key Rules, Objectives and Policies

[205] The relevant planning rules triggered by the Proposal and requiring resource consent are identified in the application documents.[80] It is not necessary to repeat these here. To avoid doubt, the district plan rules as such do not apply to the NoRs.

[206] During the course of the Hearing there was a particular focus on several key objectives and policies of the relevant regional and district planning instruments.

[80] Report 2 (Volume 3).

The Board turns to briefly introduce these below. For the most part these relate to the reclamation and biodiversity provisions triggered by the Proposal. The Board is mindful of the statement made by the authors of the Key Issues Report that, "*A great many policy provisions are relevant* …"[81] As mentioned earlier, the Board will address specific planning provisions where necessary or desirable to assist in providing reasons for its decision.

[207] Before the Board sets out the key provisions relevant to the Proposal it is useful to reflect on the following concluding remarks from the authors of the Key Issues Report:[82]

> "*... A wide range of policy provisions are relevant due to the nature of the proposal. Tensions arise between the policy thrust of individual themes.*
>
> *The Board consider issues associated with reclamation to be the greatest policy challenge. The appropriateness of the proposed reclamation underpins the entire project. As highlighted in this report, the policy framework at both a national and regional level seeks to avoid reclamation, with criteria for contemplating reclamation where it is unavoidable …*"

[208] Turning to the key coastal objectives and policies:[83]

(a) Reclamations – F2.2.2 Objectives and F2.2.3 Policies (Legacy Regional Coastal Plan policies 13.4.1 and 13.4.2);

(b) Outstanding Natural Features – D10.2 Objectives and D10.3.3 and D10.3.4 Policies (Legacy Regional Coastal Plan policies 5.4.); and

(c) Significant Ecological Areas – D9.2 Objectives and D9.3 Policies (Legacy Regional Coastal Plan policies 5.4.).

[209] A great deal of attention fell on the directive and at times tense relationship between reclamation policies F2.2.3.1 and F2.2.3.3,[84] which are set out below in full:

> "*(1) Avoid reclamation and drainage in the coastal marine area except where all of the following apply:*
>
> *(a) the reclamation will provide significant regional or national benefit;*
>
> *(b) there are no practicable alternative ways of providing for the activity, including locating it on land outside the coastal marine area;*

[81] At [Para 25].

[82] At [Para 139] to [–140].

[83] The Board notes the most relevant provisions identified in the Memorandum of Counsel and Planner to the Board of Inquiry relating to section 104D of the RMA and other matters, dated 9 June 2017, at [para 54].

[84] And subsequent policies in F2.2.3.5–10.

*(c) efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use, or to enable drainage.*

*…*

*(3) Provide for reclamation and works that are necessary to carry out any of the following:*

*(a) maintain or repair a reclamation;*

*(b) enable the repair and upgrade of existing reclamations and seawalls, by way of minor reclamation;*

*(c) carry out rehabilitation or remedial works;*

*(d) maintain or enhance public access or linkages with public open space to, within or adjacent to the coastal marine area;*

*(e) enable the construction and/or efficient operation of infrastructure, including but not limited to, ports, airports, roads, pipelines, electricity transmission, railways, ferry terminals, and electricity generation; or*

*(f) create or enhance habitat for indigenous species where degraded areas of the coastal environment require restoration or rehabilitation.*"

[210] Moving on to the key vegetation management and biodiversity objectives and policies in the AUP:OP:[85]

(a) D9 (and particularly policies D9.3.9 and D9.3.10 regarding the SEA overlays);

(b) E15 (and particularly policies E15.3.9 and E15.3.10 regarding vegetation management and biodiversity); and

(c) D9.3.1 and D9.3.2, and E15.3.2, which seek to minimise and offset adverse effects where avoidance is not practicable.

[211] And finally on to a range of other key provisions triggered by the Proposal, which broadly engage the following chapters (or particular sections) of the AUP:OP:[86]

(a) D21 – Sites and Places of Significance to Mana Whenua

(b) E26 – Infrastructure;

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[85] The Board notes the particularly relevant provisions identified in the Memorandum of Counsel and Planner to the Board of Inquiry relating to section 104D of the RMA and other matters, dated 9 June 2017, at [para 79]. Note – The reference to biodiversity policies D9.2.3.9/10 and E15.2.3.9/10 has been corrected (the correct reference is D9.3.9/10 and E15.3.9/10).

The Board also notes for clarification that these biodiversity policies in D9 and E15 are essentially worded the same.

[86] The Board adopts the relevant provisions not already identified above as referred to in Mulligan, Closing, at [21.20]. Note –The reference to D8 Historic Heritage has been corrected (the correct reference is D17).

(c) F2.11 – Discharges;

(d) E18 – Natural Character;

(e) D17 – Historic Heritage; and

(f) F2.14 – Use and Development.

[212] While a number of these objectives and policies received a considerable amount of attention with respect to the s104D gateway test, the Board is in no doubt that they (as well as all relevant provisions triggered) are also relevant to the substantive assessment required by ss104 and 171 of the RMA. Thus, its findings on the weightings to be applied are woven throughout the following chapters of this Report.

[213] For ease of reference a number of key provisions identified above are provided in full in [Appendix 10: Key Regional and District Objectives and Policies].

## Rule C1.5

[214] The Board encountered an interpretation issue that arose during the Hearing. The issue related to the bundling of activities and the application (or otherwise) of Rule C1.5 of the AUP:OP:

> "***C1.5. Applications for more than one activity***
>
> *(1) Where a proposal:*
>
> *(a) consists of more than one activity specified in the Plan; and*
>
> *(b) involves more than one type of resource consent or requires more than one resource consent; and*
>
> *(c) the effects of the activities overlap;*
>
> *the activities may be considered together.*
>
> *(2) Where different activities within a proposal are subject to different parts (regional, coastal or district) of the Plan, each activity will be assessed in terms of the objectives and policies which are relevant to that activity.*
>
> *(3) Where different activities within a proposal have effects which do not overlap, the activities will be considered separately.*"

[215] Propositions on the correct application of Rule C1.5 were advanced by counsel for Ngāti Whātua Ōrākei and Te Kawerau ā Maki, TOES and Others, and NZTA. No parties contested that the activity status of the consents should not be bundled. However, the key debate focused on whether the s104D non-complying activity assessment should focus on reclamation provisions, the AUP:OP$^{RCP}$ as a whole, or all relevant regional provisions (AUP:OP$^{RCP}$ and AUP:OP$^{RP}$). It was common

ground that for the purposes of the Board's analysis the district plan provisions of the AUP:OP$^{DP}$ were less relevant to the s104D assessment.[87]

[216] The Board accepts Ms Rickard's position that with the bundled non-complying activity status, all relevant regional provisions should be considered.[88] But the Board also acknowledges that the non-complying status is triggered by coastal activities in particular, the proposed reclamation, and by some regional activities such as stream works in an SEA. On that basis, the approach taken by Ms Coombes provides an appropriately cautious route through this planning analysis[89] that is to consider the most relevant coastal provisions first. This is also similar to the submission of Mr Burns,[90] albeit that he considers the most relevant to be those that relate to reclamation, rather than the broader AUP:OP$^{RCP}$. Thus, in chapter 14.3 of this Report, the Board first considers the Proposal under the reclamations provisions of the AUP:OP$^{RCP}$, then broadens its consideration to other relevant coastal provisions, and finally considers relevant AUP:OP$^{RP}$. In that way, the Board avoids artificially "finessing" out favourable provisions, notwithstanding that it accepts that the considerations are not a "numbers game", as it has discussed in chapter 12.5 of this Report.

[87] Ms Rickard acknowledged that the AUP:OP$^{DP}$ relevance was limited to a small number of land use activities not covered by NoRs (Transcript, p2433).

[88] Hearing Summary, Rickard, para 6.

[89] Statement of Primary Evidence, Coombes, para 10.8 and 10.9.

[90] Transcript, Burns, p691.

# 8. A BRIEF OVERVIEW

[217] This Report is in essence about the proposed EWL highway. NZTA has sought NoRs and various resource consents under the provisions of the RMA to enable it to construct the highway. The estimated cost of the Proposal is in the vicinity of $1.8 billion. Two Ministers of the Crown, the Minister for the Environment and the Minister of Conservation, consider that NZTA's proposal is one of national significance. Thus, Part 6AA of the RMA comes into play, under which part the Board has come into being.

[218] The Ministers' reasons are set out elsewhere in this Report.[91] Unsurprisingly they include the significant use of natural and physical resources that the construction of the proposed highway will consume, the proposed reclamation of approximately 18.3ha of the Manukau Harbour's Māngere Inlet, and, mirroring s142(3)(a)(i), widespread public concern or interest over actual or likely effects on the environment.

[219] The AEE[92] accurately describes the proposed highway as running, at its western end, from Neilson Street in Onehunga to just south of Princes Street in Ōtāhuhu at its eastern end. Eight "key features" of the highway Proposal are identified, which are set out in chapter 1.1 of this Report.[93]

[220] The AEE, and in its submissions NZTA, states the major need for the proposed highway is to address heavily congested roads in the Onehunga, Penrose and Mt Wellington areas of Auckland, those areas being of economic importance to the Auckland area and being the main industrial transport and distribution hub for both the city and the upper North Island. The EWL is described as enhancing connectivity, both to and from this area, as well as reducing travel times for all transport users, including freight.

[221] Reclamation is proposed to form part of the EWL alignment along the northern foreshore of the Māngere Inlet and includes a component that is described as:[94]

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91 Chapter [3.2].

92 AEE, Chapter 3.

93 Ibid.

94 Ibid, Chapter 1.

> "*The naturalisation of the existing highly modified coastal edge, which provides opportunities for enhanced public access and water quality improvements, assisting to restore the mana of the Māngere Inlet.*"

[222] As is apparent from processes described in other parts of this Report,[95] settling on an alignment for the proposed highway has not been easy. That part of the Auckland isthmus situated between the Neilson Street Interchange and the Mt Wellington Interchange (at Tip Top corner) on SH1 is the intensely concentrated home of a multiplicity of industrial sites. The only significant open areas adjacent to the proposed highway are Gloucester Park North and South (sitting inside a heavily modified volcanic tuff ring, Te Hōpua), Waikaraka Cemetery and Waikaraka Park, and the unique ecological area of Anns Creek.[96]

[223] The congestion caused by truck traffic moving freight into and out of the Onehunga-Southdown-Penrose area is already significant and is deteriorating.[97] The need for "an EWL" has been recognised for many years and is seen as a transport priority under the Auckland Plan.[98] Were such a road to be constructed, the areas across which it might pass present formidable difficulties of route selection. Aptly, the process has been likened to that of threading a needle. The geography of the narrow Auckland isthmus imposes constraints. So too does the concentrated industrial area "an EWL" is designed to serve. Further constraints of public opinion are imposed by the legitimate expectations of inhabitants of the Onehunga residential area, who value their already impaired connection with the Manukau Harbour foreshore.

[224] The Onehunga area was, and still is, of historical and strategic significance. For Māori in pre-European times, the Māngere Inlet had obvious significance. The Inlet at its easternmost point was but a few hundred metres from the Ōtāhuhu Creek, thus providing the entry and exit point for portage of waka between the Manukau and Waitematā Harbours. Towering above the northern shore of the Inlet is One Tree Hill / Maungakiekie, which at various times was the site of large pā and Mutukāroa-Hamlins Hill. The Inlet provided an obvious food source for Māori when they inhabited the area.

[225] The narrow Auckland isthmus, sitting as it does between two significant areas of large Māori settlement, the Northland Peninsula and the Waikato valley, was in pre-European times frequently fought over and the scene of the waxing or waning

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95 For example, see chapter [15.1] under the sub-heading *Alternative Routes*.

96 There are other areas affected by the proposed EWL. The areas in the text, however, are the ones most easily recognised as open space.

97 Statement of Primary Evidence, A Murray, para 9.5–9.14.

98 Statement of Primary Evidence, Gliddon, para 1.2.

influence of various iwi. Unsurprisingly, therefore, the Proposal has a potential impact on areas and sites of significance to Mana Whenua.

[226] With the arrival of European traders and settlers and the signing of the Treaty of Waitangi in 1840, the Onehunga area and Manukau Harbour acquired a new significance. Onehunga became a port. For the first 30 years after 1840 Onehunga, as well as becoming a rapidly expanding town, was seen as a defence settlement with land being allocated to Fencibles. Flour mills and saw mills closely connected to Onehunga port flourished. The railway line with a connection to Auckland and the east arrived in 1873. Two years later the first Māngere Bridge was constructed. Churches, schools and roads were built. By 1891 Onehunga's population approximated 3,000 people. The Onehunga Borough produced the first woman mayor in the British Empire. Waikaraka Park was set aside in 1881 for public use as a recreation ground. The Waikaraka Cemetery opened in 1890. At that stage the cemetery was on a promontory jutting out into the Māngere Inlet and surrounded by water on three sides.

[227] Further expansion in the area followed in the first half of the 20th century. Freezing works were established at the head of the Māngere Inlet at Westfield and Southdown. Flat land with easy access to Auckland's ports, roads and railways led to the rapid development of Onehunga and Ōtāhuhu as sites for heavy industry. The Te Hōpua Lagoon was reclaimed in the 1930s. There has been significant reclamation of the north side of the Māngere Inlet between 1940 and 2010, including three large bays east of the Te Hōpua Lagoon.[99]

[228] Ever since Māngere International Airport opened in the mid 1960s, the streets of Onehunga and Māngere Bridge (both old and new) have provided vehicular access to the Airport. Belatedly, after the construction of what was Hugh Watt Drive and is now the six motorway lanes of SH20, the Taumanu Reserve (lying to the west of the current Neilson Street Interchange), was created through reclamation. Under the AUP:OP, Onehunga is partly zoned as an intensifying residential area. Apartment blocks and denser residential land use will be permitted. Panuku and the local board have (as yet inchoate) plans to use the Onehunga Wharf area (now used only by fishing trawlers and as a truck yard) for harbourside recreational and entertainment purposes.[100]

[229] The two Ministers are undoubtedly correct when they assessed the Proposal as one that, in terms of s142(3)(a)(i), would arouse widespread public concern or

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[99] AEE, Figure 10-4, p184.

[100] Statement of Primary Evidence, Marler, In particular refer to the attachment titled, *Transform Onehunga, High Level Project Plan – March 2017*.

interest. Particularly this is the case with the proposed reclamations to accommodate the highway along the northern edge of the Māngere Inlet and the additional severance that the EWL will bring about for Onehunga where the community already has to contend with the physical and visual barrier of SH20.

[230] The Māngere Inlet, despite extensive reclamation over the past 80 years, remains an area of ecological significance. The extensive mudflats on both shores are exposed at low tide. Adjacent to the current coastal walkway on the north side of the Inlet are sporadic mangrove areas. Stormwater discharge pipes carrying stormwater from the hinterland run under the walkway into the harbour itself. The mudflats themselves are valuable feeding grounds for a number of birds, which, as well as the ubiquitous seagull, include wading birds and migratory birds. Some of these birds are rare or endangered.[101]

[231] The major public concerns (excluding site-specific objections by individual property owners) have been understandable and principled opposition, firstly, to the reclamations of the northern shore of the Māngere Inlet and, secondly, to the additional severance that the EWL will cause between the Manukau Harbour and the Onehunga community. Some iwi are opposed to any reclamations as a matter of principle. Legitimate concerns have been raised about the effect reclamations may have on the habitat and feeding ground of certain birds. The descendants and families of people buried at Waikaraka Cemetery object to the potential loss of the tranquil setting. The construction of a new interchange at Neilson Street and the EWL itself at its western end are claimed to be a further and unacceptable severance of Onehunga from its old wharf and a disruption to plans to develop the wharf area for recreational purposes.

[232] Representatives of some of the Onehunga-related concerns the Board heard were those presented by Dr T Buklijas and Dr J Randerson, both Onehunga residents. Dr Buklijas, for her part, considered that a focus on the reduction of travel time for trucks ignored the restricted access to the foreshore and noise, health costs caused by increased pollution, and the general increase in greenhouse gases. Dr Randerson, for her part, stressed the lack of focus on remedial treatment to the "long mistreated foreshore" of the Manukau Harbour, the risk to the diverse ecosystem of the Māngere Inlet, and the delay and disruption, after years of neglect and misuse of the Manukau Harbour, to plans to develop a "new Wynyard Quarter-style" development around the Port.[102]

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[101] See chapter [14.2] of this Report under the sub-heading *Avifauna*.

[102] Hearing Summaries and Transcript, Day 43. However, this view was not shared by Panuku Development and NZTA.

[233] It is clear from this overview that the EWL gives rise to a large number of environmental concerns. The Proposal is a complex one. Application of the relevant provisions of the RMA is no easy task. The weighing and balancing involved is challenging. Had NZTA been able to design an EWL route or corridor that avoided severance of Onehunga from the Manukau foreshore, and in particular avoided reclamations, the Board's task would have been easier. However, given the nature of the area to be served by the Proposal before the Board, and in particular, given the need to find a transport solution that is both effective and enduring, the wish just expressed is probably forlorn.

[234] This is an overview of the task confronting the Board.

# 9. STRATEGIC NEED FOR THE PROPOSAL

[236] The Board is totally satisfied, by the evidence it has heard, that there is a need for a connecting highway to link SH1 and SH20 with the attenuated industrial belt stretching from Southdown to Onehunga. This need is particularly relevant in terms of economic and transport strategies. The highway will provide considerable public benefit.

[237] By making this statement in its Report, the Board is certainly not short-circuiting or avoiding its obligation to scrutinise and resolve, under the provisions of the RMA, NZTA's Proposal. Rather the statement is to highlight the regional, national, and public benefits that the evidence satisfies it will flow from "an EWL" in some shape or form.

[238] A highway of the type proposed by NZTA has been foreshadowed in regional planning documents for many years. The Auckland Plan (2012) identified "an EWL" as one of high strategic importance, addressing congestion and freight movements in the Auckland region.[103] The same Plan also referred to "an EWL" as part of a "*step change required to provide a modern, efficient, world-class transport system*", with the further observation that the benefits would be best achieved through a completed project rather than incremental roading improvements.[104]

[239] Mr Gliddon gave evidence, in his capacity as NZTA's Highway Manager for Auckland and Northland, that the Proposal was developed in accordance with the Government Policy Statement on Land Transport Funding and the goals of the National Land Transport Programme (NLTP).[105] He also identified that NZTA's Statement of Intent included the EWL as a key feature contributing to the Accelerated Auckland Transport Programme to provide congestion relief, support economic growth, and improve safety outcomes for Auckland and wider New Zealand.

[240] Mr Gliddon accurately summarises (there being effectively no challenge to his evidence) the regional and strategic importance of the Proposal in his evidence in chief:[106]

> "*The Project is located within the Auckland suburbs of Onehunga, Penrose, Mt Wellington, Te Pāpapa and Ōtāhuhu. The area is regionally important due to its road and rail transport connections and close proximity to Auckland International Airport and the Port of Auckland. The area is one of*

[103] Auckland Plan, p322 and 325.

[104] Ibid, p330 and 332.

[105] Statement of Primary Evidence, Gliddon, para 8.2–8.6

[106] Statement of Primary Evidence, Gliddon, para 5.1-5.4.

*the key economic drivers of Auckland – it is the main industrial, transport and distribution hub for the city and the upper North Island. KiwiRail and Port of Tauranga (MetroPort) both have inland distribution centres located in the Project area at Southdown. In the Auckland Plan the area is identified as part of the 'regional economic corridor' due to its established commercial, industrial and residential land uses.*

*Many local roads and the connections to the State highways in the Project area are heavily congested and this problem is projected to worsen in the future. Travel times to and from the State highways can be lengthy and inconsistent. This can cause significant problems for freight movements and general traffic. Some of the current routes to the State highways from the key distribution hubs are indirect and lengthy. This congestion affects existing businesses, inhibits economic growth, and means that the economic opportunities of the Onehunga and Penrose area cannot be fully realised.*[10] *As well as affecting connections to the State highways, the congestion inhibits the flow of people and goods between businesses in the area, reducing the benefits of agglomeration.*

*Freight demand in Auckland is expected to continue growing in line with the region's population, placing increasing pressure on the area's already stressed transport network. The changing industry mix in the area is also likely to increase commuting trips within and through the area.*

*The congestion contributes to delays affecting a key public transport route between Māngere Bridge and Onehunga. The area also suffers from a number of gaps in the local pedestrian and cycle network and in places the quality of the local pedestrian and cycle network is also poor.*"

[241] Evidence in similar vein (also essentially unchallenged) was given by Mr Wickman, NZTA's principal transport planner:[107]

"*The Auckland Plan (which is also discussed in Mr Gliddon's evidence) was adopted in by Auckland Council in March 2012 after input from key stakeholders including the Transport Agency and an extensive public consultation process. In response to Directive 13.5 of the Auckland Plan, the Transport Agency, Auckland Transport, and Auckland Council formed a project team to interrogate the need for transport investment in the Onehunga, Mt Wellington, East Tamaki, Favona, and Māngere area in late 2012. This included a high level assessment of what could be expected to be achieved by responding to the identified transport problems.*

*The initial stage of this work involved a series of workshops which were attended by senior representatives of the Transport Agency, Auckland Transport, Auckland Council, KiwiRail, Port of Auckland, Port of Tauranga, and Auckland Business Forum. Through the workshops, a set of agreed problems were identified along with a series of benefits that could accrue if these problems were addressed.*

*The strategic case, referred to as the Multi-Modal East West Solutions Strategic Case, was completed in March 2013. The strategic case supported the development of a programme business case in order to respond to the following agreed problems statements:*

*(a) Inefficient transport connections in the wider east-west area increase travel times and constrain the productive potential of Auckland and the upper North island;*

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[107] Statement of Primary Evidence, Wickman, para 4.8-4.10. These factors were also agreed by the experts particpating in the Joint Witness Conference on economics, refer to the JWS Report of 29 May 2017.

*(b) A lack of response to changes in industry's supply chain strategies contributes to greater network congestion, unpredictable travel times and increased costs in this area; and*

*(c) The quality of transport choices in the east west area is inadequate and hinders the development of liveable communities.*"

[242] Mr Williamson, a consulting economist engaged by NZTA to give supporting evidence, identified some important strategic and economic factors relevant to the area that the Proposal will traverse:[108]

> "*The East West Link (**EWL**) project area (Onehunga, Penrose, Mt Wellington and Ōtāhuhu) plays an important and unique role within the Auckland and upper North Island economy, as it is both Auckland's and the upper North Island's main industrial, transport and distribution hub. The economic contribution of the area is regionally and nationally significant, generating approximately $4.7 billion of output in 2012, or 7.5 per cent of Auckland's total gross domestic product (**GDP**).*
>
> *The area is a significant employment centre, accounting for 10 per cent of Auckland's employment in 2015, second only in size to the Central Business District (**CBD**). It is Auckland's main manufacturing location accounting for 18 per cent of the region's and 6 per cent of New Zealand's manufacturing employment. It also acts as a major hub for transport and logistics for Auckland and the upper North Island with 20 per cent of the region's and 9 per cent of New Zealand's employment in transport and wholesaling located here. These two sectors combined accounted for 45 per cent of the area's total employment in 2015.*
>
> *The area has a number of important economic attributes which have contributed to this pattern of development, based on proximity to key markets and suppliers and access to the strategic road and rail network, including the most important interface between road and rail freight in Auckland. The Westfield/Southdown road and rail freight terminal includes the MetroPort inland port serving the Port of Tauranga and the adjacent Southdown KiwiRail and Toll Freight terminals. In addition to these intermodal activities, the area accommodates a large number of other major distribution and logistics facilities serving Auckland and the upper North Island. Supporting these activities and the supply chains they underpin is clearly important to the future economic prosperity of the Auckland and the upper North Island.*
>
> *Whilst the EWL area remains a stronghold of manufacturing and distribution activity, structural economic change is taking place, with business service activity growing at a faster rate than industrial, transport and distribution activities. The area's economy is becoming more service oriented, with the share of the area's employment accounted for by business services now reaching 25 per cent, up from only 15 per cent in 2000. This trend is consistent with the broader transformation of Auckland and many other developed cities, towards a more service oriented economy.*
>
> *However, evidence suggests that the area will remain a stronghold of industrial and transport activity. Transport related employment in the area increased by over 1,300 jobs between 2012 and 2015, more than compensating for a decline in manufacturing, where 690 jobs were lost, reflecting the area's continuing function as a specialised regional*

[108] Statement of Primary Evidence, Williamson, para 1.1-1.5.

> *distribution centre. It would be expected that the improved accessibility arising from the Project would help to reinforce this pattern of development.*"

[243] Transport factors identified by Mr Williamson[109] that might constrain the potential of Onehunga and industrial areas included more freight traffic (being a product of population growth), and increasing consumer demand, leading to an increasing number of freight trips through the area, more private vehicle trips by an increasing number of employees, and more congestion, particularly during peak hours. Mr Williamson thus saw the EWL as providing "*... an opportunity to reduce travel times and improve connectivity between firms and markets locally and between regions, and between workers and jobs, mainly within Auckland*".[110]

[244] The Board is satisfied by this evidence and does not consider the fact that the above witnesses were employed or engaged by NZTA has resulted in them embellishing or overstating their evidence.

[245] Consistent with this evidence, the objectives of the Proposal, specified by Mr Mulligan in his opening, are:

(a) To improve travel times and travel time reliability between SH1 and SH20 and businesses in the Onehunga-Penrose industrial area.

(b) To improve safety and accessibility for cyclists and pedestrians.

(c) To improve journey time reliability for buses between SH20 and Onehunga Town Centre.

[246] It is the first of the above three objectives that is of primary importance.

[247] There were traffic and transport benefits assessed by Mr A Murray, an experienced traffic engineer engaged by NZTA, in his evidence in chief. These included significant travel time savings for business vehicles accessing the Onehunga-Penrose industrial area from both north and south on SH1 and SH20, improved journey times over the wider area, and more consistent and reliable access leading to increased freight efficiency. There would be consequential reduced congestion in Neilson Street, Church Street and Great South Road, coupled with reduced traffic, including heavy vehicle traffic, on Onehunga residential streets. Mr A Murray also opined that the EWL would improve "network resilience" by providing an

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[109] Statement of Primary Evidence, Williamson, para 1.6.

[110] Ibid, para 1.7.

alternative route between SH1 and SH20. These benefits identified by Mr A Murray were essentially confirmed by the evidence of Mr Tindall, a transport planner engaged by Auckland Council.[111]

[248] The Board is satisfied, on the basis of all the evidence it has heard, that the EWL highway, as proposed by NZTA, will deliver worthwhile benefits to Auckland's road network, both in relevant travel times and also in transport connectivity in the region. The Board accepts the evidence, based on both his experience and on modelling, of NZTA's witness Mr A Murray. The Board notes and accepts, there being no effective challenge to it, Mr A Murray's rebuttal evidence (he having participated in five conferencing sessions) to the effect that his overall methodology for his transport assessment, including modelling and associated benefits, had not been refuted by other transport experts.[112]

[249] Of particular importance, in the Board's view, is Annexure 1 to Mr A Murray's primary evidence. Table 4.1 of that annexure lists a number of critical transport performance benefits and measures of performance, including reliable freight connections, efficient freight connections to the strategic network, and other important strategic and efficiency benefits. Important too (based in the main on modelling) were the enduring benefits of the Proposal seen by Mr A Murray, with a particular focus on traffic flows on Neilson Street and Church Street (with a view to retaining such benefits between 2026 and 2036). The changes in travel time and average travel costs were assessed with a view to seeing whether a broad daily capacity for those streets would be maintained.

[250] Mr A Murray's conclusions are worth repeating.[113] They were:

(a) That existing transport problems in the area are significant, affecting both the local area and the wider roading network on a significant daily basis;

(b) That the objectives of NZTA's Proposal reflect those problems;

(c) That transport works are necessary to attain the Proposal's objectives;

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[111] Statement of Primary Evidence, Tindall, para 7.1.

[112] Statement of Rebuttal Evidence, A Murray, para 1.1 and 1.2(b).

[113] Statement of Primary Evidence, A Murray, para 22.1.

(d) Identified transport effects have been avoided or mitigated and are offset by the reduced access times to the wider network; and

(e) The Proposal strongly achieved its objectives with substantial benefits to both the local area and the wider Auckland network.

[251] Mr A Murray, dealing with NZTA's assessment of alternatives and the statutory relevance of s171(1) of the RMA, referred in his primary evidence[114] to NZTA's shortlisted six options.[115] The Board agrees with Mr A Murray that given the expense of the EWL, the need to secure some lasting benefit is critical. It is important not to overlook the concept of an enduring benefit,[116] which were seen by Mr A Murray as benefits that lasted for a number of years into the medium term (10-20 years) rather than short-term benefits. Enduring benefits were seen and assessed only with Options E and F (as modified).

[252] As practical examples of the benefits, Mr A Murray's evidence (again essentially unchallenged) discussed travel times and reliability.[117] Depending on the point from which business vehicles would access the Onehunga-Penrose industrial area, travel time reductions were assessed (variable distances clearly being involved) of between up to 4.1 minutes to up to 18 minutes. Increases in average speed were significant (increases of between 15 to 37 km/h). The number of vehicles per day benefitting from these transport improvements were estimated to range from 17,400 to 42,000. Improved journey times were also predicted for a number of journeys in the Auckland area. Also predicted were large reductions of daily traffic in Neilson Street, Church Street, Great South Road, Onehunga Mall and Onehunga Harbour Road.

[253] It is clear from Mr A Murray's evidence that, without being addressed, the problems of traffic congestion and slow traffic times will continue to get worse. It is fanciful to suggest that improved investment in the provision of public transport (of huge benefit to Auckland and its citizens in so many areas) will somehow alleviate the area-specific problems that currently plague the Onehunga-Southdown-Penrose industrial area.

[254] Of central importance to the Board in its assessment must be the tangible transport and social benefits that will flow from the EWL highway. The evidence points strongly not only to those benefits but to the proposed route providing the most

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[114] Ibid, para 6.8 and following.

[115] These are detailed elsewhere in this Report in chapter [14.8].

[116] Statement of Primary Evidence, A Murray, para 6.10.

[117] Statement of Primary Evidence, A Murray, para 10.3-10.16.

enduring transport benefits. The weight that flows from the Proposal providing those enduring benefits must be considerable.

[255] The Board is satisfied that the industrial area traversed by the Proposal is not just any industrial area. Rather it is an industrial area with some unique characteristics that give it a strategic significance. These unique characteristics include:

(a) Its situation on or close to the narrow Auckland Isthmus;

(b) Its proximity to the centre of New Zealand's largest city;

(c) Direct access to the North Auckland Rail Corridor and the Southdown Siding;

(d) Inclusion of three large inland container ports operated by KiwiRail, Port of Tauranga and Ports of Auckland;

(e) It is a distance of only a few kilometres from New Zealand's largest airport and the various freight hubs operating in the Auckland International Airport complex; and

(f) Its western end is adjacent to an expanding residential area of increasing concentration – Onehunga.

[256] Access to this area by trucks and commercial traffic from the east and from SH1 involves travelling along Great South Road and/or Mt Wellington Highway, west on to Church Street and then on to Neilson Street. Access from SH20 and the west involves exiting SH20 at Neilson Street or, alternatively, accessing Neilson Street via Church Street and/or other Onehunga local roads. Heavy truck traffic and resulting congestion, especially on Neilson Street, is critical. Submissions were made to the effect of "rat-running" through Onehunga streets by trucks and commercial vehicles trying to avoid such congestion.

[257] The strategic importance of the area and the adverse effects of current congestion were helpfully covered in evidence received from National Road Carriers (Inc), Carr & Haslam Limited, and Auckland Business Forum.

[258] The Auckland Business Forum saw the proposed highway as a "catch-up". "An EWL" was originally proposed for completion by 1986 but had been a casualty of under-investment in Auckland's transport infrastructure. "An EWL" would help separate freight and general traffic and would have the capacity to meet significant traffic growth flowing from Auckland's population increase. The Forum saw the Onehunga-Penrose area as being the "freight-distribution and logistics capital" of the upper North Island. The submission referred to 6,000 heavy freight vehicle

movements each day along the principal arterial routes of Church and Neilson Streets.

[259] Mr Garnier, presenting submissions on behalf of National Road Carriers, referred to extended congestion and its time cost to freight operators, poor access between the industrial area and the Southdown KiwiRail freight terminal and the motorway network, and the inadequacies of the local street network to handle some 6,000 heavy freight vehicles each working day. He referred to "stop-go trips" that on occasions involved 20 to 30 minutes to travel along the Neilson Street route. He pointed to the fact that the KiwiRail terminal handled the third largest number of truck-to-rail and vice versa container movements in New Zealand, after Ports of Auckland and Port of Tauranga.

[260] The Board was particularly impressed by evidence given by Mr Carr of the long-established private transport and trucking enterprise Carr & Haslam Limited. Mr Carr presented thoughtful submissions from his perspective as a person with a lifelong familiarity with Onehunga and as a driver and an operator of a transport business. Freight deliveries by truck were an indispensable part of distributing goods. Consignments might arrive in the Auckland region by rail, ship or aircraft, but subsequent to arrival they needed to be transported to their ultimate destination. Such distribution could not be achieved by railway, motorcar or public transport. Mr Carr gave the example of the need to distribute throughout the Auckland region 1 million litres of milk each day.[118] He referred to the fact that there were some 200,000 freight vehicles in Auckland. He reminded the Board that Auckland was at the apex of a very large population triangle (the other two points being Hamilton and Tauranga) and that this was "a totally population-driven" very busy freight triangle.[119] There was a constant increase in freight distribution activities in the area that the EWL was designed to serve. Recycling areas in the vicinity of Neilson Street also generated many truck movements: 35,000 tonnes per annum at the Pikes Point Waste Transfer Station, 90,000 tonnes of glass recycling, 40,000 tonnes of paper per annum by Carter Holt Harvey Pulp. As currently configured, the relevant industrial area generates a lot of congestion.

[261] Mr Carr referred to the possibility of an alignment of a highway along Neilson Street. He had been involved in previous consultations on such an alignment. His view, however, was that such an alignment would be impossible to build because there

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[118] Transcript, Carr, p5867.

[119] Transcript, Carr, p5869.

were no viable alternatives for the many sites lining both sides of Neilson Street and adjacent to it during the construction phase.[120]

[262] There were some lay submitters[121] who, while accepting that traffic along and in the region of Neilson Street was extremely congested to the detriment of the Onehunga community, nonetheless considered that building a four-lane highway such as the EWL was not the answer. These submitters considered that a greater focus on and an investment in public transport and cycleways would reduce the volume of traffic in and around Onehunga and Neilson Street, thus improving the situation for legitimate truck traffic. Unfortunately, such submissions do not address or solve the current reality. Auckland's constant (and in recent years increasing) population growth, coupled with increased use of private motor vehicles and under-investment in public transport, have all combined (along with the physical constraints of the narrow isthmus) to make Auckland's traffic congestion acute. The problems caused by traffic congestion to freight movements in particular and generally to the Onehunga–Southdown industrial area will continue to get worse and would, in the Board's view, deteriorate long before there would be any amelioration of traffic congestion in the area brought about by improved public transport.

[263] The Board is mindful of the adverse economic impact of serious traffic congestion. Congestion, as such, increases travel time. This trite observation has a demonstrable impact on the economy and on productivity. The number of visits each day that can be made by building subcontractors, appliance repairers, courier drivers, delivery vehicles, and many other groups, will obviously reduce in proportion to congestion-affected journey times. The economic impact of such reductions is highly relevant given the industrial complexity and activities of the Onehunga-Southdown-Penrose area that the EWL would serve.

[264] Given the need to provide some enduring solution to fulfil the Proposal's objectives, the pressing need to relieve congestion on Neilson Street, and the need to ensure that a proposed EWL highway provided truck access to the many receivers and despatchers of freight in the area, the creation of the highway somewhere on the south side of Neilson Street, enabling traffic to enter or exit the highway close to the site trucks are serving, seems to the Board to be the most effective solution.

[265] Finally, the Board notes the primary evidence of Mr Wickman, NZTA's principal transport planner, which detailed the integrative function of the EWL with other parts of Auckland region's transport network. The EWL would provide improved transport

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[120] Some witnesses did grapple with the issue of the ease with which affected businesses could relocate. However, widening Neilson Street would involve relocating many more businesses than the Proposal.

[121] Submission 126252, Carr; Submission 126240, Grove Hardware Limited and others; Submission 126026, C To.

resilience by being integrated with the Western Ring Route (which includes the recent Waterview Tunnel connection) and by providing an extra link to SH20 for northbound traffic along SH1 and conversely for southbound traffic on SH20 wishing to join SH1. The Board notes that one of the seven matters of national significance listed by the Ministers, to which it is obliged to have regard under s149P(1)(a), is the relating of NZTA's proposal to the state highway network, that, when viewed in its wider geographic context, extends to more than one district or region.

[266] As stated at the outset of this chapter, the Board is satisfied that "an EWL" servicing the Onehunga-Southdown industrial area, would be a highway of strategic and national importance. The evidence satisfies it that such a highway is long overdue and is urgently needed to provide better freight transport links to an area of national and regional significance.

[267] Whether the local, regional and national benefits that "an EWL" will clearly provide can be achieved by NZTA's proposal requires a careful assessment of the complex Proposal before the Board against the relevant requirements of the RMA. Such assessment is carried out elsewhere in this Report. The considerations set out in this chapter have been assessed by the Board and, where relevant, underpin the Board's assessment under ss104D and 104 in chapter 14 of this Report and also the Board's assessment under s171(1) of the various sectors of the Proposal in chapter 15.

# 10. ISSUES WHICH ARE AGREED OR NOT CONTESTED

[268] Both at conferencing and during the course of the Hearing the parties (and their experts) engaged in constructive dialogue. As a result, agreements were reached regarding several issues, which are discussed below or elsewhere throughout this Report. Many of these agreements were subject to sets of conditions. Some issues were uncontested. All agreements reached were, of course, conditional on NZTA obtaining the necessary consents and approvals to construct and operate the EWL.

## 10.1 A NUMBER OF LAND OWNERS OR OCCUPIERS

[269] The Board does not intend to record the details of every agreement reached. Rather it shall simply list the parties who were able to reach agreement with NZTA. The Board granted leave for a number of submitters to withdraw from these proceedings. Some did not fully withdraw and retained their rights as a submitter, including the right to appeal.

[270] All evidence produced by submitters that withdrew has been considered by the Board and given appropriate weight. The conditions attached to these agreements have also been considered by the Board and, unless otherwise stated, have been adopted. A helpful summary of this is provided in the closing of NZTA, which is attached in [Appendix 13: Summary of Issues Resolved During the Hearing].

[271] The submitters who reached agreement were:

(a) Aotea Sea Scout Group;

(b) Auckland Heliport Limited Partnership;

(c) EnviroWaste Services Limited;

(d) Fonterra Brands Limited;

(e) Jaafar Holdings Limited;

(f) Sanford Limited;

(g) Spark New Zealand Limited;

(h) Stratex Group Limited;

(i) Tram Lease Limited; and

(j) Ward Demolition (partial agreement).

[272] The Board acknowledged the successful efforts of those Parties to find common ground.

## 10.2 AUCKLAND TRANSPORT

[273] Auckland Transport and NZTA have entered into a "side" agreement to address a number of effects of the Proposal on Auckland Transport's assets and the wider transport network.

[274] This agreement is in lieu of incorporating these matters in the designation conditions. The agreement provides for matters relating to Proposal design and planning approvals, input into works that affect Auckland Transport's roading infrastructure, assessing and remedying effects of heavy vehicles, and construction management (particularly in the vicinity of the Southdown site). No further comment is needed.

## 10.3 BIKE AUCKLAND

[275] Bike Auckland and NZTA entered into a "side" agreement, which addresses some concerns regarding the design of the cycling elements and lack of local cycling links.

[276] This includes NZTA using its best endeavours to encourage the adoption of specific cycling facilities sought by Bike Auckland. The Board returns to address unresolved issues later in chapter 15.8 of this Report.

## 10.4 TRANSPOWER ASSETS

[277] Any remaining or residual concerns by Transpower regarding the Proposal's impact on the national grid have evaporated. There is common ground between Transpower and NZTA that adverse effects on the national grid assets can be managed through proposed conditions and a Network Utility Management Plan (NUMP).

[278] Mr Gardner-Hopkins for Transpower did not see any aspects of the proposed highway in close proximity to Transpower pylons and transmission lines as being "show-stoppers". He expressed his client's confidence that NZTA and Transpower would successfully resolve matters without in any way compromising the integrity of the national grid.

[279] This is particularly relevant to Transpower's infrastructure at the Southdown site in Sector 3 of the NoR. Mr Gardner-Hopkins confirmed his client's position in his closing:[122]

> "*13. Transpower does not consider that any risk introduced by the EWL project is so great to Transpower's assets that it should not proceed. It is now clear, for example, that Transpower's Control Building and relay room, will not be impacted by any physical works (the designation has been drawn back so as not to include that building).*
>
> *14. Transpower is also satisfied that options exist for relocation of the KiwiRail transformer and associated switchgear, both on the Southdown site as well as offsite. It will need to be carefully managed, and the conditions provide for that.*"

[280] The Board later addresses, in chapter 15 of this Report, the outcomes sought by a number of submitters relating to Tower 31, the T&G site, and the strong but aspirational submissions to underground the transmission lines in and around Onehunga.

## 10.5 KIWIRAIL

[281] KiwiRail presented evidence at the Hearing, but it did not present closing submissions. Its position was summarised in the evidence of Mr Gordon and Ms Beals. KiwiRail was supportive of the engagement it had received from NZTA and how the Proposal had addressed the existing and future operation of KiwiRail infrastructure.

[282] Mr Mulligan, in his closing for NZTA, outlined both the context and the position it had reached with KiwiRail:[123]

> "*One of KiwiRail's key assets is its Southdown freight terminal and inland port.[21] The Southdown depot is New Zealand's third largest export port and provides an important link between rail and road freight movements.[22] KiwiRail's evidence was that, because it is not an end-to-end transport operator, it is essential that KiwiRail has the ability for road transport operators to get in and out of its site in an efficient manner.[23] KiwiRail sees the EWL as part of a transport system which integrates with rail and supports the EWL and its current alignment, subject to conditions. Its Master Plan provides for KiwiRail to build an internal road connection to link into the proposed Port Link Road.[24]*
>
> *The current EWL is the alignment option that best preserves the safety of KiwiRail's network.[25] It is also important to note that KiwiRail specifically*

[122] Closing Statement, Gardner-Hopkins, para 13–14.

[123] Closing Statement, Mulligan, para 3.9 –3.10.

*prefer this alignment over other options,[26] particularly those involving the upgrade of Neilson Street. KiwiRail sees this alignment as the best enduring outcome for its operations.*"

[283] This position is supported by Ms Beals:[124]

"*In summary, KiwiRail supports the proposal as notified, subject to the inclusion of NU.10 within any Southdown-specific conditions, to ensure that adverse effects on the rail network can be adequately avoided, remedied or mitigated. I express no opinion or preference for the other conditions proposed by Ms Hopkins and Mr Grala, so long as the conditions put forward do not impede the consistency and continuity of electricity supply to the rail network. NU.10 will ensure that KiwiRail remains a party to any discussions regarding the relocation of the Rail Supply Substation, which in my opinion is sufficient for its purposes.*"

## 10.6 FIRST GAS

[284] First Gas Limited owns and operates high pressure gas supplies that extend east to west across Sector 3, and around the south side of the Mercury site, and the pigging station that is located immediately south of the Mercury site. It holds a designation for those assets that will require alteration as a result of the Proposal. First Gas also owns the decommissioned connection into the Mercury site. Mr Edwards presented planning evidence on behalf of First Gas[125] that addressed all of its assets that will be affected by the Proposal, extending across all sectors.

[285] In relation to Sector 3, the First Gas pigging station and other infrastructure will need to be relocated. Likewise, the First Gas connection to the Southdown site will need to be replaced, unless not required by Mercury.

[286] First Gas did not oppose the Proposal and Mr Edwards summarised First Gas' position to be: [126]

"*(a) the Project alignment poses a number of risks to and from First Gas' assets on the Southdown Site, and therefore relocation is required;*

*(b) the gas supply infrastructure must remain connected to the Southdown Site to retain First Gas' ability to supply gas to potential users;*

*(c) the relocated assets are not specifically required to be accommodated within the confines of the existing Southdown Site ('connection' is required however);*

*(d) a range of sites continue to be investigated (via a specialist consultant contracted by First Gas) to accommodate relocated assets; and*

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[124] Hearing Summary, Beals, para 1.9.

[125] Statement of Primary Evidence, Edwards, 10 May 2017; Hearing Summary, Edwards, 21 August 2017.

[126] Hearing Summary, Edwards, para 9.

(e) *First Gas will not accept a situation where it is 'worse off'. By this, I mean that:*

(i) *a suitable site(s) for the relocated asset is found and any necessary approvals to enable that relocation are secured;*

(ii) *that all costs associated with the asset relocation will be borne by the Transport Agency; and*

(iii) *the ability to supply gas to potential users at the Southdown Site is not compromised.*"

[287] Mr Edwards was satisfied with the amended NZTA conditions with the exception of Southdown Condition SD.7, which he thought should be extended to include the upgrade and renewal of First Gas assets under the s176 RMA waiver of approval, to be consistent with existing First Gas designation 9102.[127] NZTA has not adopted that change to the condition and has not addressed it in closing submissions.

[288] The Board notes that the subject condition (now SD.8) is specific to the Southdown site rather than across all the First Gas assets that will be affected by the EWL. As NZTA's proposed Southdown conditions also require it to provide the ongoing connection to the First Gas supply, the Board does not find such an addition to the waiver provided for by Condition SD.8 to be necessary. Once the new connection to the site is installed, the waiver will adequately provide for the routine maintenance of that asset.

[289] On the basis of evidence presented on behalf of First Gas, and the conditions proposed by NZTA, the Board finds that the effects on First Gas infrastructure will be appropriately managed to the satisfaction of First Gas, and that NoR1 can be approved in relation to that infrastructure in Sector 3, and other sectors of the Proposal.

[290] As a consequence of re-ordering in the updated set of conditions provided by NZTA in its closing, an equivalent condition relating to KiwiRail (and others with an interest in the Southdown Rail Supply Substation) is provided in condition SD.5 relating to NoR1.

[127] Hearing Summary, Edwards, para 13(c)(iii).

# 11. CONTESTED ISSUES TO BE DETERMINED

[292] Having outlined in the previous chapter the issues that have been agreed or are not principal issues in contention, the Board now turns to those issues that remain in contention. Indeed, most of them are critical to its final decision. The following chapters of this Report are detailed to cover the positions of the parties and the Board's findings.

[293] The previous chapter lists and describes a number of issues that were resolved during the course of the Hearing by way of negotiated agreements (usually conditional) between NZTA and affected submitters.

[294] The purpose of this chapter is to list and summarise outstanding issues that remain at large. It will be necessary for the Board to resolve these outstanding issues in its subsequent analysis under Parts 2, 6, 6AA and 8 of the RMA. All these issues have been raised by submitters, who saw them as being fundamental objections to the entire highway Proposal or to portions of the proposed alignment sought under the NoRs. An assessment is also required under s104D of the RMA since the applications for resource consents sought for the Proposal have an overall non-complying activity status.

[295] The Board, by listing several outstanding issues in this chapter, has not overlooked a multitude of other matters raised by submitters (such as noise, construction effects, vibration, and adverse visual and amenity effects), all of which it has considered and dealt with in what it considers to be an appropriate fashion by the imposition of conditions.

[296] In accordance with s149Q(2) of the RMA, the principal unresolved issues follow.

## 11.1 SEVERANCE

[297] An effect of the proposed highway's on- and off-ramps in the vicinity of Gloucester Park and Onehunga Wharf will be to create a barrier between the Onehunga community and the Manukau foreshore. Such severance will occur in an area already degraded by the six lanes of SH20 and the pylons that support two high voltage transmission lines.

[298] Counsel for TOES and Others succinctly submitted that the Proposal would, "*further sever the urban area of Onehunga from its coastal foreshore, adversely impacting on heritage, volcanic and other valuable features along the way*".[128]

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[128] Transcript, Hewison, p6206

[299] This severance, it was submitted, aggravates the current severance of the Onehunga community from Onehunga Wharf and additionally delays somewhat inchoate but nonetheless laudable proposals for the improvement of the Manukau foreshore and Onehunga Wharf for the ultimate benefit of the residents of a rapidly developing and expanding suburb of Auckland.

[300] Additional, and in the Board's view serious, severance will occur at the southern edge of Waikaraka Cemetery where the EWL highway, slightly elevated at that point, will constitute a physical barrier between the cemetery and the Māngere Inlet. This will change forever the tranquillity that attaches to most cemeteries and the currently available view from the cemetery grounds of the harbour and its waters.

[301] At an overall level, the Proposal would constitute a barrier along much of the Māngere Inlet's northern foreshore. Submissions were made to the Board that the EWL would have a permanent severance effect on future land use in the area.[129] Further observations were made that it was arguably unusual for a coastal city to construct a new highway along the coastline rather than, as in some cases, to remove such highways entirely. The Board has some sympathy with these submissions, but notes that it is not the planning authority for Auckland and that the Māngere Inlet northern coastline was recently zoned by AUP:OP for industrial use. The Board has thus limited its consideration of severance to existing land uses and access to the coast.

## 11.2 RECLAMATIONS

[302] Sector 2 of the Proposal would be on reclaimed land, resulting in permanent loss of the CMA – some 18.4ha. This would increase the current reclaimed area of the untouched Manukau Harbour (24 percent) by approximately 3.5 percent. The proposed reclamations, as explained elsewhere in this Report,[130] go considerably beyond what would be necessary for the carriageway of the EWL highway. The reclaimed area would provide for stormwater treatment flowing from the 611ha catchment and would additionally provide walkways and cycleways as recreational facilities.

[303] Reclamations will also involve the permanent removal of bird habitat, with potentially adverse effects on migratory and other bird species (some endangered or rare) which use the mudflats of the Māngere Inlet as a feeding ground.

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[129] Transcript, Oram, p5549.

[130] Para [633(c)]

[304] The proposed reclamations raise a number of critical planning issues, such as consistency with the AUP:OP, prima facie inconsistency with the AUP:OP and NZCPS policies to avoid reclamation, consideration of the relevant s104D gateway test, and important Part 2 cultural and Treaty of Waitangi issues.

## 11.3 DREDGING

[305] Important environmental and cultural issues were raised by NZTA's proposal to dredge inter-tidal and sub-tidal areas of the Māngere Inlet to provide mud and sediment for the manufacture of mudcrete to be used for highway construction purposes. It is also proposed to dredge a new channel for the outlet of Anns Creek.

## 11.4 DESIGNATION AT ANNS CREEK

[306] Anns Creek, identified in the AUP:OP as a significant ecological area, has on its banks significant remnant areas of lava shrubland and saltmarsh. Some of the land is owned by TR Group. The proposed highway would cross the Anns Creek area on a viaduct. NZTA's proposed NoR1 would cover not only a portion of TR Group land that would be used as a construction yard but also extend into an area that is subject to a covenant imposed by Auckland Council designed to protect the rare ecology of the area. NZTA's justification for a permanent designation in this location is it will be well equipped in perpetuity to protect and nurture the vegetation in the area. The TR Group for its part submits that such use of the provisions of s171(1)(c) is impermissible.

## 11.5 TE HŌPUA A RANGI

[307] Te Hōpua a Rangi is a shallow, ancient volcanic explosion crater surrounded by a tuff ring. It is designated in the AUP:OP as an outstanding natural feature (ONF). The tuff ring encloses Gloucester Park North and South. In pre-European times (similar to Ōrākei Basin and formerly what is now the Basin Reserve in Wellington) the crater floor was a lagoon. It was used for boating purposes by both Māori and the early settlers. Gradually the lagoon was filled by reclamation material, including rubbish. A park was formed on this reclaimed land and named after the then Duke of Gloucester in the 1930s. Currently the tuff ring is difficult to discern. The floor of what was the crater is bisected by SH20.

[308] Te Hōpua a Rangi is a site of some significance to Mana Whenua iwi, Te Ākitai, Ngāti Whātua and Te Kawerau ā Maki in particular, who are opposed to its further degradation by trenching and the earthworks required to create ramps for the highway on the southern edge of the Te Hōpua a Rangi tuff ring.

## 11.6 MERCURY SOUTHDOWN SITE

[309] Mercury contends that the approvals sought by NZTA should be declined. Mercury submits that its site is strategically important, that it holds consents that entitle it to recommission its gas-fired electricity generation plant, and that there is insufficient evidence to show that the highway and an operating power plant can safely operate together in close proximity.

## 11.7 CULTURAL AND MANA WHENUA INTERESTS

[310] Submissions were made by Ngāti Whātua Ōrākei, Te Kawerau ā Maki, Ngāti Te Ata Waiohua, and Makaurau Marae, that the consents sought by NZTA should be refused. Other Mana Whenua submitters either filed in support of the Proposal, remained neutral or recorded that they did not oppose.[131] In addition to submissions relevant to s104D, it was submitted that various Part 2 issues, particularly s6(e) (the relationship of Māori with their culture and traditions with their ancestral lands, water, and other taonga), s7(a) (kaitiakitanga) and s8 (Treaty of Waitangi) were engaged.

[311] Specifically reference was made to:

a. The 1985 Report of the Waitangi Tribunal on the Manukau claim (WAI 8);

b. The Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014; and

c. The Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed of 2012.

## 11.8 BIODIVERSITY

[312] Closely related to the reclamations issue above in chapter 11.2 of this Report, the Board received submissions that critical habitat of avifauna and feeding areas were imperilled by the Proposal, as well as the terrestrial ecology of Anns Creek. These submissions called into aid relevant biodiversity policies of the AUP:OP and also s104D of the RMA.

[313] At a higher level there is the issue of whether there has been adequate and appropriate mitigation for the adverse ecological effects of the Proposal.

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[131] Chapter [13.3].

## 11.9 TRANSMISSION TOWERS AND UNDERGROUNDING

[314] Submissions were received, particularly from TOES and Others, Jackson Electrical and The Local Lockup, that adverse impacts and effects of the highway on the Onehunga community justified conditions requiring the various transmission lines and pylons owned by Transpower to be placed underground.

## 11.10 ADVERSE EFFECTS ON PARTICULAR SITES

[315] Important issues relating to adverse effects and the need either to refuse the Proposal or adequately mitigate those effects were received in relation to a number of sites, including those of T&G, properties in Onehunga Mall Cul-de-Sac, various sites in Captain Springs Road close to the Neilson Street intersection, 2 Harbour View Road, various freehold and leasehold interests on Sylvia Park Road, and property owned by POAL affected by the creation of the proposed Port Link Road. Auckland Council submitted that the use of Waikaraka Park as a construction site would impact adversely on its plans to construct sports fields on Waikaraka Park.

## 11.11 ALTERNATIVES AND ECONOMICS

[316] Submissions were received from various submitters to the effect that NZTA's choice of route for the EWL and/or its assessment of alternative routes was inadequate. These critical issues must be considered and weighed by the Board in its assessment of NZTA's notices and applications. This involves consideration of Parts 2, 6, 6AA and 8 of the RMA and also (because the Proposal is a non-complying activity) s104D.

[317] Some of these submissions were coupled with suggestions that the cost of the Proposal was prohibitive or that any benefit/cost analysis was inadequate and was insufficient to justify proceeding with the Proposal. This is not a matter for the Board to consider, being one of a number of matters that NZTA considers when selecting a project for inclusion within the National Land Transport Programme. The various business cases initiated and scrutinised by NZTA have been outlined in chapter 1.3 of this Report.

# 12. KEY LEGAL ISSUES

[318] In terms of s149V of the RMA, a right of appeal is conferred on parties stipulated in s149R(4) to the High Court, but only on a question of law. Any appeal beyond the High Court (but only on a question of law) is to the Supreme Court if leave is granted. The Court of Appeal is excluded from the appellate process.[132]

[319] The Board, of course, will ensure that to the best of its endeavours it complies with the provisions of the RMA and avoids errors of law. The purpose of this chapter is not to provide a quarry for hopeful appellants. Rather, it is, in the interests of transparency, to catalogue briefly some of the legal issues that arose during the course of the Board's deliberations.[133] To varying degrees, these may have influenced the Board's approach.

[320] Exposition and amplification of the legal issues mentioned is unnecessary and has been avoided.

## 12.1 THE BOARD'S POWERS

[321] The Board is a creature of Part 6AA of the RMA.[134] The Board's substantive responsibilities are set out in s149P. In respect of an application for resource consents, the Board is obliged to apply ss104 to 112 of the RMA as if it were a consent authority (s149P(2)). In respect of Notices of Requirement, the Board is obliged to have regard to the matters set out in s171(1) and comply with s171(1A), as if it were a territorial authority (s149P(4)).

[322] Thus, in essence the Board is exercising the powers and discretions conferred by the RMA, which are relevant to all the applications made by NZTA.

[323] An additional obligation is cast on the Board by s149P(1)(a). The Board must have regard to the Ministers' reasons for directing the establishment of the Board under s147. The Ministers' reasons issued under s147(5)(b) have been set out in chapter 3.2 of this Report. Two of the seven reasons specify the effects of the proposed highway on the foreshore of the Māngere Inlet of the Manukau Harbour. One reason relates specifically to Māori interests and outstanding natural features. One reason relates to the need to relocate infrastructure of regional and national importance. These four reasons all coincide with RMA assessments. Nonetheless,

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[132] RMA, Section 149V(5) and (6).

[133] Other legal issues, such as the application of the NZCPS, are canvassed in other chapters of this Report.

[134] It is noted that the version of the RMA that applies to this application is the version that does not incorporate the amendments to the Act made by the Resource Legislation Amendment Act 2017. See Schedule 2 of the Resource Legislation Amendment Act 2017, which amends Schedule 12 of the RMA (clause 12(1)).

the s149P(1)(a) obligation will result in the Board giving those effects added scrutiny.

[324] The other three reasons relate to widespread public concern over environmental effects, the Crown's obligations and functions in areas of public health, welfare, security and safety, and the geographic reach of the state highway network.

## 12.2 STATUTORY FRAMEWORK

[325] The relevant provisions of the RMA are detailed in Chapters 6 and 7 of this Report, there being no need to replicate them here. Central to the NoRs sought by NZTA is s171. Central to the consents sought by NZTA is s104. Both those provisions are expressed to be subject to Part 2 of the RMA. Part 2 has been thus described by Randerson J in *Auckland City Council v John Woolley Trust*:[135]

> "*Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act.*"

[326] Part 2 of the RMA comprises but four sections (ss5–8). This Part is headed 'Purpose and principles', which is an unambiguous statutory guide. The purpose is simply expressed in s5(1) as being to promote the sustainable management of natural and physical resources. Section 5(2) defines "sustainable management" as follows:

> "*(2) In this Act,* sustainable management *means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*
>
> *(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
>
> *(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
>
> *(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.*"

[327] It is not necessary for the Board to expound on this definition. There is ample authority on it. There is an obvious tension between the adjective "sustainable" and its noun "management". Sustenance and safeguarding are important aspects of the statute's purpose. Critical too are the avoidance or remedying and mitigation of adverse environmental effects.

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[135] *Auckland City Council v John Woolley Trust* (2008) 14 ELRNZ 106, [2008] NZRMA 260 (HC) at [47].

[328] Sections 6, 7, and 8 of the RMA are all prefaced by critical words:

> "*In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall …*"

[329] Those words are clear and unambiguous. They impose a statutory obligation on all people or bodies exercising relevant functions and powers under the RMA. The obligation imposed in respect of each of the three sections is differently cast. They have been described as a hierarchy.[136] In respect of the s6 matters of national importance, the obligation is "to recognise and provide for". In respect of the s7 "other matters", some of which are relevant to the applications before the Board, the obligation is to "have particular regard to". In respect of the Treaty of Waitangi, which is the topic of s8, the obligation is to "take into account".

[330] Obviously Part 2 does not provide a template or methodology for the many specific proposal-related (and sometimes technical) decisions that must be made under the RMA but the s5 purpose of the RMA and the mandatory obligations imposed by ss6–8 remain clear and must not be read down. That said, Part 2 cannot provide a platform for a decision-maker to ignore or drive a coach and four through some policy or plan that some other authority has lawfully promulgated in the exercise of an RMA statutory power.

[331] This comment is totally consistent with the powerful dicta of the Supreme Court in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*.[137] The majority judgment had pertinent observations on both Part 2 and on the jurisdictional limits that other planning documents might place on RMA decision-makers.

> "*[150] … We agree that the definition of sustainable management in s 5(2) is general in nature, and that, standing alone, its application in particular contexts will often, perhaps generally, be uncertain and difficult. What is clear about the definition, however, is that environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2.*
>
> *[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-*

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[136] *Ngati Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407 at [65]–[68], *Freda Pene Reweti Whanau Trust v Auckland Regional Council* HC Auckland, CIV-2005-404-356, 9.

[137] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38.

> *making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.*"

[332] As the majority in *King Salmon* commented,[138] the RMA effectively establishes a three-tiered management system or hierarchy of planning documents at national, regional and district levels. The majority in *King Salmon* further commented:[139]

> "*As we have said, the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.*"

[333] The statutory provisions and legal authorities canvassed in this chapter of the Report are the parameters within which the Board has operated in carrying out its assessments and making its decisions. In respect of the NoRs sought by NZTA, the Board has applied the provisions of s171(1). During that process the Board has considered and applied where relevant (with the required hierarchical weight) Part 2. The Board has done this for the simple reason that s171 is expressed to be "subject to Part 2". The interpretative and historical analysis of Brown J in *New Zealand Transport Agency v Architectural Centre Incorporated*[140] is authoritative and binding and has guided the Board with its s171 deliberations.

[334] With regard to the Board's consideration of the resource consents sought by NZTA, its primary guide has been the AUP. Part 2 provisions, particularly ss6, 7 and 8, have assisted the Board when so engaged, particularly in assessing the impacts and effects of the EWL on the Manukau Harbour, its foreshore, and Mana Whenua interests and concerns.

## 12.3 NOR AND S171(1)

[335] The jurisdiction for the Board to make a decision in respect of the two NoRs sought by NZTA is found in s171 of the RMA. Section 171(1) imposes on the Board a mandatory requirement to consider the effects on the environment of the proposed NoRs. Such consideration must be carried out with regard to two statutory

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[138] At [10].

[139] At [30].

[140] *New Zealand Transport Agency v Architectural Centre Incorporated* [2015] NZHC 1991.

imperatives. The first imperative is that the consideration must be "subject to Part 2". The second consideration is that the consideration must have "particular regard" to the various matters set out in the four following subsections of s171(1).

[336] Section 171 and its mandated process was subjected to an exhaustive and compelling analysis by Brown J in *New Zealand Transport Agency v Architectural Centre Inc & Ors.*[141]

[337] The NoR request in that case was for a two-lane, one-way bridge on the north side of Wellington's Basin Reserve, which would have been approximately 320m in length (including the bridge abutments) had approval been granted. That proposal, modest in comparison with the length and complexity of the EWL, occupied a Board for 72 days over a four-month period and attracted widespread opposition from various Wellington groups. The appeal to the High Court itself on matters of law occupied some 10 sitting days.

[338] A number of questions of law were posed to Brown J. These and their complexity are not of much assistance to this Board. The battleground was very different. Importantly in the Hearing that has occupied this Board, challenges to the NoRs under s171(1) were broadly based and at a comparatively high level. Nonetheless, the Board has found Brown J's judgment helpful.

[339] The Board of Inquiry in the *Basin Bridge* case (Basin Board) had adopted this approach. The Basin Board proceeded to note that the Wiri Prison Board[142] had undertaken a substantive effects assessment and determined that that project would result in some significant effects, before moving on to consider the s171(1)(b) matters. The Basin Board favoured that approach:[143]

> "*[198] We adopt the same approach, as we consider it:*
>
> *[a] Allows us to fully consider all mitigation being offered by [NZTA], and whether there actually will be significant adverse effects remaining once that mitigation is taken into account;*
>
> *[b] Would be consistent with the High Court's comments in Queenstown Airport Corporation Limited v Queenstown Lakes District Council[144] that the greater the impact on private land (or similarly, the more significant the project's adverse effects), the more careful the assessment of alternative sites, routes and methods will need to be. We will have a better understanding of the significance of the Project's adverse effects (and therefore the robustness of the alternatives assessment required), if we*

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[141] *New Zealand Transport Agency v Architectural Centre Inc & Ors* [2015] NZHC 1991.

[142] Final Report and Decision of the Board of Inquiry into the Proposed Men's Correctional Facility at Wiri, September 2011.

[143] Final Report and Decision of the Board of Inquiry into the Basin Bridge Proposal, August 2014, para 198.

[144] *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347.

> *undertake our substantive effects assessment before considering the adequacy of the [NZTA's] alternatives assessment; and*
>
> *[c] Would appropriately reflect the fact that as Section 171(1) is subject to Part 2, some consideration of the relevant matters from that Part is required in terms of forming a view on potential effects. As such, we consider we need to have some understanding of the evidence/effects assessments to reach a view on whether effects are in fact likely to be significant.*"

[340] Brown J considered that the Basin Board's reasoning, set out above, appeared, to him, to be sound.[145]

[341] Brown J also considered that despite legislative change that had resulted in a repositioning within the subsection of the words "subject to Part 2", the words, unsurprisingly, meant what they said and that Part 2 was still relevant to the matters set out in (a) to (d) of s171(1).[146]

[342] Brown J also analysed (in the context of submissions he received) the Supreme Court's majority judgment in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors*.[147] His analysis is similar, with respect, to that adopted by this Board.[148] Importantly, Brown J did not consider the Basin Reserve Board had misunderstood or incorrectly analysed the *King Salmon* decision.[149]

[343] The *King Salmon* decision, in any event, did not involve any consideration of a NoR under s171(1).

[344] Another feature of Brown J's judgment is its emphasis on the importance of the statutory mandate in s171(1) of "having particular regard to" the matters listed in (a) to (d) of the provision. The adjective "particular" clearly regards a sharp focus when a decision-maker under s171(1) is considering the effects of a requested requirement. Interestingly, the same words are used in s7 of the RMA. Brown J's approach, undoubtedly correct as a matter of statutory interpretation, was that the words required a decision-maker to give the matter in its regard specific and separate attention:[150]

> "*[66] While NZTA submitted that the (a) to (d) matters in s 171(1) were to be carefully weighed in coming to a conclusion, no submission was advanced in the course of argument on the interpretation issue to the effect*

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145 *New Zealand Transport Agency v Architectural Centre Inc & Ors [2015] NZHC 1991, para 82.*

146 Ibid, para 98.

147 *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38.

148 *New Zealand Transport Agency v Architectural Centre Inc & Ors [2015] NZHC 1991, para 83-118.*

149 Ibid, para 116.

150 Ibid, para 66.

> *that the matters to which particular regard was to be had were required to be the subject of extra weight. On that issue I share the view of Sir Andrew Morritt V-C in* Ashdown v Telegraph Group Ltd*:*
>
> > *It was submitted that the phrase 'must have particular regard to' indicates that the court should place extra weight on the matters to which the subsection refers. I do not so read it. Rather it points to the need for the court to consider the matters to which the subsection refers specifically and separately from other relevant considerations.*"

[345] At [77] of his judgment, Brown J set out the Basin Board's approach to its s171(1) decision-making process.

[346] The Basin Board transparently stated its intended decision-making process at [199]:

> "*[199] We therefore propose to structure this part of our decision (appropriately applying the guidance from King Salmon, as just identified) as follows:*
>
> *[a] To identify and set out the relevant provisions of the main RMA statutory instruments that* ***we must have particular regard to under Section 171(1)(a)****, and the relevant provisions of the main non-RMA statutory instruments and non-statutory documents that* ***we must have particular regard to under Section 171(1)(d)****;*
>
> *[b] To consider and evaluate the adverse and beneficial effects on the environment informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents;*
>
> *[c]* ***To consider and evaluate the directions given in Section 171(1)(b)*** *as to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work;*
>
> *[d]* ***To consider and evaluate the directions given in Section 171(1)(c)*** *as to whether the work and designation are reasonably necessary for achieving the objectives for which the designation is sought; and*
>
> *[e] In making our overall judgment subject to Part 2, to consider and evaluate our findings in (a) to (d) above, and to determine whether the requirement achieves the RMA's purpose of sustainability.*
>
> [Emphasis added]"

[347] Brown J did not consider that this approach was "susceptible to challenge" so far as s171(1) was concerned.[151]

[348] This is indeed the approach that this Board has taken in its assessment in this chapter of the effects of NZTA's proposal on a sector-by-sector basis. It has paid particular regard to relevant policy statements, the consideration of alternative routes, and whether the work and designation are reasonably necessary to achieve NZTA's objectives, particularly the many social and transport benefits that will flow from the EWL highway, including it being an enduring transport solution. The Board

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[151] Ibid, para 78.

has also had particular regard to the objectives and policies of AUP:OP and relevant planning instruments.

## 12.4 POSSIBLE CONFLICTING HIGH COURT AUTHORITY

[349] Mr Mulligan, in his opening submissions to the Board, and various other counsel during their submissions, alerted the Board to a possible conflict between two recent High Court authorities. The first was Brown J's judgment released in August 2015, *New Zealand Transport Agency v Architectural Centre Incorporated*.[152] That judgment dismissed an appeal by the New Zealand Transport Agency from a constituted Board of Inquiry under s149J of the RMA, which, by a majority, had refused to grant a NoR to erect a two-lane bridge over the northern side of the Basin Reserve in Wellington.

[350] The second authority is Cull J's judgment released in January 2017, *R J Davidson Family Trust v Marlborough District Council,*[153] which involved unsuccessful appeals from the Environment Court that had upheld a Commissioner's decision to decline a proposal to establish a mussel farm in Beatrix Bay in Pelorus Sound.

[351] Mr Mulligan's detailed opening submission on the conflict explained the matter in this way. Hitherto there had been an "orthodox" approach to Part 2 whereby courts and other decision-makers exercised an "overall broad judgment" when considering applications for resource consents or NoRs. This approach involved stepping back to consider the applications (and presumably the proposed decisions) against Part 2. The Environment Court in *North Shore City Council v Auckland Regional Council* described the process thus:[154]

> "*The method of applying s5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose. … Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.*"

[352] That "orthodox" approach has, in the eyes of some, been seen as modified by dicta in the Supreme Court's *King Salmon* decision. The previous section of this chapter

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[152] [2015] NZHC 1991.

[153] *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

[154] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 at 26, affirmed on appeal to the High Court in *Green & McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519.

refers in part to *King Salmon*. The triggering application in the *King Salmon* case was for a plan change. This brought into play (the proposed salmon farm being in the coastal environment) the effect of a high level policy document, the New Zealand Coastal Policy Statement. One of the issues put by counsel to the Supreme Court was the extent to which a decision-maker could refer to Part 2 when it was required to give effect to the NZCPS.[155] The majority dealt with the submission in this way:

> "*[90] The difficulty with the argument is that, as The Board have said, the NZCPS was intended to give substance to the principles in pt 2 in respect of the coastal environment by stating objectives and policies which apply those principles to that environment: the NZCPS translates the general principles to more specific or focussed objectives and policies. The NZCPS is a carefully expressed document whose contents are the result of a rigorous process of formulation and evaluation. It is a document which reflects particular choices. To illustrate, s 5(2)(c) of the RMA talks about 'avoiding, remedying or mitigating any adverse effects of activities on the environment' and s 6(a) identifies 'the preservation of the natural character of the coastal environment (including the coastal marine area) ... and the protection of [it] from inappropriate subdivision, use and development' as a matter of national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others. For these reasons, it is difficult to see that resort to pt 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.*"

[353] Thus, *King Salmon* has been seen by some as authority for the proposition that it is impermissible for a decision-maker to refer to Part 2 unless there is an allegation of invalidity, incomplete coverage, or uncertainty of meaning, over a relevant planning instrument or document. Certainly, that is what the Supreme Court has said at [90]. But importantly the Supreme Court has also pointed out that there are limits to the extent decision-makers can "decline" to implement a policy document in the circumstances of the particular application. That limitation, for the reasons

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[155] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38, para 90.

already intimated by the Supreme Court,[156] flows from the hierarchical nature of planning instruments and documents.[157]

[354] It does not seem to the Board that any fair or contextual reading of the Supreme Court's dicta in *King Salmon* results in a proposition that Part 2 should be ignored. Rather, when operating in the area covered by a hierarchical planning instrument, a decision-maker's ability to minimise, read down, or dilute a planning instrument is severely circumscribed.

[355] In the appeal before Cull J in *Davidson Family Trust*, the Environment Court[158] had stated:

> "*We now know, in the light of King Salmon, that it is not merely a 'conflict' which causes the need to apply Part 2. The Supreme Court has made it clear that, absent invalidity, incomplete coverage or uncertainty of meaning in the intervening statutory documents, there is no need to look at Part 2 of the RMA even in section 104 RMA.*"

[356] One would, with respect, search in vain for anything in the Supreme Court's *King Salmon* decision to the effect that there was, "*no need to look at Part 2 of the RMA, even in s104*". Nor, when Cull J, in her *Davidson Family Trust* judgment, upheld the Environment Court, did she make any suggestion of that sort. Rather, she stated:

> "*[75] The Supreme Court rejected the 'overall judgment' approach in relation to the implementation of the NZCPS in particular. It is inconsistent with the elaborate process required before a national coastal policy statement can be issued and the overall judgment approach created uncertainty.*
>
> *[76] I find that the reasoning in King Salmon does apply to s 104(1) because the relevant provisions of the planning documents, which include the NZCPS, have already given substance to the principles in Part 2. Where, however, as the Supreme Court held, there has been invalidity, incomplete coverage or uncertainty of meaning within the planning documents, resort to Part 2 should then occur.*
>
> *[77] I also consider that the Environment Court's decision was consistent with King Salmon and the majority correctly applied it to the different context of s 104. I accept Council's submission that it would be inconsistent with the scheme of the RMA and King Salmon to allow Regional or District Plans to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications. It could result in decision-makers being more restrained when making district plans, applying the King Salmon approach, than they would when determining resource consent applications.*"

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[156] Ibid.

[157] This approach is consistent with the recent judgment of Wylie J, released on 12 December 2017, *Royal Forest and Bird Protection Society of NZ Inc v Bay of Plenty Regional Council* [2017] NZHC 3080. It is also consistent with the Court of Appeal's conclusion that *King Salmon* has led to an "inevitably more restrictive regime", *Man'O War Station Ltd v Auckland Council* [2017] NZCA 24 at [60].

[158] *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81, para 259.

[357] Indeed, it would be surprising if any higher court were to suggest that Part 2 should be ignored. Section 104, like s171(1), is expressly stated in s104(1) to be "subject to Part 2". The s5 purpose of the RMA must always remain as an interpretative guide, not only for the statute itself but for instruments, plans and documents made pursuant to the statute. The mandatory obligations cast upon people exercising functions and powers under the RMA imposed by ss6, 7 and 8, must, as a matter of law and policy, extend to people making decisions under s104. There is certainly nothing in Cull J's judgment to the contrary. It seems to the Board that the conflict seen by some counsel may be more apparent on a cursory reading of the relevant cases than real.

[358] Obviously, at the end of any RMA consideration, a decision-maker would be wise to ensure that his or her decision is consistent with the s5 purpose. That is almost certainly why an overall judgment is necessary. Furthermore, consideration of Part 2 matters might well be necessary in situations where a plan (such as the AUP:OP) does not cover the entire range of environmental issues raised by an application or is short on specifics or detail.

[359] That said, it is not for this Board to ignore High Court authority, although a Supreme Court authority inevitably has greater force. This Board is comparatively a lowly worm among courts interpreting the RMA. The Board was told by Mr Gardner-Hopkins, counsel for Transpower, who was also counsel for the unsuccessful appellant in *Davidson*, that Cull J's judgment has been appealed to the Court of Appeal and the Board understands that a hearing has been set down for November 2017.

[360] Mr Mulligan's submission was that, given this conflict, the Board should effectively ride both horses. There were, he submitted, two approaches open to the Board. The first was to apply an overall broad judgment under Part 2 when considering the NoRs under s171 but to limit consideration of resource consent applications (by not considering Part 2) under s104. The second approach was to follow the *Davidson* decision, having recourse to Part 2 when the relevant plans did not provide complete coverage. This approach, submitted counsel, would necessarily follow, given that NZTA's proposals sat across both district and regional coastal plan areas. In either case Mr Mulligan submitted, and correctly so, the Board's approach would require a balancing and weighting of relevant factors with proper regard to directive policies and policy nuances resulting in an overall broad judgment. There is no heresy in that submission. Nor is it in conflict with *King Salmon*, or the judgments of Brown J and Cull J.

## 12.5 SECTION 104D

[361] The Proposal is a non-complying activity. Resource consents can thus only be granted if the applications pass through one of the two s104D gateways. There is no way the application would satisfy the s104D(1)(a) test of having adverse effects that were minor. The only remaining gateway is thus s104D(1)(b), which requires NZTA to establish that the activities involved would not be contrary to the objectives and policies of the relevant plans and proposed plans and in particular those of the AUP:OP.[159] Only if the application satisfies that test will the Board be in a position to consider the resource consent applications under s104.

[362] Some of the planners who gave evidence to the Board considered that the application failed to penetrate the s104D(1)(b) gateway.[160] Other planners, quite properly, saw the application, so far as the threshold was concerned, as being finely (or very finely) balanced,[161] while Ms Rickard and Mr Gouge remained of the view that the gateway test was (simply) passed.[162]

[363] The fact that an activity is non-complying inevitably raises tensions between the relevant plan, the assessment of the effects, and the plan's policy. As the Court of Appeal noted in *Arrigato Investments Limited v Auckland Regional Council*, a non-complying activity "*is, by reasons of its nature, unlikely to find direct support from any specific provision of the plan*".[163]

[364] Most plans of course, and the AUP:OP is no exception, will contain a multitude of policies and objectives covering different fields, some of which will overlap and some of which will not. The very nature of Auckland's geography, where much of the city surrounds two harbours and spreads up and along two North Island coastlines, triggers complex AUP issues, given the proximity of Auckland and its many zones to the CMA. Such an approach inevitably leads to a "fair appraisal" of the objectives and policies read as a whole as discussed in *Dye v Auckland Regional Council* to which authority the Board now turns.

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[159] Although not the regional policy statement provisions, namely the AUP:OP$^{RPS}$.

[160] Statement of Primary Evidence, MacPherson, para 34; Statement of Primary Evidence, Arbuthnot, TG Global, para 9.5; Statement of Primary Evidence, Arbuthnot, POAL, para 97.34; Statement of Primary Evidence, Brown, para 6.3.

[161] Hearing Summary, Coombes, para 3.1; Memorandum of Board Planner and Counsel, para 88.

[162] Statement of Primary Evidence, Rickard, para 12.14; Statement of Primary Evidence, Gouge, para 11.8.

[163] *Arrigato Investments Limited v Auckland Regional Council* [2002] 1 NZLR 323 at [17].

[365] A holistic approach to considering objectives and policies when considering the s104D test was established in the Court of Appeal decision in *Dye v Auckland Regional Council*.[164] In that case, the Court of Appeal upheld the Environment Court's decision (overturned by the High Court) regarding its assessment of the objectives and policies in the Rodney District Plan. The Court stated:

> "*[25] In summary, the Environment Court was fully mindful of the basic thrust of the relevant objectives and policies which was to confine rural residential activities to the designated areas. The Court considered that the objectives and policies allowed for the possibility, albeit limited, that such activities might nevertheless appropriately be allowed to occur outside the designated areas and in the general rural part of the district. Whether a particular application which would necessarily be for a non-complying activity was appropriate, would obviously depend on its particular combination of circumstances. It is implicit in its approach that the Environment Court did not see the relevant objectives and policies as precluding altogether developments not falling within a designated area. The objectives and policies themselves recognised that some wider development might be appropriate. If the Court found a particular proposal to be appropriate, it could not be said to be contrary to the objectives and policies on the basis that it was outside the particular controls which were designed to implement them. The Board are unable to conclude that in approaching the matter in that way the Environment Court misunderstood or misinterpreted the objectives and policies. The view which the Court took was open to it on a fair appraisal of the objectives and policies read as a whole and, in reaching its view, the Court committed no error of law.*"

[366] Some helpful comments were also made by the Environment Court in *Akaroa Civic Trust v Christchurch City Council.*[165]

> "*… We consider that if a proposal is to be stopped at the second gateway it must be contrary to the relevant objectives and policies as a whole. We accept immediately that this is not a numbers game: at the extremes it is conceivable that a proposal may achieve only one policy in the district plan and be contrary to many others. But the proposal may be so strong in terms of that policy that it outweighs all the others if that is the intent of the plan as a whole. Conversely, a proposal may be consistent with and achieve all bar one of the relevant objectives and policies in a district plan. But if it is contrary to a policy which is, when the plan is read as a whole, very important and central to the proposal before the consent authority, it may be open to the consent authority to find the proposal is contrary to the objectives and policies under section 104D. … The usual position is that there are sets of objectives and policies either way, and only if there is an important set to which the application is contrary can the local authority rightly conclude that the second gate is not passed.*"

[367] In *Re Waiheke Marinas Limited*[166] the Environment Court noted that the statement in the *Akaroa Civic Trust* case is a helpful pointer to scenarios that can arise when

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[164] *Dye v Auckland Regional Council* [2002] 1 NZLR 337; (2001) 7 ELRNZ 209; [2001] NZRMA 513 (CA).at [25].

[165] *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at [74].

[166] *Re Waiheke Marinas Limited* [2015] NZEnvC 218.

carrying out the task of a "*fair appraisal of objectives and policies read as a whole*" as directed by the Court of Appeal in *Dye v Auckland Regional Council*.

[368] Applying the above, the approach must be to consider and weigh carefully the many activities that NZTA's applications entail and to decide whether those activities collectively are or are not contrary to the objectives and policies of both the AUP:OP and the legacy Coastal Plan provisions.

# 13. MANA WHENUA AND CULTURAL ISSUES

## 13.1 CULTURAL LANDSCAPE

[369] The cultural landscape within which the footprint of the Proposal falls was described in submissions, evidence and representations given by Mana Whenua and set out in the Cultural Values Report and the cultural values assessments provided with the submissions of Te Kawerau ā Maki, Ngāti Te Ata Waiohua and Ngāti Paoa. The Board also heard oral evidence from respected kaumātua and expert Mr Te Warena Taua on behalf of Te Kawerau ā Maki and from Mr Blair on behalf of Ngāti Whātua Ōrākei about the ancestral and contemporary relationship of those iwi within the Manukau and surrounds, including some of the Kahui tipua (guardian taniwha) who watch over the Manukau, tohu, waahi tapu and other cultural sites within the area.

[370] Places and features of the physical environment valued by Mana Whenua include (although are not limited to):

(a) Coastal and freshwaters (Māngere Inlet (Te Waimokoia) and the wider Manukau Harbour, Ōtāhuhu Creek and Tāmaki River beyond);

(b) Volcanic cones and features (Ngā Tapuwae o Mataoho) like Te Hōpua a Rangi, pahoehoe lava flows on the edge of the Māngere Inlet, Ōtāhuhu / Mt Richmond, Rarotonga / Mt Smart (the latter two maunga being part of the Tāmaki Collective Settlement);

(c) Places of settlement (Onehunga, Mutukāroa-Hamlins Hill, ancestral pā at Ōtāhuhu / Mt Richmond, Rarotonga / Mt Smart);

(d) Ōtāhuhu (Te Tō Waka) and Kāretu Portages;

(e) Urupā; and

(f) Sites and areas of specific heritage and history, including Ngā Rango e Rua o Tainui, Te Pāpapa, Te Apunga o Tainui, Waihihi and Te Puna Tapu o Pōtatau.[167]

[167] NZTA, Cultural Values Assessment Report.

[371] The Urban and Landscape Design Framework (ULDF) sets out Mana Whenua urban design objectives that were prepared following extensive consultation with Mana Whenua and were a key consideration throughout the preparation of the ULDF:[168]

- The values of the environment (including the economy, culture, nature and community) are holistic across the Project area.
- The cultural landscape of the area is significant, for settlement (as a residence but also as a meeting place), for access (as a portage) and for movement (as a trade hub and with different whakapapa for many iwi).
- The project should seek to restore and/or replenish the mauri of the environment – to enhance and acknowledge the mana of the Māngere Inlet and the Manukau Harbour.
- The project should seek opportunities to increase the restorative rehabilitation capacity of the environment.
- The Proposal should acknowledge and give special design consideration to the following remaining iconic "geographic areas" of interest as "features of the cultural landscape", including: Te Hōpua a Rangi; Anns Creek; Mutukāroa; Te Apunga o Tainui, waahi tapu site; Ōtāhuhu Creek; Pikes Point / Pahoehoe lava flows; Portages – Kāretu and Ōtāhuhu.

[372] Dr Patterson outlined the relevant cultural landscape values for Ngāti Whātua Ōrākei that are associated with Onehunga, including waahi tapu, waahi taonga and the Manukau Harbour, and explained that the harbour is important to Ngāti Whātua Ōrākei because of its connection to their ancestors and the landscape they named and moved within. He noted that one of the most commonly recited names of the Manukau Harbour itself reflects that ancestral connection with the harbour, being called Te Manukanuka o Hoturoa to recall the rangatira (captain) of the Tainui waka who portaged and explored the harbour.[169]

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[168] NZTA, Urban and Landscape Design Framework, p2.

[169] Transcript, Patterson, p4260; Transcript, Taua, p4286.

[373] Dr Patterson considered there had been little assessment of the cultural dimension to landscape and produced a report he had prepared on behalf of Ngāti Whātua Ōrākei dated 16 April 2008 for the purposes of the Manukau Harbour Crossing Proposal, noting that it provided an important context to the landscape values and adopting it as his evidence for the purposes of this Hearing.

[374] Ms Wilson on behalf of Te Ākitai Waiohua described the Manukau Harbour as their central identifier[170], treasured as a means of transport and the provider of food including fish, kaimoana (seafood) and birds as well as other basic necessities of life. She expressed in particular the deep connection they have with Te Hōpua a Rangi, named after Rangihuamoa, an ancient tūpuna of Te Ākitai Waiohua.

[375] Together with representations on behalf of Ngāti Te Ata Waiohua, Ngāti Tamaoho and Ngāti Maru, Mana Whenua highlighted the relevance and importance of their connections to the wider area traversed by the Proposal with waahi tapu and other taonga, including Te Tō Waka, Te Apunga o Tainui, Mutukāroa and the Kāretu Portage.

[376] Mr Minhinnick on behalf of Ngāti Te Ata Waiohua also related the harbour to the identity of Ngāti Te Ata Waiohua, highlighting their links with Tainui, Pōtatau and the Onehunga area. He related the longstanding commitment and advocacy role that Ngāti Te Ata Waiohua have had as kaitiaki advocating for the harbour and other water-related issues.[171]

## 13.2 CULTURAL ISSUES

[377] NZTA's Proposal raises both provisions under the RMA and cultural issues of importance to Māori. Of central importance to Mana Whenua is the status of the Manukau Harbour and its mauri, the Te Hōpua a Rangi volcanic tuff ring, the proposal to reclaim part of the foreshore of the Māngere Inlet, and associated proposals to infringe on mudflats, bird habitat, and dredge part of the Inlet.

[378] A starting point must be the Agreement between the Crown and a number of Auckland iwi, *Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed*.[172]

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[170] Transcript, Wilson, p4749.

[171] Transcript, Minhinnick, p5926.

[172] NZTA CVR, p9-10;

This Deed was finalised and executed in December 2012 between the collective Auckland iwi[173] and the Crown.

[379] Section 10 of the Deed, headed 'Waitematā and Manukau Harbours', contains a joint acknowledgement by Ngā Mana Whenua o Tāmaki Makaurau and the Crown that, the Manukau Harbour is "… *of extremely high spiritual ancestral, cultural, customary and historical importance to Mana Whenua o Tāmaki Makaurau* ..."[174]

[380] The Deed further provides[175] that cultural redress in relation to both harbours is still at large and to be "developed" in separate negotiations with the Crown. The Collective Deed was a prelude to (codes) of legislation coming into force[176]. The Deed itself was a product of 2009-2010 negotiations and understandings between Ngā Mana Whenua o Tāmaki Makaurau and the Crown to arrange for the vesting and co-governance of maunga[177] granting the right of first refusal over Crown land in the Auckland area, and embarking on a process to resolve Treaty claims relating to the harbours.[178]

[381] Twenty-seven years before the Deed, the Waitangi Tribunal issued its 1985 Manukau Report (WAI 8). That report dealt extensively with Treaty of Waitangi issues arising out of the ownership, use and despoliation of the Manukau Harbour since 1840. The Waitangi Tribunal in 1985 did not have the extensive jurisdiction it has today. Nonetheless, the Tribunal found:

> "*In the Manukau the tribal enjoyment of the lands and fisheries has been and continues to be severely prejudiced by compulsory acquisitions, land development, industrial developments, reclamations, waste discharges, zonings, commercial fishing and the denial of traditional harbour access (para 6.4).*

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[173] As set out in s9 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, Ngā Mana Whenua o Tāmaki Makaurau means the collective group of the following iwi and hapū: Ngāi Tai ki Tāmaki; Ngāti Maru; Ngāti Pāoa; Ngāti Tamaoho; Ngāti Tamaterā; Ngāti Te Ata Waiohua; Ngāti Whanaunga; Ngāti Whātua o Kaipara; Ngāti Whātua Ōrākei; Te Ākitai Waiohua; Te Kawerau ā Maki; Te Patukirikiri; hapū of Ngāti Whātua (other than Ngāti Whātua o Kaipara and Ngāti Whātua Ōrākei) whose members are beneficiaries of Te Rūnanga o Ngāti Whātua, including Te Taoū not descended from Tuperiri; and the individuals who are members of 1 or more of those iwi and hapū; and any whānau, hapū, or group to the extent that it is composed of those individuals.

[174] Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed 2012, Clause 10.1.1.

[175] Ibid, clause 10.1.2.

[176] Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014.

[177] Ibid, section 10. Sets out the meaning of 'maunga' for the purposes of the Act.

[178] Ibid, clause 1.3.

*The omission of the Crown to provide a protection against these things is contrary to the principles of the Treaty of Waitangi (para 6.3).*"[179]

[382] The Tribunal made a number of recommendations. These recommendations included one to the Minister of Transport that, pending the formulation of an Action Plan (a plan to commit to taking positive measures for the restoration of the Manukau Harbour), further reclamations in the Manukau should be prohibited.[180]

[383] As is clear from Clause 10.1.2 of the Collective Redress Deed, the issue of cultural redress in respect of the Manukau Harbour is still at large. The breaches identified by the Tribunal in 1985 have yet to be settled, although some process is in place. The Action Plan for the Manukau Harbour was finalised in 1990,[181] but has continued to influence subsequent planning responses, including those relating to stormwater management and reclamation.[182]

[384] This brief background indisputably brings into play important provisions contained in Part 2 of the RMA. Section 6(e) stipulates as a matter of national importance the relationship of Māori with their ancestral lands and water and other taonga. The Manukau Harbour is indisputably a taonga. People exercising functions under the RMA must "recognise and provide for" such a matter of national importance. Section 7(a) defines kaitiakitanga as being a matter to which people exercising powers under the RMA must "have particular regard". Importantly, the Treaty of Waitangi, which s8 stipulates people exercising functions and powers under the RMA must "take into account", is clearly engaged. The WAI 8 Report acknowledged that breach of Treaty principles. The Crown, in the 2012 Deed, effectively acknowledges that full redress has yet to be negotiated.

[385] To its credit, NZTA, as a Crown agency, entered into a dialogue with Mana Whenua (being Manukau Harbour connected iwi) at an early stage. A Cultural Values Report for the EWL was produced. Ten Mana Whenua groups participated. It was common ground that none of the participating groups would or could bind iwi or iwi governance structures in any way. Nor would the group be able to make any final commitment to the EWL.

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[179] WAI 8, para 9.2.1.

[180] Ibid, para 10.3 and 10.4.

[181] Statement of Rebuttal Evidence, Linzey, Cultural Values Assessment-Engagement, para 6.3.

[182] Ibid, para 6.3-6.4.

[386] Three overarching themes that NZTA accepted arising out of this consultation process were to:

(a) Respect the place;

(b) Restore the whenua; and

(c) Reconnect the people.[183]

[387] Care was taken to avoid various sites such as Hamlins Hill (Mutukāroa) and Te Apunga o Tainui. Recognition of the Kāretu Path and Portage and the Ōtāhuhu Portage (Te Tō Waka) were outcomes. So too, in NZTA's submission, was the development of a plan to treat the discharge of untreated stormwater flowing into the Māngere Inlet from the 611 ha Onehunga hinterland.

## 13.3 ENGAGEMENT

[388] The Cultural Values Report (CVR) listed the following iwi and hapū as being engaged with and providing input into the Proposal:[184]

(a) Ngāi Tai ki Tāmaki

(b) Ngāti Maru

(c) Ngāti Paoa

(d) Ngāti Tamaoho

(e) Ngāti Te Ata Waiohua

(f) Ngāti Whātua Ōrākei

(g) Te Ahiwaru (Makaurau Marae Māori Trust)

(h) Te Ākitai Waiohua

(i) Te Kawerau ā Maki

(j) Te Rūnanga o Ngāti Whātua

[389] The Board understands from the CVR that each of the Mana Whenua listed above, apart from Ngāti Whātua Ōrākei and Te Ahiwaru, submitted Māori Values Assessments (MVAs) to the NZTA project team for the purposes of option

[183] Statement of Primary Evidence, Hancock, para 10.3.

[184] NZTA, CVR, para 2.2.

evaluation (MCA) and wider environmental assessment of the Proposal. The MVAs were reviewed during the compilation of the CVR but not produced as evidence because they held sensitive information.

[390] Nonetheless, Ngāti Paoa, Ngāti Te Ata Waiohua and Te Kawerau ā Maki attached their MVAs to their original submissions.

### Ngāi Tai ki Tāmaki

[391] In their original submission, Ngāi Tai ki Tāmaki indicated full support with conditional approval. They confirmed their satisfaction with the level of engagement with NZTA, recognising that NZTA had provided for their concerns and vision with regard to the overall Proposal. Ngāi Tai ki Tāmaki stated their belief that their concern to improve the health of the Inlet and Manukau Harbour had been heard, considered and would be actioned. They noted their support was conditional upon the provision of a contamination bund to reduce pollutants into the Inlet and Harbour and also confirmed that Ngāi Tai ki Tāmaki had been an integral part of the team and supported the CVR provided for the Proposal.

### Ngāti Maru Rūnanga (Ngāti Maru)

[392] Ngāti Maru's original submission[185] indicated a neutral position with no view as to the decision the Board should make although some key areas for conditions were identified. Mr Warren, on behalf of Ngāti Maru, filed opening submissions in writing[186] and Mr Majurey appeared at the Hearing to make a statement on behalf of the iwi.[187] The final position of Ngāti Maru was made clear when Mr Warren confirmed he appeared on their behalf and that they were party to the Mana Whenua Tribes Agreement.

### Ngāti Paoa

[393] Ngāti Paoa's submission indicated partial support and asked the Board to approve the Proposal with conditions. It records that the Cultural Values Assessment (CVA) prepared by them in April 2016 was issued in reliance on information provided by NZTA in 2014, with the intention for an updated CVA to be provided prior to the Hearing. The submission records that the CVR for the EWL, prepared by NZTA, does not constitute an assessment of cultural effects upon Ngāti Paoa. It confirms

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[185] Submission 126358, Ngāti Maru, clause 3.

[186] Opening Submissions, Warren, dated 6 July 2017.

[187] Representation, Majurey, Ngāti Maru, Hearing Day 43.

that Ngāti Paoa largely support the general intent of the CVR but considered enforceable and valid commitments to restoration of mauri, commitment of funding to achieve this outcome and additional measures to avoid, remedy, mitigate and offset relevant adverse cultural effects still needed to be achieved.[188] The Board understands from the closing statement of Mr Warren that Ngāti Paoa are party to the Mana Whenua Tribes Agreement.[189]

### Ngāti Tamaoho

[394] Ngāti Tamaoho's original submission[190] indicated full support for the Proposal and requested that the Board approve the Proposal for the reasons outlined therein. They included that Ngāti Tamaoho had had good engagement with NZTA throughout the entire process over several years and that NZTA had provided for their concerns and vision with regards to the overall project. They considered there would be an improvement to the health of the Māngere Inlet and, consequently, the Manukau Harbour; the Proposal provides for a contamination containment bund that will reduce pollutants reaching the harbour. Importantly, it records that Ngāti Tamaoho support the CVR provided for this proposal. Ms Rutherfurd appeared at the Hearing to make a statement on behalf of the iwi.[191] Ngāti Tamaoho are party to the Mana Whenua Tribes Agreement as confirmed by Mr Warren when he appeared to present his Closing Statement on their behalf.[192]

### Ngāti Te Ata

[395] Ngāti Te Ata fully opposed the Proposal and asked that the Board decline it, standing by the recommendations of the Waitangi Tribunal in the Manukau Report. A copy of their Cultural Impact Assessment (CIA) was attached to their submission. The representation on their behalf given by Mr Minhinnick reiterated that opposition and indicated a preference for a discussion around restoration of the Manukau Harbour with the creation of mutually beneficial opportunities.[193]

### Ngāti Whātua Ōrākei

[396] Ngāti Whātua Ōrākei fully opposed the Proposal and asked that the Board decline it in its entirety. They did not submit an MVA on the Project.[194] Ngāti Whātua Ōrākei were well represented at the Hearing by Mr Enright and fully participated in the

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[188] Submission 126522, Ngāti Paoa, dated 23 March 2017, clauses 3 & 4.

[189] Closing Statement, Warren, para 3.

[190] Submission 126362, Ngāti Tamaoho, dated 22 March 2017, clause 3.

[191] Representation, Rutherfurd, Ngāti Tamaoho.

[192] Closing Statement, Warren, para 1-2.

[193] Submission 126320, Ngāti Te Ata; Representation, Minhinnick.

[194] NZTA, CVR, 12.12.

Hearing, cross-examining relevant witnesses on key issues, presenting cultural and expert (planning) evidence, which was able to be tested by the Board and cross-examination by interested parties.

### Te Ahiwaru (Makaurau Marae Māori Trust)

[397] Makaurau Marae Māori Trust (Makaurau Marae) originally submitted in partial support of the Proposal, asking that the Board approve the Proposal with conditions. That partial support was clarified as "not opposing" the Proposal provided that appropriate conditions are imposed to avoid, remedy, mitigate and offset adverse cultural effects. Ms Olsen presented a statement on behalf of Makaurau Marae confirming that their final position was to oppose the Proposal.

### Te Ākitai Waiohua Waka Taua Society (Te Ākitai)

[398] Te Ākitai Waiohua Waka Taua Society (Te Ākitai) submitted in full opposition to the Proposal, but nevertheless asked that the Board approve it subject to certain conditions to address future Treaty of Waitangi settlement negotiations with the Crown and the effects of the Project on Te Hōpua and the Manukau Harbour, to ensure its cultural values are recognised.[195] Evidence was given by Ms Karen Wilson, on behalf of Te Ākitai, who very clearly and capably set out the views of Te Ākitai. The final position of Te Ākitai was made clear to the Board by Mr Warren who confirmed that Te Ākitai are party to the Mana Whenua Tribes Agreement (discussed in detail below) and do not oppose the Proposal.[196]

### Te Kawerau ā Maki

[399] Te Kawerau ā Maki's preliminary CIA attached to their submission[197] indicates partial support for the Proposal and asks the Board to approve the Proposal with conditions. It lists sites of significance to Te Kawerau ā Maki within the Proposal

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[195] Submission 126332, Te Ākitai Waiohua, clauses 3-4

[196] Closing Statement, Warren, para 3; Warren, Transcript, Day 47, p. 6319, lines 2-3 and p.6326, lines 33 to 39. The Board notes Mr Warren's observation that once each individual Mana Whenua group sat back to look at the full picture, the environmental benefits of stormwater treatment and contaminant containment together with the Agreement and the suite of opportunities and mechanisms to address the issues raised by Mana Whenua, and just put it through the lens or filter of their worldview, you can only assume that that was a very delicate judgment to make particularly when you consider Ms Wilson's evidence in terms of the staunchness of Te Ākitai on these issues to where things have moved today. (Warren, Transcript, Day 47, p.6327, lines 42 to p. 6328, line 3.).

[197] Dated January 2014 and provided as an addendum to their earlier Preliminary CIA dated November 2013 .

area. Te Kawerau ā Maki's final position was to oppose the EWL and recommend the Board decline.

### Te Rūnanga o Ngāti Whātua

[400] Te Rūnanga o Ngāti Whātua indicated partial support for the Proposal in their original submission, asking the Board to approve with conditions. Those conditions sought to address, among other matters, the mitigation of adverse effects on ONFs, ONLs and SEAs within the Proposal area and aspects around dredging for the purposes of providing the base material for the contaminant containment bund. During the Hearing, Ngāti Whātua Ōrākei produced a letter from the Rūnanga that expressed support for Ngāti Whātua Ōrākei's formal position opposing the Proposal.[198] The final position of Te Rūnanga o Ngāti Whātua was made clear when Mr Warren confirmed he appeared on their behalf and that they were party to the Mana Whenua Tribes Agreement, subject to ratification by the Trustees of Te Rūnanga o Ngāti Whātua (confirmation of which was subsequently received).[199]

[401] Ngāi Tai ki Tāmaki, Ngāti Paoa and Te Rūnanga o Ngāti Whātua did not appear at nor participate in the Hearing, but were represented by Mr Warren who appeared before the Board to present closing submissions on their behalf in terms of the Mana Whenua Tribes and Mana Whenua Tribes Agreement referred to in more detail below.

### Findings and conclusions

[402] The Board acknowledges Mr Warren's submission that, regardless of the position taken by the Mana Whenua Tribes, they have individually – and at times, collectively – consistently raised with the Board and/or NZTA a number of issues they wanted addressed by the Proposal, which include:[200]

(a) Ensuring that the Project does not impact on Mana Whenua rights in regards to their extant Te Tiriti o Waitangi / Treaty of Waitangi claims and settlement negotiations relating to the Manukau Harbour;

(b) The protection of the Manukau Harbour;

(c) The protection of waahi tapu; and

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[198] Exhibit U.

[199] Memorandum of Counsel, Warren, dated 19 September 2017.

[200] Closing Statement, Warren, para.8.

(d) The overall environmental effects of the Project – ensuring that there is appropriate monitoring of the Manukau Harbour and the avoidance, remediation and mitigation of adverse effects.

[403] NZTA's approach recognised that Mana Whenua are best placed to identify the impacts of the Proposal on the physical and cultural environment valued by them. NZTA therefore engaged with Mana Whenua throughout the design and development of the Proposal. They have, in relation to every aspect of the application, left it to Mana Whenua to assess the impact of the Proposal on their cultural values relating to their ancestral and contemporary use and occupation in this area and kaitiakitanga of the natural resources within it. That approach is appropriate. As submitted by Mr Enright, the RPS identifies Mana Whenua as the specialists in identification of cultural values and effects.[201] The Board notes that the Unitary Plan also recognises Mana Whenua as specialists in the tikanga of their hapū or iwi and as being best placed to convey their relationship with their ancestral lands, water, sites, waahi tapu and other taonga.[202]

[404] The Board accepts the evidence and submissions of NZTA that the engagement with Mana Whenua reflects the principles of Te Tiriti o Waitangi. Based on the principle of partnership, engagement with Mana Whenua occurred at the outset of development of the Proposal. The CVR sets out the process of early engagement and records that NZTA, with Auckland Transport in the early stages, recognised early on in the development of the Proposal that the way to achieve the best outcomes for the Proposal and for wider infrastructure development was to engage comprehensively and meaningfully with Mana Whenua. It states that engagement was "*underpinned by the commitment of partnership between Mana Whenua and NZTA (as representative of the Crown) founded by Te Tiriti o Waitangi*".[203]

[405] Throughout, Mana Whenua were both informed and involved in decision-making in respect of the Proposal. A Schedule of Mana Whenua specific engagement is set out at Appendix B of the CVR, with more information regarding the wider engagement processes for the Proposal provided in the AEE and in the evidence of Ms Linzey and Mr Delamere. The CVR records that during these meetings, Mana Whenua were engaged on their aspirations for the Inlet and bespoke issues relating to the design of the Proposal, the assessment of option alternatives and the

[201] Closing Statement, Enright, p1.

[202] Policy B 6.2.2 (1)(e).

[203] NZTA CVR, para 12.2.

measures needed to mitigate and address identified effects.[204] Throughout the Proposal development, NZTA actively recognised the relationship Mana Whenua have with the Proposal area and has worked to address and appropriately mitigate any potential effects.[205]

[406] As stated by Ms Linzey, "*There has been demonstrable consideration given to the enduring relationship of a Maori with the natural and physical resources*" [206] in this area and this "*is particularly demonstrated in the assessment of corridor and alignment options and in the Project design*".[207]

[407] Ongoing engagement occurred right up to lodgement and was set to continue through the Hearing process with the objective of keeping Mana Whenua informed of updates to the design, seeking feedback and working collaboratively on outcomes, particularly production of the ULDF, reclamation, stormwater, leachate treatment options and biodiversity and ecology outcomes.[208]

[408] Mr Blair agreed that NZTA had in good faith embarked on a very lengthy and probably expensive consultation process with Mana Whenua.[209] He also accepted that, consistent with Ngāti Whātua Ōrākei's Iwi Management Plan, it is best practice to have Mana Whenua in the room making decisions.[210] However, he did not consider that "real" decision-making had been shared, instead likening the process that had occurred to a "participation process".

[409] The Board accepts the evidence of Ms Linzey that members or staff of Ngāti Whātua Ōrākei participated in the engagement process on behalf of the iwi. Mr Blair made the point numerous times that there is nothing on the record to indicate their declaration of support for the Proposal.[211] While that is true, as noted by NZTA

[204] Ibid, para 12.16.

[205] Ibid, para 12.4.

[206] Statement of Primary Evidence, Linzey, Cultural Values, para 10.1(b).

[207] Ibid.

[208] NZTA CVR, para 12.17.

[209] Transcript, Blair, p4392.

[210] Transcript, Blair, p.4392.

[211] Transcript, Blair, p4382; p4389; p4396.

there is also nothing on the record to indicate specific opposition on the part of Ngāti Whātua Ōrākei as to the design that was unfolding. [212] [213]

[410] While the Board agrees that there is a real difference between "engagement" and "decision-making", the Board also acknowledges the evidence of NZTA that this process was an iterative one, hence the importance of Mana Whenua kaitiaki being "at the table" with a real ability to have input into and influence the final design as it evolved. Certainly, that input and influence has occurred but how that aspiration fits with the "rules of engagement" as set out in the CVR[214] is uncertain and would have been assisted by terms of reference as between NZTA and each Mana Whenua iwi being agreed at the outset, clarifying each party's expectations and commitment to that engagement process.

[411] Ngāti Maru acknowledged the various changes to Proposal design to address Mana Whenua concerns arising out of the consultation process. Ngāti Maru were concerned to explore mechanisms that preserved their spiritual and cultural values, including the mauri and long-term health of the Manukau Harbour, while enabling the future transport needs of Tāmaki Makaurau. The Board considers that for Ngāti Maru this Proposal achieves that.

[412] Ms Wilson emphasised in both her submissions and evidence that NZTA in partnership would need to have a strategy to ensure that Te Ākitai and/or any other Mana Whenua group have the ability to influence decision-making in relation to the harbour during the process of settling Manukau Harbour Treaty claims. NZTA's acknowledgement of that issue, and confirmation that they would not "cross over the top" of those matters was vital alongside the assurance that Te Ākitai would be able to continue to exercise their role as kaitiaki. The Board considers that for Te Ākitai this Proposal achieves that.

[413] The Board accepts Mr Mulligan's submission that consultation and engagement processes with Mana Whenua have been robust and have enabled NZTA to understand Mana Whenua concerns and incorporate Mana Whenua values into design and decision-making processes.[215] The CVR records that Mana Whenua

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[212] Statement of Rebuttal Evidence – Cultural Values Assessment-Engagement, Linzey, para 4.11–413.

[213] Transcript, Mulligan, p4382-4399.

[214] NZTA CVR, para e.

[215] Closing Statement, Mulligan, para 8.34.

consider the process of engagement to have been exemplary.[216] Ms Rutherfurd noted Ngāti Tamaoho had forged a respectful relationship with NZTA through the Proposal and considered this to be an example of a good process that resulted in cultural values influencing decisions.[217] The Board acknowledges and accepts Mr Delamare's evidence and confirmation that this process was the best Mana Whenua engagement process (at a kaitiaki level) that he had been involved in and that in his view consultation was robust and meaningful and had been undertaken in good faith with a genuine intent on behalf of NZTA to work in partnership with Mana Whenua. [218]

## 13.4 MANA WHENUA TRIBES AND MANA WHENUA TRIBES AGREEMENT

[414] The complex and somewhat fraught nature of the various Mana Whenua interests in the Manukau Harbour and its surrounds was demonstrated in the closing days of the Hearing. As discussed generally elsewhere,[219] those Mana Whenua groups who chose to give evidence to the Board did not speak with one voice.

[415] When Mr Warren appeared before the Board to present closing submissions, those submissions were made on behalf of five Mana Whenua Tribes, who were:

(a) Te Ākitai Waiohua

(b) Ngāti Tamaoho

(c) Ngāti Maru

(d) Te Rūnanga o Ngāti Whātua

(e) Ngāi Tai ki Tāmaki.

[416] Those five tribes (defined by Mr Warren as "the Mana Whenua Tribes") together with Ngāti Paoa, Ngāti Whanaunga and Ngāti Tamaterā, had apparently been negotiating with one another and with NZTA for some time to try to resolve their concerns and reach an agreement in respect of the Proposal. The agreement reached has been ratified by all the Mana Whenua Tribes. Importantly, all of the Mana Whenua Tribes, together with Ngāti Paoa, Ngāti Whanaunga and Ngāti

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[216] NZTA, CVR, para 12.6.

[217] Representation, Rutherfurd, p.2.

[218] Closing Statement, Mulligan, para 8.34(b).

[219] Paragraph [426] of this Report. [is this para 426?]

Tamaterā, are also parties to the 2012 Ngā Mana Whenua o Tāmaki Makaurau Collective Deed of Settlement with the Crown.

[417] Counsel informed the Board that the outcome of the Agreement was that all the Mana Whenua Tribes who were parties to the Agreement were satisfied that their individual and collective concerns about the EWL had been satisfied. Thus, none of the Mana Whenua Tribes oppose the Proposal, some indeed (but not all) indicating their clear support.

[418] The Agreement itself was not produced to the Board and was described by counsel as confidential. Nonetheless both Mr Warren and Mr Mulligan confirmed both its content and that the Agreement had been concluded. From a procedural standpoint they accepted the Board's suggestion that the existence of the Agreement was common ground.

[419] The Agreement was described by counsel as legally binding and confidential. It is apparently conditional on NZTA receiving the necessary consents to proceed with the Proposal.

[420] The Agreement apparently has seven parts, which counsel's closing submissions itemised thus: [220]

(a) The protection of the legal and customary rights of Mana Whenua. These were described as rights under the Treaty of Waitangi including future claims to the Manukau Harbour; rights under Ngā Mana Whenua o Tāmaki Makaurau Collective Settlement including any future Manukau Harbour Treaty settlements; any future settlements between Mana Whenua and the Crown including cultural redress; and the ability to pursue claims or entitlements under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA).

(b) The vesting of the non-state highway reclamations in Mana Whenua. The Agreement apparently obliges NZTA to take the necessary steps through a partnering approach to vest the non-state highway proposed reclamations in Mana Whenua, using the MACA provisions as a vesting mechanism, coupled with the establishment of a fund of money by NZTA to meet ongoing costs relating to the non-state highway reclamations.

(c) The future governance of the non-state highway reclamations to be undertaken by both Mana Whenua and NZTA. This aspect of the Agreement apparently commits to the creation of a "reclamation

[220] Closing Submissions, Warren, para 14.

governance group" with members appointed by both Mana Whenua and NZTA, with a support funding mechanism to be provided by NZTA.

(d) Joint development by Mana Whenua and NZTA of operational management arrangements for the non-state highway reclamations.

(e) An agreement to explore whether the non-state highway reclamations can be given a particular legal status, possibly under the Reserves Act 1977.

(f) Various activities associated with the non-state highway reclamations, including the entire range of stormwater treatment, proper access on walking and cycling paths and environmentally sensitive areas to involve Mana Whenua input.

(g) Very specific agreed arrangements to recognise Mana Whenua relationship with sites to be explored (in relation to the non-state highway reclamations) including signage, pouwhenua, publications and waahi tapu protection mechanisms.

[421] At one level, especially in relation to proposed governance and operational management structures of the reclaimed land, the Agreement represents a significant empowerment of those iwi who are parties to it in their relationship with a Crown entity (NZTA). Such an Agreement, if implemented, would significantly influence the management of part of the Manukau Harbour environment and advance the relationship that Mana Whenua have with the harbour, its mauri, and its ongoing health and wellbeing with corresponding benefits to participating iwi.

[422] Whether or not, by entering into the Agreement, NZTA has loosened the lid of a Pandora's Box is fortunately not for the Board to decide. Clearly there will be downstream issues that will need resolution. The governance provisions of the Agreement have the potential to impact or alter NZTA's clearly stated objective of vesting the stormwater treatment facilities and plant in Auckland Council. The relevant provisions of MACA that might apply to the reclaimed land could well lend themselves to competing claims by iwi who are not parties to the Agreement. Although the Agreement provides for other Mana Whenua groups to join (the Agreement in counsel's words not being "a closed agreement"), there may be iwi who are opposed to reclamations and/or who regard the Manukau Harbour and its foreshore as being part of their rohe, who refuse or choose not to become parties to the Agreement. Again (and fortunately), these are not issues with which the Board has to grapple. The reclaimed land, and the governance rights that certain iwi may have over it, has the possible potential of bedevilling or delaying the settlement of Treaty Claims between the Crown and Manukau Harbour iwi.

[423] The matters traversed in the previous two paragraphs have not in any way influenced the Board's decision under the principles of the RMA.

[424] The Board is mindful of the fact that the existence of the Agreement, described as confidential, was not revealed during the Hearing. The Board was only given a broad outline (undoubtedly accurate) of the Agreement by counsel. Nonetheless the Agreement was not a factor on which Mana Whenua parties such as Ngāti Whātua Ōrākei, Te Kawerau ā Maki, Ngāti Te Ata Waiohua and Te Ahiwaru (Makaurau Marae), all of whom were opposed to the EWL, had the opportunity to call relevant evidence about or make submissions on.

[425] Arguably the existence of the Mana Whenua Tribes Agreement and what the Board has been told about its terms are not "evidence". It is common ground between NZTA and Mr Warren's iwi clients that such an agreement, with its summarised coverage, exists. Evidential rules under the RMA are pragmatic and relaxed. For instance, in terms of s276 the Environment Court can receive anything in evidence that it considers it appropriate to receive and it is not bound by the rules of law about evidence that apply to judicial proceedings.[221] Operating as it does under Part 6AA of the RMA, it does not appear the Board, so far as evidence is concerned, needs to operate in any different way from consent authorities and territorial authorities.[222]

[426] The Mana Whenua Tribes Agreement, to which NZTA is a party, has some interest. It is not its evidential status that is important. Rather, the Agreement's existence demonstrates that unsurprisingly iwi, with their disparate and individually-focused interests in the Māngere Inlet, the Manukau Harbour, the EWL proposed reclamations, neither speak with one voice nor see the same picture. The Agreement has been instrumental in part in some iwi deciding to support or not oppose the EWL. Such support or lack of opposition and the existence of the Agreement, quite apart from natural justice considerations, does not weaken or undermine by one iota the submissions and evidence that the Board has received from iwi who oppose the Proposal.

[427] The cultural landscape, the relevant provisions of Part 2 of the RMA and the diverse and differing Mana Whenua stances, submissions and evidence are all matters the Board must weigh when considering NZTA's various notices and applications.

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[221] Sections 276(1)(a) and 276(2).

[222] Section 41(1)(b) gives to the Board appointed under s149J broad powers under s4B of the Commissions of Inquiry Act 1908.

## 13.5 MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011

[428] For a considerable portion of its length, the proposed EWL highway will occupy some of the foreshore of the Māngere Inlet. MACA, which confers substantive statutory rights on Māori, is engaged. The purpose of MACA, set out clearly in s4(1), is fourfold, being:

(a) To establish a durable scheme for the legitimate interests of all New Zealanders in the marine and coastal area;

(b) To recognise the mana tuku iho exercised in the marine and coastal area by tangata whenua;

(c) To provide for the exercise of customary interests in the common marine and coastal area;

(d) To acknowledge the Treaty of Waitangi.

[429] Potential issues arise under MACA because the carriageway of the proposed EWL will rest on a reclamation of the current foreshore of the Māngere Inlet.[223]

[430] The bed of the Inlet across which the proposed highway will pass lies below the high water mark. Describing the foreshore as "current" highlights the fact that the Manukau foreshore, and in particular that of the Māngere Inlet, has been extensively reclaimed and modified over the years. Part 3 of MACA provides for protected customary rights and, importantly, customary marine title in the common marine and coastal area. An applicant group (defined in s9 as including iwi, hapū, or whānau groups) may be able to establish a customary marine title if it has held an area in accordance with tikanga and has exclusively used and occupied it from 1840 to the present "without substantial interruption".[224]

[431] Given extensive and expanding European use of the Māngere Inlet and its littoral since 1840, to say nothing of reclamation, waste disposal, structure erection and the many other activities for well over a century, the prospects of any Manukau-related iwi being able to establish a customary marine title to part of the northern shore of the Māngere Inlet are remote. During the course of the Hearing the Chair

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[223] The word "*foreshore*" is deliberately not used in MACA, being a statute which repealed the Foreshore and Seabed Act 2004. The central concept in the s9 definition section is "*marine and coastal area*" which extends from MHWS to the outer limits of the territorial sea.

[224] Section 58(1) Marine and Coastal Area (Takutai Moana) Act 2011.

of the Board described such prospects as “slim”. Counsel and witnesses with knowledge of MACA agreed with that assessment.

[432] Nonetheless the Board has considered and weighed, in relation to Mana Whenua claims and interests, the possibility, albeit remote, of s58 claims being affected by the Proposal.

[433] Different considerations, however, might apply to reclaimed land to which ss29 to 45 of MACA apply. The land that NZTA intends to reclaim does not, of course, yet exist. But there is a statutory scheme set out in MACA to cover reclaimed land in the common marine and coastal area. A description of the provisions is unnecessary. Suffice to say that NZTA sees itself as a “developer” for s35 purposes; the Crown would be the owner (s31). It is by this route that NZTA, as a party to the Mana Whenua Tribal Agreement, hopes to vest reclaimed land in Mana Whenua groups as co-owners.

[434] Clearly there is statutory provision to govern the ultimate ownership and vesting of reclaimed land on the northern foreshore of the Māngere Inlet, which, for MACA purposes, is a common marine and coastal area.

[435] MACA has no other relevance of which we are aware. No customary marine title has been issued in respect of any of the Manukau Harbour and s116(6) of the RMA and s66(1) of MACA have no applicability. It will ultimately be for NZTA as a Crown agency, and indeed the Crown itself, to resolve any dilemmas arising out of competing MACA claims and in particular the interplay of the provisions as between iwi with the reclaimed land provisions of MACA.

# 14. APPLICATIONS FOR RESOURCE CONSENT

## 14.1 INTRODUCTION

[436] NZTA has applied for a number of resource consents for the construction and operation of the EWL as summarised in chapter 2 of this Report and detailed in [Appendix 2: List of Applications and Notices for the Proposal]. In summary, the applications for resource consent include:

(a) One land use consent (for activities on new land created under s89 of the RMA);

(b) Eight land use consents (Proposal wide);

(c) Four coastal permits;

(d) Six water permits; and

(e) Five discharge permits.

[437] The detailed scope and extent of the Proposal as originally submitted by NZTA, including the works relating to the activities requiring resource consent, is shown throughout the drawing set accompanying the AEE, and in the AEE itself. The drawings of particular relevance include the proposed road alignment, the proposed Onehunga Wharf land bridge, and the construction activities at Anns Creek / Sylvia Park Road.

[438] During the course of the Hearing the scope of the proposed works and related drawings were amended by NZTA. The amended drawings of particular relevance include:

(a) Road Alignment AEE-AL-001-116 Sheets 01 to 16 (inclusive) Rev 4 dated 13 September 2017;[225]

(b) Plan and Long Section AEE-C-202 Sheet 02 (showing the proposed Onehunga Wharf Land bridge) Rev 2 dated 13 September 2017;

(c) Coastal Occupation Embankment – Overview AEE-CMA-101 Rev 2 dated 22 September 2017;

[225] Exceptions: Sheet 01 dated 12.09.2017; Sheet 09 dated 12.09.2017; Sheet 12 dated 27.06.2017.

(d) Coastal Occupation Embankment AEE-CMA-102102-104 Sheets 1 to 3 Rev 2 dated 22 September 2017;

(e) Coastal Occupation Ōtāhuhu Creek AEE-CMA-111 Rev 1 dated 27 June 2017;

(f) Coastal Occupation East West Link Typical Sections AEE-CMA-301 Rev 1 dated 27 June 2017; and

(g) Construction Activities – Anns Creek / Sylvia Park Road AEE-CA-108 Sheet 08 Rev 3 dated 13 September 2017.

[439] The originally submitted drawings, and those drawings subsequently updated during the course of the Hearing, have been considered by the Board. For ease of reference the amended drawings mentioned above are reproduced in [Appendix 11: Key Plans and Drawings].

### Jurisdiction

[440] The Board's jurisdiction in relation to the resource consents is set out in s104 and s104D of the RMA, as mentioned earlier in chapter 6.2 of this Report. The Board emphasises at this juncture that the Proposal has to pass the s104D gateway test, before proceeding to the broader assessment under s104 and the Board proceeds on that basis.

[441] It is necessary for the Board to have a full understanding of the effects of the Proposal in order to make decisions under s104D and s104(1). Consequently, the Board first considers the effects that are specific to the resource consents sought, then applies s104D[226] and s104(1) to that analysis.

## 14.2 EFFECTS ON THE ENVIRONMENT

### Reclamations and Occupation of the CMA

*Context*

[442] NZTA proposes to reclaim 18.4 ha of seabed within the Māngere Inlet (the Inlet), a further 5.9 ha of filling below mean high water springs (as permanent coastal occupation associated with the inter-tidal extent of fill embankments), and approximately 11 ha of temporary occupation during construction, which comprises the total area impacted by works activities that will occur around the margins of the permanent works. The purpose of these activities is to construct the EWL through Sector 2 (Galway Street to Anns Creek West), tying in with Sectors 1 and 3, and to

[226] Noting that it is only "adverse effects" that are relevant when considering the first limb of s104D.

provide consequential mitigation for landscape, visual, amenity and severance effects.

[443] Additional coastal works comprise the installation of viaduct piers across Anns Creek West, the replacement of culverts with bridges at the SH1 crossing of Ōtāhuhu Creek, and associated access and disturbance necessary to undertake those works.

[444] The specific areas of reclamation and coastal occupation associated with these activities are as follows:[227] [228]

| **Occupation / Reclamation Area – Ōtāhuhu Creek** | | | |
|---|---|---|---|
| Zone | Area of Declamation | Area of Permanent Occupation | Area of Temporary Occupation |
| Bridges | 0.55ha | 0.12ha | 0.16ha |
| Bridge Piles | 0.00ha | 0.01ha | 0.00ha |
| Total | 0.55ha | 0.13ha | 0.16ha |

| **Occupation / Reclamation Area – Neilson Street Interchange to Anns Creek** | | | |
|---|---|---|---|
| Zone | Area of Reclamation (Above New MHWS) | Area of Permanent Occupation (Below MHWS) | Area of Temporary Occupation |
| Embankment | 5.63ha | 0.89ha | 11.09ha |
| Landscape Features & Stormwater Wetlands | 12.72ha | 4.35ha | |
| Boardwalk | 0.00ha | 0.66ha | |
| Bridges (Anns Creek) | 0.00ha | 0.78ha | 1.06ha |
| Bridge Piles | 0.00ha | 0.01ha | 0.02ha |
| Total | 18.35ha | 6.69 | 12.17 |

[445] The mitigation for landscape, visual, amenity and severance effects will primarily comprise three new landforms extending into the Inlet. Landform 1 is to be located to the south of the Alfred Street industrial area, Landform 2 to the south of Waikaraka Park South, and Landform 3 (the largest) to the south of the Ports of

[227] Plan Set 5 – Coastal Occupation, Drawings AEE-CMA-111 – Occupation/Reclamation Areas.

[228] Plan Set 5 – Coastal Occupation, Drawings AEE-CMA-101 – AEE-CMA-111.

Auckland land (including Pikes Point West and Pikes Point East landfills) between Miami Parade and Anns Creek. Landforms 2 and 3, as proposed, will include headland fingers[229]. In addition to the reclaimed landforms, coastal boardwalks are proposed to extend between the landforms, and continuing from Landform 1 to Galway Street, to provide separation between the recreational path and the EWL.

[446] It is further proposed to incorporate wetlands into the landforms that will also function as treatment devices for stormwater runoff both from sections of the EWL and from 611 ha of existing developed catchment, and for treatment of leachate from the adjacent Pikes Point East and Pikes Point West landfills.

[447] Ms Linzey explained the evolution of the overall design and function of the reclamations, including input received through engagement with the Proposal's key Mana Whenua Partners (Mana Whenua Group)[230]. In his closing submissions, Mr Mulligan[231] emphasised the integrated design process for the reclamations, which he considered to have taken account of all potential adverse and positive effects and achieved an overall positive outcome for the Māngere Inlet.

[448] As described by Mr Lister, "*The northern shore of Māngere Inlet formerly comprised an intricate and deeply indented shoreline that was historically straightened and infilled*".[232]

[449] The indented shoreline, comprising a series of embayments and volcanic lava outcrops, was described from a personal perspective by Mr Lovegrove, who recalled time spent in the 1960s observing birdlife within the embayment now filled to the east of Waikaraka Park as follows:[233]

> "*We looked across a lovely bay, which then went along the eastern side of the Waikaraka Cemetery, between Neilson Street and the coast. We used to call it the bay of islands. This was a lovely area of basalt outcrops, basalt islands, the remnants of the lava flows, of which we just have little relics left now.*"

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[229] Plan Set 4 – Landscape, Drawings AEE-LA-103 to AEE-LA-106; Plan Set 3 – Road Alignment, Drawings AEE-AL-103 to AEE-AL-106.

[230] Transcript, Linzey, from p2045.

[231] Transcript, Mulligan, p6456–57.

[232] Statement of Primary Evidence, Lister, para 8.17.

[233] Transcript, Lovegrove, p 2814.

[450] Mr Lovegrove's personal reflection, supported by other evidence and witness statements, encapsulated the geomorphic history of the foreshore, and emphasised the landform changes that have occurred as a result of filling. It is uncontested that the natural landform that predated the current foreshore evolved in response to lava flows from Maungakiekie (One Tree Hill) and Rarotonga (Mt Smart).[234]

[451] Subsequent filling has included:

(a) an extension of the Waikaraka Park headland southward, being the area that now comprises the southern half of Waikaraka Cemetery;

(b) filling between Alfred Street and Galway Street; and

(c) filling within the Pikes Point East and West landfills.[235]

[452] The filling has created an essentially straight coastline between Anns Creek and SH20, contributing to an approximately 24 percent reduction in the CMA within the Inlet since 1853 (cumulatively 1.8 $km^2$ reclaimed from an original 7.5 $km^2$).[236]

[453] A public shared path extends along the foreshore from Hugo Johnston Drive to Onehunga Harbour Road. The path passes to the south of industrial land, Waikaraka Park and Waikaraka Cemetery. Despite its proximity to industrial land uses, it is uncontested that this path affords a sense of separation from the urban environment that is tranquil. The Board noted these aspects during its site visit to that location.

[454] In his closing submissions, Mr Mulligan highlighted[237] the divergent views of Mana Whenua in respect of reclamations. The Board agrees with Mr Mulligan that the position many iwi have taken in respect of reclamations is more nuanced.[238] While Mana Whenua may not support reclamations in principle,[239] it is apparent that reclamations can be appropriate given context and circumstance.

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[234] Technical Report 4 – Geological Heritage Assessment, November 2016, p 13.

[235] Transcript, Mulligan, p101.

[236] Technical Report 15 – Coastal Processes Assessment, p 17.

[237] Closing Statement, Mulligan, para 8.22.

[238] Ibid, para 9.15.

[239] NZTA CVR, para 1.6.

[455] Ngāti Te Ata Waiohua stated in their original submission and throughout the consultation process that they are generally opposed to all reclamation.[240] In his representation, Mr Minhinnick claimed the reclamation was a breach of this iwi's Treaty rights, although he also commented that Ngāti Te Ata Waiohua are not opposed to the idea of development and reclamation might be considered in context.[241]

[456] Ms Wilson confirmed that Te Ākitai Waiohua has a particular world view, where in essence there must be a balance between all things. If a balance is struck they will not oppose modern day developments.[242] The final position of Te Ākitai, as confirmed in closing, is that they do not oppose the EWL.

[457] Dr Patterson confirmed that in the past Ngāti Whātua Ōrākei have supported reclamation. However, it is Proposal dependent and context dependent[243] based on their subjective judgement using their cultural lens, their ecological and environmental knowledge and their value systems to reach a decision whether they believe the benefits outweigh the negatives for this particular Proposal.[244]

[458] For instance, the Board notes that Ngāti Whātua Ōrākei supported the reclamation of the Manukau Harbour, which led to the Taumanu Reserve. The iwi support is noted in the Auckland Council decision granting planning approval to the reserve and reclamation in 2012.

[459] Ms Rutherfurd gave a representation on behalf of the Ngāti Tamaoho Trust and confirmed that while they are generally opposed to reclamation, particularly for "beautification" purposes,[245] Ngāti Tamaoho realised early on that this Proposal provided an opportunity to incorporate environmental improvements into the Proposal design.

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[240] NZTA CVR, para 1.6; Closing Statement, Mulligan, ftnote 136, p. 25.

[241] Transcript, Minhinnick, p5923 – 5936.

[242] Summary Statement of Primary Evidence, Wilson, para 3(c).

[243] Transcript, Patterson, p4333 and 4275; Closing Statement, Mulligan, ftnote 140.

[244] Transcript, Patterson, p4275; Closing Statement, Mulligan, ftnote 141.

[245] Representation, Rutherfurd, Ngāti Tamaoho were not supportive of the Taumanu Reserve reclamation for "beautification" purposes.

[460] Ms Olsen[246] also confirmed that as supporters and signatories to WAI 8, the goals for Makaurau Marae included having a healthy asset returned to next generations. Despite reclamation and/or trenching being contradictory to their principles, the bund offered some workable solutions given their ongoing priority to see health and ecological balance return to the Manukau.[247] Makaurau Marae have nevertheless confirmed their opposition.

[461] Ngāti Pāoa stated in their CVA (attached to their original submission) that they supported Option F because the route followed a line of former reclamation and therefore was less likely to impact adversely on cultural values, and the chance of disturbance to traditional tapu sites.[248]

[462] Mr Majurey[249] referred to the *Kauaeranga*[250] decision and the facts of that landmark case as an early example where modification of the landscape for the world view of the tribe occurred, through the staking out of an area for nets and for the gathering of fish, as being an appropriate modification.[251] He explained that the world view of some iwi is such that they have an absolute opposition to reclamation, while others subscribe to a world view in which reclamation is a matter of context and circumstance (particularly where it has clear benefits).[252]

[463] Mr Majurey's explanation is both persuasive and compelling. He states:[253]

> "*Are there benefits in the Māori world view? Are there other interests that go with that, such that a decision can be made that there is actually a net benefit, a net positive or something speaking in favour of the development? Development, per se, in these types of situations again comes [down] to context. If one, when they drive around Tāmaki Makaurau, looks at the Tūpuna Maunga, the ancestral mountains, those are very revered places. But, as is very clear in terms of a visual confirmation, those landscapes were modified, pā, terraces, kumara pits … in the Māori world, there is a reason for things and so our society was not one of not utilising resources.*"

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[246] Hearing Summary, Olsen, para 11. Ms Olsen is the Kaitiaki / resource management representative for Te Ahiwaru, Te Waiohua through the Makaurau Marae Māori Trust (MMMT).

[247] Hearing Summary, Olsen, para 16.

[248] Submission 126522, Ngāti Paoa, p41.

[249] Transcript, Majurey, p5889.

[250] Kauaeranga [1870], Hauraki Minute Book 4, fol 236; Kauaeranga (1984) 14 VUWLR 227, 228, 239–240.

[251] Transcript, Majurey, p5889.

[252] Transcript, Majurey, p5888-5889; NZTA Closing Statement, Mulligan, para 8.21.

[253] Transcript, Majurey, p5888-5889.

[464] The appropriate balance is clearly achieved from the perspective of those iwi who either support or do not oppose the Proposal, but the balance is different for those iwi who continue in their opposition. It appears to the Board, based on the evidence before it, that for Ngāti Whātua Ōrākei, Te Kawerau ā Maki and Makaurau Marae, the extent to which reclamation in and of itself is considered adverse is dependent on their views about the context, scale and form of the proposed reclamations. For Ngāti Te Ata Waiohua, the matter appears to be one of approach, acknowledgement and respect.

*Fauna*

[465] It is also uncontested that the inter-tidal areas of the Inlet are a feeding and roosting area for various shore birds. Dr Bull noted that:[254]

> "*A diverse assemblage of species were recorded foraging on the Māngere Inlet intertidal mudflats and included NZ pied oystercatcher (At Risk), bar-tailed godwit (At Risk), pied stilt (At Risk), lesser knot (Threatened), wrybill (Threatened), northern NZ dotterel (Threatened), royal spoonbill (At Risk), white-faced heron (Not Threatened), red-billed gull (Threatened) and black-backed gull (Not Threatened).*"

[466] The significance of the Inlet for those species was confirmed by Dr Lovegrove,[255] who identified its particular significance as a key feeding and roosting site and departure point for the endemic wrybill plover (*Nationally Vulnerable*). He stated that the wrybill has a global population of c5,000 birds, with up to 1,200 of these having been reported in the Māngere Inlet.[256] This was corroborated by Dr Bull.[257]

[467] Dr Bull stated that in relation to the northern shoreline of the Inlet, the primary feeding and roosting areas were located to the east, in areas denoted as SEA-M1 and SEA-M2 in the AUP:OP,[258] extending from Anns Creek to the western end of the Pikes Point West landfill. Dr Lovegrove acknowledged this but considered that all the inter-tidal areas are available and utilised feeding areas for shore birds.[259]

[468] Dr Bull provided the following conclusions regarding the overall assemblage values of the Inlet and its surrounds: [260]

> "*(a) The wading and shorebird assemblage was determined to be very high value due to the number of Threatened and At Risk species;*

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[254] Statement of Primary Evidence, Bull, para 7.5.

[255] Statement of Primary Evidence, Lovegrove, paras 7.5. 7.6 and 7.7.

[256] Statement of Primary Evidence, Lovegrove, para 7.8.

[257] Statement of Primary Evidence, Bull, para 1.6.

[258] Statement of Primary Evidence, Bull, para 7.2.

[259] Transcript, Lovegrove, p2848.

[260] Statement of Primary Evidence, Bull, para 7.13.

> *(b) The cryptic marshbird assemblage (banded rail and bittern) was determined to be very high value due to the Threatened and At Risk classifications; and*
>
> *(c) The landbird assemblage was determined to be of low value due to it comprising primarily introduced and also widespread and common native species.*"

[469] Dr De Luca described the inter-tidal environments of the northern shore of the Māngere Inlet and Anns Creek Estuary as having:

> "*... medium ecological values, being characterised by silty sediment, a typical assemblage of benthic organisms, and mangroves. The subtidal habitat also comprises silty sediment and typical organisms, but the benthic community in some parts is dominated by an invasive species.*"*261*

[470] Dr Sivaguru agreed that, "*The invertebrate community comprises moderate richness, diversity and abundance*", but noted that, "*The species composition recorded in the Inlet includes prey species for wading birds and this reflects the high avifaunal values identified in the Statutory Plans*".[262]

[471] The Board accepts that there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such effects must be considered significant. On the basis of the evidence, however, the Board concludes that the proposed coastal works will not result in loss of habitat that is sufficiently rare that it would impact on the overall populations of those species, or the presence of those species within the Māngere Inlet or adjacent coastal areas. Therefore, provided that appropriate and adequate mitigation and offsets are implemented, the Board finds that the effects of the proposed reclamations and coastal structures are acceptable when considered against the objectives and benefits of the works that necessitate those activities. The adequacy of mitigation and offsets is addressed later in chapter 14.2 of this Report under the sub-heading *Certainty of Outcomes*.

*Scale and Function*

[472] The proposed road carriageway, cycleway and footpaths are predominantly on the reclamation between Galway Street and Captain Springs Road and predominantly on land between Captain Springs Road and the eastern extent of the Ports of Auckland Land (Pikes Point East). This would create a total area of reclamation of 5.63 ha and a further 0.89 ha of occupation below MHWS. Fill embankments will extend into the CMA for most of this section of the alignment. In accordance with the discussion presented in chapter 15.12 of this Report, the Board finds that NZTA has undertaken an appropriate assessment of alternative corridors and alignment

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[261] Statement of Primary Evidence, De Luca, para 5.5.

[262] Statement of Primary Evidence, Sivaguru, para 7.10.

options, assessing environmental and land use impacts through a replicable Multi Criteria Analysis (MCA) process. However, the proposed alignment necessitates mitigation that, in this case, triggers additional adverse effects that must be considered against the benefits afforded and the overall mitigation and offset package offered.

[473] Mr Lister stated that the scale and form of landforms and boardwalks proposed within the Inlet is necessary to mitigate the landscape, visual, amenity and severance effects of the proposed foreshore alignment.[263] He also opined that, "*Without the reclamation, the severance would be greater and it would be unmitigated*".[264] When questioned about the scale of the proposed reclamations, Mr Lister indicated that they had been reduced in size during his involvement in the Proposal. In his view, the inclusion of wetlands within the reclamations was a component of the naturalisation of the shoreline and contributed to its amenity. He also considered the scale was necessary to address severance by providing a destination that will draw people across the highway, and commented further that:[265]

> "*If we were doing just landscape mitigation these landforms would be of a size similar to what we've designed, in fact they might be larger. The reason for that is a question of scale and the scale relates to the components of the landscape, which I'll come to in the figures, but the elements of the headlands, the wetlands themselves and the beaches, they need to be in scale with each other to have an aesthetic coherence. They also need to be in scale with that shoreline and road to fulfil the mitigation functions and in scale with Māngere Inlet as a whole. But there has been a driver to reduce the scale to as small as we can make it. I think there are possible refinements that might reduce it a little bit more and part of that would be interrogating each of the elements of the reclamations, and that includes stormwater, so it is tied in with that scale.*"

[474] Mr Brown, on behalf of Auckland Council, considered that: [266]

> "*From my 'landscape' perspective, the main benefits associated with the EWL are derived from re-creation of a more varied and quasi-natural shoreline. The current, almost ruler-straight, frontage to Māngere Inlet has very limited appeal and it is my view that the shoreline needs to be varied, even convoluted, to enhance perceptions of Māngere Inlet as a whole, and, at the more site-specific level, to entice recreational users out onto the new coastline. An important component of the shoreline's rehabilitation is undoubtedly its symbolic lava flows, which should be both clearly*

[263] Transcript, Lister, p 1295.

[264] Transcript, Lister, p 1296.

[265] Transcript, Lister, p 1296

[266] Statement of Primary Evidence, Brown, para 84.

*discernible and reasonably authentic in their expression of volcanic processes. In my view, this is essential if the proposed 'naturalising' of the coastline is to be both meaningful and functional (in the best sense of that term).*"

[475] In response to questions, Mr Brown suggested that:

> "*The proposed naturalising of much of Māngere Inlet's northern shoreline would greatly enhance both the character of that coastline and community interaction with it. Strategically, it would enhance connectivity across the southern Auckland Isthmus as well as to and from both Onehunga and Penrose*."[267]

[476] While some reconfiguration of the reclaimed landscaping may be possible to yet achieve the necessary mitigation, such mitigation still required a degree of scale although Mr Brown was not prepared to comment in detail on any specific reductions.[268] When questioned about the degree of naturalness of the proposed coastline he responded that, "[*I]t is a pseudo-natural edge but can still be very persuasive*".[269]

[477] Mr Brown noted that while the location and form of the reclamations are heavily influenced by the location of existing stormwater outfalls, the one aspect that could be considered for reduction would be the promontories (headlands), which could be reduced to address hydrological and ecological effects. He was generally supportive of those features if they were considered acceptable from those perspectives.[270]

[478] Mr Brown also considered that the utilisation of the reclamation for stormwater and leachate treatment represented an efficient use in terms of Policy 10 of the NZCPS.[271]

[479] Mr McIndoe, also on behalf of Auckland Council, identified the "*replacement of the existing straight and environmentally degraded Māngere Inlet edge with a naturalised coastal edge form, which helps to integrate this major infrastructure into the natural setting*" as a positive quality and effect that is consistent with good urban

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[267] Transcript, Brown, p2720.

[268] Transcript, Brown, p2726.

[269] Transcript, Brown, p2727.

[270] Transcript, Brown, p2744.

[271] Transcript, Brown, p2745.

design practice.[272] He expressed specific agreement with Mr Lister that the proposed landforms are in scale with the Inlet.

[480] Mr McIndoe was aware that the reclamation had been reduced in scale from an earlier iteration considered by NZTA,[273] and he supported aggregating the reclamations into fewer, larger landforms, as proposed.[274] Mr McIndoe also supported separation of the boardwalk sections from the EWL as important components of amenity mitigation.[275]

[481] Messrs Lister, Brown and McIndoe were the only landscape experts who presented evidence at the Hearing. They were consistent in their support of the general form and scale of the proposed reclamations as necessary landscape, visual, severance and amenity mitigation for the proposed EWL alignment along the foreshore. They all acknowledged the integrated design process through which the reclamations had been developed, combining wetland features that would provide a dual function of amenity and stormwater and leachate treatment for the hinterland. They also acknowledged the design revisions that had been undertaken by NZTA in reducing the overall scale of the reclamations while achieving necessary mitigation for the effects of the road.

[482] Dr Allison described the design approach for the proposed stormwater treatment systems to be provided within the wetlands[276] and explained the opportunity that the wetland areas within the reclamations provided for treatment of currently untreated runoff from the upstream 611 ha developed catchment. He explained the constraints faced during the design of the treatment systems, including the limited available area, low elevation of existing pipe outfalls (within the tidal range), stormwater baseflows that include landfill leachate, and the need for the treatment system to respond to the coastal naturalisation proposal. He emphasised that, "*it was critical to maximise treatment within the potential reclaimed areas*".[277] The outcome of that design process was the proposed "*... combined wetland and bioretention system that is more space efficient than wetlands alone and can*

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[272] Statement of Primary Evidence, McIndoe, para 9.1.

[273] Transcript, McIndoe, p2675.

[274] Transcript, McIndoe, p2676.

[275] Transcript, McIndoe, p2676-2677.

[276] Statement of Primary Evidence, Allison, section 7.

[277] Statement of Primary Evidence, Allison, para 7.6.

*process baseflows coming from the large catchments that bioretention alone cannot*".[278]

[483] In the JWS Report for Stormwater, Dr Allison, Ms Paice, Mr Cain (NZTA), and Mr Sunich and Mr Roa (Auckland Council) all agreed that the combination of wetlands and biofiltration systems was innovative. It allowed the treatment area to be minimised, while achieving the minimum design standard of 75 percent removal of total suspended solids (TSS) on a long-term annual average basis. All experts agreed that there were no plans or opportunities for similar large catchment-wide treatment devices in the catchment.[279] The experts retained these views in their evidence and at the Hearing. No expert evidence was heard that opposed those views.

[484] Other matters agreed by the experts who were parties to the JWS Report for Stormwater and confirmed at the Hearing were:

(a) The design will need to provide for at least 20 years of predicted sea level rise. Subsequent adjustments can be made to the bund heights and operation of the system.[280]

(b) There is some risk of reduced treatment efficiency in the event of mechanical failure of the system, for example pump failure. However, the period of reduced efficiency will still afford a better level of treatment than the current situation.

(c) Likewise, in the event of occasional sea water inundation and recovery period, any reduced treatment efficiency will be better than the existing situation.

(d) Outlet levels must be confirmed through detailed design to ensure the risk of blockage from sedimentation is minimised.

(e) There was sufficient resilience in the design to ensure that pump failure or pipe blockages will not result in flooding upstream of the EWL alignment.

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[278] Statement of Primary Evidence, Allison, para 7.6.

[279] JWS Report – Stormwater, para 6.3

[280] This was also agreed in principle in the JWS Report – Coastal Processes.

[485] Dr Allison noted that the two systems (wetlands and biofiltration) are commonly used separately, and are well understood in terms of performance. The innovation was to combine them into an integrated system. Mr Sunich considered the design "bespoke"[281] but did not consider it to be experimental because it combined two types of device that are commonly used, and are promoted in the relevant Auckland Council design guideline manual.[282] Mr Roa reached the same conclusion.[283] Dr Allison explained that such combined systems have been constructed and operated in Australia, citing a monitored and studied system in Adelaide and another being constructed in Queensland.[284]

[486] Mr Sunich confirmed that the 75 percent minimum TSS design efficiency was consistent with Auckland Council's expectations and with the outcomes of the Auckland-wide Stormwater Network Discharge Consent currently being sought by Council.

[487] Ms Paice confirmed that the water quality volume (one-third of the two-year flow) was to be diverted to the wetlands, in part via pumps, but higher flows are to bypass directly to the coast via weirs and pipes. Consequently, pump failure will not result in flooding of upstream properties.[285] Mr Roa accepted this conclusion.[286]

[488] With respect to the potential effects of saltwater intrusion, Dr Allison discussed vegetation types that can be incorporated to have resilience, and considered the recovery period from such an event to be a matter of months[287] or less. He cited the successful operation of a treatment wetland at Tahuna Torea in Glendowie, which functions successfully at close to sea level and with occasional inundation.[288]

[489] Experts agreed that it was appropriate to design to a predicted 20-year sea level rise, so as to reduce the frequency of the wetland bund heights needing to be raised. They agreed the initial bund height could be confirmed during detailed design in consultation with Auckland Council. Conditions have been agreed in that

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[281] Transcript, Sunich, p2999.

[282] Transcript, Sunich, p3002.

[283] Transcript, Roa, p3064.

[284] Transcript, Allison, p1436.

[285] Transcript, Paice, p1418.

[286] Transcript, Roa, p3047.

[287] Transcript, Allison, p1439-1440.

[288] Transcript, Allison, p1442 – 1443 and p1433.

regard. When queried on the degree to which the bund height should be future-proofed in the initial design, Mr Lister stated a preference for a staged, retro-fit approach thus:[289]

> "*In my view, it's better to retrofit it because the aesthetic coherence of those landforms depends on a difference in height between the different elements, and so the lower the beaches are the better that is and it also provides better views out to the inlet. If they're increased to the ultimate height to cope with sea level rise now, for a number of decades you've got people perched on a beach which is out of sync with the natural processes and you do have to do major maintenance on stormwater wetlands every few decades. In my view, it's better to do it then. They can be easily raised at that point.*
>
> *The other reason that I say that is that I'm hopeful that within the next 100 years that we come up with methods of treating stormwater using saltwater systems. Now that has already been trialled in Napier, in a project that I'm familiar with there and Sanna O'Connor, who was the stormwater engineer that we worked with at the beginning of this project, she has now left to do a PhD at Yale. She has changed her topic to be stormwater treatment using saltwater systems. So, keeping it at a lower level now maintains flexibility into the future if such methods are shown to be feasible.*"

[490] Ms Williams, Dr Wallis and Ms Eldridge addressed the proposed leachate treatment to be provided within the wetlands. The Board accepts that existing leachate from the Pikes Point East and Pikes Point West landfills is currently captured in interception trenches and pumped to the Māngere Wastewater Treatment Plant (WTP) for disposal. The Board also accepts that the opportunity to continue that disposal option will be maintained by the Proposal, as a contingency in the event that leachate contaminant levels exceed that which can be disposed to the wetlands.

[491] The disposal and treatment of leachate through the wetlands will reduce the wastewater load at the WTP, and will comprise an additional efficient use of the wetland areas within the reclamations. The EWL alignment along the foreshore will reduce the extent of saltwater intrusion and leachate discharge direct to the coast, and will improve the interception of treatment of leachate that may be present between the Pikes Point landfills. The EWL alignment adjacent to Galway Street landfill will also slow the rate of groundwater movement towards the coast, and reduce potential leachate effects.[290]

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[289] Transcript, Lister, p1324.

[290] Statement of Primary Evidence, Williams, para 1.6.

[492] Conditions relating to the monitoring and management of leachate have been generally agreed between NZTA and Auckland Council.[291] Ms Eldridge sought some minor additions to conditions, most notably that the trigger levels to be established for monitoring of leachate be subject to the approval of the Council. The Board recognises the regulatory role that the Council would hold during the implementation of the project. In the absence of triggers being offered at this time, the Board supports that modification.[292]

[493] It was acknowledged by the evidence during the Hearing that the larger reclamations of the foreshore proposed early on in the Proposal's development was opposed by Mana Whenua. The extent of that reclamation raised concern and resulted in a revised design with a significant reduction in the land area set to be reclaimed.[293] The Board will return to this hotly contested issue in this decision.

[494] The Cultural Values Report (CVR) explains that: [294]

> "*Due to extenuating circumstances and the need to clean up contamination (including sediment) in and around the Māngere Inlet, Mana Whenua are not opposed to the proposed design. Extenuating circumstances of this Project include the need to progress the containment, remediation and clean-up of contamination (including sediment) in and around the Inlet.*"

[495] Mr Mulligan submitted that the primary challenge to the proposed stormwater function of the reclamation was from Ngāti Whātua Ōrākei who raised concerns regarding numerous aspects of the proposed system.[295]

[496] Mr Enright submitted that the claimed cultural benefits (stormwater treatment for the hinterland and a leachate bund to treat putative leachate from historic landfills) result in significant adverse effects to biodiversity (loss of habitat for rare and threatened species). He considered that this claimed "benefit" should not cause its own suite of significant adverse impacts and noted there is a substantial and net loss to both the mauri of the Manukau as a taonga and living entity and to the mauri of the habitat of rare and threatened native bird species.[296]

[497] Mr Enright further submitted that the benefits of treatment of the Onehunga catchment (the hinterland) were overstated in the context of the Māngere Inlet as a whole and that the information provided by NZTA during engagement with Mana

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[291] Conditions C.1H, L.1 and L.2.

[292] Condition CL.12(e) and L.2(d).

[293] NZTA CVR, para 1.7.

[294] Ibid, para 1.8.

[295] Closing Statement, Mulligan, para 9.27, re Opening Statement, Enright, para 22-28.

[296] Closing Statement, Enright, para 14(f).

Whenua, that historic landfills are "significantly" degrading water quality, were inaccurate. Ms Eldridge, on behalf of Auckland Council, agreed under cross-examination about that statement that she would not have used the word "significantly". However, she did go on to state that the improved collection efficiency of the trench represented a more efficient form of treatment and would provide additional benefits in reducing discharges of leachate occurring via saltwater intrusion.

[498] Ms Rutherfurd confirmed that the stormwater and leachate treatment was seen as an opportunity to rectify past degradation and continual contamination of the Māngere Inlet while providing for their responsibilities as kaitiaki of the Manukau Harbour. A key reason for that support lay not only with the opportunity to treat runoff from the road but also the 611 ha of catchment, "*whose stormwater flows virtually untreated into the harbour*".[297] Ms Rutherfurd also understood the benefits of treating discharges of leachate at source in the proposed stormwater treatment system rather than sending it on to the already stressed Māngere Wastewater Treatment Plant, which would still result in the leachate ultimately being discharged into the harbour.

[499] In general, the Board acknowledges that it is for each tribal group to form a view as to whether reclamation is appropriate in all the circumstances, bearing in mind countervailing considerations of the poor state of the Manukau Harbour and the various efforts to try to improve that water quality.

[500] In finding common ground, NZTA submitted that the idea for dual use of the reclamations for stormwater and leachate treatment stemmed from the kaitiaki representatives of the Mana Whenua Group.[298] This was also confirmed by Ms Rutherfurd during her presentation at the Hearing.

[501] The potential for earthworks to increase sediment discharge into the Inlet was highlighted by Mana Whenua and considered likely to affect detrimentally local ecosystems and habitats in and around the Inlet.[299] Measures to reduce the risk of sediment discharge to nearby waterways include the implementation of robust sediment controls.

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[297] Transcript, Rutherfurd, p5900-5902; Representation, Rutherfurd, on behalf of Ngāti Tamaoho, 6 September 2017. See also NZTA CVR, para 13.10.

[298] Closing Statement, Mulligan, para 8.22(b) Ftnote 139.

[299] NZTA CVR, para 13.4.

[502] It is also acknowledged that the reclamations will remove the feeding grounds for rare and threatened seabirds and have a potential impact on Kāretu, Anns Creek. Mr Blair stated that in his view, taking 25 ha of the CMA, the loss of wading habitat, the loss of feeding areas, not only for birds but also for shellfish, in exchange for a motorway on the harbour foreshore was unacceptable and does not provide enough benefit to enhance the mauri of the Manukau. He said, "*I can't emphasise that enough*".[300]

[503] The Board is mindful of and gives considerable weight to the existing effects of untreated stormwater and contamination on the ecological environment and mauri of the Māngere Inlet and Manukau Harbour. It acknowledges the importance of the Proposal incorporating measures to manage stormwater and sediment discharges to ensure the mauri of the water is not further degraded. It is also recognised that the opportunity to treat some 611 ha of catchment, including the discharge from contaminated industrial land is, as stated in the CVR, "*expected to enhance the mauri of this water body and help to restore the mana of the wider area*".[301]

[504] Mr Mulligan observed in his closing submissions that although Makaurau Marae Māori Trust and Ngāti Te Ata Waiohua oppose the reclamations, they have previously expressed written support to NZTA for the contamination containment bund.[302] Mr Blair accepted that the stormwater treatment proposals will be beneficial to the catchment.[303]

[505] Ms Rutherfurd stated:[304]

> "*We have put NZ Transport Agency's engineers and specialists through the grill over this because our support has been pivotal on it being not a reclamation but a contamination containment bund and associated wetlands, and we have been assured - and I am not an engineer but I can read some of their stuff and understand it - that the contamination containment bund will stop most of the contaminants and those that it does not stop will end up in the wetlands being treated through the wetlands.*"

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[300] Transcript, Blair, p4368.

[301] NZTA Cultural Values Report, para 13.13.

[302] Closing Statement, Mulligan, para 8.22(j).

[303] Transcript, Blair, p4377.

[304] Transcript, Rutherfurd, p5903.

[506] The above comments by Mana Whenua are consistent with the Board's overall finding in relation to the reclamations later in this Report.[305]

*Coastal Process Effects*

[507] The mean annual sedimentation rate over the entire area of the Inlet is estimated for pre-reclamation conditions as 9.8 mm/yr. With the reclamations in place and 1 m of sea level rise the predicted sedimentation rate is 10.5 mm/yr. There is also a predicted increase in sedimentation depth within embayments from 25 mm/yr to 30 mm/yr.[306] Mr Priestley[307] and Dr De Luca[308] did not consider these changes to be significant in terms of coastal processes or ecological effects.

[508] As previously noted, Mr Lister maintained that the headlands are an important component of the landscape design, whereas Messrs Brown and McIndoe accepted that they could be reduced if that was justified on an ecological or coastal processes basis. Ms Coombes considered that the scale of the landforms should be further reduced, in particular in relation to the headlands.[309] Mr Priestley accepted that from a coastal processes perspective the headlands could be reduced and still provide a function to maintain the beaches proposed between the headlands, but he did not consider this to be necessary on an effects basis.[310] However, he acknowledged that eliminating the headlands would reduce the volume of material required for construction.[311] Dr Carpenter supported the removal or modification of the headlands to improve tidal flows past the reclamations and thus reduce the potential extent of increased sedimentation. This also addressed her concern about sediment accumulation that might impact on the discharge capacity of proposed stormwater outlets from the wetlands, an effect that could be exacerbated by the headlands.[312] Removal or modification of the headlands also addressed, to some extent, concerns expressed by Dr Sivaguru and Dr Lovegrove

[305] For example, Paragraph [517] onwards.

[306] Technical Report 15, Section 7.2.

[307] Transcript, Priestley, from p1468.

[308] Transcript, De Luca, from p1642.

[309] Transcript, Coombes, p3470.

[310] Statement of Rebuttal Evidence, Priestley, paras 4.1 and 4.2.

[311] Transcript, Priestley, p 1487.

[312] Statement of Primary Evidence, Carpenter, para 7.17.

(discussed later in this Report) regarding the extent of deposition on inter-tidal feeding areas for shore birds.[313]

*Outstanding Natural Features*

[509] Areas of volcanic outcrop within coastal Anns Creek Estuary and Anns Creek West and the terrestrial Anns Creek East are denoted in the AUP:OP as Outstanding Natural Feature (ONF) 192 – Southdown pahoehoe lava flows. They are recognised as one of few examples of pahoehoe surfaces on basalt lava flows in the Auckland volcanic field.[314] In his evidence, Mr Jamieson provided the following assessment of the Proposal with respect to the coastal extent of the lava outcrops:[315]

> "*At Anns Creek Estuary, the alignment of the Proposal avoids physical damage to the coastal exposures of basalt lava along the foreshore; with the piles situated well clear of the lava flows. From examining the plans while on site, it appears that the viaduct will largely pass between two outcrops of lava on the coast here, and directly above a very small part of one of them.*
>
> *At Anns Creek west, where a section of the ONF lies immediately south of the Southdown Power Station site, the proposed alignment passes to the north of the ONF and avoids it completely.*"

[510] The Board accepts Mr Jamieson's assessment and did not hear evidence to the contrary. On that basis, the Board finds that the Proposal will not directly impact on the coastal extent of that ONF.

*Historic Heritage*

[511] The Background of Chapter D17 of the AUP:OP defines the "extent of place" of scheduled historic heritage places as follows:

> "*Most scheduled historic heritage places include an identified area around a heritage feature; referred to as the 'extent of place'.*
>
> *The extent of place comprises the area that is integral to the function, meaning and relationships of the place and illustrates the historic heritage values identified for the place. The provisions relating to a historic heritage place apply within the area mapped as the extent of place on the Plan maps, including the airspace.*

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[313] Transcript, Sivaguru, p2906; Transcript, Lovegrove, from p2812.

[314] Statement of Primary Evidence, Jamieson, para 6.2.

[315] Statement of Primary Evidence, Jamieson, para 6.5 and 6.6.

> *Schedule 14.3 Historic Heritage Place maps clarifies the extent of place that apply to some historic heritage places.*"

[512] The proposed reclamation footprint extends into the "extent of place" associated with Waikaraka Cemetery and its context is described by Ms Caddigan[316] as extending to the seaward extent of the certificate of title boundaries of the property, as well as recognising views and the continuity of use between the cemetery and foreshore walkway.

[513] Ms Matthews[317] describes the effects of the Proposal on the cemetery as being the creation of an elevated embankment that will obscure views and impact on the peaceful quality of the site. Ms Matthews notes that the proposed alignment avoids direct impacts on the cemetery and the stone wall and mature pōhutukawa trees that line the coastal edge of the site. Ms Matthews identifies mitigation for those effects as planting of the embankment and the provision of a pedestrian overbridge.

[514] The impact of severance of the Proposal along Sectors 1 and 2 of NoR1 was raised by many submitters and is addressed in chapters 15.2 and 15.3 of this Report. The impacts on views from the cemetery and on the tranquillity of the cemetery are addressed herein as direct effects of the EWL, which is to be formed mostly on reclamation within and adjacent to the "extent of place" of that site.

[515] Experts varied on the balance given to the protection of views versus noise mitigation[318] but this was resolved between NZTA and Auckland Council with amendments to Condition LV.5F to require the urban design and landscape treatment of the EWL at that location to:

> "*[I]ncorporate measures to mitigate operational noise effects from traffic on the EWL Main Alignment on visitors to the cemetery with a target to achieve 50dB LAeq when measured within the boundary of the cemetery unless impracticable to do so in which case achieve Best Practicable Option*"

taking account of other measures to maintain a sense of separation and soften views of the EWL, maintain views over the EWL and reflect the built and landscape features of the site.

[516] The Board accepts this approach as representing a resolution of the matter between the relevant experts. While the Board acknowledges and empathises with concerns expressed by submitters regarding impacts on the cemetery,[319] based on

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[316] Statement of Primary Evidence, Caddigan, para 7.4.

[317] Statement of Primary Evidence, Matthews, para 8.21 and 8.22.

[318] Transcript, Matthews, p1696; Transcript, Caddigan, p3153.

[319] Submission 126638, Heritage New Zealand Pouhere Taonga; Wendy Slatter (Submission 126181); and others.

its findings regarding the assessment of alternatives for the EWL alignment, the Board finds that the noise and amenity effects on the cemetery have been appropriately considered and will be adequately mitigated.

*Conclusion*

[517] Overall, the technical evidence presented to the Board has been generally consistent with the need for scale and function of the proposed reclamations. With the exception of the headlands, differences are matters of detail and have been resolved either through conditions or agreement between Auckland Council and NZTA. No technical evidence has been presented to refute those matters.

[518] Having considered the evidence of the various experts, the Board finds that the potential adverse effects that may result from the change in overall sedimentation rates within the Māngere Inlet as a result of the reclamations is likely to be minor. In that regard, the Board generally favours the evidence of Mr Priestley and Dr De Luca. With respect to Dr Sivaguru's concern about rates of increased sedimentation, the Board recognises that the research quoted was event-based rather than representing annual rates, and is not directly relevant to the predicted effects of the Proposal.[320]

[519] However, with respect to the headlands, the Board favours the evidence of Drs Carpenter, Sivaguru and Lovegrove to the extent that any measures that can further reduce potential sediment effects on the feeding grounds of shore birds should be adopted (and particularly within the embayments between the proposed landforms). Ms Coombes supports a reduction in the extent of reclamations from a coastal planning perspective and neither Mr Brown nor Mr McIndoe consider that the reduction (or modification) of the headlands would reduce the adequacy of the mitigation that would be afforded by the reclamations. The Board also favours their evidence over that of Mr Lister in that regard and finds that the headlands of Landforms 2 and 3 should be removed or modified to increase tidal flow velocities past the reclamations. Condition C.1BB reflects this finding.

[520] Aside from the modification of the headlands, and on the basis that the road alignment has been justified through the corridor and alignment selection, the Board finds that the scale and form of the reclamations are necessary to mitigate landscape, visual, severance and amenity effects of the road.

[521] The Board accepts that the reclamation design has been an integrated, multidisciplinary process. However, the balance of evidence indicates that the scale and form of the landforms proposed (excluding headlands) is based on the

[320] Statement of Primary Evidence, Sivaguru, para 7.28.

minimum area necessary to mitigate the adverse landscape, visual, amenity and severance effects. Evidence has not shown that the stormwater and leachate treatment function has increased the size of the reclamations. While stormwater and leachate treatment may not be considered alone as sufficient justification for the reclamations, they would be an appropriate and efficient dual use.

[522] The Board accepts that there are limited opportunities for the treatment of stormwater within the developed upstream catchment, and no opportunities for catchment-wide stormwater treatment facilities, because much of the catchment comprises industrial land uses and roads. Even if some, albeit limited, opportunities exist for retrofitting of treatment devices, the proposed wetlands present an opportunity for a comprehensive treatment approach within a timeframe that is likely to exceed a more piecemeal retrofitting approach. The Board also finds that the proposed combined wetland and biofiltration system is bespoke and innovative, but not experimental to the extent that the performance of the system cannot be reasonably anticipated.

[523] The Board recognises that the leachate from the Pikes Point landfills is currently intercepted and treated. However, it also accepts that residual untreated leachate discharges from those sites to the Inlet, including via tidally influenced saltwater intrusion. In addition, the Galway Street landfill is not currently treated and is also subject to saltwater intrusion. Consequently, the Board finds that the proposed leachate treatment system is an appropriate additional use of the coastal reclamations and the EWL alignment will reduce leachate from the Galway Street landfill. Monitoring, as proposed through agreed conditions, will be undertaken and the contingency to divert leachate runoff to the WTP will be retained.

[524] Opposing submissions and evidence was received from Ngāti Whātua Ōrākei, Te Kawerau ā Maki and Ngāti Te Ata Waiohua. Those submissions were directed at potential ecological effects of the reclamation on the inter-tidal area, and particularly in relation to avifauna, as well as the inconsistency of the Proposal with the world view of those iwi.

[525] Countering this, submissions were received from other Mana Whenua in support of the Proposal, or at least not opposing the Proposal. Those submissions were subject to the proposed levels of stormwater and leachate treatment being achieved.

### Dredging within the CMA

[526] NZTA seeks consent to undertake sub-tidal dredging and inter-tidal dredging to construct the proposed reclamations.

[527] Sub-tidal dredging (200,000 $m^3$ to a depth of approximately 1.5 m over 15 ha) is proposed as a source of material for the creation of the reclamations, using it to form mudcrete. The dredging area will comprise approximately 45 percent of the sub-tidal area of the Māngere Inlet. Sub-tidal dredging (7,000 $m^3$) is also proposed to create a new secondary tidal channel from Anns Creek, as Landform 3 will extend into the existing channel.

[528] Inter-tidal dredging (36,000 $m^3$) is proposed to form a stable foundation for the outer bunds of the reclamations.

[529] Mr Priestley[321] described alternative options for the construction of the reclamations, which comprised various combinations of sub-tidal and inter-tidal dredging, and sourcing materials from off-site. He modified this list at the Hearing but confirmed that there would probably be enough material available from the inter-tidal dredging to complete the works[322] (with sub-tidal dredging still required for the relocation of the Anns Creek tidal channel). He also confirmed that the consent for sub-tidal dredging was sought as a contingency[323] and that avoiding sub-tidal dredging could reduce construction cost by approximately $4 million.[324]

[530] During questioning Mr Priestley accepted that Auckland Council was particularly concerned about the sub-tidal dredging within the main body of the Inlet.[325] This position was confirmed in the closing submissions of Mr Lanning on behalf of Auckland Council.[326]

[531] Effects of the sub-tidal dredging include resuspension of sediment and contaminants, increased sedimentation and changes in sedimentation patterns during and after dredging, and a small reduction in tidal flow velocities through the dredged area.[327]

[532] The evidence of Mr Priestley, Dr De Luca and Mr Udema was consistent in concluding that the effects of sub-tidal dredging would be minor with respect to

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[321] Statement of Rebuttal Evidence, Priestley, para 4.7.

[322] Transcript, Priestley, p1469.

[323] Transcript, Priestley, p1488.

[324] Statement of Rebuttal Evidence, Priestley, para 4.9.

[325] Transcript, Priestley, p1475.

[326] Closing Statement, Lanning, para 4.1.

[327] Technical Report 15, Appendix F.

coastal processes, contaminant resuspension and distribution, and sedimentation rates (when compared to existing sedimentation rates). Dr De Luca also suggested that the dredging area would target Asian date mussel beds (an invasive species) such that some benefit would be afforded from the removal of that area of mussel beds. Dr De Luca did acknowledge that that species is likely to recolonise the area along with other species.

[533] Conversely, Mr Cameron[328] cautioned that:

> "*The water quality from the dredging will be a near daily effect for a year whilst resuspension of significant amounts of native material [under existing conditions] only occurs infrequently during storm events. The majority of the sediment dredged to a depth of 1.5m will also be anoxic (deoxygenated). Exposing this anoxic sediment will decrease oxygen levels in the surrounding water and may increase the release of contaminants as the sediment becomes oxygenated, particularly if acid sulphate sediments are present.*"

[534] Likewise, Dr Sivaguru noted that:

> "*[W]hile the proposed dredging of 15 ha is outside the SEA-M1 (23W2, SEA-M1) and SEA-M2 (23a SEA-M2) identified in the AUP:OP, the proposed dredging area is surrounded by the SEA-Marine Areas in the AUP:OP, CPAs and wading bird areas identified in the statutory plans for the Māngere Inlet.*"[329]

[535] Dr Sivaguru did not accept the removal of Asian date mussels as a notable benefit of the sub-tidal dredging, based on the likely recolonisation and the risk of disturbance enhancing the spread of that species. Based on potential effects of dredging, including redistribution of contaminated sediments, Dr Sivaguru recommended avoidance of sub-tidal dredging and supported alternative sources of reclamation fill.

[536] Dr Carpenter expressed concern regarding the potential for increased sedimentation on the flanks of the dredging basin (in particular the southern flank adjacent to an SEA-M1 area) and the duration of instability within the dredging basin causing a potential delay in recovery of ecology in that site.

[537] Dr De Luca addressed Mr Cameron's concerns about the risk of increased contaminant effects from dredging, and considered that the existing biota within the Inlet is already exposed to the contaminants assessed and that the proposed

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[328] Statement of Primary Evidence, Cameron, para 7.7.

[329] Statement of Primary Evidence, Sivaguru, para 7.3.

dredging would be unlikely to result in significant adverse effects.[330] In forming this conclusion, Ms De Luca relied on the evidence of Mr Udema, who expressed the opinion that the disturbance of the contaminated sediments would have a minor environmental effect.[331] However, Dr De Luca did note that, "*Given that the NZTA project team have not surveyed everywhere within the Inlet at a very fine scale, we cannot rule out Mr Cameron's concerns*".[332]

[538] Mana Whenua also expressed concerns about the proposed dredging. Mr Enright submitted that dredging is opposed by Te Kawerau ā Maki and Ngāti Whātua Ōrākei and will elevate contaminants in the harbour for a short to medium period, reducing mauri.[333] He noted the JWS Report on Ecology records, "*avoiding dredging would be a better ecological outcome*" and set out the range of adverse impacts identified by Dr Cameron.[334]

[539] Ms Linzey stated that the Mana Whenua Group had the opportunity to discuss the dredging activity proposed at a project hui on 2 May 2017, where NZTA's coastal ecologist (Dr De Luca) and coastal processes expert (Mr Priestley) attended. She observed that discussion focused particularly on:

(a) The ecological impacts of dredging material being taken from the sub-tidal area of the Māngere Inlet; and

(b) Concern regarding the disturbance of sediment during dredging operations.[335]

[540] Concerns were expressed over construction flexibility and the potential impacts of dredging on marine sediments. Ms Linzey considered the engagement requirements of the Mana Whenua Group (with specific reference to Conditions MW.1/RCMW.1 and MW.2/RCMW.2) and the cultural monitoring conditions (particularly MW.5/RCMW.5), would provide Mana Whenua the opportunity for ongoing input and comment on the limits set in the Construction Environmental

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[330] Statement of Rebuttal Evidence, De Luca, paras 4.19 to 4.25.

[331] Statement of Rebuttal Evidence, Udema, para 1.4.

[332] Statement of Rebuttal Evidence, De Luca, para 4.22.

[333] Opening Statement, Mr Enright, paras 24 & 34.

[334] Ibid, para 35; Dr Cameron, Statement of Evidence, paras 3.2, 7.4, 7.6, 7.8, 7.9, 7.11, 7.14, 7.16.

[335] Statement of Rebuttal Evidence – Cultural Values Assessment – Engagement, Linzey, para 7.2.

Management Plan.[336] She was satisfied that there is a process whereby the cultural effects of this activity can be appropriately managed during construction.

[541] Given the lack of agreement between experts on the potential effects of sub-tidal dredging, and the concerns raised by Mana Whenua, caution is required in determining the need and appropriateness of that activity. In this case, the evidence presented suggests that the proposed reclamations can be completed without the primary source of sub-tidal dredging. There is no clear evidence that the sub-tidal dredging will have an environmental benefit. The only benefit is as a contingency source of construction material. In Mr Priestley's opinion, there is likely to be enough material if sourced from within the reclamation footprints and the relocation of Anns Creek channel (because the current channel is encroached on by the reclamation). Therefore, in the event that sub-tidal dredging is not approved, that would be unlikely to result in a significant increase in construction traffic such as trucks transporting alternatively sourced material to site. Even if some additional road-based importation of material was required, Mr Wu stated that sensitivity testing of construction options that were less reliant on sub-tidal dredging gave him some comfort that such a change could be reasonably accommodated within the road system.[337] Therefore, the Board finds that sub-tidal dredging should be limited to that necessary for the relocation of the Anns Creek tidal channel.

[542] During the Hearing Mr Hewison, counsel for TOES and Others, suggested that dredging of sediment from the inner area of Onehunga Wharf could be considered as mitigation for impacts of the Proposal on the Onehunga community. In response to questioning, Mr Priestley[338] confirmed that sediment accumulated within the Onehunga Wharf is likely to be suitable for use in the construction of the reclamation. Mr Priestley was also familiar with the existing consents for the Onehunga Wharf and indicated that the area of dredging being promoted by Mr Hewison was outside the existing consented dredging area of the wharf.

[543] The Board does not consider there to be sufficient nexus between potential impacts of the Proposal on the community and benefit that would be afforded by dredging of the Onehunga Wharf, given that the community does not currently have access

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[336] Ibid, para 7.6. Ms Linzey also notes that she supports the minor amendment (Rebuttal, Ms Hopkins, to Condition MW.2(e)) to recognise this includes coastal construction management as well as the CEMP.

[337] Transcript, Wu, p 1927.

[338] Transcript, Priestley, p1493-1494.

to the wharf. However, the Board is satisfied that if additional material is required for the construction of the reclamations, an additional source of material is likely to be available at that Wharf, in relatively close proximity to the Proposal. The Board also notes that consent for the additional dredging at that site, which is zoned a Minor Port Zone in the AUP:OP, would be a controlled activity.[339] On that basis, while not guaranteed, consent for such dredging is likely to be granted.

### Ōtāhuhu Creek – Declamation and Bridge Construction within the CMA

[544] The Ōtāhuhu Creek is a narrow tidal creek branching off the Tāmaki Estuary. It is crossed by SH1. The creek is channelled underneath the motorway by triple culverts installed in the late 1950s. The culverts have adequate capacity to accommodate extreme flood events, storm surges and tsunami. The creek on the upstream side (west) of SH1 comprises approximately 5 ha. Ninety-five percent of that area is covered by mangroves. The creek is bordered by unremarkable exotic vegetation. The mangrove cover provides little by way of habitat for avifauna. The ecological value of Ōtāhuhu Creek in the vicinity of SH1 is assessed in the AEE as low.[340]

[545] The Ōtāhuhu Creek geographically is the westernmost penetration of the Tāmaki Estuary, pointing in the direction of the Manukau Harbour. Unsurprisingly, being on or close to the narrowest part of the Auckland Isthmus, the creek was of practical and cultural significance to Māori, being part of a portage route over which waka travelled between the Waitematā and Manukau Harbours. The upper reaches of the creek lie to the west of SH1, the creek terminating at the appropriately named Portage Road.

[546] NZTA proposes to restore to some extent the natural channel of Ōtāhuhu Creek where it is crossed by SH1 by removing the box culverts and replacing them with bridges. This would make more evident the nature of the ancient portage. This aspect of the Proposal has the support of Mana Whenua groups.

[547] There was no contest regarding the benefits of this aspect of the EWL. It evolved through consultation with the Mana Whenua Group and is supported by the Mana Whenua Group.

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[339] AUP:OP, Rule F5.4.1(A4).

[340] AEE, p394.

## Stormwater Diversion and Discharge

[548] This section addresses the proposed management of stormwater runoff from the proposed road carriageway, and associated reticulation but excludes the Sector 2 reclamation wetland and biofiltration devices.

[549] Consent is sought to divert and discharge treated stormwater runoff from the proposed road alignment, via proprietary devices and wetlands. The detail of various treatment options is described in the relevant technical reports[341] and the associated drawing set. The road alignment will comprise 47 ha of impervious carriageway, of which 22 ha will be new and the balance being existing impervious areas. Stormwater treatment design has been based on treating the full 47 ha.[342] Water quality treatment will meet a minimum standard of 75 percent removal of total suspended solids (TSS) on a long-term annual average.[343] Reticulation will be provided to pass the 10-year Average Recurrence Interval (ARI) runoff, and has been designed such that it will not create or exacerbate flooding effects on adjacent properties.[344] The design has been accepted as such by Auckland Council.[345] It is also considered by Auckland Council to be consistent with the Auckland-wide stormwater network discharge consent that Auckland Council is presently seeking on its own behalf.[346]

[550] Overall, the general design of the stormwater treatment system for the Proposal has not been contested. However, three specific matters have been raised by submitters and are addressed as follows.

*Stormwater wetlands within Kempton Holdings Limited land*

[551] Mr Sax appeared at the Hearing in support of the submission by Kempton Holdings Limited. Mr Sax sought two amendments to the Proposal design, being:

(a) Relocation of the proposed stormwater wetland proposed to the west of Hugo Johnston Drive; moving it to alternative locations either west or south

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[341] *Technical Report 12 Stormwater Assessment*, November 2016; *Technical Report 12 Stormwater Supplementary Assessment Great South Road Intersection*, December 2016.

[342] Statement of Primary Evidence, Allison, para 9.2.

[343] Ibid, para 9.3.

[344] Transcript, Cain, p1463.

[345] Transcript, Lanning, p6393.

[346] Transcript, Sunich, p2999.

of the Mercury Southdown site. Those alternative locations are both owned by Kempton Holdings Limited.[347]

(b) Deletion of the proposed stormwater wetland proposed within the downstream end of the Miami Stream, piping of the stream, and alternative (unspecified) treatment of road runoff.[348]

[552] Mr Sax's suggested amendments were sought to reduce the EWL footprint within his properties.

[553] The Board has not received any technical evidence in support of the suggested amendments and cannot determine their viability in terms of meeting the proposed level of stormwater treatment. NZTA has not directly addressed the matters raised by Mr Sax or as stated in the Kempton Holdings Limited submission. The Board notes that the proposed wetland / pond system west of Miami Parade is intended to treat existing upstream catchment (approximately 40 ha)[349] as well as some road runoff. Piping of the stream at that location would eliminate the benefit of treatment of the upstream catchment. Without further technical advice, the Board cannot adopt Mr Sax's suggestion for that site and, accordingly, finds that the Proposal design should be unchanged.

[554] With respect to the requested relocation of the proposed stormwater wetland at Hugo Johnston Drive, the Board notes that the alternative location immediately to the south is proposed as a public carpark to service access to the coastal walkway. Thus, relocation of the wetland to that site would result in adverse parking and access effects that would not be possible to mitigate. Moreover, the location of the car park was a matter addressed through consultation with Mercury. Therefore, the implications of moving the wetland to that location have not been assessed and, as such, the Board cannot support the request.

[555] The second alternative site promoted by Mr Sax is located immediately south of the Mercury site. That location appears to be predominantly within the CMA, and is within the Anns Creek West ecological area. Thus, it does not appear to be a practical alternative location and is not supported by the Board.

*Stained discharges from stormwater pipe near Sea Scouts building*

[556] Mr Hewison, on behalf of TOES and Others, raised concern regarding stained discharges from an existing stormwater pipe located to the south of the Sea Scouts

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[347] Transcript, Sax, p6054.

[348] Ibid, p6056.

[349] Addendum to Technical Report 12, Table 1-9-1.

building. No evidence has confirmed the source of that staining. It may be that the upgrade of stormwater treatment upstream of that outfall will address the effect. The inclusion of Gloucester Park in the Contaminated Land Management Plan (Condition CL.2) may also lead to some identification and improvement of the effect. However, in the absence of evidence on the cause of the staining, the Board does not make a finding or requirement on this matter. This does not preclude NZTA working with Auckland Council and/or TOES and Others to address the matter through detailed design and construction.

*Relocation of the stormwater pump station – Monahan Properties Limited*

[557] Monahan Properties Limited[350] sought that the Proposal be granted with conditions, but submitted concern regarding potential impacts of the Proposal on its site immediately south of T&G Global on Monahan Road. Those concerns included the potential effect of relocating a stormwater pumping station from NZTA land on SH1 on to the Monahan Properties Limited site.

[558] In relation to this issue, Mr Cain indicated that the proposed relocation of the stormwater pump station adjacent to that site could be adjusted during detailed design and in discussion with the property owner.[351] He also confirmed that the lid of that device would be able to withstand general industrial yard activities.[352] Thus, the Board finds that the effect of the relocation of the pump station on to the Monahan Properties site can be appropriately mitigated.

[559] In summary, the Board finds that the general management of stormwater from the Proposal alignment will be consistent with accepted best practice and will ensure that any stormwater-related adverse effects, including construction effects, will be minor or appropriately addressed through other processes.

## Earthworks

[560] This section addresses the potential sediment-related effects of the land-based earthworks necessary for the construction of the EWL, as a matter to be considered under the regional consent applications. Other district matters that may arise are addressed under the consideration of the NoRs.

[561] Earthworks are to be managed in accordance with Auckland Council Erosion and Sediment Control Guide for Land Disturbing Activities in the Auckland Region Guideline Document 2016/005 (GD05). The management of sediment-related

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[350] Submission 126270.

[351] Transcript, Cain, p1462; Statement of Rebuttal Evidence, Cain, para 4.21.

[352] Statement of Rebuttal Evidence, Cain, paras 4.14 and 4.15.

effects from the land-based earthworks was not specifically contested and the Board finds that such effects can be appropriately managed if implemented in accordance with the proposed methodology and conditions.

[562] During Mr Cain's attendance at the Hearing, the Board presented questions on Conditions E.3 and E.4 (site-specific erosion and sediment control plans (SSESCPs)); Condition E.6(f) (double flocculation sheds) and Condition E.6(k) (last-line-of-defence controls).

[563] Mr Cain agreed that a simplification of the information to be submitted in the SSESCPs required by Conditions E.3 and E.4 could be beneficial[353] and the Board notes that some changes have been made.

[564] In relation to Condition E.6(f) and Condition E.6(k), the Board queried whether double flocculation sheds and last-line-of-defence controls were necessary or practical on a tightly constrained, lineal urban works area such as the EWL. Mr Cain considered them to be necessary and achievable. The Board retains doubt regarding these requirements but does not have an evidential basis to alter those conditions. The Board also accepts that retaining the requirements for those measures will not increase the risk of sediment discharge to the receiving environment.

[565] Aside from the cautions noted above, overall the Board finds that earthworks necessary for the construction of the Proposal will be appropriately managed in accordance with industry best practice. Provided that works are undertaken in accordance with the proposed consent conditions, adverse sediment-related effects of the earthworks will be minor and temporary.

### Contaminated Land

[566] Contaminated or potentially contaminated land will be encountered at various locations along much of the route, including closed landfills and other historic fill sites, and industrial properties. Matters relating to the disturbance of contaminated land were addressed in Technical Report 17, and in the evidence of Dr Wallis and Ms Eldridge. Specific matters were also raised in submissions by POAL and T&G Global.

[567] There was a general level of agreement between NZTA and Auckland Council regarding management of the disturbance of contaminated land, as reflected in proposed conditions CL.1 to CL.13, which were updated after the Joint Witness

[353] Transcript, Cain, p1464.

Conference on Closed Landfills. NZTA has also adopted other amendments to conditions proposed by Ms Eldridge in her evidence, being:

(a) Explicit inclusion of closed landfills and the uncontrolled landfills of Gloucester Park in the matters to be addressed in the Contaminated Land Management Plan (CLMP); and

(b) Additional detail in Condition CL.9 relating to the removal, replacement and decommissioning of landfill monitoring bores and infrastructure.

[568] POAL submitted that the potential effect of disturbing the cap of the Pikes Point landfills, and associated potential effects on the management of stormwater at that site, had not been adequately assessed.[354] Dr Wallis clarified that the reinstatement of a cap had been accounted for in his assessment and that would be undertaken[355] and that conditions had been amended accordingly.[356] The Board accepts this response.

[569] T&G Global submitted that insufficient consideration had been given to the potential effects of disturbing contaminated land within the T&G Global site, and conditions did not provide sufficient certainty on the management of those effects.[357] Mr Arbuthnot proposed additional conditions to address this matter[358] with a key requirement being for NZTA to consult with the affected land owner when preparing the CLMP.

[570] Dr Wallis addressed this matter in his rebuttal evidence,[359] and in response to questions indicated he had had previous involvement with remediation of the T&G Global site.[360] Dr Wallis considered that the draft conditions adequately provided for an appropriate level of management of contaminated land throughout the Proposal footprint. While in his rebuttal evidence he did not consider that the requirement to consult with land owners should be explicitly included in conditions, he did agree, through questioning, to the proposition that it is best to consult with

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[354] Statement of Primary Evidence, Kirk, paras 4.13 to 4.16.

[355] Statement of Rebuttal Evidence, Wallis, para 4.24.

[356] Conditions CL.9 to CL.13.

[357] Statement of Primary Evidence, Arbuthnot, paras 7.60 to 7.64.

[358] Statement of Primary Evidence, Arbuthnot, para 7.65.

[359] Statement of Rebuttal Evidence, Wallis, paras 4.31 to 4.38.

[360] Transcript, Wallis, p1823.

the current owner and operator of a site when determining how best to mitigate adverse effects of construction activities.[361] The Board agrees and finds that it is appropriate to explicitly require consultation with the owners and operators of properties during the development of the CLMP. Refer to amended condition CL.1.

[571] Dr Wallis[362] also addressed the submission of Monahan Properties Limited regarding potential contaminated land effects on their property at 7 Monahan Road (immediately south of T&G Global). Dr Wallis did not consider that the plume of contamination within the T&G Global site would extend to the Monahan Properties site. The Board accepts Dr Wallis' response in that regard.

[572] Overall, the Board is satisfied that the potential adverse effects of the disturbance of contaminated land during construction has been adequately assessed and will be appropriately managed and mitigated through the implementation of conditions, as amended by the Board.

### Streamworks

[573] Works are proposed in or over Southdown Stream, Anns Creek (landward of MHWS), Clemow Stream and Miami Stream. NZTA and Auckland Council confirmed that Hill Street Stream (through The Local Lockup site) is an artificial channel and not a stream. It is no longer addressed by the Board as no resource consent is required.

[574] No matters relevant to these sites were contested through evidence, aside from the matters raised by Mr Sax (addressed from paragraph [551] onwards) and the more general effects on Anns Creek East (as discussed below).

[575] The Board finds that the potential adverse effects of the proposed works and structures on streams will be minimised and mitigated to an acceptable level. Ecological effects and associated mitigation is discussed in the following section.

### Discharges to Air

[576] The only consent sought specifically for discharges of contaminants to air is that associated with the operation of the temporary concrete batching plant to be located at the Waikaraka Park South construction yard, and ancillary storage of cement

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[361] Transcript, Wallis, p1824.

[362] Statement of Rebuttal Evidence, Wallis, paras 4.27 to 4.30.

(application reference RC12). No submissions raised specific concerns against this activity and it was not addressed in detail at the Hearing. The Board finds that the adoption of the proposed consent conditions associated with that activity will ensure that potential adverse effects will be appropriately minimised.

[577] The Board also notes that discharges of exhaust gases from vehicles travelling on roads (excluding tunnels) is permitted without standards by the AUP:OP.[363] Therefore, the potential reverse sensitivity issue raised by Mercury in relation to compliance with its discharge to air consent is addressed separately in chapter 15.3 of this Report.

### Adequacy of Ecological Mitigation and Off-sets

[578] NZTA has proposed a package of ecological mitigation and offsets to address all ecological effects of the EWL. The approach was described by Dr De Luca[364] as follows:

> "*The approach taken was to assess a bucket of effects across the areas of ecology and develop a bucket of mitigation and offset, as it is not possible to propose like-for-like mitigation for effects such as permanent loss of marine habitat. For example, even though the adverse effects of the project on freshwater ecological values are not particularly significant, measures to enhance freshwater ecological values have been proposed which will improve functioning and values of the whole ecosystem.*"

[579] The details of the ecological package proposed were provided in Technical Report 16,[365] and by Dr De Luca.[366] That package was supported by Conditions EM.1 to EM.12, which have now been updated by NZTA as EM1.A to EM.12B.

[580] Additions to the mitigation and offsets were offered during the Hearing, which included an overall increase in the ecological restoration and habitat enhancement measures from 10 ha to 30 ha. NZTA has also updated the certainty of implementation of various measures such as ecological restoration at Gloucester Park and Anns Creek Reserve (e.g. Condition EM.2A) and more directive wording of outcome-based conditions (e.g. Conditions EM.3A, EM.3B and EM.3C). The additions also included the measures listed by Mr Mulligan in his closing submissions,[367] being:

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[363] AUP:OP, Rule E14.4.1(A114). `

[364] Transcript, De Luca, p1643.

[365] Technical Report 16, Chapter 6.

[366] Statement of Primary Evidence, De Luca, Table 7.

[367] Closing Statement, Mulligan, para 14.23.

(a) Additional restoration and planting at Anns Creek Reserve, including wetland and raupo enhancement;

(b) Additional restoration and planting at Blake Reserve;

(c) Additional pest plant and animal control within Anns Creek (including Anns Creek Estuary, West and East); and

(d) Longer term planting and restoration in Anns Creek of a minimum of 10 years.

[581] At the commencement of the Hearing, experts agreed that appropriate assessment methodologies had been used[368] and that minimising the effects envelope through design was appropriate.[369] Experts also agreed that: [370]

(a) The integrated ecosystem approach to effects, mitigation and offset is appropriate; and

(b) The quantum of mitigation and offsets is finely balanced and is contingent on the successful implementation of all measures listed in Table 7 of Dr De Luca's primary evidence, and the relocation of the proposed construction yard out of Anns Creek East.

[582] The potential ecological effects of most significance are on avifauna (via impacts on feeding and roosting areas), and on the ecosystems of Anns Creek, and in particular Anns Creek East.

*Avifauna*

[583] Dr Bull's conclusions regarding the likely effects on avifauna were summarised as follows: [371]

> "*[8.8] Due to the difficulty in clearly demonstrating a measurable cause and effect relationship with incremental habitat loss and ecological value, the magnitude of effect of cumulative reclamation and occupation of estuarine ecosystems within the Māngere Inlet is likely to be assessed as negligible, but in order to be conservative I have assessed the magnitude as low.*
>
> *[8.9] Given the very high value of the shorebird assemblage within the Māngere Inlet, the overall level of effect of cumulative reclamation and occupation of estuarine ecosystems within the Māngere Inlet and the Manukau Harbour is considered to be moderate for shorebirds.*

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[368] Joint Witness Statement – Ecology, section 5.

[369] Joint Witness Statement – Ecology, section 6.

[370] Joint Witness Statement – Ecology, section 11.

[371] Statement of Primary Evidence, Bull, paras 8.8 to 8.10.

> *[8.10] In terms of the terrestrial avifauna, the magnitude of effect of permanent terrestrial habitat loss due to the construction of the EWL are considered to be negligible at both the local and population level.*"

[584] In response to questions, Dr Bull confirmed that because the direct impact of the reclamation is permanent and cannot be avoided, offsets are the primary means of addressing effects on shorebirds. This will include restoration of Ngā Rango e Rua o Tainui Island as a roosting site, proposed statutory protection of existing roosting sites around the Māngere Inlet, and the management and enhancement of South Island breeding sites for species affected by the EWL.[372] These measures are detailed in conditions.

[585] Additional to the direct impact of the reclamation, Dr Lovegrove listed[373] and described a number of other potential impacts that the reclamation may have on shore birds, including:

(a) Extending the presence and potential disturbance by people and activities beyond the current shoreline (referring to the different "startle distances" associated with different activities)[374] In turn, that will increase the overall impacts of the reclamation beyond the footprint of the reclamation.

(b) Suspension and dispersal of sediment and contaminants, including those generated by dredging.

(c) Increasing rates of sediment accumulation in the constructed embayments that may smother feeding areas (particularly in relation to wrybill which feed on near-surface organisms).

[586] Dr Lovegrove also stated that while the SEAs are the most important areas, the shore birds also utilise other inter-tidal areas of the Inlet that are mapped as General Marine Zone in the AUP:OP.[375]

[587] In this regard, Dr Lovegrove supported:

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[372] Transcript, Bull, p1609.

[373] Statement of Primary Evidence, Lovegrove, para 7.1.

[374] Transcript, Lovegrove, p2852.

[375] Transcript, Lovegrove, p2848.

(a) the creation of alternative roosting sites, such as at Ngā Rango e Rua o Tainui Island and protection of other roosts around the Manukau;

(b) including pest control and weed management;

(c) locating walkways and boardwalks are far as possible from the inter-tidal zone, saltmarshes and wetlands; and

(d) minimising noise and lighting.

[588] Dr Lovegrove[376] and Dr Bull both indicated that if the wrybill population increased in response to South Island breeding ground management, there would be sufficient feeding grounds available within the Manukau and other locations (including Tāmaki River, Manukau Harbour, Firth of Thames, and Kaipara Harbour). Neither expert considered that the Proposal would have an adverse effect on a population basis. Similarly, birds (including dotterel) will feed and roost elsewhere during construction.[377]

[589] Other ecological impacts of reclamation would be in Sector 1 in the vicinity of the proposed Galway Street intersection, which will require the loss of 9,400 $m^2$ of saltmarsh and mangroves, and a 900 $m^2$ glasswort meadow,[378] and mangrove removal along the Sector 2 foreshore and within the Anns Creek Estuary. These impacts are addressed in the overall ecological mitigation package.

[590] Mr Cameron suggested that to further offset the sedimentation effects of the proposed dredging and reclamation, 10 ha of riparian restoration (fencing and riparian planting) could be undertaken elsewhere in the Manukau Harbour catchment, to the value of $4 million.[379]

*Anns Creek East*

[591] The ecological impact of the Proposal on the terrestrial extent of Anns Creek was described by Ms Myers in her statements of evidence and at the Hearing, and in Technical Report 16.

[592] In summary, Ms Myers stated:[380]

> "*Anns Creek East contains sensitive and unique ecological values with lava shrubland habitats, threatened plant habitats and gradients between*

[376] Transcript, Lovegrove, p2842.

[377] Transcript, Bull, p1610.

[378] Technical Report 16, Section 2.2.1.1

[379] Transcript, Cameron, p2967.

[380] Statement of Primary Evidence, Myers, paras 1.8 to 1.12.

*mangroves to saltmarsh to freshwater wetland. The viaduct has been designed to be located within the more modified northern edges of the creek which contain weed species, native plantings and areas of fill. The location of piers will be designed to avoid sensitive areas of lava shrubland.*

*Construction of the Anns Creek viaducts, including access for temporary staging and location of a construction yard, however, will result in significant ecological effects:*

*(a) disturbance and loss of lava shrubland ecosystems;*

*(b) disturbance and loss of freshwater raupo wetland and saltmeadow communities;*

*(c) disturbance and loss of ecological sequences from terrestrial to saline to freshwater;*

*(d) loss of and impacts on a naturally uncommon ecosystem type.*

*The viaducts will result in significant adverse effects on the north-eastern lava flow, and loss of raupo wetland and saltmarsh ecosystems. A total of 9,599m2 (18%) of vegetation communities in Anns Creek East will be adversely affected by the Great South Road intersection design.*

*Ongoing operational effects of the Anns Creek viaducts will include shading and rain shadow effects on vegetation in Anns Creek, and increased weed invasion from the construction and staging footprint.*

*An ecological mitigation and offsets package has been developed for the Project which includes restoration of saltmarsh and lava shrubland ecosystems, and weed control in Anns Creek East and Anns Creek Estuary. A plan identifying exclusion areas for pier location within Anns Creek East has been developed and will guide detailed design. A long term integrated environmental management plan is proposed to be developed for Anns Creek East. I recommend that to mitigate and offset adverse effects the long term permanent protection of Anns Creek should be provided for.*"

[593] Dr Bishop generally accepted Ms Myers' assessment of potential effects, but sought to widen that consideration to the effects of the proposed construction yard within the TR Group site. He also questioned whether the proposed mitigation resulted in "no net loss" of ecological values.

[594] In his evidence, Dr Bishop also expressed concern about the adequacy of mitigation or offsets, particularly relating to effects on freshwater wetland and lava substrate ecosystems within Anns Creek East. In his opinion, the Proposal would result in a net loss of those rare ecosystems, which in his opinion did not represent the commonly adopted multipliers for ecological offsets, which could be up to 30 times the impacted area.[381]

[381] Statement of Primary Evidence, Bishop, paras 7.24 to 7.26.

[595] When questioned on the comparison between the mitigation proposed by NZTA and the mitigation required of TR Group under its existing consents, Dr Bishop concluded that the main difference between the outcomes is more a matter of implementation rather than a gap between the quantum of mitigation proposed.[382]

[596] In response, Ms Myers[383] noted that, "*A combined ecosystem approach to mitigation has been undertaken rather than addressing each feature individually. This is a different approach to mitigation and offsets than that proposed by Dr Bishop*."

[597] She considered that:

> "*The integrated approach will achieve a more comprehensive package of mitigation including protection, restoration and weed management of lava shrubland ecosystems in Māngere Inlet and Anns Creek. The approach is more targeted to the effects of the Proposal, providing for in situ restoration and protection, rather than a line by line accounting approach as proposed by Dr Bishop.*"

[598] Ms Myers[384] considered that "a huge effort" had been made to avoid the ecological effects, and mitigate or offset effects that could not be avoided, and noted that, "*[F]rom an ecological perspective, it would be best for a road not to go through this area, but there are a whole lot of other issues that need to be weighed up*".

*Certainty of Outcomes*

[599] Focus was given to the proposed mitigation trials and research offsets, and whether the value of those as offsets was dependent on those initiatives resulting in a tangible environmental benefit "on the ground".

[600] A key area of inquiry was on the proposed research into recolonisation of inter-tidal soft and hard food sources for foraging birds. In terms of the outcomes of the research, Dr De Luca considered that contribution of the research to the relevant body of knowledge was the offset benefit. In her opinion, that benefit was not dependent on successful recolonisation of inter-tidal soft and hard food sources for foraging birds at the research site.[385]

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[382] Transcript, Bishop, p2892.

[383] Statement of Rebuttal Evidence, Myers, paras 4.12 and 4.13.

[384] Transcript, Myers, p1556.

[385] Transcript, De Luca, p1644.

[601] Mr Lanning questioned the reliability of the research delivery process, based on the original wording of conditions. The Board shared Mr Lanning's concern, but now notes that significant modification and tightening of the avifauna research conditions has been made by NZTA (EM.10) that more clearly sets objectives, general methodology, and the obligation of NZTA to deliver the research.

[602] Dr Bishop[386] questioned the viability of the proposed saltmarsh restoration trial which, in his opinion, "*will present extraordinary challenges and considerable adaptive management may be required*", referring to a failed attempt undertaken at Ambury Park in 1990s. He recommended commencing "*trials in degraded areas, not affected by the construction, as soon as possible, to gain experience and to give more certainty that the benefits from the mitigation and offsets that are proposed, are actually achievable in short-medium timescales*".

[603] In response to questions from Mr Enright, Ms Myers did concede that she may not be able to support the Proposal if all the proposed mitigation measures could not be implemented.[387] However, Ms Myers explained why she considered the likely success of the ecosystem restoration proposed, including the saltmarsh restoration trial, was better than a previous unsuccessful example quoted by Dr Bishop (Ambury Park), as the NZTA proposal is to restore and enhance an existing ecosystem[388] rather than creating a new ecosystem.

[604] Ms Myers agreed that some of the conditions relating to management of effects at Anns Creek could be strengthened.[389] The Board notes that NZTA has made amendments to conditions in that regard.

*Discussion*

[605] As noted earlier, the Board accepts that there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such effects must be considered significant but on the basis of the evidence of Drs Bull and Lovegrove, the proposed coastal works will not result in loss of habitat that is sufficiently rare that it would impact on the overall populations of those species, or the presence of those species within the Māngere Inlet or adjacent coastal areas. The Board is satisfied that the potential impacts that the Proposal will have on shore birds can be adequately mitigated and offset, with some modification of the design and construction methodology. As agreed by Dr De Luca,[390] excluding sub-tidal

[386] Statement of Primary Evidence, Bishop, para 7.16.

[387] Transcript, Myers, p 1552.

[388] Transcript, Myers, p 1553.

[389] Transcript, Myers, p 1582.

[390] Transcript, De Luca, p 1650.

dredging (with the exception of the Anns Creek tidal channel works) and removal or modification of the headlands will reduce ecological effects. The Board finds that those changes to the Proposal would positively influence the effects / mitigation balance. Consequently, it will become less finely balanced and less dependent on every element of the package having a direct ecological benefit with respect to marine ecology and avifauna.

[606] The Board is also satisfied that appropriate modification has been made to the avifauna research conditions to the extent that the conditions now place a clear obligation on NZTA to deliver the research outcomes. With the exclusion of sub-tidal dredging and deletion or modification of the headlands, the Board can accept that the contribution to the body of scientific knowledge is a satisfactory offset benefit of the research, albeit that the offset would be significantly strengthened if the research indicated successful mitigation could be achieved on the ground.

[607] With respect to Mr Cameron's recommended 10 ha of planting within the Manukau Harbour catchment, the Board agrees that, in the absence of sufficient alternative mitigation and offsets, such an initiative does have some nexus with sedimentation effects within the harbour. However, the benefit that such works would have to the Māngere Inlet is indirect at best, and not possible to define. With the deletion of sub-tidal dredging and modification or deletion of headlands, the Board does consider the inclusion of the additional riparian restoration recommended by Mr Cameron to be necessary.

[608] With respect to Anns Creek East, the Board notes that filling within the footprint of the proposed construction yard within TR Group site is already consented as Stage 2 of the TR Group fill area. In the event TR Group undertakes the filling, the mitigation required by the TR Group consents will be engaged. However, the Board accepts[391] Mr Lanning's proposition that if NZTA undertakes the construction yard filling, the TR Group Stage 2 mitigation will not be engaged. Consequently, the Board accepts that mitigation for that work must be addressed through the NZTA consents. This matter is addressed further in chapter 15.4 under the sub-heading *TR Group*.

[609] Maintaining the planting and ecological mitigation beyond 10 years is not justified based on Ms Myers' evidence. The ecological restoration will be well established in that time and ongoing maintenance will not be necessary to maintain the overall quantum of mitigation.

[391] Chapter [15.4] of this Report for Sector 3.

[610] The Board accepts Ms Myers' evidence that the adverse effects within Anns Creek East have been avoided to the greatest extent practicable by pushing the Proposal alignment as far north as possible, into the Mercury site, so as to avoid the most intact lava shrubland habitats and the threatened plant habitats, and minimise construction access impacts. While experts agree that like-for-like mitigation of effects on the lava shrubland ecosystems is difficult, the Board accepts that restoration and enhancement of existing ecosystems is more likely to succeed than establishing new ecosystems.

[611] The Board also finds that the mitigation and offsets now offered will adequately address the effects of that construction activity and the shading that will occur on completion of the works. This includes the additional planting in Anns Creek Reserve, additional pest control throughout Anns Creek and extending the management period for those areas as direct mitigation for terrestrial and coastal effects on those environments.

### Cumulative effects

[612] Having carefully considered each of the potential adverse effects in this section of its decision, the Board has also considered whether those effects might have an adverse composite effect. This situation was considered by the Court of Appeal in *Dye*, whereby the conjunctive effect of taking all effects together was considered to be a cumulative adverse effect:[392]

> "*The concept of cumulative effect arising over time is one of a gradual build-up of consequences. The concept of combination with other effects is one effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration. The same connotation derives from the words 'regardless of the scale, intensity, duration, or frequency of the effect'.*"

[613] Having examined all of the effects, the Board is satisfied that they will not, together, have a further adverse composite effect that requires any additional mitigation beyond the mitigation and off-sets proposed by NZTA as part of the Proposal.

### Conclusion

[614] Overall, the Board accepts the integrated approach to the consideration of ecological effects, mitigation and offsets in relation to the Proposal. The range of effects and the scale of the Proposal facilitates this approach and provides greater flexibility to offset effects that cannot be adequately mitigated, provided that the scale of effects themselves is acceptable. In this case, the Board finds that the

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[392] *Dye v Auckland Regional Council* (2001) 7 ELRNZ 209, [2002] 1 NZLR 337, [2001] NZRMA 513 at [38].

magnitude, scale and intensity of effects is acceptable in the context of the mitigation and offsets proposed, and by a margin that has improved throughout the Hearing. While there will be direct adverse effects on rare and threatened species, those effects will not compromise the viability of those populations or ecosystem types. However, an outcome that at least balances the ecological effects through mitigation and offset benefits is an appropriate requirement. The Board finds that such an outcome will be achieved through the deletion of the sub-tidal dredging, modification or deletion of headlands, and implementation of the additional ecological mitigation and offsets proposed.

## 14.3 SECTION 104D – NON-COMPLYING ACTIVITY ASSESSMENT

[615] The Parties agree that direct adverse effects of the Proposal, and in particular the coastal activities, will be more than minor. On that basis, the Board finds that the Proposal does not pass the first limb of the gateway test (s104D(1)(a)).

[616] In forming a conclusion on the second limb (s104D(1)(b)), the Board has considered carefully the various interpretations presented on this matter.[393] The Board accepts the proposition advanced by Ms Rickard. There is no contest that the resource applications should be bundled with an overall non-complying status.

[617] The Board accepts Ms Rickard's conclusion, that widening the scope of the s104D(1)(b) assessment beyond the AUP:OP$^{RCP}$ to include all relevant regional provisions of the AUP:OP$^{RP}$ does not identify additional provisions, to which the Proposal might be "contrary". More likely, it introduces various provisions with which the Proposal is generally consistent. However, in its initial assessment the Board favours the approach taken by Ms Coombes in taking a broad overview but placing,[394] "*… particular consideration on the objectives and policies with the most specific relationship to the non-complying aspects of the relevant proposal and on those provisions which are more directive*".

[618] Consequently, the Board focuses its initial s104D(1)(b) assessment on the provisions most relevant to the non-complying coastal activities, which are listed in Technical Report 2.[395] They comprise infringements under Chapter F2 of the AUP:OP associated with the formation of reclamations and structures within the SEA-M1 and SEA-M2, ONFs and Historic Heritage Extent of Place overlays within the Māngere Inlet, including associated vegetation removal, damming or

[393] Refer to chapter [7.2] of this Report under the sub-heading *Rule C1.5.*

[394] Statement of Primary Evidence, Coombes, para s10.8 and 10.9.

[395] Technical report 2, Appendix A.

impounding water, and other construction activities. The Board considers that that approach will provide the most conservative assessment, minimising the risk of artificially weighting any conclusion with supportive provisions in favour of the Proposal.

[619] At the time of writing this Report, the Board was advised by Mr Lanning that Auckland Council is still waiting on ministerial approval for the AUP:OP$^{RCP}$. Therefore, the Board has also considered the relevant provisions of the ARP:C, but accepts the weighting attributed by Ms Coombes[396] in that regard, finding that the AUP:OP$^{RCP}$ provisions must be given significant weight, and the ARP:C provisions limited weight.

### Reclamations

[620] Policy F2.2.3(1) directs that reclamation be avoided unless all of the following apply:

(a) the reclamation will provide significant regional or national benefit;

(b) there are no practicable alternative ways of providing for the activity, including locating it on land outside the coastal marine area; and

(c) efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use, or to enable drainage.

[621] Later in chapter 15.12 of this Report, the Board undertakes the statutory assessment required by s171(1)(b) of the RMA as to whether adequate consideration has been given to alternative routes or methods for undertaking the work. The Board explores the process used by NZTA for identifying and evaluating corridor and alignment alternatives using Multi Criteria Analysis (MCA) methodology, and briefly outline the "Long List" comprising 16 corridor options, the six options selected to the next stage of the MCA (alignment evaluation) plus the OBA option, which led to the selection of the preferred option.

[622] It will become clear that the potential need for reclamations for the Proposal in locations of high environmental value were balanced against the potential opportunities for environmental betterment. A central component of NZTA's reasoning for accepting a foreshore alignment with the associated reclamations was that it would provide the most enduring transport benefit.

[623] In the context of its consideration of the AUP:OP$^{RCP}$ provisions most relevant to the proposed reclamations, it is critical for the Board to be satisfied that the EWL alignment is indeed the option that provides the most enduring transport benefits to

[396] Statement of Primary Evidence, Coombes, para 8.6; Transcript, Coombes, p 3468.

the extent that those benefits are necessary and that there are no "practicable alternatives" to achieve that outcome.

[624] Mr Burns, when addressing the Board on Policy F2.2.3(1)(b) submitted:[397]

> "*[T]he test is not whether this is the best, or cheapest, option for NZTA's road, or whether it is justified by transport outcomes, but simply whether there are any practicable ways of putting the road somewhere else.*"

[625] The Board disagrees. The analysis undertaken by Mr A Murray, which contributed to the balancing of all factors in choosing the proposed alignment, must be relevant to whether there is a practicable alternative. It is not appropriate, under the detailed and integrated option selection process undertaken, to apply such a simplified interpretation of "practicable alternative" i.e. whether any road can be located elsewhere, regardless of how inferior its transport, walking and cycling, or public transport benefits may be.

[626] For these reasons, the Board is indeed satisfied that there is no "practicable alternative" to the route NZTA proposes. The Board reaches this conclusion simply because it is satisfied that NZTA's scrutiny of alternative routes did not produce any enduring transport solution other than the selected route.

[627] In consideration of Policy F2.2.3(1), the Board finds:

(a) While some submissions considered that NZTA had selected the wrong alignment, and that the Proposal should not extend into the CMA, it was common ground that the EWL would provide significant regional benefit. The Board is also satisfied that given the significant contribution that the Penrose-Mt Wellington area makes to the Auckland economy and employment,[398] the EWL can reasonably be concluded to have significant national benefit.

(b) If unencumbered by topography or development, it is intuitive that there will be a practical alternative landward route suitable for the provision of a road. However, the areas surrounding the Māngere Inlet are fully developed with industrial, commercial and residential land uses. As discussed in chapter 15.12 of this Report, the Board is satisfied with NZTA's evidence on the assessment of alternatives and enduring transport benefits conferred by the chosen alignment. Therefore, it finds that there are no "practicable alternative" ways of providing for the objectives of the Proposal in a manner that avoids the proposed

[397] Opening Statement, Burns, para 161.

[398] Statement of Primary Evidence, Williamson, section 7.

reclamations and coastal occupation. The Board accepts that in refining the EWL alignment, NZTA has sought to balance a range of effects, including ecological, business disruption, cultural and social. In turn, that alignment has necessitated mitigation in the general form and scale of that proposed.

(c) As discussed in chapter 14.2 of this Report, the Board finds that efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use. The scale and form of the reclamations has been developed through an integrated design process and is now the minimum necessary to mitigate landscape, visual, severance and amenity effects. Additional efficiency has been achieved by using the wetlands within the reclamations to treat stormwater runoff from the developed hinterland, and to provide an alternative upgraded treatment option for landfill leachate.

[628] As a result, the Board finds that the Proposal is generally consistent with, and not contrary to, Policy F2.2.3(1) of the AUP:OP. In the event that Parties maintain a different interpretation regarding the F2.2.3(1)(b) question of practical alternatives, this is but one sub-clause of the policy. Notwithstanding the inclusive wording of the policy that requires that all sub-clauses apply, the Board has also considered the degree to which the Proposal is consistent with the policy in conjunction with its overall balanced assessment.

[629] Policy F2.2.3(2) requires consideration of the overlay policies that are relevant to the area of the proposed reclamation. In this case that engages the policies in Chapters D9 (Significant Ecological Areas Overlay) and D17 (Historic Heritage Overlay). Those provisions are assessed further below.

[630] Policy F2.2.3(3) provides for reclamation associated with various activities. That includes to enable the construction and/or efficient operation of infrastructure, including roads. The proposal is consistent with that policy.

[631] Policy F2.2.3(4) is not directly relevant, although it provides for the future maintenance of stormwater outfalls, including those from the proposed wetlands.

[632] Policy F2.2.3(5) requires proposals for reclamation to mitigate effects through the form and design of reclamation as far as practicable, taking into account the shape of the reclamation, and the extent to which the materials used are visually compatible with the adjoining coast, and the ability to avoid consequential changes to coastal processes, including erosion and accretion. For the reasons discussed in this Report, the Board is satisfied that the Proposal is consistent with this policy provided that the proposed headland features of Landforms 2 and 3 are modified

to maximise tidal flow and minimise sediment accumulation within the formed embayments.

[633] Policy F2.2.3(6) requires the Board to consider the need for compensation for those effects that have not been avoided, remediated or mitigated on site, by way of additional or enhanced public access or public facilities or environmental enhancement or restoration. The proposal generally meets that policy through the provision of ecological offsets.

[634] Policy F2.2.3(7) requires the design of reclamations to take into account the potential effects of climate change, including sea level rise, over 100 years. This has been achieved.

[635] Policy F2.2.3(8) directs that reclamations maintain and, where possible, enhance public access to and along the coastal marine area to the extent practicable, having regard to:

(a) The purpose and proposed use of the area;

(b) Whether a restriction on public access is necessary for public health, safety or operational reasons; and

(c) The ability to remedy or mitigate any loss of public access.

[636] The Proposal mitigates the loss of the existing coastal shared path by providing a commuter cycleway, roadside footpath, and separated walkway and boardwalk system. The new public access will have different characteristics to the existing coastal walkway, but it will be consistent with this policy.

[637] The Proposal is not consistent with Policy F2.2.3(9), which requires provision of esplanade reserve or strip. But it cannot be reasonably considered to be contrary to that provision given the level of public access to be provided, which achieves an outcome equivalent or better than that sought by Policy F2.2.3(9).

[638] Policy F2.2.3(10) enables the beneficial use of dredged material in reclamations, including where stabilised with cement. The proposal is consistent with that policy, albeit that the Board finds that the sub-tidal dredging should not be approved.

[639] With respect to Policy F2.2.3(11), any material imported to the reclamations from off-site will be clean fill. Where dredged material is utilised, it will be sourced from the local environment such that any contaminants present will be pre-existing. The potential effects from mobilisation of contaminants during dredging and other disturbance has been assessed, and those policies specific to that activity are

discussed below. The materials will be contained by mudcrete and armouring. Consequently, the proposed reclamations are not contrary to this policy.

[640] Policy F2.2.3(12) requires assessment of past unlawful reclamation or drainage. NZTA does not seek consent to authorise any existing reclamations. The Board's consideration is limited to the applications before it and this policy is not directly relevant to those.

[641] Policy F2.2.3(13) enables declamation.

## Overlays

[642] Returning to Policy F2.2.3(2), the Board is required to consider the relevant provisions of Chapter D9 (Significant Ecological Areas Overlay), Chapter D10 (Outstanding Natural Features Overlay and Outstanding Natural Landscapes Overlay) and Chapter D17 (Historic Heritage Overlay).

*Significant Ecological Areas*

[643] Policy D9.3(1) directs avoidance of adverse effects on indigenous biodiversity in the coastal environment to the extent stated in Policies D9.3(9) and (10). The Board agrees with Mr Mulligan's submission that the overlay policies do not trump the reclamation policies.[399] The Board reads the relevant overlay policies within the set of all relevant policies that must be considered under s104D and s104(1) of the RMA.

[644] Policy D9.3(9) states:

> "*(9) Avoid activities in the coastal environment where they will result in any of the following:*
>
> *(a) Non-transitory or more than minor adverse effects on:*
>
> *(i) threatened or at risk indigenous species (including Maui's Dolphin and Bryde's Whale);*
>
> *(ii) the habitats of indigenous species that are the limit of their natural range or which are naturally rare;*
>
> *(iii) threatened or rare indigenous ecosystems and vegetation types, including naturally rare ecosystems and vegetation types;*
>
> *(iv) areas containing nationally significant examples of indigenous ecosystems or indigenous community types; or*
>
> *(v) areas set aside for full or partial protection of indigenous biodiversity under other legislation, including the West Coast North Island Marine Mammal Sanctuary.*

[399] Closing Statement, Mulligan, para 21.39.

*(b) any regular or sustained disturbance of migratory bird roosting, nesting and feeding areas that is likely to noticeably reduce the level of use of an area for these purposes; or*

*(c) the deposition of material at levels which would adversely affect the natural ecological functioning of the area.*"

[645] It is contestable whether the Proposal will have non-transitory or more than minor adverse effects on threatened or at-risk indigenous species (clause D9.3(9)(a)(i)), given that experts agreed that the Proposal would not adversely affect the populations of those species and that the shore birds would opportunistically feed elsewhere in the Māngere Inlet, Manukau Harbour or Tāmaki River.[400] Regarding clause D9.3(9)(a)(ii), the Proposal will result in non-transitory and more than minor effects on areas of habitat utilised by some rare species. It will not result in such effects on habitats of species that are at the limit of their natural range, or habitats that are at the limit of their natural range. Evidence received indicated that the habitats to be affected are important to shore birds, including rare and threatened species, but that the shore birds will roost and feed elsewhere.

[646] In relation to clauses D9.3(9)(a)(iii) and D9.3(9)(a)(iv), the Proposal alignment, construction methodology and proposed conditions seek to avoid adverse effects on Anns Creek to the greatest extent practicable, and otherwise minimise and mitigate unavoidable effects. The extent to which potential effects on the ecosystems and vegetation within Anns Creek has been avoided is evidenced through the alternatives assessment,[401] and includes the fact that the proposed alignment encroaches into the Mercury site.[402] Accordingly, while the placement of the road across part of Anns Creek is not consistent with the policy directive, the efforts made to avoid the relevant effects to the greatest practicable suggest that the Proposal is not contrary to those policies.[403]

[647] In considering clause D9.3(9)(b), the disturbance of the migratory bird roosting and feeding areas will be temporary during construction, but the displacement of the birds from areas directly affected by the reclamations will be permanent. Permanent loss of such habitat is addressed in other clauses of the Policy D9.3(9) but it is recognised that some ongoing disturbance may result from people utilising the proposed coastal walkways, which will extend further into the Inlet than the

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[400] Refer to chapter [14.2] of this Report under the sub-heading *Avifauna*.

[401] Refer to chapter [15.12] of this Report.

[402] Which the Board finds in chapter [15.4] of this Report, was done in recognition of the need to accommodate the potential future use of that site for power generation.

[403] In reaching this conclusion, the Board has considered a range of relevant objectives and policies, which we have discussed elsewhere in the Report, for example D9 Policy 1 at [212], D9 Policy 8 at [710], and the E26 Infrastructure policies at [726] – [727].

current walkway. The scale of this effect has been debated by experts. The sections of proposed walkway adjacent to the most significant SEA-M2 habitat have been kept within Landform 3 and otherwise close to the shoreline. Thus, the Proposal can be considered inconsistent with clause D9.3(9)(b). It is however, unclear whether it is contrary to that policy directive and, as noted in chapter 14.2 of this Report, birds will likely opportunistically feed and roost elsewhere in the Inlet, the Tāmaki River and other areas of the Manukau Harbour.

[648] The proposal will be contrary to clause D9.3(9)(c) as it will result in deposition of material at levels that would adversely affect the natural ecological functioning of the area of deposition.

[649] Policy D9.3(10) provides directives to avoid significant adverse effects, and avoid, remedy or mitigate other effects on a range of listed ecological values. Essentially, this addresses the next tier down in terms of ecological significance and avoidance, while not "reading down" the values addressed in that policy. The Board is satisfied that the Proposal has avoided significant adverse effects on Anns Creek, and will mitigate other effects on that environment. It will not impact on habitats that are important during the vulnerable life stages of indigenous species. It will impact on indigenous ecosystems and habitats within the Māngere Inlet, but such effects will be mitigated. Notwithstanding the opposition in principle submitted by Ngāti Whātua Ōrākei, Te Kawerau ā Maki and Ngāti Te Ata Waiohua, no contrary evidence was presented that indicated that the reclamations would result in a significant adverse effect on habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes, including fish spawning, pupping and nursery areas. It will impact on habitats, including areas and routes important to migratory bird species, and the scale of that impact has been addressed by experts. Nor has evidence been presented that indicated that the Proposal would have a significant adverse effect on ecological corridors, and areas important for linking or maintaining biological values, or water quality such that the natural ecological functioning of the area is adversely affected. Consequently, the Board finds that the Proposal is consistent in part, and not contrary to Policy D9.3(10).

*Outstanding Natural Features*

[650] Policy F2.2.3(2) engages the provision of Chapter D10 with respect to mapped ONFs. As discussed in chapter 14.2 of this Report, the Board accepts Mr Jamieson's assessment that the Proposal will not directly impact on the coastal extent of the ONFs and particularly notes that reclamation does not extend into a mapped extent of an ONF. On that basis, the Proposal cannot be contrary to the relevant provisions of Chapter D10 of the AUP:OP$^{RCP}$.

*Historic Heritage*

[651] Policy F2.2.3(2) engages the Chapter D17 provisions that are relevant to the Historic Heritage Extent of Place of Waikaraka Cemetery.

[652] In chapter 14.2 of this Report the Board found that the adverse effects that the EWL will have on views and noise amenity within the cemetery has been appropriately considered and will be adequately mitigated. The Proposal challenges some of the provision in their general intent of protecting the values of historic heritage places, but is not directly inconsistent with most. The Proposal does achieve consistency with Policy D17.3(5) that enables the establishment of network utilities and small-scale electricity generation facilities within scheduled historic heritage places where all of the following apply:

(a) there is a functional need or operational constraint that necessitates their location within a scheduled historic heritage place;

(b) significant adverse effects on the heritage values of the place are avoided where practicable; and

(c) other adverse effects are avoided, remedied or mitigated.

[653] The Board has accepted that there is an operational need for the road within that alignment, which has avoided direct impacts on the cemetery and will mitigate other effects. Overall, the Board finds, despite its effect, that the Proposal is not contrary to the relevant provisions of Chapter D17 with respect to the section of the EWL alignment located within the reclamation adjacent to Waikaraka Cemetery.

*Conclusion on Reclamations*

[654] Careful consideration has been given to all other relevant coastal policies of Chapter F2 (and the extent that it engages the biodiversity provisions in D9) of the AUP:OP. On the basis of the Board's finding that there is no "practicable alternative" to the proposed alignment, and that the Proposal will not result in significant adverse effects on populations or ecosystems, the Board finds that the Proposal is not contrary to those other provisions. Nor is the Proposal contrary to the broadly worded objectives F2.2.2(1), (2) and (3).

## Depositing and Disposal of Material

[655] The formation of the reclamations and inter-tidal fill batters and mitigation will require the deposition of material within the CMA, which engages Objectives F2.3.2(1) to (5), and Policies F2.3.3(1) to (11). The Board finds that the Proposal is not contrary to those provisions, with the possible exception of F2.3.3(4)(a) that directs the avoidance of the disposal of material in the coastal marine area where

it will have significant adverse effects on sites scheduled in the D17 Historic Heritage Overlay. The extent of place of Waikaraka Cemetery, as mapped in the AUP:OP, extends into the CMA. The EWL alignment will slightly encroach on that mapped area within the CMA. It is common ground that the EWL will adversely affect views from, and amenity within, the cemetery. As the effect is indirect, it may be more appropriate to consider it inconsistent with the policy rather than contrary.

### Dredging

[656] The activity of dredging is subject to Objectives F2.4.2(1) to (4) and Policies F2.4.3(1) to (6). The Board finds that the Proposal is not contrary to any of those provisions, which either enable, or require management of the effects of dredging.

### Disturbance of the Foreshore and Seabed

[657] Objectives F2.5.2(1) and (2), and Policies F2.5.3(1) to (7) specifically apply to the disturbance of the foreshore and seabed. They enable minor disturbance and provide for other disturbance with a general direction away from impacts on areas with significant values. The wording of the provisions is not as directive as the reclamation provisions, in allowing for avoidance, remedy or mitigation of effects. As described in the background to Chapter F2.5 of the AUP:OP, the disturbance provisions relate to activities that are separate from reclamation and dredging, for example installation or removal of structures, drilling, piling or tunnelling. To that extent, the Board finds that the Proposal is generally consistent with, and not contrary to, those provisions to the extent that works outside of the reclamations and dredging will appropriately avoid, remedy or mitigate effects of disturbance.

### Other Coastal Activities

[658] The non-complying activity status of the Proposal is also triggered by the following coastal activities:

(a) Mangrove removal (Objectives F2.7.2(1) to (5) and Policies F.2.7.3(1) to (4));

(b) Damming and impounding water (Objective F2.10.2(1) and Policies F2.10.3(1) to (4));

(c) Discharges (Objectives F2.11.2(1) to (3) and Policies F2.11.3(1) to (10)); and

(d) Structures, public amenities, artwork, and associated use and occupation (Objectives F2.14.2(1) to (8) and Policies F2.14.3(1) to (7), (10) and (11)).

[659] The Board finds that the Proposal will not be contrary to the provisions relevant to those activities listed above.

[660] While the resource consent applications have been bundled with an overall non-complying activity status, the above assessment has focused on those activities that trigger that status, being those coastal activities that are proposed to occur within the SEA-M1, Outstanding Natural Feature or Historic Heritage overlays as defined in the AUP:OP.

[661] Regarding other activities for which resource consents are sought, the Board accepts the conclusions of Ms Rickard and Mr Gouge that the Proposal is not contrary to the provisions specific to those activities.

### Overall Conclusion – s104D

[662] The Board is persuaded by Mr Mulligan's submission that the approach taken by the Environment Court in *Akaroa Civic Trust v Christchurch City Council*[404] is appropriate to adopt. Further discussion about the relevance and force of *Akaroa* is contained in chapter 12.5 of this Report. In some consent applications a provision may be so central to a proposal that it sways the s104D decision, but generally the s104D assessment will be made across the objectives and policies of the plan as a whole and not determined by individual provisions. The Board finds that the latter applies in this case, notwithstanding that there are indeed some inconsistencies between the NZTA Proposal and relevant objectives and policies, particularly in the areas of reclamation and biodiversity. In doing so, the Board has given measured weight to the word "avoid", which is clearly not a direction to be ignored.

[663] On balance, the Board finds that the Proposal is not contrary to the objectives and policies of the AUP:OP when considered as a whole. Its consideration has given particular focus to the provisions most directly relevant to the activities with non-complying status but has also recognised the broader planning assessments of Ms Rickard[405] and Mr Gouge.[406] The Board is left in no doubt that its conclusion would be strengthened if it were to look in detail at every relevant objective and policy (of which there are many), rather than those provisions of most relevance, as it has done.[407]

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[404] *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110.

[405] Statement of Primary Evidence, Rickard.

[406] Statement of Primary Evidence, Gouge.

[407] In addition to the Board's assessment, it relies on the broader planning assessments provided in the AEE, and the primary and rebuttal statements of evidence by Ms Rickard and Mr Gouge.

[664] While the Proposal is concluded to be contrary to a small number of policies or sub-clauses of policies, the Board does not consider those individually or cumulatively as reason to conclude that the Proposal is repugnant to the policy direction of the AUP:OP with respect to the resource consents sought. The Board's conclusion is that where the Proposal infringes policies, neither individually nor cumulatively do those infringements tilt the balance for s104D purposes against the Proposal as a whole.

## 14.4 SECTION 104(1)(B) ASSESSMENT OF RELEVANT PROVISIONS

[665] Having passed the second limb of the s104D gateway test, s104(1)(b) of the RMA requires the Board to have regard to relevant provisions of (i) a national environmental standard; (ii) other regulations; (iii) a national policy statement; (iv) a New Zealand coastal policy statement; (v) a regional policy statement or proposed regional policy statement; and (vi) a plan or proposed plan. Herein the Board addresses those matters.

[666] The AUP:OP objectives and policies addressed in the s104D gateway test are also relevant to the Board's substantive assessment required by s104(1)(b). To avoid unnecessary repetition, the following should be read in conjunction with chapter 14.3 above relating to the Board's detailed consideration of s104D, along with the planning instruments and provisions set out in chapter 7 of this Report.

[667] In making its assessment, the Board accepts the proposition that it is not necessary for a proposal to meet every single aspect of every single policy.[408] Further, it is reminded by Mr Lanning, in his re-examination of Ms Coombes, that the substantive assessment under s104(1)(b) is not a test,[409] and that a balanced judgment is required.

[668] The Board also notes that, consistent with various case law,[410] while making a full assessment of planning provisions, the Board is not compelled, nor is it efficient, to quote and individually report on every relevant objective or policy. The Board proceeds on that basis.

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[408] Closing Statement, Mulligan, para 21.37.

[409] Transcript, Lanning and Coombes, p 3852–3.

[410] Refer to chapter [12.5] of this Report.

### Section 104(1)(b)(i) – National Environmental Standards

[669] The relevant national environmental standards are set out in chapter 7.1 of this Report. These are:

(a) The NES – Drinking Water (which is of limited relevance and not addressed further);

(b) The NES – Soil Contamination;

(c) The NES – Air Quality (relevant to both the NoRs and resource consents); and

(d) The NPS – Electricity Transmission (particularly relevant to the NoRs and addressed more generally in chapter 15.11 of this Report).

[670] For the reasons and findings found throughout chapters 14.2 and 15.1 of this Report, the Board accepts the conclusions presented in the AEE[411] on these matters of national direction. The Board finds that the relevant standards have been appropriately considered by NZTA and will be met as necessary, through the Proposal design and implementation. Appropriate conditions have been imposed relating to investigation, monitoring, and construction and operational management plans.

### Section 104(1)(b)(ii) – Other Regulations

[671] No other regulations have been identified as relevant to this Proposal.

### Section 104(1)(b)(iii) – National Policy Statement

[672] The relevant national policy statements have been set out in chapter 7.1 of this Report. A number of these are addressed in detail later in the Board's assessment of the relevant statutory provisions under s171(1)(a) in chapter 15.11 of this Report. There is no need to repeat that assessment here. Thus, the focus is on the remaining NPS – Freshwater as it relates to the applications for resource consent.

[673] As previously identified, Policy 4A in particular requires the Board:

> "*When considering any application for a discharge the consent authority must have regard to the following matters:*
>
> *a. the extent to which the discharge would avoid contamination that will have an adverse effect on the life-supporting capacity of freshwater including on any ecosystem associated with freshwater and*

[411] AEE, Section 15.6.

*b. the extent to which it is feasible and dependable that any more than minor adverse effect on freshwater, and on any ecosystem associated with freshwater, resulting from the discharge would be avoided.*"

[674] The Board accepts the uncontested evidence of Ms Rickard and the witnesses she relies on:[412]

> "*10.13 My assessment is that the Project responds to the policy direction in the NPS:FM through the development of innovative solutions to reduce long term discharge of contaminants to the environment, including both fresh and coastal water.*
>
> *10.14 There are important aquifers underlying parts of the East West Link area, and there has been an assessment undertaken (refer to the evidence of Ms Williams and Technical Report 13) on the potential impacts on those parties that draw water from the aquifer including Watercare's municipal water supply. No potential adverse effects on those water supplies have been identified in that assessment, as arising from East West Link.*
>
> *10.15 The NPS also has an emphasis on improvement (Objective A2) where a water resource has been degraded. Ms Williams has discussed how the existing groundwater freshwater resource is impacted by the historic landfilling activities, and how there will be an improvement as a result of the Project including from reduced saline water ingress. Mr Sides' evidence also addresses the impact on freshwater streams from the Project and concludes there will be a net positive outcome.*"

[675] Ms Rickard and other planning witnesses did not have the benefit of the updated NPS – Freshwater and counsel did not alert the Board to the change. Nonetheless the Board has given due consideration to the updated version. Its findings below hold.

[676] For the reasons given in chapter 14.2 of this Report in relation to the construction and operational effects on the freshwater resources in and around the Proposal area, the Board does not find any policy conflict, and indeed finds a level of policy support.

### Section 104(1)(b)(iv) – New Zealand Coastal Policy Statement

[677] In addition to the NZCPS, under s10 of the HGMP Act, s7 and s8 of the HGMP Act must be treated as a New Zealand coastal policy statement. The works to which the HGMP Act is relevant are the proposed replacement of the SH1 culverts with bridges across the Ōtāhuhu Creek, and any earthworks within catchments of drainage systems that discharge to the Tāmaki River. On these matters, the Board finds that the proposed works methodologies will appropriately minimise any potential effects on the Ōtāhuhu Creek and Tāmaki River, and waterways of the Hauraki Gulf. Indeed, the removal of the SH1 culverts will result in a long-term

[412] Statement of Primary Evidence, Rickard, para 10.3–10.15.

benefit to that environment. On that basis, the Board is satisfied that the works respond positively to the provisions of the HGMP Act.

[678] Turning to the NZCPS, the question of whether to focus the Board's attention on the provisions of the AUP:OP, which as Mr Mulligan reinforced has been prepared in full recognition of *King Salmon*, or whether to loop back up to higher order instruments such as the NZCPS received much attention at the Hearing.

[679] In principle, the Board agrees that the RMA anticipates that in giving effect to the higher order NZCPS, regional coastal plans will be refined to reflect the specifics of the region. Otherwise the RMA would have required plans to "adopt" the NZCPS, rather than "give effect to"[413] it. As noted in chapter 12 of this Report, the Board also accepts the general assertion[414] that referring in detail to the higher order planning instruments may be limited to instances of invalidity, incomplete coverage or uncertainty of meaning in the lower order documents.

[680] However, in order to be satisfied that there is consistency (or otherwise), the Board must be cognizant of the higher order documents, in this case the NZCPS, and s104(1)(b)(iv) requires the Board to have specific regard to the NZCPS. Having had such regard, the Board is satisfied that there is no specific incongruity between the NZCPS and AUP:OP. Any key differences are an anticipated and appropriate particularisation between the national and regional level documents. Therefore, the substantive discussion on coastal objectives and policies herein is made against the AUP:OP provisions. The NZCPS assessment is limited to confirming the consistency between the two documents, with particular attention to reclamation and biodiversity provisions. In taking this approach, the Board acknowledges and considers the emphasis placed on the NZCPS by Mr Brown[415] and Ms Coombes[416] in particular, and takes account of their evidence throughout the following assessment.

*Reclamation*

[681] Chapter B8 (Toitū te taiwhenua – Coastal Environment) provides the regional policy provisions of the AUP:OP[RPS] that are directly relevant to the coastal environment.

[682] Policy B8.3.2.(9) reflects, and clarifies (as underlined), NZCPS Policy 10(1):

> "*(9) Avoid reclamation of land in the coastal marine area unless <u>all of the following apply</u>:*

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[413] RMA s67(3).

[414] *Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

[415] Statement of Primary Evidence, Brown, para 3.1 to 3.31.

[416] Statement of Primary Evidence, Coombes, section 11.

*(a) land outside the coastal marine area is not available for the proposed activity;*

*(b) the activity which requires reclamation can only occur in or adjacent to the coastal marine area;*

*(c) there are no practicable alternative methods of providing for the activity; and*

*(d) the reclamation will provide significant regional or national benefit.*"

[683] A modified version is provided in Policy F.2.2.2(1) of the regional coastal plan level of the AUP:OP$^{RCP}$, which is further strengthened by requiring efficient use of the CMA:

"*(1) Avoid reclamation and drainage in the coastal marine area except where all of the following apply:*

*(a) the reclamation will provide significant regional or national benefit;*

*(b) there are no practicable alternative ways of providing for the activity, including locating it on land outside the coastal marine area;*

*(c) efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use, or to enable drainage.*"

[684] The remaining reclamation Policies 10(2) to (4)[417] of NZCPS have been reflected in the provisions of the AUP:OP$^{RCP}$ in modified form and a number of provisions also added, from a regional perspective. These are subsequently covered in Policies F2.2.3(2) to (13) of the AUP:OP.

[685] A comparison of the relevant NZCPS and AUP:OP$^{RPS}$ and AUP:OP$^{RCP}$ provisions relating to reclamation is provided in [Appendix 12: Comparison of Reclamation Policies]. No specific incongruity exists.

*Biodiversity*

[686] In terms of the relevant biodiversity provisions, the Board is mindful of the additional policies added to AUP:OP Chapter D9 (Significant Ecological Areas Overlay). Based on the resulting amendment submitted to the Minister of Conservation for approval, the Board accepts that the current version of the AUP:OP provides the most relevant policy direction in this regard.

[687] Policy D9.3(9) of the AUP:OP slightly modifies NZCPS Policy 11(a) by limiting the avoidance directive to "*non-transitory or more than minor adverse effects*" and aggregates threatened taxa NZCPS Policies 11(a)(i) and (ii) into a single AUP:OP Policy D9.3(9)(a)(i) covering threatened or at-risk indigenous species.

[417] Policies 10(2) to (4) of the NZCPS relate to suitable use considerations, efficient operation of infrastructure considerations, and encouraging de-reclamation of redundant reclaimed land.

[688] Policy D9.3(10) of the AUP:OP closely reflects NZCPS Policy 11(b) of the NZCPS, and somewhat strengthens it with two additions. Policy D9.3(10)(d) adds "*fish spawning, pupping and nursery areas*" as matters to be considered. Policy D9.3(10)(g) adds "*water quality such that the natural ecological functioning of the area is adversely affected*" as another matter to be considered.

*Mana Whenua*

[689] In reflection of NZCPS Policy 2, recognition of Mana Whenua values is provided through objectives and policies throughout the AUP:OP, including Chapter B8 (Coastal Environment) and particularly Chapter B6 (Mana Whenua).

*Conclusion*

[690] In summary, in relation to the Proposal the Board finds that the AUP:OP provisions appropriately reflect the NZCPS provisions, as concluded by Ms Rickard.[418] The Board does not consider the differences between the NZCPS and AUP:OP to result in invalidity, incomplete coverage or uncertainty of meaning between the planning instruments. Thus, the Board turns now to the AUP:OP as it is key.

## Section 104(1)(b)(v) – A regional policy statement or proposed regional policy statement and s104(1)(b)(vi) – A plan or proposed plan

[691] As the AUP:OP is a unitary plan encompassing the regional policy statement and regional and district plans, it is appropriate and efficient to consider these matters together. The relevant provisions of the AUP:OP and the legacy plans are listed in Technical Report 2[419] and chapter 7.2 of this Report. The completeness of those lists was not contested.

[692] Consistent with the relative weight and focus given to issues at the Hearing, this assessment gives particular emphasis to the aspects of the Proposal that impact on the coastal environment and Anns Creek East. In doing so, the Board does not read down any relevant provisions and all aspects of the Proposal for which the resource consents sought are carefully considered.

[693] For completeness, this section also addresses the legacy ARP:C, albeit with limited emphasis.

*Coastal activities and Anns Creek East*

[694] As already addressed, in the Board's consideration of alternatives and under s104D, the key planning elements engaged by the Proposal are whether the NZTA

[418] Transcript, Rickard, p2430.

[419] Technical Report 2, Appendices D2, D3 and D4.

has adequately justified the proposed coastal route and then whether the potential adverse effects of that route can be adequately avoided, remedied or mitigated. When considered against the provisions of the AUP:OP (and NZCPS and ARP:C), other elements of the Proposal fall into line if it satisfies these initial considerations. Notwithstanding the directive wording of the key reclamation and biodiversity provisions, they must be assessed on balance against all relevant provisions, including those that support the Proposal, and an overall balanced finding made.

[695] Ms Rickard, in her consideration of the overall statutory provisions, remained of the view that the development of the Proposal has maintained appropriate regard to the relevant statutory provisions in the context of s104 (and s171) of the RMA. Ms Rickard emphasised that the Proposal is of national significance and that there are positive effects that are likely to be felt well beyond the immediate site area, with significant local and wider benefits, including for the business community, local residential communities and the environment more generally.

[696] Ms Coombes, in contrast, remained of the opinion that, while the s104D gateway test could be passed, "*but only by a very fine margin*",[420] without modification or conditions (including reducing the extent of reclamation, addressing biodiversity concerns, and avoiding adverse effects of proposed sub-tidal dredging on the Māngere Inlet environs), the Proposal should be declined under s104(1). The Board's findings regarding effects, including the deletion of sub-tidal dredging and deletion or modification of headlands, addresses this matter and is pertinent to its overall 104(1)(b)(v) and (vi) RMA planning assessment.

[697] Mr Brown initially focused his evidence on the provisions of the NZCPS rather than the AUP:OP (in contrast to Ms Rickard and Ms Coombes who applied a broader approach and a particular focus on the AUP:OP). He maintained the opinion that the Proposal is contrary to key policies of the NZCPS regarding reclamation (Policy 10) and Indigenous Biological Diversity (Policy 11), concluding that these breaches of key directive policies are so significant they warrant refusal of resource consent.[421] The Board has directly addressed these matters in chapter 14.3 of this Report. During the Hearing, Mr Brown presented his witness summary expanding his earlier assessment to the AUP:OP provisions, albeit mostly in relation to the s104D gateway test. He concluded that the Proposal fails to pass s104D, but if the Board did not agree within his s104D conclusion, the Proposal should be refused

[420] Transcript, Coombes, p3802.

[421] Hearing Summary, Brown, para 2.1.

under s104(1) in any event. This was underpinned by his view that a new highway in the CMA should only be provided for if necessary, which, in his consideration of the approach to NZTA's alternative options assessment, it is not.[422]

[698] Mr Mulligan acknowledged in his closing that, in relation to the NZCPS, the Proposal engages a wide range of provisions, positively responds to a number of objectives and policies and, on the evidence, meets reclamation Policy 10, but concedes there is inconsistency with parts of biodiversity Policy 11.[423] In terms of the AUP:OP (Policy D9.3.), Mr Mulligan also acknowledged that the effects generated by the Proposal are not consistent (as opposed to contrary) with certain aspects of Policies (1), (9) and (10), which seek to avoid more than minor effects on certain biodiversity values[424].

[699] While the Board agrees that it is unusual to propose such significant reclamations to construct a road, it is satisfied, on the basis of the evidence heard, that if the road is to be located along the proposed coastal route, the additional reclamation proposed as mitigation is necessary and justified. Rather than accepting Mr Brown's contention,[425] made in relation to NZCPS Policy 10(1)(B), that, "*There is no basis for claiming that highways can only occur in the coastal marine area*", the Board adopts an assessment that is provided for by the particularisation presented in the corresponding AUP:OP provisions. The Board does not accept Mr Brown's contention that, "*The selection process did not take adequate account of environmental factors*".[426] This matter has been addressed extensively in the Board's discussion on coastal and biodiversity effects, and assessment of alternatives. The Board agrees with Mr Brown that, "*[T]he route is there by choice, not functional necessity*".[427] The Board is satisfied that the choice was made after an extensive, replicable assessment of alternatives to achieve the Proposal objectives, and in consideration of all potential effects and how those could be most appropriately mitigated. The Board finds that the justification for the coastal route has been adequate. Alternative routes will not, on the basis of the evidence, achieve the same level of benefit as the proposed route when considered against the Proposal objectives.

[700] While the Board agrees with Mr Brown that there is not a functional need for the road to be located within the CMA, on the basis of the Board's finding in relation to

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[422] Transcript, Brown, p4446 to 4449.

[423] Closing Statement, Mulligan, para 22.14.

[424] Ibid, at [21.33].

[425] Statement of Primary Evidence, Brown, para 3.5.

[426] Ibid.

[427] Ibid.

the route selection, there is an operational need for it to be located within the CMA. This outcome is anticipated in the preamble of Section F2.14 (Use, development and occupation in the coastal marine area) of the AUP:OP, which states, "*[D]ue to the geography of Auckland, some infrastructure may have an operational need to locate in, or traverse the common marine and coastal area to enable an effective and sustainable network*".

It is explicitly provided for by Policy F2.14.3(5) which states:

> "*Provide for use and occupation of the common marine and coastal area by infrastructure, where it does not have a functional need to locate in the common marine and coastal area but has an operational need, and only where it cannot be practicably located on land and avoids, remedies, or mitigates other adverse effects on:*
>
> *(a) the existing use, character and value of the area;*
>
> *(b) public access, recreational use and amenity values;*
>
> *(c) natural character and scenic values, from both land and sea;*
>
> *(d) water quality and ecological values;*
>
> *(e) coastal processes including erosion;*
>
> *(f) other lawfully established use and development in the coastal marine area or on adjoining land;*
>
> *(g) the anticipated future use of the area for marine activities; and*
>
> *(h) Mana Whenua or historic heritage values.*"

[701] These matters are reinforced through Policy E26.2.2(6) (Infrastructure). As discussed throughout various chapters of this Report, the Board finds that the matters listed in those policies have been adequately addressed through avoidance, remedy, mitigation or offsets.

[702] Detailed consideration of the reclamation and dredging provisions has been provided in chapter 14.3 of this Report and is not repeated. But it is important to reiterate that the Board finds that the Proposal is consistent with a number of key provisions in that it will:

(a) Provide significant regional and likely national benefit;

(b) Make efficient use of the CMA by using the minimum necessary for the road and mitigation;

(c) Provide reclamations that are necessary to enable the construction and efficient operation of the road;

(d) Mitigate effects through the form and design of the reclamations, including materials and consequential changes to coastal process (if modified in accordance with the Board's findings);

(e) Take account of the potential effects of sea level rise;

(f) Maintain public access (the number and quality of access points will be increased, albeit with a change in amenity);

(g) Enable the beneficial use of dredging materials, including where stabilised with cement (from the footprint of the reclamations and the Anns Creek tidal channel relocation); and

(h) Avoid using contaminated materials (or using locally dredged materials in a way that avoids remedies or mitigates effects on water quality and ecological values).

[703] The Proposal is not consistent with policy requiring the provision of an esplanade reserve or strip, but it gives effect to that provision through the level of public access to be provided, which achieves an outcome equivalent or better than that sought by an esplanade reserve or strip.

[704] In conjunction with the reclamation provisions, the most significant biodiversity provisions have been considered in chapter 14.3 of this Report. That assessment is also applicable to Vegetation and Biodiversity Policies E15.3(9) and (10) which replicate the corresponding Significant Ecological Area policies of Chapter D9. Expanding on that consideration, the Board also notes Policies D9.3(8) and E15.3(7), which provide for the use, maintenance, upgrade and development of infrastructure in accordance with the other relevant policies, recognising that it is not always practicable to locate and design infrastructure to avoid significant ecological areas or areas with indigenous biodiversity values.

[705] The Board accepts that the Proposal is not consistent with particular clauses of Policies D9.3(9) and (10) and corresponding E15.3(9) and (10) and may be contrary to some, as addressed in the Board's s104D assessment. However, based on its findings in relation to the potential effects of the Proposal, the overall assessment must take account of the scale of those effects and the extent to which they will be avoided, mitigated or offset, including protection and restoration of habitats. To that end, the Board has found that the reclamation is necessary for the road alignment and consequential mitigation of landscape, visual, severance and amenity effects.

[706] The Board also finds that the alignment across Anns Creek East has, to the extent practicable, avoided the rare and threatened ecosystems. The adverse effects that have not been avoided will be adequately mitigated or offset. Furthermore, the Board is satisfied that the Proposal will not result in a more than minor adverse effect on species populations or the presence of species within the Inlet or Anns Creek East. Notwithstanding the opposition in principle submitted by Ngāti Whātua

Ōrākei, Te Kawerau ā Maki, and Ngāti Te Ata, no evidence was presented that indicated that the reclamations would result in a significant adverse effect on habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes, including fish spawning, pupping and nursery areas.

[707] The proposed dual function of the wetlands is strongly consistent with the Chapter E1 (Water quality and integrated management) regional plan provisions of the AUP:OP. As noted by Mr Gouge,[428] it also strongly responds to the Chapter B7.4 (Coastal water, freshwater and geothermal water) regional policy statement provisions, where there is focus on improving the water quality of degraded areas, and corresponding Policies 21 and 23 of the NZCPS.

[708] Mr Gouge also considers that the Proposal responds well to NZCPS Policy 22 (Sedimentation), but the Board considers it to be neutral in that regard. The proposed stormwater treatment will reduce sediment input to some extent, as will the proposed erosion and sediment control measures during construction. But as discussed in chapter 14.2 of this Report, modelling indicates that the overall CMA disturbance and reclamations will result in a change in sedimentation patterns and rates rather than a reduction.

[709] For completeness, the Board finds that the Proposal is generally consistent with the provisions relevant to:

(a) Mangrove removal;

(b) Damming and impounding water;

(c) Discharges; and

(d) Structures, public amenities, artwork, and associated use and occupation.

*Natural Character (and Landscape)*

[710] To the extent that the relevant provisions relating to natural character and landscape values of the coastal environment (including those provisions relating to reclamation, biodiversity and ONFs) have not already been addressed, the Board does so succinctly below.

[711] Chapter E18 of the AUP:OP in its background section states that:

> "*These objectives and policies give effect to Policy 13(1)(b) of the New Zealand Coastal Policy Statement 2010, and Regional Policy Statement Objective B8.2.1.(2) and Policy B8.2.2.(4).*"

[428] Statement of Primary Evidence, Gouge, para 14.8 and 14.10.

[712] There are also elements of the objectives and policies in E18 that clearly give effect to Policy 14 of the NZCPS, which relates to the restoration and rehabilitation of natural character. The Board is satisfied that there is no need to circle back up to the NZCPS.

[713] The relevant objectives and policies in E18 are provided in full in [Appendix 10: Key Regional and District Objectives and Policies].

[714] As noted earlier, Messrs Lister, Brown and McIndoe were the only landscape experts who presented evidence at the Hearing, and they were consistent in their support of the general form and scale of the proposed reclamations. There was also mutual agreement that the proposed restoration of the degraded and highly modified northern coastline of the Māngere Inlet is a positive outcome from a landscape mitigation perspective.

[715] While not rejecting the conclusions of Messrs Lister, Brown and McIndoe outright, Ms Coombes highlighted a relevant tension as follows:[429]

> "*It is clear that there is a tension between landscape experts and ecologists regarding whether the reclamation scale is appropriate. In resolving such a tension, in my view, greater weight should be given to the directive avoid biodiversity policies of the New Zealand Coastal Policy Statement and the unitary plan over the more general requirements to consider whether a reclamation is an appropriate form and to promote the restoration of natural character. The need to mitigate the visual and severance effects of the new road through a large reclamation appears to have been given greater weight than the biodiversity policies.*"

[716] The Board has resolved this tension by requiring the modification of headlands of Landforms 2 and 3.

[717] During cross-examination, Mr Gouge acknowledged that the Proposal responds to the policy direction in terms of restoration of the coastal environment; it identifies areas and opportunities for restoration and rehabilitation.[430] The Board agrees.

*Infrastructure, Historic Heritage, and Urban Development*

[718] The Waikaraka Cemetery (a site scheduled in the Historic Heritage Overlay)[431] extends into the CMA, and the formation of the reclamations and inter-tidal fill batters and mitigation will require the deposition of material within the CMA in the vicinity. The proposal alignment will slightly encroach on the extent of place for the

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[429] Transcript, Coombes, p3347.

[430] Transcript, Gouge, p3927.

[431] D17 of the AUP.

Cemetery, and it is common ground that views from and amenity within the cemetery will be adversely affected, as discussed in chapter 14.2 of this Report.

[719] While there is a degree of overlap with regard to the resource consents sought, the relevant provisions relating to Infrastructure, Historic Heritage (with the exception of the Waikaraka Cemetery, which have been addressed above), and Urban Development (NPS – Urban Development), are more fittingly dealt with in the s171 assessment of the NoRs and designations. As noted in chapter 14.3 of this Report, the Proposal is consistent with Chapter D17 provisions that recognise there can be an operational need for network utilities within scheduled historic heritage places and the Proposal avoids direct physical impacts on the values of the cemetery by avoiding the existing mature pōhutukawa, stone wall and cemetery grounds.

[720] Impacts on views and aural amenity have been addressed in the modified conditions and will be mitigated to the extent practicable. As expected, impact on this scheduled historic heritage cemetery is not broadly consistent with the relevant provisions, but the overall assessment of that is made in the context of the Proposal need, alternatives assessment and benefits.

*Infrastructure*

[721] The Chapter E26 (Infrastructure) provisions of the AUP:OP are district and regional provisions, so must be engaged in the consideration of the resource consent applications. These are addressed briefly in the AEE,[432] but not in any detail in evidence received. The Board notes, however, that Objectives E26.2.1(1)-(5) and (9) and Policies E26.2.2(1), (2), (4), (5), (6), (14) and (15) are of particular relevance to its decision.

[722] Various provisions in Chapter E26 recognise and enable the benefits of infrastructure and the safe and efficient servicing of existing development, including enabling the functioning of business; economic growth and development; transport of goods, freight and people; and how infrastructure contributes to the strategic form, function and intensification of Auckland.

[723] Other Chapter E26 provisions reflect the policy direction of other chapters already considered, including the need to consider the functional or operational need for infrastructure proposed for a particular location; the consideration of practicable alternative locations, routes or designs that would avoid or reduce effects; and the consideration of ecosystems or habitats and Mana Whenua values. The provisions also require the consideration of identified values of an area or feature pursuant to

[432] AEE, Section 15.4.2.1.

any national policy statement, national environmental standard or regional policy statement.

[724] The Chapter E26 provisions also seek to ensure that roads are designed, located and constructed to avoid, remedy or mitigate adverse effects (including from noise), minimise severance effects, provide for the needs of all road users and modes of transport, and maintain or enhance the safety and efficiency of the road network.

[725] There is a clear and unavoidable tension across these provisions that requires the balanced assessment necessary for roading projects such as the EWL. Not surprisingly, the enabling and providing provisions clearly support the Proposal. The provisions that require the Board's consideration of potential adverse effects of the infrastructure have been well canvassed through consideration of equivalent provisions in other chapters of the AUP:OP. The Board's finding on those matters has been stated above.

[726] Policy E26.2.2(5) is particularly germane to the balanced consideration of this Proposal. It states:

> "*Consider the following matters when assessing the effects of infrastructure:*
>
> *(a) the degree to which the environment has already been modified;*
>
> *(b) the nature, duration, timing and frequency of the adverse effects;*
>
> *(c) the impact on the network and levels of service if the work is not undertaken;*
>
> *(d) the need for the infrastructure in the context of the wider network; and*
>
> *(e) the benefits provided by the infrastructure to the communities within Auckland and beyond.*"

[727] For the reasons provided elsewhere in this Report, the Board is satisfied that the Proposal is justified, in the context of Policy E26.2.2(5) has taken account of the specific characteristics and values of the proposed alignment; the avoidance, mitigation or offset of adverse effects; and the benefits that will be afforded by the EWL.

[728] The Board finds that the Proposal positively responds to the Chapter E26 provisions, and appropriately addresses the matters that must be considered.

*Operative Auckland Regional Plan: Coastal*

[729] The Board accepts Ms Coombes' conclusion that the planning assessment should focus on the AUP:OP and that the ARP:C should be specifically addressed only

where it brings different considerations.[433] As discussed throughout Ms Coombes' evidence, there is general alignment between the AUP:OP and ARP:C provisions. The ARP:C does more explicitly address cumulative effects of reclamation,[434] but the Board is satisfied that those effects have been incorporated into the overall assessment of effects against the AUP:OP provisions. Consequently, the Board concludes that its assessment of the AUP:OP provisions is applicable to the ARP:C provisions, given the level of consistency between the Plans and the limited weight to be afforded the ARP:C.[435]

### Section 104(1)(b)(v) and (vi) Conclusion

[730] In the overall conclusion on the s104D gateway test the Board found that, on balance, the Proposal is not contrary to the objectives and policies of the AUP:OP when viewed as a whole. While the Proposal is contrary to a small number of policies or sub-clauses of policies, the Board does not consider those individually or cumulatively as reason to conclude that the Proposal is repugnant to the policy direction of the AUP:OP with respect to the resource consents sought.

[731] This same balance is found in the overall s104(1)(b) assessment of the activities for which resource consent is sought. While there are aspects of inconsistency with the policy direction and the themes identified, with the modification of the headland features of Landforms 2 and 3, declining the sub-tidal dredging (with the exception of realigning the Anns Creek channel), and the imposition of appropriate conditions to avoid, remedy, mitigate and offset effects, the Board finds that the Proposal achieves a level of consistency with the planning framework commensurate with the overall benefits of the Proposal, including those afforded by offsets. The Proposal responds in a strong positive manner to transport (including freight, public transport, walking and cycling), economic, and stormwater provisions, and to the coastal provisions as they apply to the daylighting of the Ōtāhuhu Creek culvert. The Proposal meets the multitude of other provisions that relate to the management of earthworks, contaminated land, and air quality. With respect to those elements of the Proposal that are inconsistent or contrary to provisions, and without reading down the strong directive of avoidance policies, the Board finds that adverse effects have been avoided to the extent practicable in the context of the Proposal objectives and route, and residual effects (some of which are significant) will be mitigated or offset to the extent that the Proposal can be reasonably supported within the overall policy direction of the AUP:OP, ARP:C and NZCPS.

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[433] Ibid, para 8.7.

[434] Statement of Primary Evidence, Coombes, para 11.48.

[435] Joint Witness Statement, Planning, para 3.8.

## 14.5 SECTION 104(1)(C) ASSESSMENT OF OTHER RELEVANT MATTERS

[732] Other relevant matters have been discussed in the earlier sections of this chapter and elsewhere in this Report, in particular in chapter 15.14 of this Report. No further commentary is required here and to do so would take up unnecessary space.

## 14.6 SECTION 105 CONCLUSION

[733] The statutory matters relevant to consideration of certain applications under s105 of the RMA are set out in chapter 6.2 of this Report. They relate to discharge of contaminants into the environment and consideration of whether an esplanade reserve or esplanade strip is appropriate in relation to the proposed reclamation of the Māngere Inlet.

### Discharge of contaminants into environment

[734] Under s105(1), where the application is for a discharge permit or a coastal permit to do something that would otherwise contravene ss15 or 15B of the RMA, the Board must have regard to additional matters to those in s104(1), in particular in relation to the nature of the discharge and the receiving environment.

[735] The Board has considered these matters in the context of the discharge of contaminants required by the Proposal, in particular in relation to stormwater and leachate and dredging of the Māngere Inlet to relocate the Anns Creek channel. Six discharge permits that contravene s15 of the RMA are sought for the Proposal, which broadly relate to the following:

(a) Discharge of contaminants into air or on to land or water;

(b) Discharges of contaminants during construction;

(c) Discharges to air; and

(d) Discharges of stormwater from permanent impervious surfaces to land, freshwater, and coastal water including discharges involving a stormwater network.

[736] For the reasons given earlier on in this Report and in having regard to s105(1), the Board finds that:

(a) The nature of the proposed discharge of water into water or water to land where it may enter water (including via the stormwater system), after any necessary treatment, is appropriate in the circumstances, and can be appropriately managed.

(b) The nature of the proposed discharge of contaminants (namely cement material, dust, asbestos) is appropriate in the circumstances, and can be appropriately managed.

(c) Appropriate alternatives for the discharges have been considered, and the Board is satisfied with NZTA's reasons for the proposed choices.

### Esplanade reserve or esplanade strip

[737] As the Proposal involves an application for resource consent for a reclamation, in addition to the matters in s104(1) of the RMA, the Board is required under s105(2) to consider whether an esplanade reserve or esplanade strip is appropriate and, if so, impose a condition under s108(2)(g) on the resource consent. For the reasons given earlier, the Board does not consider an esplanade reserve or esplanade strip condition is appropriate or necessary. The provision of this is also relevant in Policy F2.2.3(9) of the AUP:OP. The level of public access to be provided by the Proposal will achieve an outcome equivalent or better than that sought by Policy (9), which requires provision of an esplanade reserve or strip.

## 14.7 SECTION 107 CONCLUSION

[738] Section 107 of the RMA prevents the Board from granting a discharge permit or a coastal permit that would otherwise contravene s15 or s15A of the RMA allowing certain effects.

[739] For the reasons given earlier in this Report, the Board is satisfied that, after reasonable mixing, any contaminant or water discharged (either by itself or in combination with the same, similar or other contaminants or water) is unlikely to give rise to all or any of the s107 effects, including the ultimate receiving waters, the Māngere Inlet (Manukau Harbour).

[740] In the event such effects do arise, the Board is satisfied that any such discharge is likely to be of a temporary nature (including during construction activities) or associated with any necessary maintenance work. Provided the consent conditions are appropriately met, consistency with the sustainable management purpose of the RMA should also be met.

## 14.8 FINDINGS ON MANA WHENUA PART 2 MATTERS

[741] Consistent with the Board's earlier comments, Part 2 (in particular ss6(e), 7(a) and 8) deals collectively with Māori considerations and their cultural and spiritual values. These require that the relationship of Māori with their culture and traditions, including ancestral lands and water, be recognised and provided for; particular regard be given to kaitiakitanga; and that the principles of the Treaty of Waitangi are taken into account in relation to managing the use, development and protection of natural and physical resources. Principles of the Treaty, of particular relevance, include rangatiratanga, partnership and good faith, mutual benefit, the active protection of Māori rights and interests and the Crown's ongoing obligation to provide redress.

### Section 6(e)

[742] The inherent historical, cultural and intergenerational relationship and connection that Mana Whenua have with their lands, waters and other taonga in this area was appropriately articulated by Mana Whenua through submissions, evidence and representations. It is grounded in whakapapa, tikanga and kinship with both rights and responsibilities to sustain, protect, manage and utilise those taonga for current and future generations.

[743] To that extent, the Manukau Harbour, including the Māngere Inlet, is a taonga. The mauri of the Manukau Harbour is another taonga and the significance of these water bodies has been acknowledged and recognised by the Waitangi Tribunal and this Board.[436]

[744] The Board is required to consider whether the Proposal recognises and provides for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, as a matter of national importance.

[745] The Board is cognisant of the divergence of world views of Mana Whenua and the way in which each iwi has conveyed to the Board what is important to them. Those

[436] Waitangi Tribunal, *Manukau Report* (1985), at p.70 as noted in Mr Enright Opening Submissions, p.1; NZTA's CVR also records (p.5, para 5.6) that, "*The water bodies of the Manukau Harbour, including the Mangere Inlet, continue to hold considerable importance to Mana Whenua who regard them as taonga. As guardians, or kaitiaki of the Inlet and its surrounding environment, Mana Whenua have an obligation to protect and enhance its wellbeing for future generations*."

matters must be weighed within the framework of the RMA and the Board must make findings in terms of evidence and the law.

[746] The Board agrees with and accepts the view expressed by Mr Majurey that it does not follow that because one tribe has a history of occupation or settlement for Onehunga or use of the Manukau, that tribe has a stronger right in terms of the outcome than other iwi with legitimate connections and interests. Each iwi has the right to participate, the right to convey the information they wish, and the right to have the Board weigh those matters in making its decision.[437]

[747] The stance taken by Ngāti Whātua Ōrākei and Te Kawerau ā Maki is one that this Board totally understands and sympathises with, but that is very different from saying that the interests of those two iwi should be given primacy. As Mr Enright accepts, in evaluating cultural effects (whether positive or negative), the Board must evaluate all of the relevant evidence, representations and submissions provided by iwi and hapū submitters and it is then a question of weight.[438]

[748] Mr Enright points out that the evidence of Te Ākitai Waiohua, Ngāti Whātua Ōrākei and Te Kawerau ā Maki was presented to this Board and was tested by questioning and cross-examination. He notes that, to his knowledge, no other iwi or hapū submitters called evidence in support of their position, despite having had the opportunity to do so.[439] The Board acknowledges that while this is technically correct, that submission does not give appropriate recognition to the CVR filed by NZTA, the purpose of that CVR and the role the Mana Whenua Group had in developing and approving it.

[749] The Board is clear that Te Ākitai Waiohua, while they consider there is the potential for effects on their cultural values and their sites of significance to be adverse, nevertheless concluded that those effects have been avoided, remedied or mitigated to the extent that they are now able to confirm the right balance has been struck and they will not oppose the EWL.

[750] The Board accepts Mr Enright's submission that the evidence of Mr Blair and Mr Te Warena Taua confirmed the ahi kaa rohe and role of Ngāti Whātua Ōrākei and Te Kawerau ā Maki respectively. In terms of the extent to which the EWL will have an adverse effect on their cultural values, both Ngāti Whātua Ōrākei and Te Kawerau ā Maki have concluded that on the basis of their world view the effects of the application are significantly adverse.

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[437] Transcript, Majurey, p5895.

[438] Closing Statement, Enright, para 12.

[439] Ibid, para 14(a).

[751] In terms of whether or not those effects could be avoided, remedied or mitigated, both iwi were largely dependent on the evidence of Dr Patterson. Throughout the Hearing, Ngāti Whātua Ōrākei and Te Kawerau ā Maki have challenged the "claimed cultural benefits" of stormwater treatment of the Onehunga catchment and a leachate bund,[440] arguing that such "benefits" would themselves result in a suite of adverse impacts with a substantial and net loss to the mauri of the habitat for rare and threatened species and the mauri of the Manukau as a taonga and living entity.[441] The Board notes that Dr Patterson came to the final conclusion that Ngāti Whātua Ōrākei could not support reclamation for the purpose of a road, having weighed up the significant adverse effects on their cultural values and determined that they could not be avoided, remedied or mitigated. He nonetheless confirmed that he had not had an opportunity to review relevant background documents and evidence associated with the Proposal, except the archaeology evidence of Ms Eaves for Auckland Council.[442]

[752] Having considered both the technical and cultural evidence, an overall judgment must be made by the Board as to whether or not the mitigation proposed by NZTA is sufficient to mitigate the overall adverse effects on cultural values. The Board agrees with the collective views of the differing Mana Whenua iwi and the Mana Whenua Group that the benefits of the stormwater treatment and contamination containment bund together with the overall mitigation package and offsets are, on balance, sufficient to mitigate the significant adverse effects on Ngāti Whātua Ōrākei and Te Kawerau ā Maki.

[753] Furthermore, the full participation of Ngāti Whātua Ōrākei and Te Kawerau ā Maki in this Hearing has resulted in changes to conditions and recommendations by the Board about further changes to the final design and implementation of the Proposal such that that adds to the overall mitigation to be considered by the Board.[443]

[754] In relation to the Mana Whenua Tribes, it is clear from Mr Warren's closing submissions that the Mana Whenua Tribes Agreement addresses the various issues raised by them.[444]

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[440] Closing Statement, Enright, Closing Submissions para 14(f).

[441] Ibid, para 14(f).

[442] Statement of Rebuttal Evidence, Dr Patterson, Fn.1. Also see Transcript, Patterson, p4278 and p4264.

[443] This refers to various changes the Board has made of its own volition to reflect cogent issues raised.

[444] Closing Statement, Warren, para 27.

## Section 7(a)

[755] Kaitiakitanga is defined in the RMA as guardianship and/or stewardship. It is acknowledged, however, that for Māori, kaitiakitanga means more than just mere guardianship. As stated in the Cultural Values Report: [445]

> "*It is the intergenerational responsibility inherited at birth to care for the environment, which is passed down from generation to generation. Kaitiakitanga is the key means by which sustainability is achieved.*
>
> *The purpose of kaitiakitanga is not only about protecting the life supporting capacity of resources, but of fulfilling spiritual and inherited responsibilities to the environment, maintaining mana over those resources and ensuring the welfare of the people those resources support.*"

[756] Ngāti Paoa describe kaitiakitanga as the responsibility of all the members of the iwi within its boundaries. They state that: [446]

> "*Rangatira deal with rangatira on political and business matters at the strategic level, but kaitiaki must tend to kaitiakitanga matters daily. RMA issues are an ongoing battle with the preservation of what remains unchanged on the land and foreshore for centuries.*
>
> *The exercise of kaitiaki and kaitiakitanga is status driven requiring ancestral authority, which is not transferable by any other processes than those which apply under Māori custom, tikanga Māori. This is strictly linked to Mana Whenua.*"

[757] Integral to their kaitiaki role, Mana Whenua recognised early on in the Project's development opportunities to incorporate environmental improvements into the Proposal design to enhance the mauri of the Inlet for further generations.[447]

[758] The CVR recognises that the entire Proposal area has a mauri that binds the current generations through mana, tapu and whakapapa to the whenua. The landscape and cultural sites, all of which have links to tūpuna and kōrero tawhito, act as a repository for the whakapapa, mana, tikanga and traditions for current and future generations.[448] It acknowledges that, "*Every living thing is recognised as having value and as having a mana, wairua and mauri of its own*".[449]

[759] Other initiatives to enhance the mauri of the Inlet include:[450]

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[445] NZTA, CVR, para 4.5-4.6.

[446] Submission 126522, Ngāti Paoa, p9.

[447] NZTA CVR, para 1.9.

[448] Ibid, para 4.3.

[449] Ibid, para 4.4.

[450] Ibid, para 1.13.

(a) The development of a vision and strategy document focused on restoring the mauri of the Inlet. The document was created by Mana Whenua in partnership with central government, Auckland Council, Auckland Transport, KiwiRail and Watercare, the purpose of which is to present a shared vision, a set of values as well as desired outcomes to be achieved through current and future investments and activities in and around the Māngere Inlet.

(b) Sediment controls and stormwater measures to prevent further pollution of the Inlet.

(c) The development of an ongoing monitoring programme for the contamination containment bund (the bund) and stormwater outcomes for the wetlands, including the establishment of a monitoring liaison group.

[760] The CVR concludes that: [451]

> "*Through regular and sustained engagement with the Project team, Mana Whenua have sought to turn their aspirations for the Inlet into a reality. In doing so, they have enabled the Project to achieve positive environmental and cultural outcomes that will work to enhance the mauri of the Inlet.*"

[761] A perusal of the minutes of meetings between NZTA representatives and the Mana Whenua Group[452] provides a real sense of the nature of that engagement and reflects the genuine effort and commitment on the part of those participants, representing both NZTA and the individual Mana Whenua iwi, to identify and address areas of concern. Those discussions also demonstrate the level to which the Mana Whenua Group has given very careful consideration, analysis and input into the entire Project design and development.

[762] What is also clear from the minutes is that for Mana Whenua, at the core of the evaluation of options and outcomes of the stormwater treatment was the "view from the Inlet" – the health of the Inlet and the harbour – and the importance of options that would maximise water quality outcomes for the harbour. It is noted that this needed to be balanced against the objective of seeking to minimise the extent of reclamations to the greatest extent practicable (with the outcomes in mind). Mana Whenua also emphasised the importance of innovation to achieve outcomes and the need to look for opportunities of continued improvement to the treatment of stormwater to remove suspended solids.

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[451] Ibid, para 1.14.

[452] Statement of Rebuttal Evidence, Linzey, Attachment B.

[763] The Board accepts Mr Mulligan's submission that the extent of consultation and the input that Mana Whenua have had (and will continue to have) on the design of this Project and the agreements reached are telling in whether the requirements in Part 2 have been satisfied in terms of Mana Whenua values. It is clear that Mana Whenua have worked closely with NZTA through the Mana Whenua group to give real effect to their responsibilities as kaitiaki. In exercising their rights as kaitiaki to do so, Mana Whenua have been able to influence and guide the design and the development of this project to avoid key sites of significance to them, to remedy the effects not only of this Project but previous roading projects (for example, the removal of culverts at SH1) and to maximise every opportunity to mitigate and offset the effects on their cultural values in a manner envisaged by s7(a).

## Section 8

[764] In his opening submissions, Mr Enright submitted that two aspects of *King Salmon* are relevant: (a) constitutional importance of Treaty principles and s8 RMA; (b) consideration of alternatives in the public domain and coastal context. He further submitted that s8 RMA was identified by the Supreme Court majority as an exception to the primacy to be accorded to higher order planning documents, and that while s8 of the RMA had not been the subject of argument by EDS or other parties, the Supreme Court majority nevertheless noted its procedural and substantive importance. He quotes:[453]

> "*Moreover, the obligation in s8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications which decision-makers must always have in mind, including when giving effect to the NZCPS …*"

[765] Mr Enright submitted, and the Board agrees, that, "*This is highly persuasive [obiter]. Section 8 RMA is to be considered, even if ss5, 6 and 7 RMA are not*".[454]

[766] A further point raised by Mr Enright and which the Board accepts is: [455]

> "*To the extent that the Board applies Davidson to the resource consent applications, it must still apply s8 RMA under s104. Davidson is not authority in relation to s8 RMA, therefore the Supreme Court's obiter is more persuasive. Treaty principles have macro-constitutional force. S8 RMA, and related Waitangi Tribunal jurisprudence, goes to recognition of historical associations of tangata whenua and active duty to protect taonga. It supports the principle of non-derogation from Treaty settlements as a relevant RMA consideration.*"

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[453] Opening Statement, Enright, paras 70-71, and referring to *King Salmon* at [88].

[454] Ibid, para 71.

[455] Ibid, para 74.

[767] The Board has already recognised that the Treaty of Waitangi, the principles of which s8 stipulates people exercising functions and powers under the RMA must "take into account", is clearly engaged. The Board has noted that the principles of the Treaty of particular relevance include rangatiratanga; partnership and good faith; mutual benefit; the active protection of Māori rights and interests and the Crown's ongoing obligation to provide redress.

[768] In giving consideration to the Collective Redress Deed, the Board recognised that the issue of cultural redress in respect of the Manukau Harbour is still at large, with the breaches identified by the Tribunal in 1985 yet to be settled.

[769] In terms of the MACA, the Board has looked at potential issues that arise under MACA and considered and weighed, in relation to Mana Whenua claims and interests, the possibility, albeit remote, of s58 claims being affected by the Proposal.

[770] The Board agrees with the submissions of Mr Mulligan that under s8 RMA, a consent authority must, when dealing with a resource of known or likely value to Māori, enable active participation in the consultative process by Māori.[456] The Board reiterates its finding that the consultation and engagement processes with Mana Whenua has been extensive and meaningful, enabling NZTA to understand Mana Whenua concerns and resulting in cultural values having a genuine influence in decision-making, particularly regarding design and development.

[771] The Board has already accepted that the engagement with Mana Whenua reflects the principles of Te Tiriti o Waitangi in that, based on the principle of partnership**,** NZTA, as a Crown agency, entered into a dialogue with Mana Whenua at an early stage, actively recognising the relationship Mana Whenua have with the Proposal area, and the importance of engaging purposefully and meaningfully with them.[457]

[772] The Board has acknowledged the importance of Mana Whenua kaitiaki being "at the table" with a real ability to have input into and influence the final design as it evolved.[458] For the most part, Mana Whenua consider the process of engagement, discussed earlier in this Report,[459] to have been exemplary, particularly from a kaitiaki perspective. That engagement was undertaken in a timely manner, in good

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[456] Closing Statement, Mulligan, para 8.31(d).

[457] Paras [409] an [410].

[458] Para [383].

[459] This Report, chapter [13.3].

faith with a genuine intent on behalf of NZTA to work in partnership with Mana Whenua, enabling NZTA to understand Mana Whenua concerns and incorporate those concerns into design and decision-making processes.[460]

[773] Consistent with the NZCPS, under Policy 2 the Board accepts that in taking account of the principles of the Treaty of Waitangi, NZTA have incorporated mātauranga Māori (Policy 2(c)) through the consultation and engagement process, recognising the importance of culturally significant sites such as (but not limited to) Mutukāroa, Te Tō Waka and Te Apunga o Tainui. They have clearly provided opportunities for Māori involvement in decision-making (Policy 2(d)) and, as set out later in this Report,[461] NZTA has taken into account relevant iwi resource management plans. The Board accepts that each of these requirements has been met as part of the consultation and engagement process that occurred.

[774] NZTA has sought to actively protect the rights and interests of Māori and to acknowledge the Crown's ongoing obligation to provide redress. In recognising the Manukau Harbour as a taonga, NZTA has worked to establish a relationship based on mutual respect, focusing on the long-term benefits and mutually beneficial opportunities of the Proposal.[462]

[775] While the Agreement between NZTA and the Mana Whenua Tribes (which Mr Warren submits is legally binding)[463] is not in evidence before the Board, the merits of which it is unable to inquire into, the extent to which those iwi who are parties to it are satisfied that it addresses their individual and collective concerns to the point that none of them oppose the Proposal (with some indicating their clear support) is certainly relevant to any Part 2 assessment.

[776] Mana Whenua Tribes have come to the view that they will not oppose, and in some cases support, the Project, having made a decision as to where the balance lies for them in the context of their previous discussions with NZTA, the conditions that have been agreed to and the opportunities to restore the mauri or health of the Manukau through this Project and adding to that the suite of agreed terms for ownership, governance and management. That is relevant to s8 in the way it reflects Treaty of Waitangi considerations ranging from the exercise of tino

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[460] Para [386].

[461] Chapter [15.14].

[462] Mulligan submissions, para 8.34(b).

[463] Warren, p.3, para 10.

rangatiratanga of those tribes in terms of Article 2 through to the active protection of taonga. As Mr Warren commented in his response to questions from the Board, the Mana Whenua Tribes are satisfied that, at this point in time, their taonga will be protected and that they will be at the table to ensure that that happens.[464] He states,[465] "*That is the key distinction and opportunity that has presented itself to the Mana Whenua Tribes, which wasn't really on the agenda 30 years ago when the Tribunal made its report*".

[777] The cultural landscape, the relevant provisions of Part 2 of the RMA and the diverse and differing Mana Whenua stances, submissions and evidence are all matters the Board must weigh when considering NZTA's designations and various applications. Mr Warren submitted that the Board must give weight to the fact that the Mana Whenua Tribes have had a certain position throughout this Proposal and the Hearing, and have confirmed that they now support the EWL and the consents being granted, with the exception of Te Ākitai Waiohua which do not oppose it.

[778] Equally, the Board must give weight to the evidence that those tribes that remain in opposition have a different view of where the Board should sit in interpreting kaitiakitanga and their ability to exercise it, or the extent to which recommending approval might frustrate that ability.

[779] Overall, in the context of the above discussion, the Board finds that, consistent with the overall judgment, the Proposal will enable people and communities to provide for their social, cultural and economic wellbeing (or at least contribute to that effect). Despite the potential adverse effects of the Proposal on the coastal environment, and Te Hōpua a Rangi in particular, this can be achieved while avoiding, remedying or mitigating the Proposal's adverse effects as required under s5(2)(c).

## Conclusion

[780] The Board considers that NZTA has conscientiously and carefully given tangible recognition to the divergent world views and values of Mana Whenua in a manner contemplated by ss6(e), 7(a) and 8 of the RMA. The conditions attached to the NoRs and associated consents will ensure such effects can be sufficiently mitigated to a level where the Proposal can be considered to fall within the ambit of "sustainable management of natural and physical resources".

[781] The Board therefore finds, given the conclusions reached here and in chapters throughout this Report, that in all the circumstances applying to these NoRs and

[464] Transcript, Warren, p6320.

[465] Ibid, p6320.

associated consents the Proposal is consistent with the relevant provisions of Part 2 of the RMA.

# 15. NOTICES OF REQUIREMENT

## 15.1 INTRODUCTION

[782] Section 168(2) of the RMA provides that a "requiring authority" may give notice of a requirement (NoR) for a designation.

[783] NZTA is an approved Requiring Authority pursuant to s167(3) of the RMA for the purposes of: [466]

> "*... the construction and operation (including maintenance, improvement, enhancement, expansion, realignment and alteration) of any State Highway pursuant to the Transit New Zealand Act 1989*"[467] *and* "*constructing or operating (or proposing to construct or operate) and maintaining cycleways and shared paths in New Zealand pursuant to the Government Roading Powers Act 1989 and the Land Transport Management Act 2003.*"

[784] The statutory definition of State highway[468] means:

> "*a road, whether or not constructed or vested in the Crown, that is declared to be a State highway under section 11 of the National Roads Act 1953, section 60 of the Government Roading Powers Act 1989 (formerly known as the Transit New Zealand Act 1989), or under section 103; and includes—*
>
> *(a) all land along or contiguous with its route that is the road; and*
>
> *(b) any part of an intersection that is within the route of the State highway; and*
>
> *(c) …*
>
> *(d) land that becomes a State highway under section 88(2) of the Government Roading Powers Act 1989.*"

[785] NZTA has given notice of two NoRs for the EWL as follows:

| | | |
|---|---|---|
| NSP38/001 | NoR 1 | The construction, operation and maintenance of a State highway, being the East West Link between Onehunga and Ōtāhuhu, and associated works |
| NSP38/002 | NoR 2 | The alteration of State Highway 1 (SH1) designation 6718 for maintenance, operation, use and improvement of the State Highway network. The alterations are associated with the proposed East West Link Project between Onehunga and Ōtāhuhu, and associated works. |

[466] Gazette Notice No 2015-go6742 (19 November 2015).

[467] Gazette Notice No 1994-go1500, page 978 (3 March 1994). NZTA has assumed the powers and functions of the former Crown Entity, Transit New Zealand, in this respect.

[468] Land Transport Management Act 2003. Refer section 5 Interpretation.

[786] The detailed scope of these NoRs as originally submitted is set out in the designation plans AEE-NoR-101 Sheets 01 to 14 (inclusive) dated 14 December 2016 and AEE-NoR-200 Sheets 1 to 4 (inclusive) dated 14 December 2016 and associated Property Schedules defining affected land parcels.

[787] During the course of the Hearing NZTA amended the scope of the NoRs, with the final scope of the designations being shown on drawings and associated schedules defining the specific properties affected:

| Notice of Requirement | Drawings | Schedules |
|---|---|---|
| NoR 1 | AEE-NoR-100 sheets 01 to 14 (inclusive) dated 8 September 2017. | Property Schedule for proposed designation NoR 1 (13 September 2017). |
| NoR 2 | AEE-NoR-200 sheets 1 to 4 (dated 8 September 2017). | Property Schedule for proposed designation alteration (NoR 1) (13 September 2017). |

[788] These amended designations are those that have been considered by the Board in this Report.

## Jurisdiction

[789] The Board's jurisdiction in relation to the NoRs is set out in s171(1) of the RMA as mentioned earlier in chapter 6.1 of this Report.

## Sectors

[790] For the purposes of the application, NZTA has divided the NoRs into six sectors described as follows:

(a) Sector 1 – Neilson Street Interchange and surrounding local road works;

(b) Sector 2 – Embankment and other coastal works from the Neilson Street Interchange to Anns Creek;

(c) Sector 3 – Anns Creek to Great South Road / Sylvia Park Road Intersection;

(d) Sector 4 – Sylvia Park Road and State Highway 1 Ramps;

(e) Sector 5 – State Highway 1 – end of Sylvia Park ramps to Princes Street Interchange; and

(f) Sector 6 – Local Roads (Alfred Street, Captain Springs Road and Port Link Road).

(g) Sector 5 is covered by NoR 2 with all other sectors covered by NoR 1.

[791] The six sectors are shown below in Figure 4.

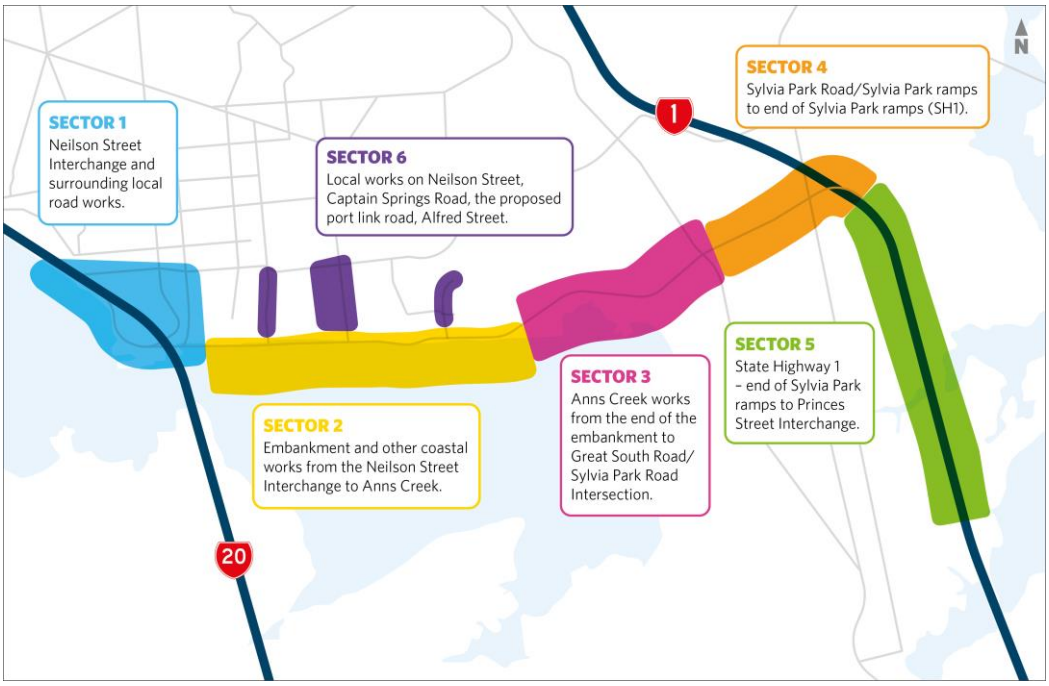


**Figure 4: Sector map of the EWL (from page 59 of the AEE).**

[792] In having regard to the effects of the Proposal, the Board has found it helpful to adopt the same sector approach in this Report. Two exceptions are walking and cycling effects and construction effects, which are considered across all six sectors.

## Designation Roll Back

[793] In its closing submissions to the Board, NZTA tabled an updated set of conditions *Amended Draft Designation and Resource Consent Conditions (September 2017 – Revision 4)* for the Board's consideration.[469] Draft Condition DC.5 proposes that after practical completion of construction NZTA will review the extent of the area designated under the two NoRs in consultation with the relevant land owners to identify land no longer necessary for ongoing operation, maintenance or mitigation of effects of the Proposal. NZTA proposes to remove the designation over such land pursuant to s182 of the RMA. This has been referred to in the Hearing as "rolling back the designations".

[469] At the Board's request during closing submissions minor amendments were made.

[794] The Board is supportive of this proposed condition because land that is no longer required for the EWL should not be subject to a designation and land owners should be permitted to utilise such land for legitimate purposes.

## Alternative Routes

[795] Section 171(1) (b) of the RMA requires the Board to have particular regard to whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if (i) the Requiring Authority does not have an interest in the land sufficient for undertaking the work; or (ii) it is likely that the work will have a significant adverse effect on the environment. There is no dispute that NZTA does not own all the land in respect of which the designations are sought and there is no dispute that the Proposal will result in significant adverse effects. Hence the Board must be satisfied that NZTA has given adequate consideration to alternative routes.

[796] The process used by NZTA for identifying and evaluating corridor and alignment alternatives using MCA methodology has been described elsewhere in chapter 15.12 of this Report. A "Long List" comprising 16 corridor options was identified and evaluated using the MCA methodology. Ms Linzey gave evidence[470] about the process of engagement with stakeholders during the development of the Proposal and consideration of alternative routes.

[797] From the Long List of 16 corridor options, six options,[471] shown in the following table, were selected to be progressed to the next stage of the MCA, alignment evaluation.

| OPTION | OUTLINE DESCRIPTION OF OPTION | OPTION NO. |
|---|---|---|
| 1 | Existing route upgrade with freight lanes | A |
| 2 | Existing route upgrade with new SH1 ramps at the South Eastern Arterial / SH1 interchange | B |
| 5 | Galway Street link to SH20 with new inland route to new SH1 ramps at Mt Wellington | C |
| 8 | Galway Street link to new SH20 Interchange with new inland route to new SH1 ramps at Mt Wellington | D |
| 13 | New SH20 Interchange with new foreshore route to new SH1 ramps near Panama Road | E |

[470] Statement of Primary Evidence, Linzey, 12 April 2017.

[471] AEE, Part D, p120, Table 8-2: Short listed options.

| | | |
|---|---|---|
| 14 | New SH20 Interchange with new foreshore route to new SH1 ramps at Mt Wellington | F |

[798] The third step in the assessment of alternatives was a full MCA of the six shortlisted options (A – F) using the same criteria and 11-point scoring method used in the Long List. Consistent with the Long List, assessment scores were assigned to each individual criterion and then an overall score for a key result area / group of criteria was assigned.[472] Consultation was undertaken with the public and key stakeholders on the Short List Options. The responses received during that consultation related to:

(a) Transport performance including traffic volumes and congestion, providing for freight, multi-modal and public transport, rail and general transport performance;

(b) Support for walking and cycling;

(c) Affordability and cost of options including the importance of value for money;

(d) Concern for loss of residential and business land;

(e) Community concerns over severance with the Neilson Street upgrade options and severance from the foreshore with the foreshore options;

(f) Protection of environmental features including Gloucester Park, Te Hōpua a Rangi, Anns Creek and Mutukāroa-Hamlins Hill;

(g) Enabling the safe and efficient movement of freight; and

(h) Business disruption during construction.

[799] Ultimately, the preferred option was a modified version of Option F described as, "A new connection from SH20 to SH1".[473] The advantages of this option were described as follows:

(a) Superior transport performance and delivered the most enduring benefits, especially compared to upgrading parts of Neilson Street.

[472] Assessment of Environmental Effects, December 2016, Appendix G Summary of Short List Options and Appendix H Short List Individual Option Assessment and Technical Report 1: *Supporting Material for the Consideration of Alternatives*.
[473] Technical Report 1 *Supporting Material for Consideration of Alternatives, December 2016*.

(b) By having the most enduring transport benefits it would maximise return on investment and remove or delay the need for further investment in the area.

(c) It best delivered the Proposal objectives of improved connectivity, travel times and reliability (including travel time savings of four to seven minutes depending on route), and greater resilience along the Neilson / Church corridor (via removal of up to 10,000 vehicles per day).

(d) Did not involve any substantial acquisition of residential or any business land along Neilson Street but did involve land requirement around the inland port and around Miami Parade.

(e) The balancing of environmental, cultural and land use impacts, and the mitigation and off-set of environmental effects has been discussed in detail elsewhere in this Report.

[800] A central component of NZTA's reasoning for accepting a foreshore alignment with the associated reclamation was that it would provide an "enduring transport solution". Mr A Murray defined this as:[474]

> "*This concept of an enduring benefit is particularly important and can be easily overlooked. Enduring benefits are those that last for a number of years, typically into the medium term (10 - 20 years) rather than the short term (5 years). If a benefit is enduring then it means that future intervention or investment to solve the relevant problem can be delayed. Conversely if a benefit is not enduring it means that the problem will return in a shorter time frame. This has direct implications for how efficient and cost effective a solution is and to how well it meets the Proposal objectives.*"

[801] Some submitters raised the impacts of the NoR and designation in Sector 1,[475] and some suggested other alternative routes or options for the Board's consideration.[476]

[802] The Onehunga Business Association (OBA) developed an outline of a further alternative which was adapted by NZTA's consultants for evaluation using the MCA.

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[474] Statement of Primary Evidence, A Murray, para 6.10

[475] Ngāti Whātua Orākei & Te Kawerau ā Maki, The Onehunga Enhancement Society Inc (TOES), The Rethink the East-West Link Society Inc, The Manukau Harbour Restoration Society Inc, The Local Lockup, Jackson Electrical Industries.

[476] Statement of Primary Evidence, Hoheisel, 20 May 2017, section 7; Representation, Hill, 4 September 2017. Representation, de Haan, 4 September 2017.

OBA was critical of various aspects of this adaption by NZTA, asserting that it resulted in an unfavourable conclusion of the MCA evaluation of its option.[477]

[803] Following a direction from the Board, Ms Linzey described the changes made to the OBA option by NZTA, the engagement with OBA concerning those and the evaluation of the option.[478] She considered that the OBA design was adequately assessed[479] by NZTA and independently peer reviewed by Mr Bauld who had consulted with Ms Kinzett of OBA and Mr Jackson on behalf of TOES and Others.[480] Ms Linzey also referred to Mr Hoheisel's *Community Plan* provided in his evidence.

[804] Under s171(1)(b) it is not within the Board's jurisdiction to determine if the best route has been selected or to propose an alternative route, although in this case the Board has extended its consideration to whether there is a practicable alternative.[481] Under s171(1)(b), the Board is required to determine if a robust process was used by NZTA to select the route. On the basis of the evidence outlining the process of identifying corridor and alignment options and the application of the MCA methodology, the Board is satisfied that NZTA engaged in a robust, replicable process of identifying and evaluating options and selecting a preferred option. It is apparent from the assessment of competing options that a route or corridor south of Neilson Street would best serve the many industries and sites currently accessed by vehicles using Neilson Street.[482] The options south of Neilson Street (Options E and F) were clearly constrained by Neilson Street itself and the Inlet foreshore. Obviously selection of either of these two options would involve reclamation. This would give rise to complex issues under the RMA. The Board notes the evidence of Ms Linzey that Option E has the poorest overall performance from an environmental and social / community effects perspective and has notable impacts on residential property.[483] The Board notes that Option E extended directly across business and residential properties between the Māngere Inlet and SH1, rather than the proposed route that crosses Anns Creek East and follows Sylvia Park Road. It is clear from the evidence that a major reason for

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[477] Statement of Primary Evidence, Kinzett, 22 May 2017, para 15; Statement of Primary Evidence, Hoheisel, sections 5 & 6; Closing Statement, Gibson, para 11.

[478] Statement of Supplementary Evidence, Linzey.

[479] Statement of Rebuttal Evidence, Linzey, para 7.1.

[480] Statement of Primary Evidence, Christopher Bauld, para 8.1 to 8.3 and 10.

[481] Chapter [15.12] of this Report.

[482] Statement of Primary Evidence, A Murray, para 1.6-1.7.

[483] Statement of Primary Evidence, Linzey, p34.

NZTA's selection of the modified Option F was its conclusion that this option provides the most enduring transport benefit[484] while minimising, to the extent practicable, adverse effects of the Proposal.

### Interface between the PWA and the RMA

[805] The interface between the PWA and the RMA was an issue throughout the Hearing. NZTA and other Parties addressed the point at which RMA considerations of adverse effects, and the need to avoid, remedy or mitigate such effects, ends and PWA processes commence.

[806] Mr Allan observed that:[485]

> "*The PWA compensation process is consequential upon the RMA assessment but neither informs nor determines it. It is not a matter that justifies NZTA disregarding or failing to mitigate adverse effects on properties that will be generated by its proposal.*"

[807] The Board notes there is nothing in the RMA to suggest that any particular type of environmental effects should be excluded from consideration under s171. Ms Carruthers submitted that the Board must first understand the effects before deciding whether the adverse effects are such that they should be avoided, remedied or mitigated by design and works, or whether unmitigable effects remain that must be addressed via compensation under the PWA.[486]

[808] The Board agrees with NZTA's submission that the effects of the Proposal on business operations are a relevant consideration in the RMA context and accepts that where possible those effects should be avoided, remedied or mitigated through design and the works. The Board is satisfied that NZTA has assessed those effects and addressed them accordingly, to the extent that it can at this time, through design and conditions. Equally, NZTA has identified properties that would be subject to effects that cannot be mitigated and would be addressed through the PWA. The detail of such PWA compensation has not been presented to the Board and it is not within the Board's jurisdiction.

[809] The Board considers that those effects, particularly where they relate to reductions or loss of land, are an unavoidable consequence of the scope of works envisaged

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[484] Statement of Primary Evidence, Linzey, p37; Statement of Primary Evidence, A Murray, para 6.22.

[485] Closing Statement – Syl Park, Allan, para 5(d).

[486] Opening Statement – T&G, Carruthers, para 4.13.

under the NoRs. The purpose of the PWA is to provide a financial remedy to such effects. In this context, as Mr Mulligan submits, it is relevant to take into account the fact that where business land is compulsorily acquired under the PWA or injurious affection is suffered as a result of the acquisition, compensation will be available through the PWA.[487]

[810] Mr Mulligan stated:[488]

> "*It would be artificial to consider business effects (and the means proposed to avoid, remedy or mitigate them) without also taking into account the future payment by the Transport Agency to business land owners of full compensation for related effects under the PWA.*"

[811] NZTA's submissions provide a helpful summary of relevant authorities[489] and conclude that, consistent with the authorities cited therein, "*The legal certainty of compensation under the PWA should be afforded considerable weight by the Board in its overall assessment*".[490]

[812] The Board considers that the impacts on those affected properties have been adequately considered and, consistent with its earlier findings, alternative sites, routes or methods have been assessed as required by s171. The Board is satisfied that the approach promoted by Ms Carruthers and Mr Allan in particular has been adopted.

## 15.2 SECTOR 1 – NEILSON STREET INTERCHANGE

[813] The western limit of the EWL is its junction with Orpheus Drive at Onehunga. The NoR for Sector 1 provides for this through a complex interchange with connections to Neilson Street, Onehunga Harbour Road, Galway Street, utilising a range of ramps under and over SH20 and a connection to Onehunga Wharf via a "land bridge". Part of Onehunga Wharf is included within the extent of the NoR. This sector terminates east of the Galway Street intersection at approximate chainage 1200. The proposed functionality of this interchange is well described in the evidence of Mr Nancekivell.[491] This is the most complex interchange on the EWL.

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[487] Closing Statement, Mulligan, para 19.4.

[488] Ibid, para 19.5.

[489] Ibid, paras 19.6-19.11.

[490] Ibid, para 19.12.

[491] Statement of Primary Evidence, Nancekivell, para 10.2 to 10.11.

[814] The Onehunga area contains several major Transpower assets that significantly impact on the visual environment between Queenstown Road and Onehunga Harbour Road / Galway Street.

[815] These are:

(a) The Henderson-Ōtāhuhu A (HEN-OTA A) 220 kV overhead line on towers;

(b) Penrose-Mt Roskill A (PEN-ROS A) 110 kV overhead line on towers; and

(c) Māngere-Mt Roskill A (MNG-ROS A) 110 kV overhead line on towers.

[816] The following features are affected by the area of the NoR in this sector:

(a) Te Hōpua a Rangi volcanic tuff crater and Gloucester Park;

(b) Coastal walkway and cycleway from Onehunga Wharf to Taumanu Reserve;

(c) Onehunga Wharf;

(d) Aotea Sea Scouts building with the adjacent Transpower's transmission Tower 33;

(e) Local business interests – Jackson Electrical Industries, The Local Lockup with the adjacent Transpower's transmission Tower 31 and The Landing Tavern; and

(f) Local residents – Onehunga Mall and Onehunga Harbour Road.

### Adverse Effects on Te Hōpua a Rangi and Gloucester Park:

[817] Te Hōpua a Rangi is small volcanic tuff crater (500 m diameter) that has been bisected by the construction of State Highway 20 in the 1970s. At one time the crater was a tidal lagoon with direct access to the Manukau Harbour and used by Māori and European settlers as a safe landing place. The lagoon was filled with refuse and other waste material in the 1930s and 1940s and currently the crater floor forms what is now known as Gloucester Park.[492] Te Hōpua a Rangi is mapped as an ONF in the AUP.[493] The area mapped as the ONF largely comprises the flat area of the crater floor either side of SH20 and a small coastal strip on the seaward

[492] *Assessment of Effects on the Environment*, Part G, December 2016, para 12.8.3.1.

[493] Auckland Unitary Plan, Schedule 6, ONF 46.

side of Onehunga Harbour Road. The area mapped as the ONF does not coincide the total or actual physical area of Te Hōpua a Rangi as it exists today.

[818] Gloucester Reserve is commonly known as Gloucester Park North and South. The parks are located on the northern and southern sides of SH20 and within the Te Hōpua a Rangi tuff ring. Gloucester Park North contains a sports training field and peripheral trees and vegetation. Access to a car park area is via Onehunga Mall on the eastern side. Gloucester Park South contains a saltmarsh wetland in the centre surrounded by grassed areas and groups of trees and vegetation.

[819] The AEE[494] has identified the effects on Te Hōpua a Rangi as follows:

> "*The Project works in proximity to Te Hōpua a Rangi include minor earthworks on the western and south western edge, the establishment of an embankment on the north western edge and minor excavation on the southern margin of the tuff ring on the eastern side of The Landing. The tuff ring has been extensively modified, and the majority of the works will be on the already breached southern side or will not directly impact the tuff ring. The works will have a minor effect on the form of the outer slopes of the tuff ring.*
>
> *The proposed works for the northbound off-ramp of SH20 will involve earthworks following the line of the existing off-ramp and across land that is filled and so will have no impact on the form of the tuff ring.*
>
> *Along the southern extent of the tuff ring, a cut trench will excavate landfill material and below sea level will encounter tuff deposits. This area has been extensively excavated by current developments. The tuff deposits are located below sea level and earthworks in this location will have no impact on the form of the tuff ring.*"

[820] The Board accepts that the design has strived to avoid, to the extent practicable, impacts on the physical qualities of Te Hōpua a Rangi.[495] The Board notes Ms Linzey's explanation that the corridor and alignment option assessment specifically considered potential impacts on culturally significant sites, including Te Hōpua a Rangi, and sought, where practicable, to avoid impacts on these sites.[496] As Mr Mulligan states:

> "*The current alignment option was developed after three earlier design options were presented to iwi, who raised concerns about these options in terms of impacts on Te Hōpua a Rangi. This led to a subsequent design being developed (Option 4), which was presented to Mana Whenua for feedback.[166] Mana Whenua identified that all options impact values, but*

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[494] *Assessment of Effects on the Environment*, December 2016, page 280.

[495] Closing Statement, Mulligan, p27.

[496] Statement of Primary Evidence, Linzey – Cultural Values Assessment Engagement, para 9.5.

*that their preference was for Option 4 in order to minimise impacts on Te Hōpua a Rangi*".

[821] Professor Smith noted in his evidence[497] the extensive modifications to the original tuff ring, noting that it currently "*represents relatively low value as a volcanic feature …*"[498] He summarised his opinion of the effects of the EWL on Te Hōpua a Rangi as follows:

> "*Along the southern margin of Te Hōpua a Rangi tuff ring a cut trench will excavate land fill material, minor tuff deposits from Te Hōpua a Rangi and underlying sediments. This is an area that has already been extensively modified by earlier development of motels, hotels and Onehunga Port. The upper part of the cut trench will encounter land fill material and the lower part is likely to encounter deposits of volcanic material. The tuff deposits that will be intersected in this trench lie below current sea level and are beyond the mapped extent of the ONF. The excavation will not affect the existing form of Te Hōpua a Rangi. Although there will be an effect below sea level, there will be no impact on the values that I have described above. The proposed excavation on the southwestern margin of Te Hōpua a Rangi tuff cone will involve the deposits of the cone that are currently below sea level. As such the excavation will not affect the present form of the cone. The excavation will provide an unrivalled opportunity (albeit transitory) for scientific investigation of the eruption styles of a small Auckland volcano.*
>
> *8.3 The Project will only have negligible impact on the existing vulcanological characteristics and qualities that contribute to the values of the Te Hōpua a Rangi Tuff Cone.*" [499]

[822] Mr Jamieson on behalf of Auckland Council did not disagree with Professor Smith's conclusions noting that: [500]

> "*It has the potential to result in more than minor adverse effects on the geological values of the crater landform. I consider that if the management measures outlined in … this evidence are implemented to avoid, remedy or mitigate these adverse effects, the overall effect of the proposal on this ONF will be no more than minor.*"

[823] Mr Lister, on behalf of NZTA, noted in his evidence[501] adverse effects on the physical form, aesthetic values and legibility of Te Hōpua a Rangi. He recommended a commissioned artwork encircling the crater to highlight its circular form and presence by way of:[502]

> "*... a realistic way of highlighting the landform given its subdued topography, and given the scale of existing urban development around and across the crater. Such an artwork would be conceived by the artist but, by way of*

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[497] Statement of Primary Evidence, Ian Smith, 12 April 2017, para 7.5.

[498] Ibid, para 7.14.

[499] Ibid, paras 8.2 and 8.3.

[500] Statement of Primary Evidence, Jamieson, 10 May 2017, para 8.3.

[501] Statement of Primary Evidence, Lister, 12 April 2017, paras 8.2, & 8.4.

[502] Ibid, para 8.8.

> *example, it might comprise a circle of light. Such an artwork could enhance the legibility of the crater compared to the existing situation, re-establish Te Hōpua a Rangi as a landmark, and contribute to its aesthetic value. It would outweigh the adverse effects of the Project.*"

[824] Mr Blair, on behalf of Ngāti Whātua Ōrākei and Te Kawerau ā Maki, gave evidence that the NoR has great impact on the physical and cultural integrity of Te Hōpua a Rangi and rejected the proposed corridor and the suggestion of proposed artwork as meaningful mitigation.[503] He did not, however, suggest that there be any specific recognition.

[825] Dr Patterson gave evidence on behalf of Ngāti Whātua Ōrākei concerning the spiritual or metaphysical effects arising from excavating Te Hōpua a Rangi: [504]

> "*My view is that it's reached a point now where further physical destruction and masking of that feature, that landscape, comes to a tipping point where the impacts really can only be seen as negative on it. Aside from its destruction, degradation and the reduction then of the legibility of that natural and cultural landscape, there is a significant risk there, and immediately to its north where the kāinga site was, of disturbing ancestral material…*
>
> *It fails that litmus test. It pushes more into the use, especially for more commercial reasons perhaps, than it supports the kaitiakitanga the respect of that environment, the respecting of the atua in our ancestral landscape.*"

[826] Dr Patterson conceded that the landform of Te Hōpua a Rangi had been subject to extensive modification over time.

[827] While expert witnesses agreed that the proposed earthworks on the crater floor and in the trench will have minimal adverse effects on Te Hōpua a Rangi,[505] the Proposal will nevertheless have further impacts on the cultural values associated with the site.[506] Mr Enright submitted that the mauri of Te Hōpua a Rangi is adversely affected by proposed excavation works; prior damage does not justify further adverse impacts.[507] The Board has no problem finding that there are high Māori cultural associations with Te Hōpua a Rangi independently of the scheduled values listed by the AUP:OP.

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[503] Statement of Primary Evidence, Blair, 22 May 2017, para 47.

[504] Transcript, Patterson, 17 August 2017, pages 4261 to 4263.

[505] NZTA Closing Submissions, para 8.27.

[506] Enright, Opening Submissions, para 83.

[507] Enright, Closing Submissions, para 14(h).

[828] Turning now to Gloucester Reserve, Ms Hannan gave evidence for Auckland Council on the effects of NoR1.[508] These included further restriction of access, severance effects and potential removal of a number of mature trees. She sought that the NoR be amended to maximise the area for active sport, practical measures to retain mature trees and access improvements.

[829] Mr Mead for TOES and Others had concerns about the adverse visual effects in relation to Te Hōpua a Rangi and considered that there was inadequate mitigation proposed by NZTA.[509] The mitigation package sought by TOES and Others includes the undergrounding of the MNG-ROS A 110 kV overhead transmission line as an additional form of mitigation to address what they considered to be significant severance and other effects that the Proposal would have on the Onehunga community. This matter was explored through questioning and cross-examination of Mr Noble of Transpower,[510] who gave evidence of the substantial costs involved in undergrounding the high tension transmission lines and Transpower's current review of it transmission assets throughout Auckland.[511] In his closing Mr Mulligan opposed any such mitigation.[512] The Board accepts Mr Noble's evidence that Transpower is reviewing transmission activities throughout Onehunga and it would be premature to impose such a requirement on the Proposal, nor does the Board consider there to be sufficient nexus between the effects of the Proposal and the undergrounding of the line to justify requiring it to occur. Thus, it is not within the Board's jurisdiction and unrelated to the adverse effects on Te Hōpua a Rangi of the EWL. Nonetheless the Board has much sympathy with the longstanding desire of the Onehunga community to underground the unsightly transmission lines running both onshore and offshore in this location. Hopefully the condition advanced by NZTA regarding the accommodation of undergrounding gives some glimmer of hope.

[830] The Board has considered the adverse effects of NoR1 on Te Hōpua a Rangi and Gloucester Park identified in the AEE, the evidence and the views of Ngāti Whātua Ōrākei and Te Kawerau ā Maki in relation to cultural effects. It considers that Te Hōpua a Rangi is a highly compromised environment, particularly with the

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[508] Statement of Primary Evidence Hannan, 8 May 2017, para 7.15 to 7.17.

[509] Statement of Primary Evidence, Mead, 29 August 2017, para 79.

[510] Transcript, Noble, p4854 – 4861.

[511] Statement of Primary Evidence, Noble, para 89, 100 to 103.

[512] Closing Statement, Mulligan, para 10.29 – 10.30.

construction of SH20, and that these changes are irreversible. While the EWL will add to the damage done to Te Hōpua a Rangi, substantial damage was done when SH20 was constructed and through the earlier filling, as discussed earlier in this Report.[513] Experts agree that any mitigation to be provided should seek to improve the legibility of Te Hōpua a Rangi. There is little support for Mr Lister's suggestion of a circle of light as an artwork and the Board does not impose such a requirement. Nor does the Board consider that the effects of EWL on this highly compromised environment warrant a condition requiring the undergrounding of the MNG-ROS overhead transmission line even if this was within its jurisdiction.

### Coastal walkway and cycleway

[831] The application provided for a 3 m-wide shared pathway and cycleway on the harbour side extending from the Galway Street intersection with the EWL through Onehunga Wharf, past the Aotea Sea Scouts building circumventing the adjacent transmission Tower 33 along Orpheus Drive to terminate at the Manukau Cruising Club's building to join with Taumanu Reserve.

[832] Ms Hannan[514] for Auckland Council expressed some concerns about aspects of the proposed shared facility. She sought amendments to the proposed conditions as follows:

> "*(a) Landscape treatment and a physical barrier (or other method) should be achieved on the landward side of the path to physically and visually separate pedestrians/cyclists from the adjacent road and to provide amenity screening.*
>
> *(b) Where practicable replace boardwalks/cantilevered paths alongside Orpheus Drive with concrete paths constructed on land in order to reduce the on-going maintenance and eventual replacement cost for the Council.*"

[833] NZTA responded to this by amending the width of the shared facility to a minimum of 4 m. The Board is satisfied that the designation does not require further amendment in this location although it would be desirable to find a better alignment of the shared facility at Tower 33.

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[513] Para [287] and [586].

[514] Statement of Primary Evidence, Hannan, 8 May 2017, paras 7.1 to 7.5.

## Sea Scouts Building and Gloucester Park

[834] Concerns were raised by a number of parties about the adverse effects on the Aotea Sea Scouts (historic) building and severance from Gloucester Park.[515] In the course of the Hearing the Board was advised that a Memorandum of Understanding had been reached with Aotea Sea Scouts to either relocate the existing facility or provide a replacement.[516] Counsel sought to formally withdraw the submission. Consequently the Board has not considered this effect of the NoR further.

[835] The Aotea Sea Scouts building is scheduled as a Category B building in the AUP:OP[DP] and identified as being of significance for its historical and social values, physical attributes and architectural values and its context values. This was confirmed by the evidence of Ms Matthews[517] for NZTA who considered that the Proposal would have moderate to significant adverse effects on the context and setting of the building, particularly in terms of its physical attributes, aesthetic values and context values.

[836] Ms Caddigan[518] for Auckland Council held similar views stating:

> "*The proposed ramps and embankments will considerably reduce the historic context, setting, and views to and from the Aotea Sea Scout Hall. The existing views to and from the hall (especially the principal façade) will be considerably impacted and the ability to view the unique eastern elevation will be limited by the reduction in open space in front of the building. Therefore, the Proposal will result in significant adverse effects on the aesthetic and context values of the place and the degradation of the place's setting.*"

[837] Ms Caddigan proposed some additions to the conditions.

[838] Ms Matthews considered that there were limited opportunities to minimise the site-specific adverse effects with the alignment located in close proximity to the Aotea Sea Scouts Hall. However, there might be opportunities to enhance the heritage values of the building by undertaking targeted repair or maintenance works, in keeping with the conservation plan.

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[515] Ibid. Paras 7.8 to 7.11.

[516] Memorandum of Counsel for Aotea Sea Scouts, 29 June 2017.

[517] Statement of Primary Evidence, Matthews, 2017, paras 8.2 & 8.3.

[518] Statement of Primary Evidence, Caddigan, 10 May 2016, para 7.2.

[839] Conditions HH.7 and HH.7A require the 2007 Conservation Plan for the building to be updated. The updated conservation plan will help inform maintenance and repair priorities for the building owner. Condition HH.7A was drafted in response to Ms Caddigan's concerns.

### Effects on Onehunga Wharf

[840] The NoR encompasses a significant area of the existing Onehunga Wharf. The Board was advised that some of this was intended for construction purposes and the designation would be rolled back after substantial completion of the Proposal.[519] The local community and Auckland Council's development arm, Panuku Development Auckland, have aspirations for a redevelopment of the wharf area as a mixed use zone.[520] These parties were concerned that the effect of the NoR would be to delay the implementation of aspirational plans for the wharf and associated rejuvenation of Onehunga.

[841] The wharf area is one of seven main construction yards proposed to be used for construction of the EWL. It is intended as the main construction yard for the Neilson Street Interchange and the trench.[521]

[842] The evidence of Panuku[522] confirmed that its plans were currently at a concept stage and that a publicly notified plan change would be necessary for them to be able to be implemented. NZTA advised the Board that it was in the process of acquiring the wharf from the POAL but that once the EWL had been constructed it had no intention of retaining ownership and would negotiate sale to Auckland Council or Panuku.[523] The Board is satisfied that in terms of s171(1)(c) of the RMA the NoR1 encompassing part of Onehunga Wharf is reasonably necessary for the purposes of constructing the EWL but subject to the roll back provisions of condition DC.5.

### Severance Effects

[843] The Proposal comprises an on-ramp to be bridged over SH20 (Orpheus Drive) at chainage 200 in the vicinity of Neilson Street and the proposed Galway Street

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[519] Condition DC.5(b).

[520] Panuku, Maungakiekie Local Board, Onehunga Business Association, TOES and Others.

[521] Statement of Primary evidence, Nancekivell, 12 April 2017, paras 11.11 & 11.12.

[522] Statement of Primary Evidence, Marler, 10 May 2016, paras 8.1 to 8.8.

[523] Closing Statement, Mulligan, para 10.26.

intersection (chainage 1000) and will create additional severance effects from the foreshore being a four-lane highway 22 m wide. From chainage 560 to 920 the EWL is proposed to be in a trench so as to pass under SH20 (Māngere Bridge). The trench will be over 7 m deep relative to Onehunga Harbour Road. From chainage 700 to 770, the trench, a "land bridge" would provide a linkage between Onehunga Harbour Road and Onehunga Wharf. The EWL trench creates significant severance effects

[844] These effects are well described in the evidence[524] of Mr Brown for Auckland Council:

> "*a) The trench occupying much of the current Onehunga Harbour Road corridor, combined with the channelising of heavy traffic over a new bridge directly in front of The Landing and Airport Harbour View Motel, would further exacerbate the physical separation of both Onehunga's town centre and Gloucester Park from Onehunga's port area. In all likelihood, it would also exacerbate the already rather utilitarian qualities of this corridor, with both the trench and vehicular activity within it, significantly effecting both physical and perceived connections between the town centre, in particular, and both the port area and wider coastal environs.*
>
> *b) The trench would create a very substantial barrier to public interaction with old Māngere Bridge / new Old Māngere bridge and the Māngere Inlet Cycleway. Onehunga Harbour Road is heavily trafficked at present, while access to the current bridge and cycleway is already hampered by the rather aesthetically challenged nature of the 'gateway' to both – under the SH20 Bridge, past industrial premises, then past Onehunga Wharf's secure operational area. The proposed 22-27m wide trench would greatly compound this feeling of severance and isolation of the waterfront. The new pedestrian way / cycleway over the EWL would effectively replace the current pedestrian bridge elevated above Onehunga Harbour Road, but would achieve little beyond that. It would not offset, or compensate for, the disruption of at grade access to and from the current bridge and surrounding harbour margins. Indeed, it is difficult to see how the New Old Māngere Bridge could become the sort of draw card and integrating element that NZTA implied in their application for the proposed bridge. In fact, the EWL would create a degree of severance and isolation that appears to be quite incompatible with such objectives.*
>
> *...*
>
> *The EWL would compound the high level of 'severance' that is already apparent between Onehunga's Town Centre and its port area, associated with SH20 and the its (sic) associated bridge. Of particular concern, it would create another barrier to connection between the long established, town centre, including its recently opened railway station, with both a revitalised port / harbour-front area – under the future stewardship of Panuku – and the old Māngere Bridge, which NZTA has proposed replacing.*" [525]

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[524] Statement of Primary Evidence, Brown, para 30.

[525] Ibid. Para 31.

[845] The severance of Onehunga Wharf, Aotea Sea Scouts building, The Landing Tavern and access to the coastal marine area caused by NoR1 was a matter of concern to the same submitters. NZTA proposed a "land bridge" linking Onehunga Harbour Road to the wharf and Orpheus Drive to provide connectivity. The location and width of this structure over the trenched section of EWL and its mitigation function was the subject of a number of submissions and its original width of 25 m was criticised as insufficient mitigation for the severance and other adverse effects. While this was increased to 70 m by NZTA, some submitters sought for a wider bridge up to 170 m [526] and providing for greater stakeholder input to its design.

[846] Mr McIndoe[527] for Auckland Council considered that the land bridge should be increased in width up to 170 m and that this "*would adequately mitigate local severance and help offset severance effects elsewhere around the Tuff Ring and along the Māngere Inlet*". He accepted that there were potential constraints to the width of the bridge if extended beyond 90 m.

[847] He presented examples of more creative designs for similar structures from overseas and advocated for a multidisciplinary approach to the design of the bridge to achieve better urban design outcomes.

[848] In response to these submissions, the Board issued a direction in relation to the design of the land bridge concerning its width, constraints and design process on 9 August 2017. A JWS Report in response to this direction was received by the Board on 23 August 2017. As a result, NZTA proposed a revised condition DC.11A to provide for a collaborative design process with input from engineering, urban design and relevant environmental disciplines from various stakeholders. Proposed Condition LV.5C was also amended by NZTA to provide for the land bridge to be relocated further to the east than originally proposed (opposite The Landing Tavern) and to be a minimum of 80 m and a maximum of 110 m wide.

[849] The Board also notes that it is proposed to provide a 5 m-wide pedestrian cycle link between Old Māngere Bridge and Onehunga Harbour Road. This is an improvement on the existing link at that location.

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[526] Statement of Primary Evidence, McIndoe (for Auckland Council), 10 May 2017, para 14.13. Statement of Primary Evidence, S Brown (for Auckland Council), April 2017, para 55. Statement of Primary Evidence, Kinzett (for OBA), 22 May 2017, para 34. Statement of Primary Evidence, Jackson (for TOES) 22 May 2017, para 65.

[527] Summary of Primary Evidence, McIndoe, paras 2(a) to (e).

[850] The Landing (originally the Manukau Tavern) is scheduled as a Category B Building in the AUP:OP[DP] and identified as being of significance for its historical and social values, physical attributes, architectural values and context values. Although currently encircled by SH20, Onehunga Harbour Road and Gloucester Park, the trench would exacerbate the severance from Onehunga Wharf and the foreshore. Ms Matthews and Ms Caddigan agreed that the proposed extended land bridge, particularly if moved eastwards to align with The Landing, would address both heritage and severance effects.[528]

[851] Given these amended conditions proposed by NZTA, the Board is satisfied that sufficient mitigation is proposed for the adverse severance effects of the EWL.

### Effects on Specific Properties

[852] Specific objections to the extent of NoR1 were received from Jackson Electrical and The Local Lockup in relation to the Neilson Street on-ramp to the EWL.

[853] Jackson Electrical is a successful Onehunga business, manufacturing electrical components and complex fibreglass mouldings. Jackson's concerns with the NoR are the encroachment of a cul-de-sac turning circle on a small portion of its frontage land that it asserts will affect the loading and unloading of large trucks at its premises. Mr McKenzie, a traffic engineer for Jackson Electrical, said:[529]

> "*It is not clear to me whether the on-ramp and associated roading infrastructure will maintain the usability of the Jackson Electrical site, including site access/egress. In my opinion, the development and operation of an on-ramp of this form and in this location will significantly alter and potentially adversely affect the effectiveness and efficiency of site operations to and from the Site.*
>
> *In my estimation, large trucks serving the Jackson Electrical site will have access and egress operations adversely affected, as well as operational delays due to the associated on-ramp transport infrastructure. In my opinion, the effects on the internal traffic movements will be significant, and have not in my opinion been adequately considered by NZTA.*"

[854] NZTA's response[530] was that it considered it to be "*fair and reasonable that trucks accessing the Jackson site will use part of the Jackson property driveway to turn around …*" The Board considers that, in the context of NoR1, this is a small encroachment issue limited solely to the Jackson property, and should be capable of resolution by negotiation between the parties without requiring a change to the NoR.

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[528] Transcript, Matthews, p1694.

[529] Statement of Primary Evidence, McKenzie, 22 April 2017, paras 4.5 to 4.7.

[530] Closing Statement, Mulligan, para 19.55.

[855] The Local Lockup, represented by Mr Palmer, is a successful business providing secure storage facilities. Its current access is from the Neilson Street on-ramp to SH20. In his evidence Mr Palmer outlined the company's concerns with the proximity of the NoR and on-ramp to Transpower's Tower 31 on the HEN-OTA 220 kV line, located within The Local Lockup's property. He pointed out that it would be necessary for Transpower to grant a dispensation under the New Zealand Electrical Code of Practice (NZECP 34: 2001) and such dispensations were only granted infrequently. He raised the potential risks of vehicle collision with the tower. Mr Palmer was also concerned that it was intended that all of his site be within the permanent designation, some of which would be used to provide access to Tower 31 for maintenance purposes. He said that, "*The taking of all the land at 11 Gloucester Park Road will cause my family and the local community considerable social and economic hardship with the closure of The Local Lockup Limited*".[531]

[856] Mr Noble, General Manager Transformation and Acting General Manager Grid Performance with Transpower, said in evidence[532] that Transpower had been in discussions with the NZTA to understand the extent of the impact of the NoRs on Transpower's assets, and to discuss possible mitigation options. In relation to the HEN-OTA line Tower 31 within a proposed construction yard, access will need to be retained to this structure during the Proposal's construction and establishment. Operation of the yard will need to be managed to protect the tower and after the Proposal was completed access to Tower 31 must be provided for maintenance purposes. He advised that Transpower would work with NZTA to ensure that the tower was adequately protected from vehicle impact.[533]

[857] Mr Noble advised that given the proximity of the EWL to Tower 31, NZTA would need to obtain dispensation under NZECP 34 for Tower 31 prior to work commencing. He did not identify any concerns with the location of the NoR to Tower 31.

[858] While the Board was sympathetic to the concerns of The Local Lockup in relation to the occupation of the site during construction and the permanent effects restricting use of the site because of maintenance access to Tower 31, it considered that in terms of s171(1)(c) of the RMA the limits of the NoR should be retained as being reasonably necessary for the NoR1 for the purposes of constructing and

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[531] Statement of Primary Evidence, Palmer, 22 May 2017, para 42.

[532] Statement of Primary Evidence, Noble, 10 May 2017, Appendix C.

[533] Transcript, Noble, p 4843 to 4844.

operating the EWL. The concerns of The Local Lockup are better addressed through direct property negotiations between the parties.

[859] Submissions were received from the Owners' Committee of 2 Harbour Road and K & M Marras regarding access to their property and noise effects. Ms Rich for herself and on behalf of Onehunga Mall Cul-de-Sac Residents was also concerned with potential noise issues. In its closing submissions NZTA states that it would review the access issue by considering relocation and that, "A*s part of the EWL a noise barrier will be installed between SH20 and the cul-de-sac. Noise levels will be reduced to below category C for all protected premises and facilities in the area.* [Emphasis added]."[534]

[860] The Board is satisfied that these issues have been adequately addressed.

### Transport Effects

[861] Auckland Transport raised concerns with the design of the Galway Street Intersections (EWL, connection to Onehunga Harbour Road and Neilson Street). Mr Davies for Auckland Transport stated:

> "*The proposed combination of a roundabout and signalised intersection within 50m of one another, and the potential for queuing and congestion to impact on the safe and effective operation of the roundabout. There is also the potential for this congestion to change the movement patterns of traffic on Church Street between Onehunga Mall and Galway Street intersections.*"[535]

[862] Mr McIndoe for Auckland Council stated:[536]

> "*In my opinion, the extension of Galway Street should be realigned to achieve further separation from Onehunga Harbour Road and better relate to the Onehunga urban grid, rather than follow the proposed curvilinear configuration.*"

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[534] Closing Statement, Mulligan, para 19.17–19.18. An explanation of Category C is provided in Technical Report 7, Section 4.13, p17 that states that: "*In accordance with NZS 6806:2010, the Category C assessment is triggered if the noise level inside habitable rooms would be 45 dB LAeq(24h) or more, with the implementation of the selected structural mitigation measures. In that instance, at least a five decibel noise level reduction is required to achieve an internal noise level of no more than 40 dB LAeq(24h). However, the Transport Agency provides building modification mitigation for all Category C buildings where the internal noise level would otherwise be above 40 dB LAeq(24h) irrespective of the internal trigger level of 45 dB LAeq(24h) being reached.*"

[535] Statement of Primary Evidence, Davies, 9 May 2017, paras 20 – 21.

[536] Statement of Primary Evidence, McIndoe, 10 May 2017, para 15.5.

[863] The concerns of Auckland Council were reiterated by Mr Tindall, a traffic engineer.[537] He noted that the concerns he identified would be resolved during the process of developing the final design.

[864] In his rebuttal evidence, Mr Nancekivell addressed the submissions of Messrs Davies, Tindall and McIndoe:

> "*The Galway Street/EWL intersection should be relocated further to the east to provide more separation between these intersections (paragraph 4.3). The designation does contain space to move Galway Street further to the east. However, the current location has been developed to allow for Auckland Transport's proposed Mass Rapid Transport (MRT) to the Airport. Any design changes would have to be agreed by Auckland Transport.*"[538]

[865] Mr Nancekivell submitted an alternative concept design for the Galway Street / EWL intersection.[539]

[866] The Board considers that while the issues raised by various submitters in relation to Galway Street alignment are legitimate concerns, they are more appropriately addressed during the concept and detailed design phases of the Proposal and there is sufficient scope within the limits of the designation at this point to allow variations such as that proposed by Mr Nancekivell to be accommodated. NZTA has proposed a revision of draft condition DC.11B intended to provide for this. Consequently, the Board is satisfied that the NoR in this locality is reasonably necessary for achieving the objectives of the Requiring Authority for which the designation is sought.

[867] Several submitters expressed concern that the designation may adversely impact on the future alignment of MRT (light rail) to Auckland Airport and extension of the passenger rail network to the Onehunga Wharf. Mr Winter for Auckland Transport said, "T*he MRT corridor alignment shown in the EWL plans to date is consistent with the most recent study which was prepared in 2016*".[540] Mr van Schalkwyk for Auckland Transport said that the Auckland Transport and NZTA Boards recently resolved that:

> "*AT would proceed with route protection for the MRT corridor and that route protection should enable a staged transition from bus to light rail in the long*

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[537] Statement of Primary Evidence, Tindall, 10 May 2017. Paras 7.13 to 7.25.

[538] Statement of Rebuttal Evidence, Nancekivell, 20 June 2017, para 6.11.

[539] Ibid. Attachment B.

[540] Statement of Primary Evidence, Winter, para 10.

*term ... AT is confident that the EWL as currently proposed appropriately accommodates the MRT corridor options identified to date*". *He* "*supported the inclusion of designation conditions which explicitly require that the MRT corridor is appropriately accommodated, particularly in the event that the EWL proposal is modified.*"[541]

[868] Mr Nancekivell stated that the MRT to the airport had been allowed for. There was no evidence to demonstrate that the designation in Sector 1 would adversely affect other public transport aspirations.

## Conclusions

[869] In summary, the Board finds in relation to Sector 1 – Neilson Street Interchange of NoR1 that:

(a) The additional mitigation in the form of undergrounding of the MNG-ROS A 110 kV overhead transmission line is not supported;

(b) Te Hōpua a Rangi is a highly compromised environment and changes made by SH20 are irreversible. Any mitigation to address the effects of the Proposal should improve its legibility but the proposed artwork does not;

(c) The shared pathway and cycleway on the harbour side extending from the Galway Street intersection, through the Onehunga Wharf, past the Sea Scouts Building, terminating at the Manukau Cruising Club's building to join with Taumanu Reserve has increased to a minimum of 4 m. Further amendment to the conditions in this location are not necessary, although it would be desirable to find a better alignment of the shared facility at Tower 33;

(d) Adverse effects on the Sea Scouts Building can be appropriately mitigated by the conditions imposed;

(e) NoR1 encompassing part of the Onehunga Wharf is reasonably necessary for the purposes of constructing the EWL but subject to the roll back provisions of condition DC.5;

(f) Adverse severance effects of the Proposal, in particular on Onehunga Wharf, Aotea Sea Scouts Building and The Landing Tavern, will be sufficiently mitigated through the conditions imposed that require:

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[541] Statement of Primary Evidence, van Schalkwyk, para 26 to 30.

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(i) A collaborative design process with input from engineering, urban design and relevant environmental disciplines from various stakeholders;

(ii) The proposed land bridge to be relocated further to the east than originally proposed (opposite The Landing Tavern) and to be a minimum of 80 m and a maximum of 110 m wide;

(iii) A 5 m-wide pedestrian cycle link between Old Māngere Bridge (and the future new Old Māngere Bridge) and Onehunga Harbour Road;

(g) Adverse effects on specific properties have been appropriately addressed through design changes and conditions or, in the case of The Local Lockup cannot be mitigated and will be addressed through the PWA;

(h) Design of the Galway Street Intersections (EWL, connection to Onehunga Harbour Road and Neilson Street) has been amended and will be subject to further revision through the detailed design process. Conditions imposed provide for this; and

(i) The design of the Proposal accommodates Auckland Transport's current anticipated option for a light rail connection to the airport.

[870] Viewed through the lens of s171(1)(c) of the RMA, the Board considers that the designation and work are reasonably necessary to achieve the objectives of NZTA. In terms of s171(1)(b), alternatives have been appropriately considered. Adverse effects have been appropriately considered and avoided, or mitigated. Those effects that cannot be mitigated can be addressed through the PWA.

## 15.3 SECTOR 2 – MĀNGERE FORESHORE

[871] The western limit of this sector commences at approximate chainage 1200, east of the proposed Galway Street intersection with EWL, and terminates at approximate chainage 3500 at the MetroPort site at the eastern end of the historic reclamation. This section of the EWL is along the foreshore of the Inlet. The Board notes that the extent of designation excludes those areas to be reclaimed that are currently part of the CMA to the south. Those aspects are dealt with in chapter 14.2 of this Report, although some integrated effects are addressed herein.

[872] To the north, the designation affects portions of Waikaraka Cemetery, Waikaraka Park South and a number of properties in private ownership. The EWL is proposed to have signalised at-grade intersections at Captain Springs Road and Port Link Road. No intersection of the EWL at Alfred Street was proposed in the NoR but an overbridge providing pedestrian and cycling connections to the foreshore at this point is proposed.

[873] The proposed design of the EWL in this sector is a four-lane arterial road with a raised median, on the northern side of the Inlet from the Neilson Street Interchange to Anns Creek.

[874] The following features are affected by the area of the designation in this sector:

(a) Access to the foreshore from Alfred Street;

(b) Waikaraka Cemetery – loss of amenity, severance from the foreshore and impact on existing walking and cycling facilities;

(c) Waikaraka Park South proposed for use as a construction yard thereby delaying the development of additional sports fields by Auckland Council;

(d) Specific properties adversely affected by encroachment.

**Alfred Street Connection, Waikaraka Cemetery and Waikaraka Park**

[875] Auckland Council was concerned about the lack of vehicular connectivity with Alfred Street and the proposed connections of walking and cycling routes. While no vehicular connection is proposed at this time, there is no major impediment to an at-grade intersection being provided at some future date should that be considered necessary. It was also concerned about impacts on Waikaraka Park and Waikaraka Cemetery.

[876] Some adverse effects are the result of the road construction and associated bunding in the CMA and they are addressed here, including:

(a) Loss of amenity;

(b) Noise;

(c) Visual; and

(d) Effects on the historic stone walls resulting from construction of the EWL.

*Context*

[877] Mr McIndoe for Auckland Council had concerns about the effects of the NoR on the cemetery and park: [542]

> "*The consequence of the Proposal will be to undermine perceptions of the Cemetery/Park being linked to the Māngere Inlet, compromise the existing convenience of access to a coastal edge path, and also compromise the potential for any improved linkage to be provided in the future.*"

[542] Statement of Primary Evidence, McIndoe, para 13.3.

[878] He considered that the EWL would introduce visual dominance effects and noise of heavy traffic along the boundary of the park and cemetery. These effects would be exacerbated by the relative levels of the EWL, with the carriageway being elevated to more than 2 m above the cemetery at its edge, and also above the edge of the Waikaraka Park South site. This would significantly impact on the ambience and recreational potential of both spaces. To mitigate these effects, Mr McIndoe recommended bunding (including potential publicly accessible viewing locations) and additional planting. Noise control and landscape treatment should also extend along the full width of the Waikaraka interface as a co-ordinated, whole of area plan, including providing for Council's planned development of Waikaraka Park South.

[879] These concerns were reiterated by Mr Brown for Auckland Council:[543]

> "*Another important aspect of the current proposal is EWL's elevation above much of the existing shoreline. This would result in the road corridor sitting some 1.5m higher than the current Waikaraka Park Cemetery.*"

*Waikaraka Cemetery (including Alfred Street Connection)*

[880] Waikaraka Cemetery was formed in 1881 at a stage when the bays on either side of the land the cemetery occupies had yet to be reclaimed. For obvious historical reasons the cemetery became Onehunga's principal burial ground. For that reason the cemetery is the last resting place of the many early and significant Onehunga residents who are buried there. Today the cemetery is administered by Auckland Council.[544] There are limited burial spaces available. It is the site of a significant war memorial and returned soldiers' area.

[881] The Board heard evidence from witnesses who regularly visited the graves of family members.[545] Understandably there was opposition, and indeed distress, at the prospect of a relatively tranquil area being cut off, visually and physically, from the Manukau Harbour and landscape. The visual severance will be significant given the projected height of the highway as it passes the cemetery. These severance effects will also be felt by members of the public who walk in the cemetery and/or park their cars on the foreshore. The Board is satisfied that the cemetery functions both as a last resting place and as a recreational area.

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[543] Statement of Primary Evidence, Brown, para 60.

[544] The Cemetery has Category B status under the AUP:OP$^{DP}$. The previous owner, Onehunga Borough Council, extended the cemetery by reclamation in 1936. Refer Primary Statement of Evidence, Matthews.

[545] Transcript, Wackrow, p5619-5620; Transcript, Carr, p5602; Transcript, Randerson, p5857.

[882] In relation to the cemetery and existing shared pedestrian and cycling path, the designation will create a severance from Māngere Inlet, which is to be mitigated by the provision of a pedestrian and cycling overbridge connecting Alfred Street to the foreshore. Mr A Murray described the features of the proposed walking and cycling facilities:[546]

> "*(a) A bi-directional, off-road cycleway and separate footpath on the southern (inlet) side of EWL along the foreshore.*
>
> *(b) A recreational path along the coastal edge, comprising various widths and forms and taking a more meandering route.*
>
> *(c) A shared path on the northern (land) side of EWL between, and with connections to, Alfred Street and Captain Springs Road. The access point at Captain Springs Road is a new connection to the foreshore.*
>
> *(d) A shared path on Alfred Street (eastern side) between EWL and Neilson Street, including a signalised crossing of Neilson Street.*
>
> *(e) A shared path on the western side of Captain Springs Road between EWL and the entrance of Waikaraka Park/Onehunga Sports Club. New footpaths on the remainder of Captain Springs Road.*
>
> *(f) A footpath on the northern side of EWL between Galway Street and Alfred Street and between Captain Springs Road and the new Ports Link road. A new footpath connection to the foreshore from Miami Parade/ Port Link Road.*
>
> *(g) Five crossing points of the EWL, to allow pedestrians and cyclists to cross safely at Galway Street (signals), Alfred Street (overbridge), Captain Springs Road (signals), Port Link Road (signals) and Hugo Johnston Drive (underpass.*
>
> *(h) A shared path on the southern edge of the EWL structure from the edge of the Ports of Auckland land to Great South Road.*"

[883] The main effect of the NoR south of the cemetery is the severance. The land subject to the NoR is relatively narrow at this point because the EWL is substantially within the CMA. The mitigation proposed for this severance is the pedestrian and cycling overbridge. Mr McIndoe submitted an alternative design[547] for the overbridge and ramps that would have potentially exacerbated the adverse visual impact. He had stated that the land bridge proposed in Sector 1 "*would assist in offsetting severance at Waikaraka Park …*"[548]

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[546] Statement of Primary Evidence, A Murray, para 8.23.

[547] Exhibit G.

[548] Summary of Evidence, McIndoe, para 2(c)(v).

[884] The severance that the highway will cause to Waikaraka Cemetery will be permanent. There will inevitably be a qualitative change to the atmosphere of tranquillity currently attaching to the cemetery.

*Stone Walls at Waikaraka Park and Cemetery*

[885] The AEE[549] identified the stone walls surrounding Waikaraka Park and Cemetery as a heritage feature but that construction and operation of the EWL would not result in the destruction of or any physical damage to these.[550]

[886] Ms Matthews, for NZTA, referred to the walls located on the southern side of the cemetery as a distinctive, formally planned element along the coastal walkway. She noted that the alignment of the EWL had been designed to avoid direct impacts on Waikaraka Park and Cemetery, including the road, pōhutukawa trees and stone walls to the south.[551]

[887] Ms Caddigan, for Auckland Council, also referred to the stone walls as a heritage feature of Waikaraka Cemetery, noting that their construction from bluestone provided a distinctive character and was a key feature of the place. She concluded that the proposed alignment of the EWL allows for the retention of the stone walls at the south end of the cemetery.[552]

[888] The Board is satisfied, based on the evidence referred to above, that the limit of the NoR1 in the vicinity of Waikaraka Cemetery will have no direct effects on the heritage stone walls surrounding the cemetery.

*Waikaraka Park South*

[889] The NoR includes a significant area of unformed land on the corner of Captain Springs Road referred to as "Waikaraka Park South". This is intended for use as a construction yard while the EWL is constructed in this area. Auckland Council was concerned that its planned development of this area, comprising three sand-carpet, floodlit sports fields, would be delayed by NZTA's proposed occupation until at least 2022.

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[549] AEE Section 12.7.

[550] Ibid, section 12.7.3.3.

[551] Statement of Primary Evidence, Matthews, para 7.38 & 8.21.

[552] Statement of Primary Evidence, Caddigan, para 7.4.

[890] Ms Hannan, for Auckland Council, argued that NZTA should provide, by way of compensation, new sports fields in the general area, possibly at Gloucester Park North, with equivalent to 54 hours per week playing capacity and associated facilities.[553] She was supported in her concerns about the effects of the delay on the local community by the Maungakiekie Tamaki Local Board.[554] In her rebuttal evidence[555] Ms Hannan presented Auckland Council's *Draft Sports Field Capacity Development Programme (2012)* showing a proposed development of Waikaraka Park South had been planned to commence in 2017-18. The *Project Status Report (15 June 2017), which* she included with her evidence, showed proposed capital expenditure of $1.533 million and that the programme of work was "y*et to be confirmed*". Under cross-examination by NZTA's counsel and questions from the Board, Ms Hannan was unable to provide the Board with certainty about the current state of Council's planning, including proposed timing of the development and budgetary provision for Waikaraka Park South.[556]

[891] Mr Gouge, for Auckland Council, stated in his evidence that Waikaraka Park South was subject to Auckland Council Designation 551 and any use of this land would require the written consent of Auckland Council under s176(1)(b) of the RMA.[557] He supported Ms Hannan's opinion on the scope of mitigation / compensation that should be required from NZTA.

[892] The JWS Report for Waikaraka Park and Cemetery noted that there was "... *a Waikaraka Park South Sportsfield Development Plan highlighting the intent of the future development with appropriate zoning and designation. The status of any consents is to be confirmed*."[558]

[893] Ms Linzey referred to the uncertainty of Auckland Council's planning for the development of Waikaraka Park South. She stated that:

> "*There has been ongoing engagement and discussions with Council in respect of their plans for Waikaraka Park South, but there is also some uncertainty for ongoing development of these plans. I understand that there has not been a consented or Local Board adopted plan for this site (beyond*

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[553] Statement of Primary Evidence, Hannan, para 3.5 and 8.2; Summary Statement, para 3(e).

[554] Transcript, Diver, p3362; Closing Submissions, Bartley.

[555] Statement of Rebuttal Evidence, Hannan, para 1.6(a-g).

[556] Transcript, Hannan, p3430 – 3456.

[557] Statement of Primary Evidence, Gouge, para 13.95 to 13.102.

[558] Expert Conferencing Joint Witness Statement, Waikaraka Park and Cemetery, para (b).

*the 'Draft Concept Plan'/Development Plan approved for consultation in 2015)*."[559]

[894] She advised that NZTA proposed condition ROS.6(b) requiring the reinstatement of Waikaraka Park South as open grassed area by NZTA to enable Council to progress its planned development in the area.

[895] Mr Lanning, in his closing submissions, argued that the planned sports fields at Waikaraka Park South should be considered as part of the existing environment and form part of the Board's assessment under s171.[560] Auckland Council sought a condition of the NoR that NZTA fund the consenting and construction of two sand-carpet sports fields or equivalent to 54 hours playing capacity per week, lighting, two cubicle changing rooms, a toilet block and a carpark at a location to be agreed by Auckland Council. This would be to offset the delayed implementation of the development of Waikaraka Park South.

[896] Mr Mulligan said in his closing submissions that NZTA considers that the level of compensation proposed by Auckland Council was excessive because Waikaraka Park South will only be temporarily removed from the Auckland Council's development programme, there was little (if any) evidence that Auckland Council had previously committed funding to the provision of those fields and the design had yet to progress through any consultation or design phase. He said that as part of its restoration works following construction, NZTA would be improving the current state of the park grounds to facilitate the future sports field development.

[897] NZTA's proposed financial compensation of $1.54 million would place Auckland Council in the same position as it is now with respect to funding. This proposal is set out in condition ROS 6A. NZTA maintains that this will provide sufficient certainty for Auckland Council to allocate funds to improve playing hours on sports fields elsewhere in the community, while also providing certainty it can commence the planned work for Waikaraka Park South following construction of the Proposal.[561]

[898] The Board noted Mr Gouge's evidence concerning the designation of Waikaraka Park South but did not receive any evidence to clarify how this and the activity status of the proposed development under the AUP:OP impacted on NoR1 in respect of the provisions of s171. The Board is satisfied that there is an effect to

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[559] Statement of Rebuttal Evidence, Linzey, para 4.12.

[560] Closing Statement, Lanning, para 7.4. Reference to *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424.

[561] Closing Statement, Mulligan, para 11.32.

be mitigated, being the potential impediment to Auckland Council's aspirations for the area albeit that the timing of that is uncertain.

[899] The Board agrees with the condition proposed by NZTA as a reasonable approach to mitigation of the effect. This will require NZTA to provide funds to Auckland Council, up to a capped sum, based on the Council's approved budget (in 2017 dollars) for the Council to spend how and where it chooses to provide playing field capacity equivalent to that temporarily unavailable as a result of NZTA occupation of Waikaraka Park South as a construction yard. On completion of Sector 2 works, the Park will be returned to the Council and be available for redevelopment by the Council. The reinstatement work to be carried out by NZTA (levelling and grassing the site) will provide a further benefit to Auckland Council because the area will be in better condition for development than it is at present.

### Effects on Specific Properties

[900] The original NoR1 would affect a number of properties in Sector 2 whose owners / occupiers made submissions:

(a) EnviroWaste / ChemWaste;

(b) Heliport Limited; and

(c) Ward Demolition.

[901] These land owners or occupiers have reached agreement with NZTA as discussed in chapter 10.1 of this Report. They are also briefly addressed in turn below.

[902] EnviroWaste / ChemWaste was concerned with the encroachment of the northern boundary of the NoR on its site and the adverse effects that resulted for its operations. An expert witness conference agreed to reduce the extent of the encroachment into the ChemWaste site by 13 m to 18 m during construction and 5 m in the operational phase, which would mean the designation boundary would result in 1 m to 2 m encroachment into the current operational area of ChemWaste.[562] These amendments have been incorporated into the revised NoR. The parties see this agreement as resolving the objections of EnviroWaste / ChemWaste through Conditions DC.14A to 14D.

[562] Expert Conferencing Joint Witness Statement, EnviroWaste Ltd, para 4.1 – 4.3.

[903] Heliport submitted that it would be severely affected by the Proposal because the Civil Aviation Authority's rules preclude the taking off and landing of most, if not all, of its helicopters over a roadway such as the EWL.[563] A Joint Memorandum of Counsel[564] advised that NZTA and Heliport had reached agreement on conditions[565] that would resolve the matters, with NZTA working to relocate the heliport. As a result, while Heliport did not withdraw its submission, it did not take any further active part in the Hearing.

[904] Ward Demolition's site is accessed from Miami Parade, will abut the Proposal and is affected by the NoR. The site is used for the recycling of demolition materials. As a result of discussions, NZTA proposed amendments to the extent of the NoR to reduce the impact on Ward's operations.[566] The Board understands that further direct discussions between NZTA and Ward has now resulted in a mutually acceptable outcome reflected in the revised NoR1.

### Conclusions

[905] In summary, the Board finds in relation to Sector 2 – Māngere Foreshore of NoR1 that:

(a) The Proposal will introduce visual and noise effects on Waikaraka Cemetery and Waikaraka Park;

(b) Severance effects on Waikaraka Cemetery will be appropriately mitigated by the provision of a pedestrian and cycling overbridge connecting Alfred Street to the foreshore;

(c) The proposed alignment of NoR1 in the vicinity of the Waikaraka Cemetery will avoid direct effects on the heritage stone walls, mature pōhutukawa, and the cemetery itself;

(d) The effects of the Proposal on the planned development of Waikaraka Park South will be appropriately mitigated by the provision of funding for alternative sports field capacity and reinstatement of grades suitable for redevelopment;

(e) Adverse effects on specific properties have been appropriately addressed; and

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[563] Opening Statement, Mulligan, para 23.68; Opening Statement, Berry, para 1.3-1.4.

[564] Dated 18 July 2017.

[565] Conditions DC.13A to 13G.

[566] Correspondence: McIntosh of The Property Group to Bryce Marx of Ward Demolition, 21 August 2017.

(f) Te Hōpua a Rangi has been substantially modified over the years and is bisected by SH20. It is culturally important. The Proposal has sought to avoid, to the extent practicable, impacts on culturally significant sites.

[906] Viewed through the lens of s171(1)(c) of the RMA, the Board considers that the designation and work are reasonably necessary to achieve the objectives of NZTA. In terms of s171(1)(b), alternatives have been appropriately considered. Adverse effects have been appropriately considered and avoided, or mitigated. Those effects that cannot be mitigated can be addressed through the PWA.

## 15.4 SECTOR 3 – ANNS CREEK TO GREAT SOUTH ROAD

[907] Sector 3 extends from the POAL Pikes Point East site (from approximate chainage 3500) to just east of the Great South Road Interchange (approximate chainage 5150) and includes the construction of the Hugo Johnston Drive Interchange, and an area immediately north of that interchange that is initially to be used a construction yard and subsequently for a stormwater wetland and new carpark for access to the coastal shared path.

[908] Sector 3 mainly comprises viaduct structures, landing at the western and eastern ends, and at the Hugo Johnston Drive Interchange. It crosses the coastal and terrestrial extent of Anns Creek, the KiwiRail Southdown siding and North Auckland rail corridor, Kempton Holdings Limited land, the Mercury NZ Limited (Mercury) Southdown site (which includes the gas-fired power station, Transpower and KiwiRail assets), First Gas high pressure gas lines and pigging station, and the TR Group Limited site, which includes the terrestrial extent of Anns Creek. Sector 3 also includes a construction yard to be formed within the TR Group Limited site.

[909] While Sector 3 crosses the CMA, NoR1 does not extend into the CMA. Matters relevant to the works within the CMA have been addressed in the Board's consideration of resource consents and are not repeated herein.

[910] At Great South Road the limits of the NoR extend both north and south to allow the connection between the viaduct structures and the existing roads.

### Effects on Specific Properties

[911] The sites and infrastructure addressed in submissions that are affected through Sector 3 from west to east are:

(a) Kempton Holdings Limited;

(b) KiwiRail Southdown rail siding and North Auckland rail corridor;

(c) Mercury Southdown site, including the Mercury site, Transpower and First Gas assets, and KiwiRail assets;

(d) First Gas pigging station and high pressure gas lines beyond the Southdown site; and

(e) TR Group.

### Kempton Holdings

[912] Kempton Holdings Limited owns land south of Hugo Johnston Drive, which wraps around the western and southern side of the Mercury Southdown site. This site is intended for construction yard 4 and ultimately will contain a stormwater treatment wetland.[567] Mr Sax, on behalf of Kempton Holdings Limited, requested that the stormwater treatment pond proposed to be within his land be relocated south of the Mercury site. The location suggested by Mr Sax is within the CMA, and has been addressed in chapter 14.2 of this Report. In summary, the Board does not consider such relocation to be practical. In the absence of any practical alternative for the treatment of stormwater, the Board does not support the change sought by Mr Sax.

### TR Group

[913] The extent of the NoR1 designation through TR Group's land has been one of the more difficult matters for the Board to consider.

[914] A large portion of TR Group's land covered by the proposed designation at Anns Creek is an ecologically sensitive area.[568] The designation includes the footprint of the EWL structures, construction access, construction yard 5,[569] and then the balance of the Anns Creek East area that is to be subject to ecological mitigation and restoration. The site of the construction yard corresponds to TR Group's Stage 2 fill area for which they already hold consent but are yet to implement. NZTA has proposed a portion of the designation to be a "construction restriction area" to limit the effects of constructing the EWL to the minimum necessary and avoid adverse effects on the most significant ecological areas of the site. The construction yard

[567] Statement of Primary Evidence, Nancekivell, para 11.12 (c) and drawing AEE-CA-107.

[568] Ibid, Annexure A.

[569] Ibid. Refer drawing AEE-CA-108.

is intended to be a supporting laydown area for the construction of the Anns Creek viaducts and will be in use for 30 months from late 2020.

[915] In relation to loss of and disturbance to Anns Creek East vegetation, Dr De Luca proposed mitigation, which included the following: [570]

> "*Investigate opportunities to relocate the proposed construction yard within Anns Creek East (currently to be in the area where a consent exists for reclamation) be explored further. In addition, discussions with the consent holder should be undertaken to determine if there are opportunities for the consent to be surrendered and the area purchased by NZTA for long term enhancement and protection.*"

[916] This second recommendation gave rise to the main objections from TR Group to the limits of the designation affecting its land.

[917] Dr De Luca's summary stated: [571]

> "*The EWL ecology and wider project team worked collaboratively to develop an integrated suite of proposed measures to avoid, mitigate and offset effects on ecological values. The approach taken was to assess the 'bucket of effects' across all areas of ecology and develop a 'bucket of mitigation and offset', as it is not possible to propose like for like mitigation for effects such as permanent loss of marine habitat.*"

[918] When discussing the effects of the viaduct structures of the EWL Dr De Luca said:[572]

> "*… in the lava shrubland, several of the proposed alignments were going smack through the middle of the lava shrublands, so we've pushed to have that alignment to the north of the TR property. Also, the bridge structural engineers we had to get them to think about, 'Do you really need even less space to piers or can you make them a little bit more random and still make your bridge work, so to avoid pockets of lava where we can?' So I am quite comfortable that we have done everything we could to avoid (effects).*"

[919] Dr Bishop, for Auckland Council, stated in evidence that he had extensive experience and a special interest in the Anns Creek area: [573]

> "*The ecological sequence of lava shrubland, freshwater wetlands, saltmarsh and mangroves at Anns Creek is the sole remaining example of a sequence that was formerly common on the Auckland Isthmus before European settlement (Gardner 1992). It is therefore unique.*

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[570] Statement of Primary Evidence, De Luca, Table 7.

[571] Summary Statement, De Luca, para 7.

[572] Transcript, De Luca, p 1647.

[573] Statement of Primary Evidence, Bishop, paras 7.8 & 7.9.

> *Unusual plant communities grow on the lava flows and Anns Creek and it is the only place in the Tamaki Ecological District where native herb species, including a number of threatened plant species, grow together on lava. Anns Creek has additional scientific importance because it is the type locality for Coprosma crassifolia, a small tree which grows in the lava shrubland. This is the place where this tree was first collected by William Colenso in 1846, and where this species first became known to science …*"

[920] Ms Hopkins, for NZTA, considered that the primary adverse effects are from the loss of threatened ecosystems and vegetation in Anns Creek and lava flow vegetation along the coastal edge of the Māngere Inlet.[574]

[921] Mr Walter, the Chief Financial Officer of TR Group, stated in his evidence[575] that it is New Zealand's largest heavy commercial vehicle hire and leasing company, providing and managing approximately 5,500 heavy vehicles to the NZ transport industry. TR Group has annual revenues of approximately $200 million and employs 144 people. TR Group acquired the 6.6 ha site at 791-793 Great South Road in 2003. The land was acquired for the sole purpose of development to increase land area to support future business growth and provide a safer and more efficient access on to the busy local road network (Great South Road and Sylvia Park Road).

[922] Mr Walter stated that in 2009, after a three-year resource consent process, TR Group was granted land use consent by the former Auckland City Council to develop approximately 4.46 ha of its site, which was significantly less than what the company had originally hoped might be developed from the site when it purchased it. The former Auckland Regional Council, however, refused to grant consent for some of the land modification works required to develop this area and the application had to be reconsidered in a contested Environment Court hearing. This eventually resulted in an amended consent issued in January 2014[576] some eight years after the initial application was lodged.

[923] Mr Walter said that the result of the Court's decision is that, from its 6.6 ha site, TR Group has only been able to yield an additional land area of 18,600 $m^2$ to support its business and ensure its future at this location. Consequently, its yard areas, including those it is yet to develop, are an extremely valuable resource for it and

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[574] Statement of Primary Evidence, Hopkins, para 8.36.

[575] Statement of Primary Evidence, Walter.

[576] Consent No. R/LUC/2008/4724, 36055, 36056, 36058, 30316.

crucial to the future viability of TR Group's business at this location and consequently it opposed the NoR in this location.

[924] TR Group holds consents for two parts of its site.[577] The consent conditions impose significant obligations on TR Group to enhance the area through a lava shrubland management plan to enhance and protect the rare vegetation and lava outcrops of the site, and a wetland enhancement plan focused on wetland species and public access to a marginal strip through the site. At this time only Stage 1 of the development has been given effect to. The filling of Stage 2 has not been commenced and this is triggered by the filling of the area that NZTA has proposed for construction yard 5. This would also mean that the conditions applicable to TR Group's Stage 2 consent would need to be actioned by TR Group.

[925] With respect to the other effects that would occur within Anns Creek East, part of the site, including the lava shrublands, is already protected by conditions of the TR Group Stage 1 consents and associated covenant that the Board understands is currently being prepared. Those requirements are imposed through the land use consent and will transfer with the title in the event that ownership of the land changes. The development potential of the site is constrained by various planning restrictions, including existing consent conditions and AUP:OP overlays. However, it is also subject to the KiwiRail designation that arcs through the site and Mr Walter of TR Group was clear that despite existing planning restrictions, TR Group wanted to avoid the imposition of any further development restrictions, with a long-term view that opportunities for development may change.[578] When asked why TR Group wanted to retain ownership of the lava shrubland if it cost money to enhance and maintain, Mr Walter replied, "*[B]ecause it is our land and we have a right to own that*".[579]

[926] The fact that the covenant required for the completed Stage 1 fill in the TR Group site has not been prepared or registered is troubling. Given the vigilance that the Auckland Regional Council and now the Auckland Council have exhibited in favour of the Anns Creek East ecology, it is somewhat surprising that Auckland Council has not been vigilant with compliance monitoring and enforcement. Dr Bishop acknowledged this lack of monitoring[580] and also acknowledged that he had not

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[577] Ibid.

[578] Transcript, Walter, p 4654.

[579] Transcript, Walter, p 4653.

[580] Transcript, Bishop, p 2877– 2878.

been to the site for three or more years.[581] Nonetheless, absence of a covenant is a matter of consent compliance and is able to be enforced by Auckland Council, should it have been motivated to do so. Given the evidence heard, the Board is not convinced that Auckland Council or NZTA would necessarily be a better custodian of the site than the current owner.

[927] TR Group partially supported the EWL because of its positive transport outcomes.[582] However, it wanted the viaduct moved south to minimise impacts on its operations and future use of the site. It noted that a portion of its land was intended to be used as a construction area for the EWL and that area corresponded to its proposed Stage 2 development area for which it held consents.

[928] Mr Nancekivell, for NZTA, stated in evidence that moving the viaduct south through TR Group's land to minimise its impact was not an acceptable alternative alignment because it would increase the adverse effects on the ecology of Anns Creek. Mr Nancekivell also stated that:[583]

> "*The current proposal to provide an access under the EWL to the land adjacent to Great South Road is being developed to allow TR Group to use the land on the southern side of EWL adjacent to Great South Road. Construction space north of the EWL structure has been reduced to minimise disruption to TR Group's operations. Access will be via Great South Road south of the Sylvia Park Road intersection.*"

[929] NZTA accepted that the EWL would have adverse effects on the ecology in the Anns Creek area and that it would need to provide mitigation for those. NZTA's proposal for mitigation of the adverse effects of the designation on TR Group's land was well described in the closing submissions of Mr Mulligan:[584]

> "*(a) The restoration works proposed by the Transport Agency within the lava shrubland component of Anns Creek East were already being undertaken by TR Group as part of its Stage 1 consents;*
>
> *(b) That the works within the wetland management area of Anns Creek East were required by the Stage 2 consents held by TR Group and that those consents were likely to be implemented.*
>
> *The works to be undertaken by the Transport Agency in Anns Creek East consist of two parts. The first component is the construction of the East West Link on a raised viaduct through the northern portion of the Anns Creek East. The second component is the establishment of a construction yard at the eastern end of Anns Creek East. The establishment of the construction yard will occur in the same area as the Stage 2 works authorised by the Stage 2 consents held by TR. As no works whatsoever*

[581] Transcript, Bishop, p 2871.

[582] Submission No 126338.

[583] Statement of Primary Evidence, Nancekivell, para 15.74 to 15.77.

[584] Closing Submissions, Mulligan, para 14.10.

> *have been undertaken by TR in relation to the Stage 2 works that consent has not been given effect to.*
>
> *In line with the Transport Agency's position on the existing environment, it accepts that resource consents which are granted and likely to be implemented can form part of the receiving environment. However, a real world analysis needs to be undertaken. In that context, if the Transport Agency is to undertake works in the construction yard / Stage 2 area it will do so pursuant to the Transport Agency's own designation and resource consents and not TR's Stage 2 consent. It will therefore be impossible for TR Group to undertake that work itself and as a result the resource consents for Stage 2 cannot be implemented and those consents cease to be part of the existing environment.*"

[930] For TR Group, its legal counsel, Mr Littlejohn, submitted that the NoR1 over the western area of TR Group's site (the lava shrubland) was *ultra vires* because it did not meet the requirements of s171(1)(c) of the RMA that, [585] "*The work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought*". He argued that the objectives of the EWL:

> "*... could not remotely justify the designation of private land for weed removal, pest, plant and animal management, geological heritage restoration, restoration planting, interpretative signage relating to cultural, ecological or heritage protection matters and nor then could it justify its potential acquisition by the NZ Transport Agency for such purposes.*"

[931] Mr Littlejohn argued that there must be a nexus between an adverse effect and the mitigation proposed and in this case there was not.

[932] This argument (*ultra vires*) was rejected by Mr Mulligan in his closing.[586] While Mr Mulligan conceded there was no case law on this particular point, his counterargument considered that designating land for the space necessary to undertake mitigation and offsetting activities as part of a project is the usual practice for NZTA and other requiring authorities, and no *vires* issues have been raised in the past.

[933] Mr Mulligan referred the Board to several examples where NZTA has designated private land for mitigation:

(a) Waterview Connection – to provide sports fields for social mitigation;

(b) Christchurch Southern Motorway – to provide lizard habitat;

(c) Peka Peka to Ōtaki – to provide for ecological mitigation; and

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[585] Transcript, Littlejohn, p 554 to 571.

[586] Closing Statement, Mulligan, para 19.21 to 19.24.

(d) Mackays to Peka Peka – to provide for ecological mitigation alongside stormwater treatment.

[934] The above examples may well constitute situations where the designation has been used for mitigation purposes, but the Board was not informed about the status of the land so used in the examples. And as Mr Littlejohn observed, a history of unlawful activities will not necessarily justify a further unlawful use of land.

[935] Ms Myers for NZTA said in evidence that:[587]

> "*An ecological mitigation and offsets package has been developed for the Project which includes restoration of saltmarsh and lava shrubland ecosystems, and weed control in Anns Creek West and Anns Creek Estuary. A long term integrated environmental management plan is proposed to be developed for Anns Creek East. I recommend that to mitigate and offset adverse effects the long term permanent protection of Anns Creek should be provided for.*"

[936] Under cross-examination, Ms Myers said that the proposed work at Anns Creek on TR Group's land was part of the "package" of mitigation and not solely for adverse effects at Anns Creek.[588] She also clarified that to achieve "long-term permanent protection" she meant through public ownership of the land. Notwithstanding the consent requirement for TR Group to register covenants over the lava shrubland, she considered that public ownership under the Reserves Act or Conservation Act would allow for a higher standard of protection.[589] Consequently, the designation and purchase of the land by NZTA was the preferred method of protection of the lava shrubland because the duration of protection under its management would extend beyond the life of the mitigation plans required of TR Group.

[937] Dr De Luca stated in evidence that she was aware that her suggested condition that "… (TR Group's) *consent to be surrendered and the area purchased by NZTA for long-term enhancement and protection*" was not acceptable to TR Group.[590] She conceded that if TR Group had successfully implemented the conditions of its Stage 2 consent that mitigation work could not also be claimed by NZTA as mitigation for the EWL.

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[587] Statement of Primary Evidence, Myers, 12 April 2017, para 11.4.

[588] Transcript, 17 July 2017, pages 1568 -1569.

[589] Transcript, 17 July 2017, page 1576.

[590] Transcript, 17 July 2017, page 1671.

[938] Ms Rickard, for NZTA, said under cross-examination that she had no information that indicated that TR Group was not implementing its conditions of consent in respect of lava shrubland management.[591] She confirmed that the requirement for the covenant was part of the Stage 2 consent conditions. In relation to what additional mitigation was proposed by NZTA, she deferred to Ms Myers' evidence concerning the duration of the protection that would be provided.

[939] In relation to questions from the Board concerning the extent of the designation over TR Group's land Ms Rickard said:[592]

> "*... mitigating the effects of a transport project is a legitimate use of the designation as a tool. Simply confining the designation to the carriageway of the project wouldn't do that. So using the designation as a tool to secure that ability to carry out the mitigation – the designation affords you the ability to get to the site, to access the site to do that work, so in my view it is reasonably necessary.*"

[940] Dr Bishop, for Auckland Council, stated in evidence that he had been previously involved with TR Group's consenting applications. He identified a cumulative level of adverse effect on Anns Creek through progressive developments over the years. His first preference is for the EWL to avoid the SEA areas in Anns Creek entirely by shifting the alignment further to the north to protect this unique habitat.[593] Should that not prove achievable, he did not agree that the mitigation and offset package proposed by the NZTA was appropriate and recommended a suite of ecological mitigation and offset measures in addition to those proposed in the mitigation and offset package in Table 7 of Dr De Luca's evidence:

> "*A proposed construction yard will destroy a significant area of wetland and salt marsh and should be placed elsewhere. Post construction, all remaining natural areas of Anns Creek East should be managed for their conservation and biodiversity values.*"[594]
>
> "*If the habitat loss associated with the construction yard could be avoided or significantly reduced then the area of 'out-of-kind' restoration required would reduce to 3 – 7.5 ha. Much of the area that is proposed for the construction yard is already subject to resource consent to be drained, filled and turned into truck parking. However, its use as construction yard for the East-West Link facilitates the exercising of this consent. Re-locating the construction yard and purchasing this wetland remnant for incorporation into the proposed Anns Creek biodiversity reserve would significantly*

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[591] Transcript, 28 July 2017, page 2510.

[592] Transcript, 28 July 2017, page 2556, lines 30 to 40.

[593] Statement of Primary Evidence, Gouge, 12 May 2017, para 13.65 to 13.68.

[594] Statement of Primary Evidence, Bishop, para 9(a).

> *increase the value of the reserve and significantly decrease the ecological impact of the proposed Anns Creek east viaduct.*" [595]

[941] Dr Bishop considered that, post construction, all remaining natural areas of Anns Creek East should be purchased by the NZTA and managed for their conservation and biodiversity values. He further stated: [596]

> "*As part of overall mitigation for the Proposal the proposed construction yard area and all remaining natural areas of Anns Creek East should be put into an ownership and management structure that ensures the areas future management for conservation and biodiversity values.*"

[942] Dr Bishop did not agree with the mitigation approach adopted by Dr De Luca. He said that: [597]

> "*In my opinion the negative impact of the permanent loss of unique and threatened indigenous terrestrial ecosystems has not been sufficiently addressed or compensated for by the proposed environmental mitigation. In particular the permanent loss of freshwater wetland and lava substrate ecosystems is not adequately addressed.*"

[943] And he also opined that: [598]

> "*If movement of the viaduct is impractical, then the area of lava shrubland and freshwater wetland ecosystems destroyed or adversely affected by construction should be re-placed with restored habitat of equal area multiplied by a compensation ratio that is commensurate with their unique biodiversity values.*"

[944] Mr Gouge, for Auckland Council, stated in evidence in relation to s171(1)(c) of the RMA that when considering a notice of requirement the consent authority must have particular regard to whether the work and designation are reasonably necessary for achieving the objectives of the Requiring Authority for which the designation is sought.[599] He referred to the Environment Court description of the 'reasonably necessary' test as follows: [600]

> "*Rather the reasonably necessary test is an objective, but qualified one where necessary falls between expedient or desirable on the one hand and essential on the other, and the epithet 'reasonably' qualifies it to allow some tolerance.*"

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[595] Statement of Rebuttal Evidence, Bishop, 20 June 2017, para 1.14.

[596] Statement of Primary Evidence, Bishop, para 8.5.

[597] Statement of Primary Evidence, 10 May 2017, para 7.20.

[598] Ibid, para 9(b).

[599] Ibid, para 7.20.

[600] *Gavin Wallace Ltd v Auckland Council* [2012] NZEnvC 120 paragraph [183].

[945] He opined that, provided that the area to be designated was the minimum necessary to construct and operate the EWL, the spatial extent of the proposed designation was reasonably necessary to achieve the NZTA's objectives.

[946] In relation to mitigation of adverse effects identified by the experts, Mr Gouge said that biodiversity offsetting is addressed in Appendix 8 of the AUP:OP and provided relevant guidance. He referred to the opinion of Dr Bishop that the mitigation package proposed by NZTA did not meet the guidance provisions of Appendix 8 and, therefore, in his opinion, failed to avoid, remedy or mitigate the adverse effect on the environment resulting from the EWL.[601]

[947] The JWS Report for Ecology discussed the following matters (inter alia):

(a) Providing formal protection of the greatest extent of Anns Creek as possible is proposed as an offset measure;

(b) Acknowledgement that there are existing resource consents for reclamation of the stream, earthworks and removal of vegetation within the construction yard area. This removal is there for part of the existing environment and any steps not to establish the construction yard will be an enhancement or an offset;

(c) A conservation management programme to control weeds, restore threatened ecosystems and restore lava shrublands in Anns Creek and the wider inlet is proposed to mitigate and offset effects.

[948] Dr De Luca referred to Dr Bishop's concerns about the quantum of mitigation and offset: [602]

> "*… he chose to take a line by line, like for like approach to assessing our effects, the effects that we have identified in the mitigation that we've proposed, instead of taking the bucket of effects and bucket of mitigation approach that he also said was an appropriate way to approach this.*"

[949] In his closing submissions for Auckland Council, Mr Lanning said that designating TR Group's land was appropriate because, firstly, as a general principle, designating land for mitigation works was an appropriate application of the Requiring Authority's powers where the mitigation works are necessary to address the effects of a project, in order to achieve the Requiring Authority's objectives.

[950] Secondly, it is necessary to address the ecological effects of the entire EWL in a comprehensive and integrated manner across the entire proposal. This requires

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[601] Statement of Primary Evidence, Gouge, para 13.71.

[602] Transcript, De Luca, p1656.

ongoing ecological enhancement and protection works within the TR Group's land as part of a wider package of ecological works not only to mitigate the effects of that portion of the EWL within TR Group's land.

[951] NZTA's ecological mitigation works will effectively subsume the requirements of the TR Group's resource consents for the Stage 2 works but using a designation to authorise those works. The NZTA designation will be effectively replacing the TR Group's Stage 2 consent and, therefore, it is not appropriate to assess the effects of the designation on the assumption that the TR Group's Stage 2 works and the associated ecological mitigation is part of the receiving environment because it is not likely that the TR Group's Stage 2 consent will be implemented if the NoR is confirmed. He said that if the works in mitigation were carried out by NZTA as a condition of the designation it would not be engaging TR Group's Stage 2 consents.

[952] In his closing legal submissions, Mr Littlejohn stated that TR Group accepted, without reservation, that the lava shrubland is unique and will remain protected in perpetuity subject to its current status being retained within the statutory planning framework.

[953] The protection of property rights, real and personal, lay at the heart of the common law, under which it was not necessary for TR Group to justify why they want to enjoy, in the future, the property rights they currently enjoy. NZTA has questioned that right through its desire to take ownership of TR Group's land as part of its mitigation for the construction effects of the EWL.

[954] Mr Littlejohn said: [603]

> "*NZTA has taken the view that this (possibility of future development) somehow makes TR Group a fox in charge of the chicken coop. NZTA seeks to remedy what it seems to see as morally reprehensible land holding through the use of its statutory powers to designate and take the land from TR Group for the purposes of road building, yet it is NZTA who is proposing to build a road through the most ecological sensitive part of the site. A part that not even TR Group sought rights to develop.*"

[955] Mr Littlejohn further submitted that the designation of those parts of TR Group's land beyond the areas needed for temporary construction access or the long-term operation of the EWL was *ultra vires*. He referred to the evidence of Ms Hopkins that, "*We have done it before*" and provided a list of projects to persuade the Board without specific detail. He submitted that NZTA's approach was an abuse of statutory power and that what NZTA has done previously would not make it lawful.

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[603] Transcript, Littlejohn, p6290.

[956] Mr Littlejohn submitted that if a designating authority is able to designate for a purpose that has no proper nexus with its gazetted approval, s167 of the RMA has no meaning, which cannot be correct.

[957] He submitted that even if an evaluative assessment of the Notice of Requirement over these parts of TR Group's land is warranted, the designation must fail for want of being reasonably necessary for achieving the objectives for which the designation is sought. Rather, the designation is being sought in this location for ulterior purposes because by adding it to the bucket of mitigation NZTA is seeking to propose a bucket of mitigation sufficient to bring the Proposal across the line.

[958] There is no argument that the proposed mitigation in Anns Creek East is intended to be relied on as part of the mitigation for the whole of the EWL, as noted in Dr De Luca's table 7. Mr Mulligan stated, "*What are we doing that is extra?*" and NZTA believes that through the taking over the responsibility for the work in this area, and having long-term responsibility for that, it does add something to the equation.

[959] Mr Littlejohn stated that there is no clear evidence that public ownership is better for the ecology of the site than private ownership. In the last three years, there was clear evidence of TR Group undertaking very significant remediation work at Anns Creek East and the public guardian (Auckland Council) not even bothering to visit the site.

[960] He further stated that a fundamental problem that NZTA has with its "reasonable necessity" argument is that the works that they claim to be reasonably necessary for mitigation are, in fact, works that are already being undertaken by TR Group. He referred to the submissions of Mr Anderson, for the Royal Forest and Bird Protection Society, that the AUP requires that offsets be demonstrably additional. Even if the Board were to find that these works were reasonably necessary for mitigation, NZTA cannot claim the benefit of the works as the works are already part of the existing environment.

[961] In his closing legal submissions, Mr Mulligan outlined NZTA's position that its statutory mandate included an ability to act and designate land in order to avoid, remedy or mitigate adverse effects. It would be illogical to have a power to construct a road but not be able to mitigate the effects. The mitigation and offsetting works form part of and are not separate to the Project. Any mitigation or offsetting works would need to have a logical connection to the Proposal or work related to the NoR. The mitigation or offsetting of the effects of its projects is consistent with the NZTA's requirements to exhibit a sense of social and environmental

responsibility and to satisfactorily comply with all responsibilities expected of a Requiring Authority under the RMA.[604]

[962] Designating land for the space necessary to undertake mitigation and offsetting activities as part of a project is the usual practice for NZTA and other requiring authorities. It is normal and expected and no *vires* issues have been raised in the past.

[963] Mr Mulligan stated that NZTA has consistently acknowledged the importance of Anns Creek East (and the combination of threatened plant habitats and the lava shrubland habitats) and the potential effect of the EWL on that ecological value. Given the rarity of this assemblage, any level of effect is likely to be significant. NZTA's design has specifically minimised the required extent of removal of this vegetation through the use of the viaduct and the identification of specific pier locations.

[964] He said that NZTA accepted that there are potentially significant residual adverse effects on ecological values from the reclamation and works within Anns Creek, especially on Anns Creek East. On that basis, it proposed a package of ecological mitigation, offset and enhancement. The experts referred to this as the "bucket". The conferencing of ecologists agreed that it was initially "finely balanced" as to whether the package adequately addressed the adverse ecological effects (with the exception of Dr Bishop for Auckland Council, who expressed the view that the terrestrial measures were not sufficient). Additions to the mitigation and off-sets were made during the Hearing, which included an overall increase in ecological restoration and habitat enhancement values from 10 ha to 30 ha. The Board is satisfied that with this increase the bucket of proposed mitigation is sufficient with regard to the adverse effects.

[965] Mr Mulligan submitted that the works to be undertaken by NZTA in Anns Creek East consisted of two parts. The first component was the construction of the EWL on a raised viaduct through the northern portion of Anns Creek East. The second component is the establishment of a construction yard at the eastern end of Anns Creek East. The establishment of the construction yard will occur in the same area as the Stage 2 works authorised by the Stage 2 consents held by TR Group. As TR Group had not undertaken any works in relation to its Stage 2 consent, that consent has not been given effect to. If NZTA undertakes works in the construction yard / Stage 2 area it will do so pursuant to its designation and resource consents and not TR Group's Stage 2 consent. It will, therefore, be impossible for TR Group to undertake that work itself and, as a result, the resource consents for Stage 2

[604] NZTA Closing Submissions, Mulligan, para 19.22.

cannot be implemented and those consents cease to be part of the existing environment.

[966] He further submitted that:[605]

> "*(a) The ecological works associated with Stage 2 TR Group resource consents will be undertaken by the Transport Agency in order to construct its own construction yard. This has implications for whether the designation is reasonably necessary;*
>
> *(b) The ecological restoration and past management work in Anns Creek East wetland area are a valid part of the mitigation bucket work associated with development of the construction yard. The scale and nature of that work is set out in Stage 2 TR consents, and includes restoration and pest control. The Transport Agency needs the designation on Anns Creek East to, at a minimum, undertake this work. The evidence of Ms Myers is that such work might take 10-15 years. Since an integrated approach is required in Anns Creek it is not feasible to separate the lava shrubland from the wetland;*
>
> *(c) The consent conditions under the Stage 2 consent requiring TR Group to implement a covenant for long term protection of Anns Creek will never be given effect to. This means that the Stage 2 TR Group consents do not provide the long term protection to the wetland area that the Transport Agency could provide.*
>
> *The Transport Agency's primary position is that it will be able to deliver better environmental outcomes for Anns Creek East with the designation and resource consents in place than will be achieved simply by reliance on the existing TR Group consents.*"

*Findings and conclusion*

[967] NZTA has sought consents and designation for the construction of the EWL and formation of the construction yard for the Proposal, and a designation across the TR Group's site to provide for the mitigation by way of restoration and long-term protection of the Anns Creek East ecosystems.

[968] The matter of whether adequate consideration has been given to alternative routes is discussed in chapter 15.12 of this Report. It is noted that Auckland Council sought to shift the limits of the designation north from its proposed position in this vicinity while TR Group sought for it to be shifted south. Both of these propositions were assessed under the corridor options analysis and were rejected for legitimate reasons. Hence the Board is satisfied that adequate consideration has been given to alternative routes and s171(1)(b) of the RMA is satisfied.

[969] The Board accepts that the extent of NoR1 for the footprint of the EWL is necessary to achieve the objectives of the s171(1) (c) of the RMA.

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[605] Closing Submissions, Mulligan, para 14.13.

[970] TR Group holds resource consents for the development of its site in two stages. Specific conditions of consent apply to each stage of the proposed development. TR Group has given effect to its Stage 1 works and associated ecological restoration. The Board also understands that, belatedly, TR Group is preparing the covenant required for the Stage 1 restoration.

[971] The approach that has been adopted by NZTA towards the ecological restoration of Anns Creek East, as set out in the evidence of Dr De Luca, has been to utilise it as a part of the "bucket" of mitigation measures for adverse ecological effects. Dr Bishop conceded that with respect to Anns Creek East his main concern related to the implementation and potential double-dipping of mitigation, rather than the quantum imposed. The Board has accepted the opinion of Dr De Luca on this point and notes that she and Ms Myers consider that this is an issue that was "*finely balanced*",[606] but with the additional mitigation proposed it was sufficient.

[972] The main area of contention is the designation for the construction yard area, which comprises filling in the same footprint as that of TR Group's Stage 2 consents. If TR Group gives effect to the Stage 2 filling, this will also trigger the need for their Stage 2 ecological mitigation and associated covenant.

[973] The Board accepts Mr Lanning's submission that if NZTA undertakes the filling of the Stage 2 area under its own consents and designation (to be temporarily used as the construction yard), TR Group's consent will not be given effect with respect to Stage 2 and TR Group's Stage 2 ecological mitigation will not be triggered. The Board accepts that without a requirement on NZTA to undertake mitigation, its formation of the construction yard would result in a lacuna, that is that no Stage 2 / construction yard mitigation would be triggered.

[974] NZTA has sought designation for the construction yard as part of the Proposal. The Board accepts that the use of the construction yard is reasonably necessary for the construction of the Anns Creek viaduct, Great South Road Interchange and potentially works along Sylvia Park Road.

[975] The Board is concerned by the issues raised by Mr Walter of TR Group and in submissions by Mr Littlejohn regarding the reasonable necessity of permanently designating the full area of Anns Creek within TR Group land, in the absence of any offer by NZTA to purchase the land. This is the area required for ecological mitigation under TR Group's consents, some of which work has been carried out.

[976] The Board has not received any evidence to support the contention by NZTA and Auckland Council that the restoration and long-term protection of the site will be

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[606] Transcript, Myers, page 1518.

better achieved through public ownership. Dr Bishop acknowledged that he had not visited the site for approximately three years, despite being involved in the previous Environment Court hearings on behalf of Auckland Council.[607] He also indicated some concern regarding Auckland Council's performance in management of ecological mitigation.[608] Conversely, the Board has received copies of the TR Group Stage 1 restoration plans and has seen planting and weed management undertaken on that site.

[977] Consequently, the Board does not accept that the permanent designation of the full area of Anns Creek within the TR Group land is reasonably necessary for the construction of the EWL provided that the level of ecological restoration and protection that TR Group would be obliged to provide is achieved. However, to avoid the lacuna identified by Mr Lanning, the Board finds it reasonably necessary to retain a designation over the site for a period sufficient to provide for the establishment and maintenance of the proposed ecological restoration. Ms Myers considered that this should be at least 10 years after construction,[609] which was confirmed by Dr Bishop.[610] To that end, NZTA provided a draft condition that would require a roll back of the designation after a period of 10 years. The Board finds that such an approach is appropriate.

[978] The Board considers that the imposition of the designation for mitigation and the requirement for roll back after 10 years adequately alleviates concerns expressed by Mr Walter for TR Group. While TR Group maintains long-term aspirations for future development within the site, the site is presently subject to significant planning constraints under the AUP:OP (SEA and ONF) and those constraints are unlikely to be modified within a 10-year planning horizon. Therefore, the Board does not consider TR Group to be unduly disadvantaged by the approach favoured by the Board. Any residual access or economic loss will be addressed through other mechanisms such as agreements between the parties or the Public Works Act.

[979] The Board's reasoning for this result weighs the various critical factors discussed above. TR Group's Stage 2 development would, in the normal course of events, result in the imposition of a covenant (flowing from previous resource consents) against the title to TR Group's land. Because of the "lacuna", immediate activation of that covenant and its registration will be delayed. At no stage during the Hearing has TR Group objected to the imposition of the covenant. Indeed it accepts its

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[607] Transcript, Bishop,1 August 2017, p2871.

[608] Transcript, Bishop, 1 August 2017, p2877.

[609] Transcript, Myers, 13 July 2017, p1546-1547.

[610] Transcript, Bishop, 1 August 2017, p2872.

obligations. The Board accepts the merits of Mr Littlejohn's jurisdictional argument insofar as it relates to an extension of the designation, the need for which would weaken as time passes. The attraction of the condition proposed by NZTA flows from these considerations. First, there will be no permanent loss to TR Group (or its successors in title) of the ecological significant land. Secondly, if the TR Group has registered a covenant equivalent to the one they would be obliged to register for Stage 2 (which during the Hearing TR Group accepted), NZTA's proposed condition will oblige them to roll back the designation. Thirdly, during the interregnum period, for the reasons outlined above, an integrated recovery programme, directed by one entity, will be progressed.

### Mercury Southdown Site

[980] Mercury owns the 4 ha Southdown site at the southern end of Hugo Johnston Drive. As described by Mr Flexman,[611] the site comprises two parcels of land. The northern parcel, formally a car park servicing the site, now contains the Mercury Solar Research and Development Centre, which comprises an array of solar panels and a small shed housing batteries. The southern parcel contains the Southdown gas-fired power station (partially decommissioned), a Transpower substation and other national grid assets, a decommissioned high-pressure gas line from the adjacent First Gas supply, and a KiwiRail electrification substation. A First Gas pigging station is located immediately south of the site.

[981] The Southdown power station includes three gas-turbine generator packages (GE101, GE102 and GE102), with the turbines having been removed from each package, gas pipe work and the gas delivery point to the site, a Wet Surface Air Cooled Condenser (WETSACC) cooling system, control room and offices.

[982] NoR1 for the EWL occupies the southern half of the southern land parcel, extending over most of the power station. The viaduct that is proposed to cross the site will converge within 7 m of the southernmost generator package (GE105) and cross over gas pipework and approximately half of the WETSACC.

[983] The matters of relevance to Mercury's submission were summarised by Ms Devine[612] in her opening submissions as:

> "*(a) The environment against which the proposal must be assessed.*
>
> *(b) The significant adverse effects of the proposal in relation to the Southdown Site, including:*
>
> *(i) adverse safety effects;*

[611] Statement of Primary Evidence, Flexman, para 27.

[612] Opening Submissions, Devine, para 2.

*(ii) reverse sensitivity effects;*

*(iii) adverse effects on New Zealand's security of electricity supply;*

*(iv) adverse effects of Mercury being prohibited from making changes if NZTA considers they might hinder the EWL;*

*(v) adverse future effects on Mercury due to the relocation of infrastructure at Southdown; and*

*(vi) other adverse effects on Mercury's ability to use its site.*

*(c) How NZTA's assessment of effects is deficient.*

*(d) Part 2 of the Act, including:*

*(i) the appropriateness of considering it;*

*(ii) how the Board cannot be sure the EWL would provide for economic wellbeing; and*

*(iii) why the proposal is contrary to section 7(b) (efficient use and development of natural and physical resources).*

*(iv) section 7(j) and the potential effects of the EWL on the development of renewable energy.*

*(e) Why the Ministers' reasons for directing a Board of Inquiry hearing require particular regard to be had to important infrastructure.*

*(f) How the proposal is inconsistent with relevant electricity and infrastructure provisions of policy statements and plans.*

*(g) The fact that adequate consideration has not been given to alternative sites, routes or methods of undertaking the proposal.*

*(h) Why the Board can have no confidence that the effects in relation to the Southdown Site would be avoided, remedied or mitigated.*

*(i) Why the Board should decline to authorise the EWL at this time.*"

[984] The Board is satisfied that those matters represent the issues that have been canvassed and responded to by NZTA and Mercury throughout the Hearing.

*The Environment against which the Proposal Must be Assessed*

[985] The environment against which the Proposal must be assessed was specifically addressed in the JWS Report on *Planning – Southdown site*[613] attended by Mr Grala and Ms Rickard, but the output of that JWS Report was inconclusive. Therefore, the Board relies on the various statements of evidence and cross-examination in its consideration of this matter.

[613] Expert Conferencing Joint Witness Statement to the Board of Inquiry RMA Planning – Southdown Site, Tuesday 11 July 2017.

[986] The key issue in defining the existing environment was whether an operating gas-fired power station should be considered as part of the existing environment. This matter evolved through the Hearing and is best summarised by reference to the closing submissions of Ms Devine and Mr Mulligan.

[987] Ms Devine maintained that the environment comprises:[614]

(a) An operating power station;

(b) A site and power station of national significance; and

(c) Lifeline infrastructure at the Southdown site.

[988] Mr Mulligan[615] contested that the environment to be considered does not include an operating power station. His reasons included:[616]

(a) Based on the evidence of Mr Crimmins, the Auckland Council air quality expert, the commissioning of new gas-fired turbines would likely require a change to the existing discharge to air consent, or require a new consent;

(b) Based on the Summary Statement of Mr Grala,[617] the operation of the turbines at the site was undertaken as permitted activity under the legacy Auckland District Plan – Isthmus Section. The operation of a gas-fired power station is no longer permitted under the AUP:OP and would need approval from Auckland Council;

(c) The power station was not lawfully permitted because it failed to meet consented requirements with respect to the provision of a footpath easement around the southern side of the site.

[989] With respect to item (a) above, the Board does not accept that the recommissioning of the power station would, under all circumstances, necessitate a change or new discharge to air consent. While possibly unlikely, Mercury could reinstall the same turbines as previously operated. In that case there would be no legal requirement to change the existing consent, provided all conditions were complied with. Alternatively, Mercury could install turbines with less emissions than those removed. In that case, a change of consent conditions may be required to reference the updated technology but, absent of any other changing circumstances,

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[614] Closing Submissions, Devine, para 3.

[615] Closing Submissions, Mulligan, para 13.23.

[616] Closing Submissions, Mulligan, para 13.27

[617] Transcript, Grala, p 6119; Summary Statement, Grala, para 22.

the Board considers that it would be highly likely that such a change would be granted by Auckland Council.

[990] Likewise, for item (c) above, the Board does not accept that a non-compliance of the provision of an easement around the site deems the operation of the power station unlawful. The Board is satisfied that that is a matter of compliance and enforcement between Mercury and Auckland Council. The power station operated from 2006 to 2015 and the Board is satisfied that Mercury (through its predecessor Mighty River Power) gave effect to the consents necessary for the operation of the site, notwithstanding this matter of non-compliance.

[991] The Board now turns to the question of regulatory status of the power station (item (b) above). This matter arose through the Summary Statement presented by Mr Grala. It was not addressed in Ms Devine's closing submissions. Conversely, Mr Mulligan submitted in closing that the power station would need to either seek a resource consent as a discretionary activity under the AUP:OP[618] to recommence generation, or apply for an extension of existing use right under Section 10 of the RMA. It would have until December 2017 to make the s10 RMA application, based on the December 2015 cessation of power generation at the site. Mr Mulligan[619] contended that if such an application was sought, Auckland Council would have to consider the planning environment existing at that time, which would include NoR1, and take account of potential effects on the activity sought by the NoR in its decision.

[992] The Board accepts that in the circumstance outlined by Mr Mulligan, an application for an extension of the existing use right would, under s10(2)(b)(ii) of the RMA, necessitate consideration of the NoR and likely require the approval of NZTA as a potentially adversely affected person. However, the Board has not heard submissions from Mercury, or evidence from any person, on this matter. The existing land use consents for the site,[620] while not triggered by a rule of the legacy District Plan that explicitly relates to a gas-fired power station, do purport to authorise the development and operation of the power station. Consequently, the Board is reluctant to base its consideration of the Mercury submission on the basis that the future operation of the power station would be reliant on an extension of existing use rights, or a new land use consent under the AUP:OP. Accordingly, the Board cautiously bases its consideration of effects on Mercury on an assumption

[618] AUP:OP Rule E26.2.3.1(A63).

[619] Transcript, Mulligan, p 6565.

[620] Refer Exhibit B, Mercury.

that Mercury could rely on existing land use consents to operate the gas-fired power station, noting that the actual legal status is unconfirmed.

[993] Much evidence was heard on the likelihood of the power station recommencing generation, or of being used for synchronous condensing for voltage regulation. In particular, this included evidence of Mr Wickman, Mr Flexman, Mr Whineray, Mr K Murray, Mr Heaps, and Mr Noble (who on this matter was expressing a personal opinion rather than providing evidence on behalf of Transpower). The evidence of these witnesses addressed, among other matters, the extent that the EWL would inhibit the restart of generation, introducing operating risks and delays in recommissioning that would impact on the economic opportunity to generate power at short notice. The Board has considered all evidence on these matters in detail. For the purposes of confirming the existing environment, however, the Board does not second-guess Mercury's intentions for the site. Therefore, the Board cautiously includes the operating 135 MW gas-fired power station as part of the environment to be considered. By taking this approach, the Board ensures that its consideration of potential adverse effects between the EWL and the Mercury site is appropriately conservative, being based on the potential co-location of the road with the operating power station.

[994] To further define the existing environment and inform its overall assessment of effects of the EWL on the Southdown site, the Board also considers whether the Mercury Southdown power station can reasonably be considered as a site and power station of national significance, as contended by Ms Devine. Suffice to say that significant evidence was heard on this matter, particularly from Messrs Flexman,[621] Whineray[622] and Heaps.[623] Mr Noble's[624] evidence was also relevant to this matter.

[995] Based on the definitions provided in Schedule 1 of the Civil Defence Emergency Management Act 2002, the Board accepts that the Southdown site does contain infrastructure operated by Lifeline Utilities, being the Transpower substation and other national grid assets, the KiwiRail substation and the power station (being operated by Mercury, which is a Lifeline Utility). The adjacent First Gas pigging station and pipelines are also infrastructure operated by a Lifeline Utility. Mr Grala

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[621] Transcript, Flexman, para 72.

[622] Transcript, Whineray, p 4148.

[623] Transcript, Heaps, p 3979.

[624] Statement of Primary Evidence, Noble, para 46 (46.1 – 46.4).

expressed the view that Mercury's concern also related to its dependence of the location of the Transpower and First Gas Lifeline Utilities within or adjacent to the site, that the strategic value of the site to Mercury was enhanced by those assets.[625] The Board accepts this, but notes that it is distinct from considering the power station as a Lifeline Utility.

[996] The Board does not accept that the power station itself should be considered as an essential Lifeline Utility. In forming this view, it also considers the extent that the Southdown site contributes to the regional and national security of electricity supply, another matter given significant attention by Mercury. Discussion on this is provided later in this chapter.

*Co-location of the EWL and Power Station – Assumptions Underpinning the Proposal*

[997] The potential effects of the EWL co-location with the potentially operating power station were extensively addressed in the evidence of NZTA and Mercury witnesses.[626] In summary, those effects include construction effects (primarily relocation and access to infrastructure, access around the site, dust, vibration and potential delays in recommissioning of the plant), and operating effects, which comprise access around the site, delays in restart, and risk to both the Southdown site and users of the EWL. A further potential adverse effect is how the EWL may impact on future redevelopment and use of the Southdown site.

[998] Pausing first to consider future uses of the site, the Board acknowledges that impacts on possible redevelopment and alternative use of land is a matter that must be considered through a NoR, to the extent that it can be in each circumstance. In the absence of confirmed redevelopment proposals, where it cannot be considered in detail, economic impacts of future redevelopment potential can be addressed through alternative mechanisms including the PWA. The Southdown site has a Business – Heavy Industry zoning that provides for a range of permitted land uses (subject to standards). In this case, the Board has not received any specific proposal for redevelopment of the Southdown site and cannot reasonably form a conclusion on the effect that the EWL may have on redevelopment. Therefore, in this instance, those issues should most appropriately be addressed through alternative commercial and legal mechanisms.

[999] Turning to more fundamental matters, Mercury contended that NZTA had incorrectly based its design and assessment of effects on an assumption that the

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[625] Transcript, Grala, p 6085.

[626] Transcript, Hopkins, p 2380 – 2381; Transcript, Erskine, p 3508, 3599 and 3720-3721; Statement of Primary Evidence, Grala, paras 23, 118-136; Statement of Primary Evidence, Phillis, para 58; Supplementary Evidence, Erskine, para 1.5.

power station was permanently decommissioned. This contention contributed to Mercury's position that the assessment of effects had been inadequate.

[1000] As an opening determination, the Board does not accept that any inadequacy in an assessment of effects at the time of lodgement of a NoR prevents all relevant matters being appropriately addressed in the final decision. The matter of whether the AEE adequately addressed all effects in sufficient detail has been superseded by the extensive evidence presented, cross-examination, and questioning by the Board that has occurred since lodgement of NoR1. For the reasons discussed below, the Board finds that it does have sufficient information to appropriately determine the potential effects of the co-location of the EWL and power station, and decide whether those effects can be avoided, remedied or adequately mitigated.

[1001] Turning to the assumptions on which the EWL alignment was based, it is concluded from the evidence presented by Mr Wickman that the NZTA had been informed in December 2015 that the Southdown site was to be retained by Mercury for "*future generation development*".[627] The exact format and footprint of such future generation had not been confirmed to NZTA in December 2015.[628]

[1002] Notwithstanding the meeting held between Mr Whineray and Mr Brash (Acting Chief Executive of NZTA) in 2016,[629] the Board has not received any evidence that indicates that prior to the lodgement of NoR1, the NZTA project team was informed that the co-location of the EWL with the power station would result in insurmountable adverse effects and risk. Based on the evidence of Ms Linzey[630] and the material provided in Annexure A of Mr Wickman's rebuttal evidence, the Board is satisfied that NZTA did undertake an analysis of route options that took account of future power generation at the site and ultimately took account of the option to recommission the existing turbine packages. There was ongoing exchange of technical information between the NZTA and Mercury regarding equipment specifications, access clearances and the like. Much of the information provided by Mercury was co-ordinated by Mr Graafhuis, an employee of Mercury who attended the Hearing but was not called to provide evidence.

[1003] The Board concludes that the proposed alignment resulted from a balancing of potential effects between the ecologically significant Anns Creek East and the

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[627] Statement of Rebuttal Evidence, Wickman, Annexure A; email from Duncan Annandale to Scott Wickman, 18 December 2015.

[628] Statement of Rebuttal Evidence, Wickman, Annexure A; email from Duncan Annandale to Scott Wickman, 21 December 2015; email from Duncan Annandale to Scott Wickman and Mike Forrest, dated 22 January 2016.

[629] Statement of Primary Evidence, Whineray, para 10.

[630] Statement of Primary Evidence, Linzey, para 10.7.

potentially recommissioned power station, as well as other constraints such as Mercury's Solar Research Development Facility, KiwiRail corridors to the east and west, Transpower infrastructure, and links to Great South Road and Sylvia Park Road. Regardless of NZTA's position on the likelihood of the power station being recommissioned, the Board is satisfied that the route selection, design and assessment of effects was based on an accommodation of that occurring.

*Security of electricity supply and delays in recommissioning the power station*

[1004] Throughout the Hearing, Mercury maintained that the Southdown power station was regionally and national significant infrastructure. Mr Kieran Murray, economist for Mercury, identified the key advantages of the site as being its existing power generation infrastructure and consents, and its co-location with other existing key infrastructure (gas supply and Transpower grid).[631] Mr K Murray addressed in detail the contribution that he considered the site makes to security of electricity supply, and impacts that the EWL may have on that contribution,[632] particularly the delay in recommissioning power generation that may be caused by the co-location of the EWL with the site. These matters were reiterated in Ms Devine's closing submissions.[633] In light of the stated significance of the site, the Board also broadens its consideration to the effect that permanent closure of the plant may have on security of supply, should that be an outcome of the EWL as proposed.

[1005] Mr Flexman[634] indicated that in the absence of the EWL it would take three to four months to recommission power generation at the site. That period would be required to:

(a) Procure and install three gas turbine engines at the approved locations;

(b) Reconnect the gas supply pipework;

(c) Replace the steam injection system (for NOx control) on Units GT101 and GT102 with a high pressure water injection system;

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631 Statement of Primary Evidence, K Murray, para 35.

632 Statement of Primary Evidence, K Murray, paras 34 to 84.

633 Closing Submissions, Devine, paras 7 and 8.

634 Statement of Primary Evidence, Flexman, para 46.

(d) Procure and install a water treatment plant for units GT101 and GT102 (the existing system is sufficiently sized for GT105 only);

(e) Recruit and train operators; and

(f) Test all safety systems.

[1006] The period necessary for reconnecting the First Gas supply and recruiting staff was disputed by NZTA.[635]

[1007] Mr Flexman confirmed that the cooling system necessary to restart the site would require approximately 20 percent of the area currently required for the WETSACC and there would be space to install it, taking account of the changes to the layout that would be required to accommodate the EWL.[636] If not undertaken prior to the decision to recommission the site, the removal of the WETSACC and replacement with a new cooling system would add up to six months to the restart programme[637] (a total of up to 10 months). Mr K Murray, economist for Mercury, contended that the extended lead time for a restart impacted on the economic viability of the restart, and the benefit that could be afforded to Auckland by bringing that generation back on line.[638] Examples of the need to restart the power station included dry years impacting hydro generation, failure of significant transmission infrastructure, or failure of alternative gas-fired power supply, or a combination of these factors.[639] Evidence of Mr K Murray for Mercury and Mr Williamson for NZTA debated whether extending the restart period from four to eight months would have an economic impact on Mercury or New Zealand.

[1008] Mr Heaps, for NZTA, expressed doubt regarding the stated strategic circumstances for recommencing gas-fired power generation at the site. He identified other sites outside Auckland with similar advantages to the Mercury site[640] and formed the following conclusions with respect to security of supply:[641]

(a) The Southdown site is not substantially more attractive than all other generation sites.

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[635] Closing Submissions, Mulligan, para 13.88(a-e).

[636] Transcript, Flexman, p 4963 and 4964.

[637] Statement of Primary Evidence, Flexman, para 48.

[638] Transcript, K Murray, p 5244.

[639] Statement of Primary Evidence, K Murray, para 58.

[640] Statement of Rebuttal Evidence, Heaps, para 4.11.

[641] Statement of Rebuttal Evidence, Heaps, para 1.2.

(b) Locating solar at the Southdown site would not be expected to have a security electricity supply benefit.

(c) There is not a range of scenarios where re-establishing power generation at Southdown would significantly reduce the probability of a national electricity shortage.

(d) It is difficult to envisage construction of the EWL on the proposed alignment limiting Mercury's ability to provide a voltage support service.

(e) It is difficult to think of examples where the risk of blackouts is less if Southdown generation can be recommenced four months sooner.

[1009] Mr Heaps considered that future generation at that the site would be based on a commercial decision and that it was unlikely that such a decision would be significantly influenced by the recommissioning period being extended from four to eight months.[642] Nonetheless, the Board notes that NZTA has now modified its proposed Condition SD.1A such that any delay in recommissioning the site will be no more than four months.

[1010] Mr Noble (who on this matter was expressing a personal opinion rather than providing evidence on behalf of Transpower) also addressed the strategic value of the Southdown power station and agreed with the conclusions presented by Mr Heaps.[643] When asked about the strategic need to retain the ability to recommission the site, he responded: [644]

> "*The only comment that I would make is that whether there's a generator there or isn't there a generator there is reliant on the price of electricity that the company that owns it will get at the time and the offer it can put in. There are transmission solutions, there are non-transmission solutions, there is a distributor generation, there's all sorts of things that impact the market but it is a commercial piece of equipment that it's got to wash its own face in the price zone.*"

[1011] Mr Noble also outlined a number of alternative options that Transpower has identified to provide voltage support, and indicated that such measures are not required while generation remains available at Huntly. Mr Noble inferred that Transpower was not reliant on a generation option being maintained at the Southdown site.[645]

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[642] Transcript, Heaps, p 3978-3979.

[643] Transcript, Noble, p 4878.

[644] Ibid, p 4877.

[645] Ibid, p 4870

[1012] Having carefully considered the evidence, the Board accepts that the site has advantages to Mercury that other sites, including greenfields sites, do not. Those advantages are the existing power generation infrastructure and consents, and access to supporting infrastructure. However, the Board has not been convinced that the Mercury Southdown site is strategically important to the security of supply to Auckland or New Zealand. In this regard, we favour the evidence of Mr Heaps and the opinion expressed by Mr Noble. In the unlikely event that the EWL and a gas-fired power station could not co-locate and notwithstanding the Board's discussion and findings on risk (provided below), the Board finds that the permanent closure of gas-fired electricity generation at the site would not result in an economic or security of supply loss to Auckland or New Zealand. The same conclusion applies in the event that synchronous condensing voltage support could not be carried out on the site.

[1013] In the more likely event that the EWL and the power station can co-locate, the conditions presented with NZTA's closing submissions will require that EWL does not result in a delay in recommissioning the power station beyond the minimum four-month period indicated as acceptable in Mercury evidence, unless Mercury agrees to a longer period. The Board finds that to be an acceptable timeframe, consistent with Mercury's evidence, and notwithstanding that a longer delay is unlikely to be strategically significant.

*Access*

[1014] Site access effects were addressed by Mr Nancekivell[646] and Mr Carlisle, the Mercury traffic witness. Mr Carlisle confirmed that the matters relating to vehicle access to the site had been resolved, and that other matters regarding site clearances, internal vehicle circulation and pedestrian access could be addressed through appropriate conditions.[647] Some of those matters have been directly addressed in NZTA's proposed conditions and the Board finds that the potential traffic and access effect that the EWL may have on the Southdown site can be adequately minimised and managed through the imposition of appropriate conditions.

[646] Statement of Rebuttal Evidence, Nancekivell, paras 7.23 to 7.33.

[647] Transcript, Carlisle, p 5483.

*Air Quality*

[1015] Dust and potential disturbance of asbestos was identified by Mr Graham, Mercury air quality witness, as potential construction effects that may impact the Mercury site. Mr Graham considered that these effects could be adequately managed through appropriate conditions.[648] Ms Needham, NZTA's air quality witness, did not accept all of Mr Graham's suggested conditions but identified amendments to Conditions AQ.1 and AQ.2 that tighten the performance for management of dust and responses to adverse dust effects.[649] Aside from those amendments, Ms Needham considered that the dust management conditions, including those that address network utilities within the site, will appropriately avoid or minimise dust effects. Ms Needham also confirmed that the management of asbestos would be covered in the Contaminated Land Management Plan, so did not require a separate condition.[650] The Board accepts Ms Needham's evidence on those matters and finds that adoption of the conditions now proposed will adequately avoid, remedy or mitigate dust and asbestos effects.

[1016] Mr Graham also raised concern about the impact that the operation of the EWL may have on ambient air quality and Mercury's ability to comply with conditions of its existing discharge to air consents.[651] In summary, his concern was that the addition of traffic south of the Mercury site could increase the background NOx to the extent that that it would impact on Mercury's ability to operate within the New Zealand National Environmental Standard for Air Quality (NES – Air Quality) maximum allowable concentration of nitrogen dioxide (NO2) 200 µg/$m^3$ (as a one-hour average). The current consented emissions from the station, when combined with the default background level, accounted for 71 percent (141 µg/$m^3$) of the 200 µg/$m^3$ limit.

[1017] Ms Needham and Mr Crimmins both addressed the matter of NOx emissions and compliance. Ms Needham identified the Mercury site, when operating, as the largest NOx emitter in Auckland (4,600 kg/day) and that the road will be approximately 8 kg/day. Ms Needham acknowledged that there was some "float" in the existing $NO_2$ emissions from the site within the maximum allowable 200 µg/$m^3$

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[648] Summary Statement, Graham, paras 6 – 8, 28 and 29.

[649] Summary Statement, Needham, para 6.

[650] Summary Statement, Needham, para 7.

[651] Statement of Primary Evidence, Graham, paras 26 to 30.

limit.[652] She also indicated that the maximum levels caused by the power station and the maximum levels caused by the road would not coincide, because they would occur in different meteorological conditions.[653] Mr Crimmins agreed that with the EWL operating, the combined levels, "*will be still reasonably comfortably within the 200 microgram as a worst case*".[654] We favour the evidence of Ms Needham and Mr Crimmins in this regard.

*Potential Effects – Health and Safety Risk*

[1018] The primary area of contention between NZTA and Mercury related to the risk that the co-location of the EWL and the power station may have for the safety of people. Those risks were based on:

(a) Risk to the Mercury site from:

(i) Direct impact of vehicles or objects falling into the site;

(ii) Damage and possible explosions caused by vehicles or objects falling into the site; and

(iii) Ignition of gas by vehicles or activities on the road.

(b) Risk to road users from:

(i) Turbine disc failure leading to projectiles passing across or landing on the road or cycleway;

(ii) Explosion of gas plumes emanating from the site, either through ignition on the site or on the road; and

(iii) Drivers being startled by start-up and venting noises emanating from the site.

[1019] Dealing with noise effects first, the Board does not accept that drivers are likely to be startled to the extent that accidents will occur if start-up or venting noises emanate from the site. The exact level of noise that drivers could be subject to was not agreed between Mercury or NZTA but Ms Wilkening, on behalf of NZTA, was

[652] Transcript, Needham, p 1746.

[653] Transcript, Needham, p 1763.

[654] Transcript, Crimmins, p 3099.

the only relevant expert to present evidence on this matter[655,656]. The Board accepts Ms Wilkening's conclusions and finds that with the inclusion of a noise barrier along the northern side of the EWL at this location, potential effects of noises emanating from the power station will be adequately mitigated for road users. Accordingly, the Board notes that NZTA has proposed a noise wall of minimum 2.5 m height (Condition SD.2(vi)).

[1020] For completeness, the Board also accepts and adopts Ms Wilkening's evidence on the potential effects of vibration from the road, where she concludes:[657]

> "*The vibration sensitivity and trip settings for Southdown equipment as provided by Mercury is magnitudes above any potential East West Link traffic vibration that may be experienced on the site. The transmission of traffic vibration from the bridge structure through the ground into the turbines will be below the vibration levels that would be caused by onsite vehicles and equipment, will generally be imperceptible and below the tripping criteria provided Mercury by orders of magnitude. The risk of turbine tripping due to road traffic vibration is negligible, approaching zero.*"

[1021] The key contested elements of risk relate to the ignition of gases and projectiles passing to or from the EWL. These matters were directly addressed at the Southdown Site Expert Conference attended by Mr Erskine for NZTA and Mr Phillis for Mercury.[658] Subsequent to that conference, Mr Erskine and his associate Ms Cook prepared a Qualitative Risk Assessment (QRA)[659] of the co-location of the EWL and power station, using the hazards and risks agreed to with Mr Phillis. Mr Erskine spoke to the QRA and responded to extensive questioning and cross-examination during the Hearing. The transcript is extensive in that regard and we do not quote every element of it in this Report. Suffice to say that the Board has considered the matters in significant detail, taking account of all relevant evidence presented by Mercury and NZTA witnesses.

[1022] Mr Erskine used the Victorian Risk Criteria and current WorkSafe New Zealand guidance on values when assessing risk reported in the QRA,[660] and presented a summary of his results in Table 19 of the QRA. Mr Erskine considered his

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[655] Transcript, Wilkening, p 4026 – 4027.

[656] Noting that the issue was raised in the Statement of Primary Evidence by Mr Phillis (para 36) who is not a noise expert.

[657] Transcript, Wilkening, p 4027

[658] Southdown Site Expert Site Conference (Part 2), Thursday 13 July 2017.

[659] Technical Report – Risk Assessment of Mercury Southdown Site, July 2017 (QRA).

[660] QRA, p 5.

assessment to be conservative[661] and explained his reasons for drawing that conclusion. The only parameter that was not found to be either "tolerable" or "broadly acceptable" was the scenario of an ignited gas release from First Gas assets (pigging or pipeline) in their current position. However, he concluded that the risk for those assets would be "broadly acceptable" or "tolerable" when relocated, depending on the new location.

[1023] Under cross-examination, Mr Erskine acknowledged that a parameter that he had not been aware of and had not considered was a potential rupture of a high-pressure gas line, located within the pipework between GE105 and the WETSACC,[662] as a result of turbine disc failure. He acknowledged that that should be factored into the risk assessment for the road, but that it is an existing risk for the site. The Board also notes Mr Erskine's explanation of his conservatism in assumptions regarding the operating time and performance of the turbines[663] and how it was likely that this risk could be adequately managed.

[1024] When questioned by the Board, Mr Erskine agreed that a risk-based performance standard would be an appropriate addition to designation conditions. Mr Grala also agreed in principle with this approach.[664]

[1025] Mr Phillis prepared his statement of primary evidence in May 2017, prior to the preparation of the QRA by Mr Erskine. In his primary statement he categorised risk as fire, turbine disc failure, relief valve discharge (noise and ignition), heat discharge from chimney stacks, natural gas pipeline release (including ignition) and earthing system. In his Summary Statement presented at the Hearing, Mr Phillis summarised his remaining concerns as being:[665]

> "*(a) The collaborative approach adopted up to that point in the initial risk workshop and Part 1 of the Facilitated Meeting on 13 July was not progressed, and stakeholders were not afforded the opportunity to review and comment on the inputs and assumptions used in the risk assessment, nor to review the results prior to presentation for consideration by the Board.*
>
> *(b) Limitations in the risk assessment approaches adopted were not sufficiently stated.*

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[661] Transcript, Erskine, p 3506 – 3507; 3572.

[662] Transcript, Erskine, p 3623-3624.

[663] Transcript, Erskine, p 3754-3755.

[664] Transcript, Grala, p 6130 – 6131.

[665] Summary Statement, Phillis, para 11.

> *(c) Omission of ignited releases from high pressure gas supply pipework on the Mercury site (refer (e) Natural gas pipeline release: (ii) Natural gas supply pipework to Southdown site in the Facilitated Meeting Report).*
>
> *(d) Sensitivity of selected scenarios to the stated assumptions.*"

[1026] He also stated that he had limited experience with gas-fired power stations.[666]

[1027] Notwithstanding Mr Phillis' reservations about some aspects of Mr Erskine's assessment, he considered the QRA to be a reasonable first step in the risk assessment of a site such as the Mercury site.[667] He was reluctant to explicitly state that Mr Erskine's assumptions were wrong, but considered it would have been more appropriate for the draft report to be circulated to, and commented on by, appropriately informed stakeholders such that the identification of all hazards and risks could be refined. Mr Phillis also expressed concern about adopting the Victorian Interim Risk Guidelines and applying interim criteria to individual risk rather than cumulative risk. In raising this concern, however, Mr Phillis noted that:[668]

> "*I am not necessarily saying it is a bad approach, it is just that I think that the limitations in that approach need to be identified to say that there is a potential that, in identifying each risk individually, you are understating the aggregated risk by doing that.*"

[1028] In essence, Mr Phillis considered the assumptions of the QRA needed to be better stated so that stakeholders would be aware of those when reviewing the report.

[1029] Mr Phillis made particular reference to high-pressure gas pipes that he considered to be a gap in Mr Erskine's QRA in relation to possible risks from gas vents and ruptures. However, the Board was unclear from Mr Phillis' responses to its questioning the degree to which that pipework had or had not been addressed in the QRA.[669]

[1030] Mr Phillis agreed that electric trains passing the site could also present a risk of ignition of released gas, although separation distance may influence that risk. He was not aware of the existing frequency of trains passing the site.[670]

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[666] Summary Statement, Phillis, para. 5.

[667] Statement of Primary Evidence, Phillis, paras 5312 – 5314.

[668] Statement of Primary Evidence, Phillis, paras 5311.

[669] Statement of Primary Evidence, Phillis, paras 5314-5315.

[670] Statement of Primary Evidence, Phillis, paras 5315-5316.

[1031] Mr Phillis would not comment on the potential for relocating the pipework within the site. His assessment was based on the pipes in their existing location.[671]

[1032] Cross-examination and questioning of Mr Phillis was extensive and the Board has considered it with care. The Board's overall observation is that Mr Phillis did not state that risks at the site could not be adequately addressed through reconfiguration or mitigation. His caution was that he sought more detail on assumptions, and potentially the inclusion of additional parameters, to update the QRA and then undertake more detailed development of risk management measures. Taking account of this, the Board accepts the specific experience and technical detail presented by Mr Erskine, which can be refined through the process described by Mr Phillis. The Board considers that, subject to appropriate conditions, sufficient information has been presented to find that the EWL and power station could co-locate.

[1033] At the request of the Board, NZTA and Mercury prepared a set of conditions specific to the Mercury site. These were presented to the Board by Ms Hopkins.[672] Mr Grala also provided the conditions he proposed on behalf of Mercury as an attachment to his Summary Statement.[673] Mr Grala considered that the imposition of his proposed conditions, with the possible addition of performance targets, would adequately achieve the outcomes sought by Mercury, including those relating to the management of risk.[674]

[1034] Conversely, Ms Devine submitted in closing that the Board is not in a position to impose conditions to address the effects of the Proposal because it does not have sufficient information to fully understand the nature and scale of those effects. Ms Devine submitted that the Board cannot seek to address deficiencies in information about effects through conditions.[675]

[1035] NZTA presented revised conditions in its closing submissions (Conditions SD.1A to SD.8). Those conditions include the following requirements:

(a) The preparation of a full Risk Assessment Report (RAR), having regard to the QRA prepared by Mr Erskine. The RAR is to be prepared in consultation with Mercury and owners of other infrastructure within the

[671] Statement of Primary Evidence, Phillis, para 5316.

[672] Summary Statement, Hopkins, Appendix B.

[673] Summary Statement, Grala, Appendix 1.

[674] Transcript, Grala, p 6131 – 6132.

[675] Closing Submissions, Devine, paras 20 – 22.

Southdown site, and with those stakeholders then being able to review and comment on the draft RAR (Condition SD.1A).

(b) The RAR will identify and quantify all risks, based on the Victorian Interim Risk Criteria, and will identify mitigation (through control measures) that may be required inside and outside the designation to achieve Acceptable or Tolerable Risk Levels (Condition SD.1A).

(c) Imposition of all identified control measures except those that, as agreed by Mercury, could be deferred and undertaken at Mercury's request at a later date, prior to recommencing gas-fired electricity generation (Condition SD.1A).

(d) Listed specific location, dimensional and control measures that must be met (including Conditions SD.2 and SD.6), in addition to any additional measures identified as necessary through the RAR.

(e) Maintenance of access to First Gas and Transpower infrastructure.

(f) A requirement for NZTA to obtain any changes to Mercury's existing resource consents that are necessary for the recommissioning of the power station.

(g) Protection of Mercury's risk concerns through Condition SD.1C which reads:

> "*In the event that:*
>
> *Mercury does not agree to the implementation of any Control Measures on the Southdown Site outside the designation; or*
>
> *The RAR identifies any Unacceptable Risk that cannot be addressed through the implementation of Control Measures, construction of the EWL viaduct west of Hugo Johnston Drive and the Great South Road intersection (between approximately Chainage 4200 and 5075) shall not commence until the Requiring Authority:*
>
> *Adjusts the alignment of the EWL to ensure that the health and safety risks associated with construction of the EWL on the Southdown Site do not require the implementation of Control Measures outside the designation to achieve an Acceptable of Tolerable Risk Level; and/or*
>
> *Acquires all or part of the balance of Lot 1 DP 178192 under the Public Works Act 1981.*"

[1036] As stated, the Board is satisfied that it has received evidence that is sufficient to understand the general nature of likely risks that may result from the co-location of the EWL with the power station. Considered in combination with the conditions now proposed, the Board finds that NoR1 can be approved in relation to that site. More likely than not the potential effects can be adequately managed. If not, the

conditions prevent the risks arising by moving the EWL alignment. Alternatively, NZTA may seek to acquire the site and permanently decommission the power station (as noted in the advice note of Condition SD.1C).

[1037] While the Board considers it likely that the EWL and the power station can co-locate, it is also satisfied that the outcome provided by Condition SD.1C, which would require the power station to be decommissioned, is acceptable, based on its finding that the security of power supply to Auckland is not dependent on the operation of a gas-fired power station at that site. The economic impact of that outcome on Mercury can be addressed through the PWA.

*Conclusion*

[1038] The Board concludes that more likely than not, the EWL and the power station will, subject to conditions, be able to co-locate with appropriate levels of risk, construction effects of the EWL can be appropriately avoided or mitigated, the EWL design will provide for appropriate site access, that traffic on the EWL will not inhibit Mercury from complying with existing or anticipated discharge to air consents, and that reverse sensitivity effects (which include those effects directly discussed and reasonably anticipated future uses of the site) will be adequately minimised. On that basis, the Board finds that NoR1 can be approved with respect to the Mercury site.

### Transpower

[1039] Transpower has key assets at the Southdown site in Sector 3. In relation to effects of the Proposal on the national grid, there are no unresolved issues, for the reasons mentioned in chapter 10.4 of this Report.

### KiwiRail

[1040] KiwiRail also has existing designations and key assets at and in the vicinity of the Southdown site in Sector 3. In relation to effects of the Proposal on its rail network, including maintaining the consistency and continuity of electricity supply, there are no unresolved issues, for the reasons previously mentioned in chapter 10.5 of this Report.

### First Gas

[1041] First Gas has key assets at the Southdown site in Sector 3. There are no unresolved issues, for the reasons mentioned in chapter 10.6 of this Report.

### Conclusion

[1042] In summary, the Board finds in relation to Sector 3 – Anns Creek to Great South Road of NoR1 that:

(a) The relocation of the stormwater treatment pond on Kempton Holdings Limited land to south of the Mercury site is not supported by the Board as it would not be a practical alternative and it is located within the CMA;

(b) Adequate consideration has been given to alternative routes within the TR Group's site. The NoR1 alignment has resulted in a balancing of potential effects between the ecologically significant Anns Creek East and the potentially recommissioned power station, as well as other constraints in the local area;

(c) The footprint of the NoR on TR Group's land is reasonably necessary to achieve the objectives of the Proposal for which the designation is sought. The permanent designation of the full area of Anns Creek within the TR Group site is not reasonably necessary to mitigate the effects of the Proposal. However, it is reasonably necessary to retain a designation over the site for a period sufficient to provide for the establishment and maintenance of the ecological restoration. That designation is subject to a roll back provision condition after a period of 10 years, subject to a covenant.

(d) Adequate consideration has been given to alternative routes in relation to the Mercury site that took into account future gas-fired power generation at the site and the option to recommission the existing turbine packages;

(e) The potential adverse construction effects of the NoR1 on the Mercury Southdown site, in relation to access to the site and dust and potential disturbance of asbestos, can be avoided or adequately mitigated through conditions;

(f) The potential risks of co-locating the EWL with the power station can be appropriately addressed through conditions;

(g) Security of electricity supply for Auckland or New Zealand is not reliant on gas-fired electricity generation at the Southdown site; and

(h) The relocation of Transpower, KiwiRail and First Gas infrastructure has been appropriately addressed, as have the potential construction effects adjacent to that infrastructure.

[1043] Viewed through the lens of s171(1)(c) of the RMA, the Board considers that the designation and work are reasonably necessary to achieve the objectives of NZTA. In terms of s171(1)(b), alternatives have been appropriately considered. Adverse effects have been appropriately considered and avoided, or mitigated. Those effects that cannot be mitigated can be addressed through the PWA.

## 15.5 SECTOR 4 – GREAT SOUTH ROAD TO SH1

[1044] The western limit of NoR1 in Sector 4 commences at approximate chainage 5150 east of the Great South Road intersection with Sylvia Park Road and terminates at approximate chainage 6500 at the junction of the EWL with SH1, just north of "Tip Top corner".

[1045] This section of the EWL comprises continuation of the viaduct from Sector 3, which terminates on Sylvia Park Road at approximate chainage 5330. The EWL continues along Sylvia Park at-grade as a multi-laned carriageway complemented by shared walkway / cycleways. At approximate chainage 5730 it separates into two carriageways – an at-grade section intersecting with Mt Wellington Highway as existing and two separate viaducts providing north-facing entry and exit ramps with State Highway 1. These ramps pass over the North Island Main Trunk (NIMT) railway. The entry ramp completes its merge with south-travelling traffic on SH1 at approximate chainage 6500 adjacent to the Fonterra factory. The exit ramp from SH1 terminates at approximate chainage 6300 adjacent to the premises of T&G Global.

[1046] The design of the EWL / Great South Road / Sylvia Park Road intersection was revised from the at-grade design originally proposed in November 2016, to a grade-separated design. Grade separation of the EWL through movements at this intersection will provide improved reliability and future resilience. A legible and continuous pedestrian and cycle experience acknowledges the heritage and Mana Whenua objectives by giving special design consideration to the former Kāretu portage route, which the ULDF notes is an element of the cultural landscape that has been erased by the current urban development of this area.

[1047] The works involve:

(a) Upgrading Sylvia Park Road carriageway to two lanes each way;

(b) One eastbound lane accessing the SH1 ramp structure and the other eastbound ramp continuing at-grade to Mt Wellington Highway;

(c) One westbound lane joining Sylvia Park Road from the SH1 northbound off-ramp and the other westbound lane allowing traffic from Mt Wellington Highway and Pacific Rise to continue at-grade to Great South Road;

(d) Raised median along Sylvia Park Road means some limitations to private property accesses – a u-turn facility will be provided at the Pacific Rise / Sylvia Park Road intersection;

(e) A widened intersection for entering and exiting Pacific Rise from Sylvia Park Road westbound;

(f) New south-facing ramps on to and off SH1 south of the existing Mt Wellington Interchange, providing access for traffic travelling north on SH1 to get on to the Main Alignment, and for traffic travelling east to south on the Main Alignment to get on to SH1 to travel south; and

(g) Pedestrian and cycle paths that continue along the Main Alignment of the EWL and into Sylvia Park Town Centre.

[1048] The EWL requires relocation of Transpower assets (towers and lines) for the construction and operation of the new ramps in Sector 4. The Board has already noted[676] that there is common ground between Transpower and NZTA that adverse effects on the national grid assets can be managed through proposed conditions and a Network Utility Management Plan (NUMP).

### General Landscape and Urban Design Effects

[1049] The AEE sets out a full description of the main landscape and urban design issues within Sector 4 in relation to:[677] the visual effects of the viaduct and ramps, including any impacts on views to landmarks including Mutukāroa-Hamlins Hill; visual effects for adjacent industrial and commercial properties; and visual effects on Mutukāroa-Hamlins Hill. Overall, it is considered that there will be some adverse visual effects arising from construction activities, but these will be temporary and will take place in the context of a landscape dominated by transport infrastructure and surrounding industrial and commercial properties.

[1050] The new Mt Wellington ramps will have some moderate adverse visual effects for passers-by on SH1 and surrounding roads, and for occupants of nearby industrial buildings. However, such effects will take place in the context of a landscape already dominated by transport infrastructure and industrial land uses.

[1051] Positive effects in this sector include: improving connectivity for cyclists and pedestrians by the proposed elevated shared path where EWL is on a structure between Māngere Inlet and 19 Sylvia Park Road and connecting through to Sylvia Park Town Centre; improving connectivity and legibility of the road network through

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[676] At chapter 10.4.

[677] NZTA, AEE, 12.10.9.

a new intersection at the corner of Great South Road, Sylvia Park Road and the Main Alignment along Māngere Inlet; and recognition of the Kāretu Portage. High quality cycle connections were supported by Auckland Transport[678] and requested through conditions by Auckland Council in closing submissions.

### Natural Landscape[679]

[1052] There will be few adverse effects on the natural landscape. The Project does not encroach on to Mutukāroa-Hamlins Hill, the prominent natural landmark that is the only significant natural feature in the vicinity. Rather, the hill's role as a landmark at the centre of transport routes will be accentuated. The EWL will skirt the toe of Mutukāroa-Hamlins Hill and trace part of the culturally important and historical former route of the Kāretu Portage that formerly extended from the head of Anns Creek. Mutukāroa has a cultural history associated with its former occupation as a settlement overlooking the Kāretu Portage with wide views from the summit ridge, in particular including a view down the Māngere Inlet in the direction of the Manukau Heads. The portage was via the swampy ground between Anns Creek and Kāretu, an inlet on the Tāmaki River.

[1053] A small basalt cut face at Tip Top corner will be lost but, while it is a feature of interest because it expresses the underlying geology, the cutting itself is not natural.

### Urban Landscape

[1054] Changes to the urban landscape will consist of:

(a) A strip of industrial properties sandwiched between Sylvia Park Road and the railway line are to be removed to accommodate the widened road;

(b) The Great South Road intersection will become a more significant node, which will have some positive effects on connectivity and urban form legibility;

(c) There will be connectivity and visual amenity benefits from the elevated shared path; and

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[678] Statement of Primary Evidence, Winter, para 20.

[679] Ibid, 12.10.9.1.

(d) The overhead local power distribution lines along Sylvia Park Road will be undergrounded, which will have a small positive effect on visual amenity.[680]

### Visual Effects[681]

[1055] The scale and character of Sylvia Park Road will change, and the Eastern Rail Line and Mt Wellington Highway will be crossed by additional overbridges. While it will add another layer, the interchange will be seen in the context of what is already a complex array of arterial roads, railway line, SH1, and transmission lines.

[1056] The Great South Road intersection will also increase the prominence of the EWL for users of the local roads and railway. However, the EWL will be seen in conjunction with a complex array of existing infrastructure. Therefore, there will be no effects of any significance on the visual amenity of Mutukāroa-Hamlins Hill. Users of the new pedestrian / cycle path will constitute a new audience. The proposed elevated shared path will add considerably to the interest and amenity of the path for users and will also mitigate views of EWL from the south. For adjacent properties, potentially the most visually affected properties include those on both sides of SH1, including at Pacific Rise.

### Effects on Mutukāroa-Hamlins Hill

[1057] The AEE records an assessment of the effects on Mutukāroa-Hamlins Hill ONF,[682] which is mapped as an ONF in the AUP:OP decisions version. The AEE sets out the reasons for that classification and describes Mutukāroa-Hamlins Hill as a rare, unmodified example of the Waitematā sandstone ridges that underpin much of Auckland, also containing the best example of a rhyolitic tuff deposit in Auckland.

[1058] It is noted that the Proposal will not physically encroach on to Mutukāroa-Hamlins Hill, and will have minimal adverse effects on its landscape qualities. The hill's role as a landmark surrounded by transport routes will be accentuated. While the EWL will affect views of Mutukāroa-Hamlins Hill from Great South Road, these will be balanced by views for road users created by EWL. For completeness, it is also noted that the Project will not affect the volcanic viewshaft from SH1 to

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[680] NZTA, AEE, 12.10.9.2.

[681] Ibid, 12.10.9.3.

[682] NZTA, AEE, 12.10.9.4, p. 299.

Maungakiekie / One Tree Hill, which originates north of the Project and is oriented in the opposite direction.

[1059] It is considered that overall the adverse and positive landscape and visual effects will be balanced in this sector.[683] The mitigation measures proposed for Sector 4 are set out in the ULDF and include:

(a) Connecting the east west walkway / cycleway to connect with the Sylvia Park Town Centre;

(b) Recognising the former Kāretu Portage that was aligned along this route; and

(c) An elevated shared path (the Kāretu Portage shared path) to recognise the cultural significance of the portage and reduce the visual prominence of EWL.[684]

### Effects on Specific Properties

[1060] The sites and infrastructure addressed in submissions that are affected through Sector 4 from east to west are:

(a) T&G Global Limited (T&G);

(b) Transpower assets;

(c) Syl Park Investments Limited and 8 Sylvia Park Road Body Corporate (Syl Park);

(d) Chamko Holdings Limited (Chamko);

(e) Kiwi Property Group Limited and Sylvia Park Business Centre Limited (Kiwi); and

(f) Z Energy.

[1061] A number of matters were resolved during the Hearing affecting the following properties located in this sector:

(a) Jaafar Holdings Limited;

(b) Stratex Group Limited; and

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[683] NZTA, AEE, 12.10.9.4.

[684] NZTA, AEE, 12.10.9.5.

(c) Tram Lease Limited.

*T&G Global Limited (T&G)*

[1062] T&G is a significant business within the Project area and its concerns with the Project were extensive, as summarised in its opening and closing submissions. It sought that the Proposal be declined to the extent that it would affect the T&G site.

[1063] Matters raised by T&G relevant to the disturbance of contaminated land have been addressed in the Board's consideration of resource consents in chapter 12.5 and are not repeated herein.

[1064] In his closing, Mr Mulligan helpfully sets out steps taken by NZTA throughout the Hearing, to reduce the effects on T&G, as compared to the lodged application. In particular:[685]

(a) Prior to the commencement of the Hearing , the Transport Agency worked with Transpower to achieve an outcome where the buildings underneath the relocated Transpower power lines could remain;[686]

(b) Transpower confirmed in its evidence that this arrangement is subject to bottom-line safety requirements and security of supply being maintained;[687]

(c) Transpower has since confirmed that the arrangement is workable and safety concerns can be addressed by sequencing and design;[688]

(d) Transpower also confirmed that an indemnity is only required for works around the power lines by the organisations undertaking those works. That obligation would fall on the Transport Agency rather than T&G;[689]

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[685] Closing Submissions, Mulligan, p 117-118, para 19.28.

[686] Transcript, Noble, p 4865-4866.

[687] Ibid, p 4820.

[688] Ibid, p 4866; Summary Statement, Noble, para 7.

[689] Ibid, p 4823.

(e) There may still be a requirement for a temporary line deviation across the site but design options are progressing in relation to the location and nature of this diversion;[690]

(f) The Transport Agency has also prepared, and now included within its final drawing set, a revised road alignment that shifts the permanent road off part of the T&G site in the proximity of the banana-ripening building and the crate-wash building;[691]

(g) This road alignment will ensure that the existing access arrangements to those buildings can be maintained.[692] A number of T&G Global witnesses confirmed that this arrangement would avoid effects related to access to these buildings.[693]

[1065] In her closing submissions, Ms Carruthers, on behalf of T&G, acknowledged that NZTA's revised alignment reduces the extent to which the northbound off-ramp will encroach on T&G's site.

[1066] That acknowledgement is appropriate. The revised road alignment shifts the permanent road off part of the T&G site in the proximity of the banana-ripening building and the crate-wash facility[694] thereby avoiding any potentially significant adverse effects originally highlighted by T&G and ensuring that the existing access arrangements to those buildings can be maintained.

[1067] As Mr Mulligan noted in his closing, a number of T&G witnesses confirmed that this arrangement would avoid effects related to access to these buildings.[695] The Board recognises that ongoing access is one of the key issues that remains between the parties alongside the ability of T&G to operate the facilities during the construction period. As Ms Carruthers noted in her closing, matters that still remained to be confirmed by NZTA included:

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[690] Opening Submissions, Gardner-Hopkins, para 22(e).

[691] This revised road alignment was presented as a working draft to T&G Global witnesses as Exhibit 21.

[692] Closing Submissions, Mulligan, p 118, para 19.28(g), footnote 637 states: "*There may be temporary occupation required with construction of retaining walls or similar, but that detail will not be known until detailed design*".

[693] Transcript, Hall, p 4563.

[694] Exhibit 21.

[695] Closing Submissions, Mulligan, para 19.28(g).

(a) Whether the revised alignment can be constructed without significantly affecting operations at the site. Specifically, it is not clear whether the access to the fruit fumigation and ripening plant (Banana Building) and the bin and crate-washing facility (Crate-Wash), or indeed those facilities themselves, can continue to operate during the construction of the revised alignment; and

(b) Where the Transpower assets will be located, both temporarily and permanently. Specifically, it is not clear whether the container grid associated with the Banana Building will be able to continue to operate during construction, and what facilities will be located under the temporary line unless relocated.[696]

[1068] Mr Mulligan submitted in his closing that NZTA considered its assessment of the T&G site and identification of the relevant environment was adequate and appropriate, with any gaps filled by the submissions and evidence of the parties provided to the Board.[697] He submitted that on this basis, the Board has all the information it requires to assess the impacts of the Project on the T&G site. The Board is satisfied that that is the case.

[1069] The Board has already made findings as to the interface between the Public Works Act and the RMA and that discussion is relevant here to address the submissions from T&G.

[1070] It is clear from the evidence before the Board that T&G and NZTA have been in ongoing discussions in relation to potential site reconfigurations or relocation of certain T&G facilities. Those discussions had not yet reached conclusion by the time NZTA closed its case. Mr Mulligan advised the Board that discussions are complicated by the need to relocate Transpower assets currently located on the site, but progress is being made. Mr Mulligan submitted that those matters do not need to concern the Board except to the extent that effects arising from land requirements associated with the EWL can be addressed through that process.[698]

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[696] Closing Submissions, Carruthers, para 1.2.

[697] Closing Submissions, Mulligan, para 19.26: Footnote 629 notes Mr Arbuthnot accepted that, at a broad level, the AEE addressed the effects that a site may be affected by (Transcript, Arbuthnot, p 4586). Mr Gouge accepted that the AEE assesses that primary effects of the Proposal (Transcript, Gouge, p 3920).

[698] Ibid, para 19.27.

[1071] The Board is also satisfied with Mr Gardner-Hopkins' submission that Transpower has a high degree of confidence that the latest T&G site configuration proposed by NZTA can be accommodated by Transpower.[699]

[1072] The Board recognises that NZTA has continued throughout the Hearing process to reduce the effects on T&G, as compared to the lodged application, in the manner helpfully summarised and set out in NZTA's closing submissions.[700]

[1073] As Mr Mulligan noted, other impacts of construction can be appropriately managed through conditions of consent, including in relation to construction noise and vibration and contaminated land.[701]

[1074] That being the case, Ms Carruthers submitted that assuming NZTA confirms the site's operations can continue unaffected during construction of the revised alignment, NZTA's designation boundary must also be modified (if the Board is to approve the revised alignment) to remove it from the Banana Building and Crate-Wash. She further submits that it is not reasonably necessary in terms of s171 of the RMA to designate facilities that will be unaffected by the Proposal.[702]

[1075] Mr Mulligan, however, advised the Board in his closing that the precise construction sequencing and site configuration remains in flux as the Transport Agency continues engagement with T&G and Transpower about the temporary line diversion and reconfiguration options and will not be known until the detailed design stage. He confirmed that while the current intentions of both NZTA and Transpower are for both the buildings to remain, at this late stage of the Hearing process NZTA's preference is to retain the current designation to accommodate this evolving design situation.[703]

[1076] The Board's findings on the s171(1)(b) assessment of alternatives are set out in chapter 15.12 of this Report. Suffice to reiterate here that having particular regard to the consideration of alternative routes, the evidence satisfies the Board that in fixing upon its preferred route in relation to the T&G site, there has been adequate consideration of alternative routes.

[1077] In terms of reasonable necessity, the Board's general findings on s171(1)(c) are set out in chapter 15.13 of this Report. The Board is satisfied that the route in relation to the T&G site is reasonably necessary to achieve the Proposal objectives

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[699] Closing Statement, Gardner-Hopkins, para 12.

[700] Closing Submissions, Mulligan, para 19.28.

[701] Ibid, para 19.29.

[702] Closing Submissions, Carruthers, para 1.4.

[703] Closing Submissions, Mulligan, para 19.30.

when considered in conjunction with the amendments to the limits of the designated areas, the roll back provisions contained in the conditions and the specific conditions related to T&G's land.

[1078] The Board considers that the operations of the Banana Building and Crate-Wash facility may well be affected during construction. In that instance, NZTA will be required to address the effects on the buildings through the means agreed with T&G.

[1079] The Board accepts NZTA's submissions that the current designation is reasonably justified and should remain over the Banana Building and Crate-Wash during construction, with roll back once construction is complete. This will be to the advantage of T&G with respect to mitigation that will be required of NZTA during construction.

*Syl Park Investments Limited and 8 Sylvia Park Road Body Corporate (Syl Park)*

[1080] The proposed works on Sylvia Park Road will have an effect on access to 8 Sylvia Park Road, which will change to a left in, left out only access. For Syl Park, the loss of right turns into and out of the site across the Sylvia Park Road frontage is the most significant adverse effect of the Project from their perspective. Employees of and visitors and customers to businesses at 8 Sylvia Park Road arriving from the east (including from SH1) will need to detour to access and egress the site. Drivers wanting to depart westward will also be inconvenienced, to a lesser extent, by an eastward turn left out of the property and then a right-hand u-turn opposite Pacific Rise.

[1081] Syl Park considered that NZTA should mitigate the adverse effects on the commercial activities at 8 Sylvia Park that will arise as a consequence of that loss of access by formalising an existing informal vehicular access along the rear of 1 Pacific Rise (accessed from Pacific Rise) by way of a right-of-way easement or service lane). That would allow visitors to 8 Sylvia Park Road to access the site from either direction, including via the proposed crossing under the EWL for westbound traffic on Sylvia Park Road.

[1082] To that end, Syl Park asked the Board to impose a condition requiring NZTA to use its best endeavours to formalise such vehicular access, including for heavy goods vehicles, between the site and Pacific Rise, preferably through negotiating an easement with relevant land owners but, failing that, through initiating designation and compulsory acquisition processes. They asked that such vehicular access be formalised and physically constructed prior to the date on which right turns into and out of the site across its Sylvia Park Road frontage are banned.

[1083] Mr Harrington gave evidence that Opus International, on behalf of NZTA, had commenced willing buyer, willing seller negotiations with the owners of 1 Pacific Rise regarding the acquisition of a right of way easement.[704] He also confirmed that the owners have indicated to Opus that they are amenable to granting an easement on the basis that fair compensation can be agreed.[705] Notwithstanding those negotiations, it is NZTA's position that the effects on Syl Park will, nevertheless, be remedied through the provision of two u-turn facilities, which will mitigate the effects of imposing a left in and left out access to and from the Syl Park site. This mitigation will comprise:

(a) A u-turn facility opposite Pacific Rise. Traffic engineers for NZTA and Auckland Transport both confirmed that they consider this u-turn can be provided safely.

(b) A u-turn facility at the Great South Road intersection. Auckland Transport has confirmed that it supports the concept that was proposed in the memorandum of 11 September 2017.[706]

[1084] NZTA has proposed conditions of consent to provide for both of these u-turns within the design of the EWL. Mr Allan, on behalf of Syl Park, acknowledged that the u-turns required by these conditions would mitigate the effects on access to the site to some extent but submitted that his clients remained unconvinced that they were practical or safe. He also submitted that the provision of the u-turns could not be guaranteed in the long term, as Auckland Transport may, at a future time, decide that they cannot be maintained. This submission was particularly focused on the u-turn at Great South Road.[707].

[1085] For that reason, consistent with the conclusion of Mr Edwards to the same effect, Syl Park continues to prefer the formalisation of access through 1 Pacific Rise. While Mr Allan acknowledged in his submissions the commencement of those negotiations,[708] he nevertheless sought that the Board impose a condition that will

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[704] Hearing summary, Harrington, p 2; Transcript, Harrington, p 2200.

[705] Ibid, p. 2202.

[706] Closing Submissions, Mulligan, p 123, para 19.50; Footnote 666 – Addressed in the Transport Agency memorandum dated 11 September 2017, para 14.

[707] Closing Submissions, Allan, para 10.

[708] Ibid, para 5.

require NZTA to use its best endeavours to legally formalise a vehicular access between its site at 8 Sylvia Park Road and Pacific Rise.

[1086] Mr Allan pointed out in his closing submissions that NZTA's planner, Ms Hopkins, accepted that a stand-alone condition could be developed regarding formalisation of access through 1 Pacific Rise[709] and she would look into wording such a condition that would be acceptable to both her and NZTA.[710] No such wording has been produced.

[1087] If an agreement with 1 Pacific Rise is unable to be formalised by NZTA, Syl Park has asked that the Board impose a condition requiring NZTA to use its designation and compulsory acquisition powers to acquire the land needed for access.

[1088] NZTA has confirmed its willingness to continue discussions to formalise an access but opposes any condition that would oblige it to use designation and compulsory acquisition powers because:

(a) Pacific Rise is a local road, controlled by Auckland Transport;

(b) Any access that is provided will only be for the benefit of private property owners and occupiers, would not provide a public benefit, and would not assist in meeting the Project objectives; and

(c) Adequate access to and from the west will be provided via the proposed u-turns.

[1089] NZTA submits that in this the Board should prefer the evidence of NZTA and Auckland Transport experts that the u-turns would be safe and can be provided.[711]

[1090] The Board acknowledges the concerns raised by Syl Park that even if u-turns are initially provided, they cannot be guaranteed to be maintained by Auckland Transport, subject to operational monitoring and safety assessments.[712] Certainly, the Board was not entirely convinced, having heard the evidence of Mr A Murray and Mr Davies, that u-turns, particularly at the Great South Road intersection, that design detail had fully confirmed that that the Great South Road u-turn could be

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[709] Ibid, para 20 and Transcript, Hopkins, p 2339, lines 31 to 41.

[710] Transcript, Hopkins, p 2340, lines 22 to 32.

[711] Closing Submissions, Mulligan, p 124, para 19.54.

[712] Closing Submissions, Allan, para 12.

operated safely, although it seemed that its safe function may subsequently be confirmed. That being said, the Board recognises Mr Edwards responses to questions of the Board confirming that:

> "*The only real way of addressing some of those matters would be for the southern kerb line to move further south… if the whole southern half of the road was moved further south you'd have a wider median that obviously is going to make the u-turn work more effectively*."[713]

Mr Edwards also acknowledged that a separate lane with a presence loop that called its own green phase at the Great South Road end might be worth exploring but would require a significantly greater amount of room.[714]

[1091] After hearing the evidence of Mr Edwards, the Board received a Memorandum of Counsel regarding Great South Road U-turns.[715] That memorandum provided the Board with further information about the safety of u-turns at the western end of Sylvia Park Road, and information about truck turning curves at the proposed u-turn at the Pacific Rise intersection. It confirmed that further amendments to the concept design of the u-turn facility were undertaken to address concerns raised by Mr Edwards and noted that the design could be refined further during detailed design to provide a wider turning area (by reducing the median area) or to install an exclusive u-turn only lane.

[1092] The memorandum recorded that Auckland Transport had confirmed support for this concept, provided that the outer right turn is unaffected by any u-turn movement, which it agrees is a matter that can be confirmed during detailed design.[716]

[1093] In terms of the Pacific Rise u-turn, it reiterated the rebuttal evidence of Mr A Murray that the design of this intersection and its provision for u-turns, had been subject to a number of independent safety audits and he considered it unlikely that the u-turn facility would not be able to be safely provided.[717]

[1094] Accordingly, NZTA's proposed additional conditions DC11 (i) and (ii) are intended to address these matters. Mr Allan, in his closing submissions noted that Syl Park

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[713] Transcript, Edwards, p 5217, lines 40-41 and p 5218, lines 1-3.

[714] Ibid, p 5218, lines 6-31.

[715] NZTA, Memorandum of Counsel of the NZTA Regarding Great South Road U-turns, dated 11 September 2017.

[716] Ibid at para 14.

[717] Statement of Rebuttal evidence, A Murray, paras 23.3 and 23.4.

welcomed the NZTA proposal to insert conditions addressing the u-turns and that "*those conditions will ensure that the issue of safe U-turn facilities is addressed by NZTA*". However, they remained of the view that the conditions do not provide any certainty that such u-turns will be implemented or if they are implemented, that they will be retained.[718]

[1095] The Board's view is that, consistent with the evidence of NZTA and Auckland Transport experts, the u-turn facilities are unlikely to be provided if it is not considered safe to do so and in any event the evidence of the experts is that it will be safe and can be provided. Furthermore, as was accepted by Mr Edwards in cross-examination, safe u-turns should be able to be provided at the Great South Road intersection through widening the road reserve (which is enabled by the incorporation of the Stratex site into the designation).[719]

[1096] The Board sees some merit in the submissions of Mr Allan and notes the observations on relevant NZTA evidence as set out in his closing submissions.[720] In terms of the right of way easement, even NZTA's engineer, Mr Nancekivell, acknowledged that that would be a preferred solution.[721] The Board, therefore, agrees that formalising vehicular access from 1 Pacific Rise provides a more immediate and suitable outcome for Syl Park. On that basis the Board accepts that an easement is the most appropriate mechanism and accepts, in principle, the proposition by Syl Park that NZTA should still use its best endeavours to formalise vehicular access, acknowledging that NZTA has already commenced discussion with the owners of 1 Pacific Rise to achieve that outcome. Accordingly the Board has imposed a condition to that effect. In any case, the u-turn facilities are sufficient to mitigate the adverse effects on Syl Park.

[1097] The Board considers that taking that condition further to require NZTA to use its powers of designation and compulsory acquisition, should negotiations with the owners of 1 Pacific Rise not prove successful, is not reasonably necessary to mitigate the effects of the Proposal. The Board is not convinced that requiring access to be provided through a designation is sufficiently justified. The Board does not consider that a "safe right turn in right turn out" of the premises is guaranteed in perpetuity.

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[718] Closing Statement, Allan, para 24.

[719] Transcript, Edwards, p 5217-5218.

[720] Closing Statement, Allan, paras 16-22.

[721] Transcript, Nancekivell, pp1028-1029.

*Kiwi Property Group Limited and Sylvia Park Business Centre Limited (Kiwi)*

[1098] Kiwi own and operate the Sylvia Park Shopping Centre and raised concerns primarily in relation to increased traffic "rat-running" and congestion effects resulting from the Project that may compromise the functioning and growth of Sylvia Park as a Metropolitan Centre.

[1099] Kiwi asked the Board to impose conditions requiring NZTA to monitor traffic effects in the vicinity of Sylvia Park. In response to a request from the Board, NZTA circulated a draft condition on 22 August 2017 relating to monitoring around the Project as a whole. However, NZTA remains in opposition to the imposition of such a condition.

[1100] Mr Parlane, Kiwi's traffic engineer, suggested amendments to the NZTA condition,[722] primarily to identify changes in long-term traffic patterns, clarify monitoring locations and provide certainty as to the timing, frequency and duration of post-construction monitoring. Kiwi remains of the view that a condition in the form proposed by Mr Parlane should be imposed on the designation.[723]

[1101] The Board notes Mr Mulligan's closing submissions, that both NZTA and Auckland Transport oppose the conditions proposed by Kiwi. NZTA's position was outlined in its memorandum to the Board and NZTA agrees with the closing submissions of Auckland Transport. The evidence of Mr A Murray,[724] which the Board accepts, is that the majority of expected changes to the transport network will occur on the local road network in the Sylvia Park area, for which the road controlling authority and Requiring Authority is Auckland Transport. Mr A Murray does not consider the EWL will have an adverse effect on the local road network in the Sylvia Park area. He makes the point that the Mt Wellington Highway is classified by Auckland Transport as a Primary Arterial and is expected to carry predominantly through-traffic such that any small or modest increase of traffic is not considered to be an adverse effect created by the EWL.[725]

[1102] The Board accepts that NZTA and Auckland Transport are responsible for collectively managing the Auckland Transport network and must consider the

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[722] Statement of Supplementary Evidence, Parlane.

[723] Closing Statement, Allan, para 4.

[724] Closing Submissions, Mulligan, Footnote 686.

[725] Statement of Rebuttal Evidence, A Murray, para 19.23.

network as a whole notwithstanding that Auckland Transport has executed an agreement with Kiwi to undertake specific additional monitoring of traffic effects arising from the EWL on the key routes around Sylvia Park.[726] Mr Mulligan submits, and the Board agrees, that that is a more appropriate response than a condition in the EWL designation.

[1103] The Board shares NZTA's concerns, which are clearly and thoroughly outlined in their memorandum to the Board.[727] It would be extremely difficult to attribute any changes to traffic patterns and/or travel times to any one activity such as the EWL given the complexity of the transport network and land uses in the wider Mt Wellington area, combined with the continued growth of Auckland. Furthermore, as acknowledged by Mr Parlane, the planned growth of Sylvia Park will also contribute to changing traffic patterns.[728]

[1104] Accordingly, the Board is not convinced that the additional monitoring requested by Kiwi and condition in the form proposed by Mr Parlane is necessary to manage the roading network after the EWL is operational. But The Board notes that a side agreement between Auckland Transport and Kiwi will nonetheless provide such specific monitoring.

[1105] The Board is also satisfied that the Proposal does not preclude the use of the proposed bus lane ramp from Mt Wellington Highway to Sylvia Park from being used for cars in the future. But it has not received evidence that sufficiently justifies a requirement for that use at this time.

*Z Energy*

[1106] The Board heard evidence from Mr Matthew Brennan, Property Manager at Z Energy Limited (Z Energy). Z Energy's concerns related to the direct effect the EWL will have on Z's Sylvia Park Truck Stop, which is located on Sylvia Park Road, Mt Wellington (Truck Stop or site).[729]

[1107] The site is approximately halfway along the length of Sylvia Park Road, on the southern side between Great South Road and with the intersection up at Sylvia

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[726] A point acknowledged by Mr Allan, Closing Submissions, para 3; Confirmed by Auckland Transport, Closing Submissions, Garvan, paragraphs 5-22.

[727] NZTA, Memorandum of Counsel, 22 August 2017.

[728] Statement of Primary Evidence, Parlane, para 6.

[729] Z Energy Limited has an unregistered sub-lease of part of the property at 19-21 Sylvia Park (Lot 1 SP 65736).

Park Rise. The truck stop is a single branded, self-service arrangement primarily for trucks. Importantly, it is also used for Z Energy's subsidiary businesses, including its high value business Mini-Tankers, playing an important role as an inland fuel terminal for them to pick up fuel and distribute to their customers via that channel.[730]

[1108] Mr Brennan was clear that the main reason for his appearance before the Board was to explain the significant adverse effects of the Project on their business given the strategic nature of this site to their network. He stated that the Truck Stop is of high commercial and brand value to Z Energy as it is Z's primary truck stop site across both the Z and Caltex networks.[731]

[1109] The Board accepts the position noted by Mr Mulligan that if consents are granted, the entire Z Energy site is proposed to be taken under the PWA. The Board expects, as noted by Mr Mulligan, that a PWA process will be completed by NZTA in terms of the purchase of that site and, given the success of the business, the PWA market value for assessment of land will allow for its potentiality and what it can yield, the value of the land being driven to a large degree by what you can yield from it.

[1110] While the Board acknowledges the concerns of Z Energy, it considers that in line with the overall findings of the Board in terms of s171(1) of the RMA, adequate consideration has been given by NZTA to alternative routes for the EWL in this sector and the extent of the NoR should be retained as being reasonably necessary for the purposes of constructing and operating the EWL. Accordingly, the effects on Z Energy will need to be addressed under the Public Works Act process.

*Jaafar Holdings Limited:*

[1111] NZTA agreed not to permanently designate or acquire a strip along the site's Mt Wellington frontage. Based on this agreement, Jaafar sought leave to take no further part in the remainder of the Hearing and Jaafar was granted leave to withdraw from the proceedings as necessary.

*Stratex Group Limited*

[1112] NZTA and the relevant parties have agreed to an extension to the designation over the Stratex property at 19-21 Sylvia Park Road. Stratex relies upon its submission to support the request to modify the designation boundary and was granted leave to withdraw from the proceedings as necessary. The Board also notes that Stratex

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[730] Statement of Evidence, Brennan, p 4, para 15; Transcript, Brennan, p 3460.

[731] Statement of Evidence, Brennan, p 4, para 13.

has been listed as a party to be consulted through the preparation of the relevant Site Specific Construction Vibration Management Plan (Condition CNV.7B(a)(i)).

*Tram Lease Limited*

[1113] NZTA and Tram Lease advised the Board of the agreement requesting the Crown to acquire both the Stratex site and the Hirepool site, conditional upon the EWL being approved. Consequently, Tram Lease sought and was granted leave to withdraw its submission and evidence.

## Conclusion

[1114] In summary, the Board finds in relation to Sector 4 – Great South Road to SH1 of NoR1 that:

(a) The adverse effects on Transpower assets will be appropriately mitigated and managed through proposed conditions and a Network Utility Management Plan;

(b) The Proposal will have some moderate adverse visual effects for passers-by on SH1 and surrounding roads, and for occupants of nearby industrial buildings. However, such effects will take place in the context of a landscape already dominated by transport infrastructure and industrial land uses;

(c) The Proposal avoids direct impacts on Mutukāroa-Hamlins Hill;

(d) The revised EWL alignment reduces the extent to which the northbound off-ramp will encroach on T&G's site. This avoids permanent effects on access to the buildings on its site. The effects during construction on the Banana Building and Crate-Wash facility will be appropriately mitigated through conditions that are subject to a roll back provision;

(e) Access to Syl Park (8 Sylvia Park Road) will be affected by the Proposal, which will change to a left in, left out only access. An easement for vehicular access through 1 Pacific Rise is being sought by NZTA and would provide a satisfactory arrangement for Syl Park. NZTA is proposing u-turn facilities subject to detailed design. While a condition requiring best endeavours to achieve the easement and a condition to implement the u-turn have been imposed, in the event that those are not achievable access, albeit inconvenient, will always be available to the site;

(f) Kiwi's issues have been addressed by "side" agreement with Auckland Transport

(g) The effects of the Proposal on Z Energy's Sylvia Park Truck Stop will be addressed under the PWA; and

(h) The issues raised in relation to the following specific properties, Jaafar, Fonterra, Stratex and Tram Lease, were resolved during the Hearing.

[1115] Viewed through the lens of s171(1)(c) of the RMA, the Board considers that the designation and work are reasonably necessary to achieve the objectives of NZTA. In terms of s171(1)(b), alternatives have been appropriately considered. Adverse effects have been appropriately considered and avoided, or mitigated. Those effects that cannot be mitigated can be addressed through the PWA.

## 15.6 SECTOR 5 – SH1 TO PRINCES STREET

[1116] Sector 5 of the Proposal is described in the AEE as being that portion of the Proposal from the end of the two new ramps linking the EWL with SH 1 to the south of the Princes Street Interchange.

[1117] In general terms, Sector 5 involves:

(a) Adding two lanes (one to each of the current northbound and southbound lanes) to State Highway 1;

(b) Complete replacement of the Panama Road overbridge to accommodate those extra lanes; and

(c) Complete replacement and reconfiguration of the current Princes Street / Ōtāhuhu Interchange.

[1118] In general terms, NZTA seeks a widening of the current NoR on either side of SH1.

[1119] More specifically, the Proposal involves:

(a) Adding one lane to each side of SH1 from the two proposed south-facing ramps to join the EWL with SH1 to south of the Princes Street Interchange. This would increase SH1's current three lanes, northbound and southbound, to four. The expansion involves shoulders.

(b) A complete replacement of the current Panama Road overbridge (necessary to span the extra two lanes involved), which would include a wider bridge to accommodate a shared pathway on each side of the bridge.

(c) Of cultural significance, complete replacement of the triple box culverts that channel Ōtāhuhu Creek under SH1 with a new wider bridge structure

to accommodate additional lanes, and a separate bridge structure to carry new pedestrian and cycleways.

(d) Complete replacement and reconfiguration of the current Princes Street Interchange, providing a wider overbridge that (as with the Panama Road overbridge) would provide shared paths.

(e) The erection of noise barriers.

### Objectives

[1120] NZTA contends that Sector 5 improves the transport functions of this part of SH1. It provides additional capacity to accommodate further traffic flows. It creates an eight-lane motorway from the Mt Wellington Interchange south to the Highbrook Interchange. The widening of the Panama Road bridge improves turning movements out of Hillside Road (currently restricted to left turns only). This improved turning facility increases opportunities for vehicles travelling between the communities on the east and west sides of SH1. The upgrading of the Princes Street Interchange, with its extra capacity and lane arrangements, will reduce the adverse effects of queuing (to join the motorway) on the local roads. There will be controlled pedestrian crossings, a large refuge for pedestrians wishing to cross the Princes Street on-ramps, and pedestrian routes between the communities on each side of the motorway will be shortened. Additionally, there will be a shared path on both sides.

[1121] Sector 5 proposals will, on the Panama Road overbridge, improve pedestrian and cycling access. The construction of an additional bridge across Ōtāhuhu Creek will, during the construction phase of the new bridge, allow for diversion of motorway traffic, with the structure being retained for future use for pedestrians and cyclists, linking in the local roads of Deas Place and Mataroa Road. NZTA contends the new layout of the Princes Street Interchange will improve significantly safety, particularly for pedestrians, cyclists and school children (by providing clearly marked footpaths and reducing the number of uncontrolled road crossings).

[1122] The Proposal additionally mandates the construction of new acoustic barriers on each side of SH1 adjacent to existing residential properties.

### Construction effects

[1123] The proposed works associated with Sector 5 widening and bridge construction will have obvious effects. There will be earthworks. Vegetation currently on the footprint of the works will need to be cleared, which will include current landscape planting inside the current designation and mangroves adjacent to the Ōtāhuhu Creek Bridge. Bridge construction will necessitate temporary realignment of

motorway lanes and the median. There are two bridges involved at Ōtāhuhu Creek. The Ōtāhuhu Creek bridge construction will require temporary occupation (during the construction phase) and subsequently permanent occupation of the CMA. The Panama Road bridge construction will, during its construction phase, lead to a reduction of lane widths on SH1, together with the temporary realignment of lanes and barriers and a consequential reduced speed limit.

[1124] Similarly with the realignment and changes to the Princes Street Interchange, there will be earthworks, demolition of the existing bridge, construction of new on- and off-ramps and disruption to SH1 traffic.

### Ōtāhuhu Creek

[1125] The matters relating to the removal of culverts and construction of bridges across SH1 at Ōtāhuhu Creek have been addressed in chapter 14.2 of this Report under the sub heading *Ōtāhuhu Creek – Declamation and Bridge Construction within the CMA.*

[1126] NZTA's proposal is to restore to some extent the natural channel of Ōtāhuhu Creek where it is crossed by SH1 by removing the box culverts and replacing them with a bridge. This would make more evident the nature of the ancient portage. This aspect of the Proposal has the support of Mana Whenua.

### Adverse effects

[1127] Interestingly, with the exception of Fonterra, concerned about the possible weakening of its site stability at Tip Top corner and the possible loss of truck turning circles on the same site, Sector 5 has attracted no substantial opposition and little comment.

[1128] The Board is satisfied that as far as Sector 5 is concerned, the adverse effects have been correctly identified in the AEE. These include traffic disruption on SH1 during the construction phase, coupled with disruption on the local road network and closure of various walking and cycling routes. There is predictable intrusion around the Ōtāhuhu Creek into the coastal and marine area with removal of some mangroves and vegetation. In the same area, the removal of the culverts and the construction of a bridge involves working on sites of value to Mana Whenua. There will be the creation of noise during the construction phase and localised dust creation and machinery emission. The motorway widening will result in the loss of some residential houses (15 residential properties have or will be acquired in the Mt Wellington South / Ōtāhuhu area, coupled with partial acquisition of 47

residential properties).[732] Earthworks will result in the risk of sediment discharges. The creation of extra motorway lanes will increase polluted stormwater discharges.

[1129] As best the Board can, it has dealt with some of the more significant adverse effects. The Board has, of course, considered all adverse effects. Many effects, however, particularly those related to the construction phase of the Proposal, are shared in common with all sectors of the proposed EWL and are, in the Board's view, adequately mitigated by pertinent conditions.

*Traffic flows*

[1130] Traffic using the two south-facing ramps joining EWL to SH1 will obviously increase flows of traffic. These were estimated at an approximately 10 percent to 11 percent daily flow increase.[733] The additional two lanes of SH1 adequately cater for such increase. The upgraded interchange at Princes Street will improve traffic flows in the area and in particular will reduce queuing congestion caused by vehicles waiting to enter the motorway.

*Transmission lines and Transpower assets*

[1131] Currently the Henderson-Ōtāhuhu A 220 kV line runs along the eastern side of SH1. At Princes Street, the proposed widening will infringe on the minimum vertical clearance requirements. Additional hazardous effects include blocking maintenance access to pylons during the construction phase, the risk of dust from construction causing arcing of lines, and the hazards of machinery working close to transmission lines. There is also the risk of earthworks undermining the support structures of pylons.

[1132] In this area, however, discussions between NZTA and Transpower have been productive. Mr Gardner-Hopkins, in his closing submissions[734], advised the Board that the effects of the Proposal on the national grid could be managed so as to avoid undue compromise of and effects on the national grid. Although there remains some uncertainty because NZTA's proposal had not yet reached a final detailed design, Transpower considered that its legislation gave it adequate protection. At Tower 15B on HEN-OTA A, additional support structures will be necessary for the transmission line to provide the required vertical clearances over the proposed new motorway ramps. Although new mono poles would be required at Towers 14A, 15A, 18A and 19A (which required restricted discretionary activity

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[732] AEE, para 344.

[733] AEE, para 226. However, future predictions of traffic flows in Auckland are influenced by so many variables that, in the Board's view, accurate predictions are problematic.

[734] Closing Statement, Gardner-Hopkins, para 1.

consents), Mr Gardner-Hopkins' submission was that there were no obvious "show-stoppers" that would preclude the grant of such consents.

[1133] The new Panama Road bridge would, like the structure it replaces, require low and medium voltage underground ducts to cross SH1. There is no adverse effect here that requires intervention.

*Gas transmission*

[1134] A bulk gas supply main inside a concrete casing crosses SH1 north of Panama Road. The proposed realignment and protection works have been discussed between NZTA and First Gas. There are no resulting issues other than those adequately canvassed in the Network Utilities Management Plan.

*Telecommunications*

[1135] A Spark cellular tower on the north-west corner of Frank Grey Place and Princes Street may need to be relocated. Again, there is no discernible adverse effect.

*Stormwater*

[1136] The widening of SH1 and the creation of an extra carriageway will require some modification of the motorway's current drainage system. The proposed stormwater drainage and treatment system in Sector 5 is adequate.

*Mana Whenua and cultural interests*

[1137] The infringement on Ōtāhuhu Creek, part of an ancient portage of significance to Māori, will include a new bridge across the creek and the removal of the existing culverts under SH1. This visual improvement of part of the portage is an acknowledgement of its importance and significance to Māori.

*Tree removal*

[1138] Trees to be removed in Sector 5 as a result of the Proposal include groups of trees at the Princes Street Interchange, street trees along Princes Street and Frank Grey Place, and trees inside the Beddingfield Memorial Park. In all cases this tree removal will be mitigated after construction by replanting in accordance with developed urban and landscape design plans.

*Visual effects*

[1139] The only significant natural feature within Sector 5 is the Ōtāhuhu Creek, which has been discussed previously.

[1140] There will be potential adverse visual effects flowing from the Proposal for residential properties adjoining SH1. For those properties there will be the

movement of the motorway closer to them, the loss of a green buffer, and the installation and encroachment of noise barriers. Those barriers will, to some extent, reduce noise and screen SH1 from the affected residences. Proposed mitigation includes re-establishing vegetation on the edges of the SH1 corridor in front of the noise walls and offering planting inside affected properties on the inside of the noise walls. There have been no submissions or evidence from residents adjacent to SH1 on Sector 5.

*Vibration*

[1141] Most residences in Sector 5 are within 15 m to 20 m of the closest construction works involved. Some, however, will be less than 10 m from retaining walls or potential earthwork operations. Housing in this sector is dense. There will inevitably be noise and vibration effects during construction. The AEE[735] suggests that vibration effects are more likely to be of category A (nuisance value) rather than category B (damaging to property). The Board has received no evidence to the contrary. The vibration conditions mitigate, as far as possible, this adverse effect.

*Noise*

[1142] The Board is satisfied that conditions designed to mitigate noise, in particular the erection of acoustic barriers that will in many areas reduce the number of inhabitants adversely affected by noise, constitutes adequate mitigation.

*Fonterra Tip Top corner site*

[1143] The concerns expressed by Fonterra about adverse effects on its site relating to the risk of undermining foundations and reduction of vehicle space have been resolved to the satisfaction of both Fonterra and NZTA. The Board is satisfied that those adverse effects, as a result of the agreement reached, are minor.

## Conclusion

[1144] In summary, the Board finds in relation to Sector 5 – SH1 to Princes Street of NoR2 that:

(a) The effect of increased traffic flows from the two south-facing ramps joining EWL to SH1 will be catered for through the addition of two lanes to SH1. The upgraded interchange at Princes Street will improve traffic flows in the area and in particular will reduce queuing congestion caused by vehicles waiting to enter the motorway;

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[735] NZTA, AEE, para 310.

(b) The adverse effects on Transpower's national grid assets will be appropriately managed so as to avoid undue compromise of and effects on the national grid. The effects on the bulk gas supply main will be appropriately managed through the Network Utility Management Plan;

(c) The works on Ōtāhuhu Creek will daylight the Tainui Portage;

(d) Visual effects on surrounding residential properties adjoining SH1 will be mitigated by re-establishing vegetation on the edges of the SH1 corridor in front of the noise walls and offering planting inside affected properties on the inside of the noise walls; and

(e) Noise and vibration effects during construction will be mitigated by the vibration and noise conditions, in particular the erection of acoustic barriers that will in many areas reduce the number of inhabitants adversely affected by noise.

[1145] Viewed through the lens of s171(1)(c) of the RMA, the Board considers that the designation and work are reasonably necessary to achieve the objectives of NZTA. In terms of s171(1)(b), alternatives have been appropriately considered. Adverse effects have been appropriately considered and avoided, or mitigated. Those effects that cannot be mitigated can be addressed through the PWA.

## 15.7 SECTOR 6 – ALFRED STREET / CAPTAIN SPRINGS ROAD / PORT LINK ROAD

[1146] This sector of NoR1 comprises three roads linking to the EWL:

(a) Alfred Street;

(b) Captain Springs Road; and

(c) Port Link Road.

[1147] There were no significant issues arising out of the NoR in Alfred Street, which extends from the EWL to Neilson Street. The pedestrian and cycling overbridge, not precluding the possibility of a future at-grade vehicular intersection, and the impacts on Waikaraka Park South are addressed in chapter 15.3 of this Report.

[1148] The limits of the designation for Captain Springs Road extend from the EWL to Neilson Street. The potential impact on a property owned by Mamaku Investment Management Limited, which operates a large storage facility (Safe Store

Containers Limited) at 89-91 Captain Springs Road was outlined by Mr Campbell.[736] With the considerable increase of traffic expected on Captain Springs Road as a result of the EWL, Mr Campbell was concerned about access difficulties (right turn entry and exit) to Mamaku's site. He sought some amendments to the flush median in Captain Springs Road. Following professional advice, Mr Campbell tabled a short report from Mr Hall, traffic engineer, who also gave evidence. He advised that the concerns raised by Mr Campbell could be addressed by some additional road widening in front of the site and an extension to the flush median. Mr Hall stated that this had been agreed by Mr A Murray for NZTA.[737]

[1149] Mr Barnard of the Auckland Organ Piano and Keyboard Society made submissions[738] about the effects on the multiple users of the Dalewool Brass Band Hall located at 98 Captain Springs Road (on Waikaraka Park) approximately opposite Safe Store Containers site. In relation to the NoR, he was concerned about entry and exit and loss of parking, including mobility spaces. Mr A Murray indicated that from a transport perspective to permit on-street parking for the events that attracted large numbers of people was not acceptable. He stated that, "*Parking immediately south of the premises is available and there would be an overall net gain of approximately 10 new parking spaces at the southern end of Captain Springs Road*".[739] He also noted that an on-street car park adjoins the hall, which could accommodate 12 cars and be used for those who have mobility issues. The potential effects are likely to be reduced through the additional widening referred to (above) and the Board concludes that the NoR does not require amendment or additional conditions.

[1150] The Port Link Road is a cul-de-sac extending 270 m from a priority controlled intersection on the EWL, terminating close to the Kiwi Rail / MetroPort site. It intersects with Miami Parade to the west and east. Generally the alignment corresponds to an existing designation held by Auckland Transport. Submissions were received from the POAL and Downer NZ, trading as Green Vision Recycling, concerning the effects of the designation.

[1151] The new Port Link Road will provide access between the inland port and EWL, and to Neilson Street via Miami Parade and Angle Street. This road will provide an

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[736] Transcript, Campbell, p 4944 – 4950.

[737] Transcript, Hall and A Murray, p 5999-6000.

[738] Transcript, Barnard, p 5579.

[739] Statement of Primary Evidence, A Murray, para 20.41.

important new freight function and is expected to carry approximately 7,700 vehicles per day (vpd) in 2026 and 6,300 vpd in 2036. It will have a collector function.[740]

[1152] NZTA stated in evidence that consideration had been given to an alternative location for the Port Link Road by extending Angle Street instead of constructing a completely new connection, "… *however the proximity of an Angle Street connection intersection to Captain Springs Road was seen as undesirable from a traffic and speed management perspective*".[741]

[1153] Mr Nancekivell, for NZTA, stated that the Port Link Road was consistent with the existing designation held by Auckland Transport for a local connector road in this location.[742]

[1154] Mr A Murray, for NZTA, outlined how the six final corridor options had considered alternative access to the inland port. [743]

[1155] For KiwiRail, the owners and operators of the Southdown inland port, Mr Gordon emphasised the important function of MetroPort as a point of aggregation for containers transported by rail from the ports of Auckland, Tauranga and Wellington and was the country's third biggest export port.[744]

[1156] Port of Tauranga supported the construction of the Port Link Road and its general alignment, subject to detailed design of the cul-de-sac at its head being able to accommodate larger vehicles.[745]

[1157] The National Road Carriers Inc. emphasised the inadequacies of the local street network capacity to efficiently and effectively handle the scale and volume of heavy traffic estimated at 6,000 vpd, noting that MetroPort handles more than 300,000 containers, which exceeds any other port in New Zealand (other than the Ports of Auckland and Port of Tauranga).[746]

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[740] Technical Report No 1, December 2016, para 6.14.

[741] Statement of Primary Evidence, Nancekivell, para 15.63.

[742] Ibid.

[743] Statement of Primary Evidence, A Murray, para 6.8.

[744] Transcript, Gordan, p 3228 & p 3241.

[745] Submission 126344, para 5.

[746] Representation, Garnier, p 2-3; Representation (PowerPoint presentation, Carr & Haslam).

[1158] POAL's outstanding concerns were with the effects of the Port Link Road on its Pikes Point operations. It wanted that section of the NoR north of Miami Parade to be declined, arguing that there was no evidence of access to the inland ports producing positive effects and that alternatives had not been adequately considered. POAL also stated that it was concerned that NZTA had agreed to relocate one of its tenants, Heliport, on land that was owned by POAL and occupied by another tenant.[747] It was stated that the proposed road did not achieve a connection to MetroPort or the Southdown container terminal.[748]

[1159] For POAL, Mr Arbuthnot stated in evidence that:[749]

> "*(a) The Port Link Road does not actually 'link' the Project to the adjacent inland ports, as it does not physically connect the roading network to the inland ports.*
>
> *(b) It reduces the size and efficiency of the Pikes Point car storage site.*
>
> *(c) There has been an inadequate consideration of alternatives (which I note is a requirement under section 171(1) (b) of the RMA), including an extension of Angle Street.*"

[1160] He noted that the cul-de-sac road form and associated turning head did not provide a full roading link for access between the EWL and the other inland port sites and, therefore, how could it contribute to achieving NZTA's objectives for the EWL.

[1161] Mr Arbuthnot also noted that Auckland Transport had not uplifted its existing designation, despite NZTA's NoR. Therefore, POAL's land would currently be subject to restrictions under s176 of the RMA in favour of two separate requiring authorities, but for a similar public work.

[1162] Mr McKenzie said that:

> "*POAL's concern with the proposed 'Port Link Road' is that it does not appear to provide an efficient 'link' between the EWL, the properties it is intended to service and the existing wider road network in this part of Penrose/Onehunga*."[750]

[1163] He opined that:

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[747] Closing Submissions, Carruthers, paras 1.3 and 2.3 to 2.5.

[748] Summary Statement, Kirk, para 1.10.

[749] Statement of Primary Evidence, Arbuthnot, para 6.3 & 6.4 (e).

[750] Statement of Primary Evidence, McKenzie, para 4.11.

> "*Without a full public road* link *between the EWL, the neighbouring inland ports and other existing public arterial roading links (e.g. Neilson Street), in my opinion the proposed Port Link Road will not contribute to the efficient distribution of freight within Auckland*."[751]

[1164] Mr Kirk for POAL stated in evidence that:[752]

> "*The proposed Port Link Road will therefore not contribute to the efficient distribution of freight within Auckland. The failure to provide connections to the inland ports in a form that would be suitable for heavy vehicle traffic, means that the very facilities that are intended to benefit from the Port Link Road the most (being the inland ports to the north of POAL's Pikes Point site) are unlikely to even utilise the proposed link.*"

[1165] He noted that Auckland Transport held an existing designation (Designation 1701) over POAL's land for a local road in the same general area of the proposed Port Link Road. While he referred to the "*strong competitive relationship between POAL and the Port of Tauranga Limited*", he emphasised that POAL was primarily concerned with the adverse effects on it particularly as a result of "*a substantial amount of valuable industrial land owned by POAL and, if the link is constructed and POAL is left holding the remainder of the Pikes Point site, it will significantly compromise the viability of the remainder of the site*".[753]

[1166] In rebuttal, Mr A Murray did not agree with Mr McKenzie that the Port Link Road would not contribute to the efficient distribution of freight, or that a "*much larger and more connected road network*" should be provided. He said:[754]

> "*The Ports Link Road is intended to connect to the properties in this area (including the large freight generating sites of MetroPort and POAL) via both direct property access and via the local road network (Miami Parade). This local road connection provides EWL access to properties located on Angle Street, Pukemiro Street and Edinburgh Street. It provides indirect access through to Neilson Street via Miami Parade and Angle Street, however the main access to Neilson Street from the EWL is intended to be via Captain Springs Road.*"

[1167] He referred to the outcome of the JWS Report with Mr McKenzie where it was agreed that:[755]

> "*The intent of the link at the northern end is to provide access to properties from the cul-de-sac and not act as a through route to Neilson Street. It was also acknowledged that the Ports Link Road will provide the opportunity for those properties along the western side of the road to seek access should they wish to do this in the future.*"

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[751] Ibid, 4.17.

[752] Statement of Primary Evidence, Kirk, para 4.7.

[753] Summary Statement, Kirk, para 1.14.

[754] Statement of Rebuttal Evidence, A Murray, para 21.3.

[755] Expert Conferencing Joint Witness Statement, Traffic & Transportation, 24 May 2017, para 3.12.

[1168] The issue raised by POAL that NZTA has not given adequate consideration to alternatives is addressed more fully elsewhere. The Board does not consider that the overlapping designations of Auckland Transport and NZTA creates any serious planning issues. This can be addressed in future if need be. The Board finds little merit in the evidence of the POAL witnesses questioning whether the Port Link Road will achieve the objectives of the Proposal. The Board concludes that the Port Link Road has been adequately justified and will appropriately contribute to the overall objectives of the Proposal. The output of the Joint Expert Witness conference and the traffic modelling of Mr A Murray would support the Board's conclusion. It is clear to the Board that there are a number of property issues to be resolved between NZTA and POAL within the scope of the PWA.

[1169] For Downer, Mr Goldsworthy[756] outlined the scope of operations as a recycling facility for construction debris. He stated the adverse effects of the EWL that would result from the proposed alignment of Port Link Road bisecting the operational area. He suggested two alternatives to resolve the matter: move the location of the Port Link Road further to the east or relocate the business on POAL land currently occupied for other purposes. During the course of the Hearing[757] it was clear to the Board that the issues primarily related to land acquisition under the PWA and that it was likely that direct negotiations could resolve these.

[1170] NZTA submitted that the Port Link Road closely follows the existing designation within the AUP:OP held by Auckland Transport for roading purposes and, therefore, the location of the road and its associated effects was well signalled. The Port Link Road is an important and necessary part of the EWL and its removal would have a detrimental effect on achieving the Proposal objectives due to reduced connectivity to the Southdown Rail Terminal and limited reduction of traffic volumes on Neilson Street[758]. On the basis of the evidence, the Board agrees with Mr Mulligan.

### Conclusions in relation to Sector 6 of NoR1

[1171] In summary, the Board finds in relation to Sector 6 – Alfred Street / Captain Springs Road / Port Link Road of NoR1 that:

(a) There were no significant issues arising out of the NoR in Alfred Street;

(b) Adverse effects on the property owned by Mamaku Investment Management Limited can be appropriately mitigated by conditions;

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[756] Statement of Primary Evidence, Goldsworthy.

[757] Transcript, Goldsworthy, pages 4926 – 4943.

[758] Closing Statement, Mulligan, para 5.14.

(c) The proposal design will ensure that satisfactory entry and exit to the Dalewool Brass Band Hall site and parking servicing the site will be maintained; and

(d) Adequate consideration has been given to alternative routes within NoR1 in relation to Port Link Road. The Port Link Road is an important and necessary part of the EWL. Its removal would have a detrimental effect on achieving the Proposal objectives due to reduced connectivity. Site-specific property issues, such as those between POAL and NZTA and Downer and NZTA, are better addressed through direct negotiations between them and NZTA under the PWA.

[1172] Viewed through the lens of s171(1)(c) of the RMA, the Board considers that the designation and work are reasonably necessary to achieve the objectives of NZTA. In terms of s171(1)(b), alternatives have been appropriately considered. Adverse effects have been appropriately considered and avoided, or mitigated. Those effects that cannot be mitigated can be addressed through the PWA.

## 15.8 WALKING AND CYCLING EFFECTS

[1173] The AEE[759] describes the commuter and recreational cycle paths provided along the Proposal alignment, and also in a north-south direction to enhance connectivity to communities in the Onehunga-Penrose area to the north of the Proposal. There is no provision for walking and cycling paths on the existing motorways (SH1 and SH20). There is an existing pedestrian path under the SH20 Manukau Harbour Bridge, which will be retained. An existing shared path extends along the northern shore of the Māngere Inlet from Onehunga Harbour Road to Southdown.

[1174] New paths will connect to existing cycle and walking networks, improving connectivity to the wider Auckland region facilities. Key linkages provided by the Proposal include:

(a) Improved linkages in and around the Neilson Street Interchange linking with the New Old Māngere Bridge and Taumanu Reserve (Onehunga Foreshore), improved access into Gloucester Park North Reserve and improved facilities on Onehunga Harbour Road and Onehunga Mall;

(b) A new Māngere Inlet foreshore with recreational and commuter paths along the alignment;

[759] NZTA AEE, Para 6.3.5.

(c) North-south shared path linkages to/from Alfred Street, Captain Springs Road, Waikaraka Park and Hugo Johnston Drive, improving access to businesses and the residential communities to the north;

(d) Linking the existing Waikaraka shared path through to Sylvia Park Town Centre thereby improving the functionality of the existing path that currently ends in an industrial environment in Hugo Johnston Drive;

(e) A shared pedestrian and cycle path over the Great South Road intersection to provide improved east-west connections;

(f) Wider pedestrian and cycle paths on the replacement bridges across SH1 at Panama Road and at Princes Street, improving sight lines and crossing points, and connectivity to residential communities; and

(g) A new pedestrian / cycle crossing at Ōtāhuhu Creek parallel to SH1, connecting Mataroa Road (north) with Deas Place (south), improving local connectivity between the residential communities east of SH1 (Panama Road and Princes Street East).

[1175] The Proposal has been designed to avoid the need for on-road cycling where practicable, with separated cycling facilities provided beside the EWL Main Alignment between SH20 and SH1, and access to the separated recreational cycle and walkway on the Māngere Inlet coastal edge. Cycle paths will be designed to the following approximate design specifications (to be confirmed in detailed design):

(a) Off-road exclusive cycle paths will generally be 3 m wide;

(b) Shared paths will have a minimum width of 3 m; and

(c) Separated pedestrian / cycle paths will have widths as specified in *Auckland Transport Code of Practice (ATCOP)*.

[1176] The detail of the type of walking and cycling infrastructure will be developed in the detailed design process, including both the form and connections. Pedestrian footpaths will generally be provided on either side of the Proposal, on all local roads and at signalised intersections (except motorways). Pedestrian facilities will generally be designed in accordance with NZTA's *Pedestrian Planning and Design Guide33,* the design principles from NZTA's *Urban Design Guideline – Bridging the Gap34* and the *Auckland Transport Code of Practice*.

[1177] Technical Report 1 provided a detailed assessment of the proposed cycling and walking facilities in each of the various sectors of the EWL. The key considerations were improving connectivity, high level of amenity including minimum width of 3 m

for shared paths and 1.8 m for footpaths and safe crossing points, separating needs of different users and integration with existing and proposed walking and cycling networks.

[1178] The evidence of Mr A Murray for NZTA described how the EWL meets key Proposal Objective 2, "*To improve safety and accessibility for cycling and walking between Māngere Bridge, Onehunga and Sylvia Park, and accessing Ōtāhuhu East*".

[1179] In addition he said that:[760]

> "*The Project will significantly improve safety and accessibility for cycling and walking between Māngere Bridge, Onehunga Town Centre and Sylvia Park Town Centre by providing high quality, off-road and continuous links connecting these key destinations. New and enhanced north-south connections will improve connectivity to the Māngere foreshore from the residential community north of Neilson Street, including at Onehunga Mall and Alfred Street. There will also be significant connectivity and safety improvements for the communities of Ōtāhuhu East.*"

[1180] Mr A Murray also stated:

> "*Onehunga Mall is expected to have the highest pedestrian and cyclist volumes, so I do support exploring alternative configurations at the detailed design phase that seek to further enhance the quality of this connection along Onehunga Mall.*"

[1181] Submissions received were both positive and negative towards to cycling and walking provisions. Ms King, for Auckland Transport, noted that the EWL would provide for over double the linear length of walking and cycling facilities in the Proposal area compared with the existing network.[761] She referred to the positive effects of the walking and cycling facilities in individual sectors and concluded that:[762]

> "*The true benefit of each is fully realised when combined with investment in connecting routes. For example, the walking and cycling facilities on the EWL mainline, when combined with perpendicular connections, will cumulatively achieve a 'network effect' which opens up multiple journey opportunities.*"

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[760] Statement of Primary Evidence, A Murray, para 12.1.

[761] Statement of Primary Evidence, King, para 19.

[762] Ibid, para 21.

[1182] Ms King supported the addition of specific walking and cycling connections proposed by NZTA in condition DC.11 (b), (c) and (d) but sought some additional conditions.

[1183] Mr Smith, for Auckland Council, agreed with Mr A Murray's suggested amendment to the designation to enable a high quality walking and cycling connection to be provided along Onehunga Mall.[763] He noted that NZTA's Cycle Design Guidance webpage suggests the minimum two-way shared path width should be 4 m. He considered that such width should be provided on all shared pathways throughout the EWL to ensure consistency for active users. Mr Smith was satisfied that the detailed configuration of the paths and cycleways could be agreed during the detail design stage.

[1184] In relation to the width of the shared pathway along Orpheus Drive (from Onehunga Wharf to Taumanu Reserve), Mr McIndoe, for Auckland Council, agreed with NZTA's urban design expert, Mr Lister, that the shared facility path should be not less than 4 m wide and possibly wider where appropriate.[764]

[1185] Mr Young, a resident of Onehunga, made submissions on behalf of the members of the cycling community of Fisher & Paykel Healthcare Limited, which employs 2,500 people at its East Tamaki site. He requested that NZTA be required to implement best practice, world-class cycle infrastructure along the EWL, suitable for all types of cycle users. He acknowledged that NZTA had made an effort to include cycle facilities in the Proposal but there were insufficient upgraded connections with other parts of the road network. He also referred to potential conflict between pedestrians and cyclists on the proposed shared pathway along Orpheus Drive. He advocated for physical separation between vehicular paths and commuter cycleways.

[1186] Ms Cuthbert made a submission and presentation for Bike Auckland, which expressed concern regarding:

(a) Severance of the harbour frontage;

(b) Opportunity cost of replicated cycling facilities;

(c) Major lack of connections to local cycling networks;

(d) Inadequate separation between walk and cycle elements; and

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[763] Statement of Primary Evidence, Smith, para 10.4.

[764] Statement of Primary Evidence, McIndoe, para 18.2.

(e) Poor design to cater for commuting and recreational cycling needs.

[1187] The separation issue in (d) above is important because, particularly with a narrow shared pathway, the difference between cyclist and pedestrian speed, coupled with the propensity of pedestrians to meander and be unaware of fast-approaching cyclists behind them, creates issues relating to safety and enjoyment.

[1188] Prior to Ms Cuthbert's appearance at the Hearing, Bike Auckland had entered into a "side" agreement with NZTA that provided for the following:

(a) Sector 1 – Orpheus Drive, separation for walk / bike except for few constrained width areas;

(b) Sector 2 – Onehunga Mall / train station, separated walk / bike / vehicles;

(c) Sector 3–4 – Hugo Johnston Drive, separated cycleway, extended link for Alfred Street and AMETI–Sylvia Park;

(d) Sector 5 – Panama Bridge upgrade to separated walk / cycle;

(e) Sector 5 – Underpass at Ōtāhuhu Creek / SH1, links to Greenways to be left to later "best endeavours"; and

(f) Sector 5 – Ōtāhuhu Interchange – Frank Grey Place, improved physical protection for pedestrians / cyclists.

[1189] NZTA agreed for Bike Auckland to have input into the detailed design. Ms Cuthbert expressed satisfaction with the terms of this agreement.

[1190] The Board has given particular consideration to Bike Auckland's suggestion that the underside of the bridges to be installed across Ōtāhuhu Creek include provision of a cycle underpass to support the future development of a cycle route along Ōtāhuhu Creek.[765] The Board does not oppose the principle of future-proofing of the design of the bridge and abutments for that purpose, but this is not to be seen as an endorsement of a future cycleway along that route, which follows the Tainui Portage between the Tāmaki River and Māngere Inlet. The Board will not indicate the appropriateness or otherwise of such a route in the absence of input from Mana

[765] Transcript, Cuthbert, p 1597.

Whenua, which will be necessary during the scoping of such a proposal. Accordingly, the Board does not include a condition to that effect.

[1191] Mr Barter[766] and Mr Walker made separate submissions concerning the need for better cycle connections to Onehunga, separation of cycleways and intersection improvements and effects of the Proposal on walkers and cyclists, especially along the foreshore of the Māngere Inlet.

[1192] NZTA proposed amended condition DC.11(b), providing for a shared pedestrian and cycle path connection between Orpheus Drive and the proposed new Old Māngere Bridge, providing a linkage to and from Taumanu Reserve to Onehunga Wharf, with a minimum width of 4 m with wider sections where practicable. The Board supports this condition.

[1193] The Board is satisfied that the proposed design for walking and cycling facilities, with the increase in width of the Orpheus Drive section and the collaborative design approach involving Auckland Council, Auckland Transport and Bike Auckland, will provide appropriate walking and cycling facilities to achieve the objectives of the Proposal and address the adverse effects.

## 15.9 CONSTRUCTION EFFECTS

[1194] In this section of the Report, the Board provides a brief overview of the proposed programme and methodology for the construction of the Proposal and the associated construction effects and management. In doing so, the Board relies primarily on the evidence of Mr Nancekivell on the construction process to be implemented by NZTA.

[1195] Mr Nancekivell identified the construction sequence in his evidence (subject to the Board approving the Proposal),[767] which can be summarised as follows:

(a) Tender process and contract award – third quarter of 2017.

(b) Construction begins – early 2018.

(c) Due to the size of this Proposal and the likely property acquisition required, the timing for construction of the Proposal is likely to be staged and split

[766] Mr Barter manages a "Share the Road" campaign of NZTA and is a committee member of Bike Auckland.

[767] Statement of Primary Evidence, Nancekivell, para 11 onwards.

into a number of contracts, with the contractors (once appointed) considering appropriate construction methods that comply with the designation and consent conditions.

[1196] An example of the proposed construction methodology is provided in the AEE,[768] with the main construction elements for the EWL summarised by Mr Nancekivell as follows:[769]

(a) Neilson Street Interchange including the Galway Street link (Sector 1);

(b) Foreshore (road embankment, landforms and stormwater treatment areas) (Sector 2) including Captain Springs Road and the Port Link Road (Sector 6);

(c) Anns Creek viaducts, Great South Road grade-separated intersection and Hugo Johnston Drive extension (Sector 3);

(d) Sylvia Park Road and SH1 ramps (Sector 4);

(e) SH1 Auxiliary Lanes, Panama Road Bridge and Ōtāhuhu Creek Bridge (Sector 5); and

(f) Princes Street Interchange (Sector 5).

[1197] Mr Nancekivell indicated that early construction could commence on:

(a) The Princes Street Interchange;

(b) The Embankment section.

[1198] The timing of other key works would be subject to a number of limitations, including:

(a) Significant utilities (for example, Transpower 220 kV transmission lines and First Gas high pressure gas main) require relocation / replacement prior to the road construction commencing, in particular within Sectors 2 and 4; and

[768] NZTA AEE, Section 7.

[769] Statement of Primary Evidence, Nancekivell, para 11.5.

(b) Works within Sectors 1 and 4 are within congested traffic areas and will need to be staged to minimise disruption. For example, works on SH20 and SH1 should not be undertaken at the same time. This includes that the works in and around the SH1 on- and off-ramps are likely to commence circa 2019-2020.

[1199] The indicative construction stages will take place over a period of approximately seven years, with construction of the Proposal expected to be completed by 2025[770].

[1200] A number of construction yards are required to construct the Proposal. NZTA do not currently own all the land for this, thus the Proposal has a necessary interface with the Public Works Act. In his evidence Mr Nancekivell explained that there will be seven main yards that will have staff facilities as well as laydown areas and equipment storage. There will be another seven smaller areas (some will be used only as laydown areas). All construction sites will be required to control stormwater runoff.

[1201] The main construction yards of the Proposal are:[771]

(a) Yard 2 –The Onehunga Wharf construction yard;

(b) Yard 3 – The Embankment: the Waikaraka Park construction yard at the end of Captain Springs Road;

(c) Yard 5 –The Anns Creek Viaduct / Great South Road intersection;

(d) Yard 6 – Sylvia Park Road;

(e) Yard 7 – Sylvia Park Ramps and SH1 widening: 430 Mt Wellington Highway;

(f) Yard 12 – 89 Luke Street; and

(g) Yard 14 – Princes Street Interchange: Frank Grey Place.

[770] NZTA AEE, Section 7.4, p83.

[771] Statement of Primary Evidence, Nancekivell, para 11.12.

[1202] A number of the technical reports supporting the AEE contain relevant assessments of potential construction effects, in particular Technical Report 17, Technical Report 10, Technical Report 8 and Technical Report 9. This list is not exhaustive.

### Management Plans

[1203] Importantly, NZTA proposes to manage many of the construction effects through management plans. The AEE describes the proposed construction management framework:[772]

> "*Where appropriate, the Transport Agency seeks a degree of flexibility in construction methods to accommodate these factors. Once the contract(s) for the Project have been awarded and a contractor (or contractors) are in place, the construction methodology will be further refined and developed. This will be undertaken within the management plan framework (as set out in Section 7.13) and conditions of the designations and consents which will be in place to manage the effects of the construction activities. Should a contractor wish to undertake construction activities in a manner which is not within the scope of the designations or consents held, appropriate assessment and additional authorisations would need to be obtained at that time.*
>
> *Management plans form an integral part of the construction methodology for the Project setting out how specific matters will be managed. A suite of management plans is proposed for the Project. These are discussed in* Section 13.1.5: Management plans of this AEE*.*
>
> *The management plans, Outline Plan(s) required for the designations, and other pre-construction documentation will be submitted to Auckland Council prior to the commencement of construction. The anticipated process for this is discussed further in* Part H: Management of effects on the environment of this AEE."

[1204] The reliance on management plans is not surprising for a Proposal of this scale and complexity.

[1205] The Board has no issue with the following view expressed by Ms Hopkins:[773]

> "*In my experience, management plans are an effective and widely used method to manage the effects from major construction projects. This is particularly so for large infrastructure projects such as this, where the design details will be finalised at a later date, meaning that not all the mechanisms for managing construction effects can be finalised at this time. I consider the management plan process to be an effective technique to provide certainty that the adverse effects of the Project will be appropriately managed.*"

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[772] NZTA AEE, Section 7.1, p81, with further commentary on the various management plans provided in Section 13.1.

[773] Statement of Primary Evidence, Hopkins, para 11.22.

[1206] This includes an overarching Construction Environmental Management Plan (CEMP) and a number of supporting plans, some of which were provided in draft form or in outline form as part of the application.[774] The coverage of these supporting management plans was detailed in the AEE[775] with refinements made in the evidence of Ms Hopkins.[776] This includes the following management plans relating to the resource consents:

(a) An overarching CEMP;

(b) A series of topic-specific management plans that form part of the CEMP (for example, plans that address coastal works, contaminated land, air quality, groundwater and settlement, and ecology);

(c) Site-specific or activity-specific management plans that contain the specific measures to be applied to a specific site or activity (for example, erosion and sediment control); and

(d) Plans that set out specific measures developed to provide for accidental discovery protocols, cultural monitoring plan and monitoring and management.

[1207] The following management plans relating to the NoRs and designations:

(a) Topic-specific management plans that form part of the Outline Plans (for example, plans that address construction noise and vibration, construction traffic and heritage);

(b) Urban Design and Landscape Master Plan(s) that form part of the Outline Plans to reflect the ULDF;

(c) Reinstatement plans for areas of public open space used for construction works; and

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[774] This included:

A draft contents page for the CEMP in Appendix A of the AEE.

A draft Contaminated Land Management Plan (CLMP) in Appendix D of Technical Report 17.

A draft Construction Traffic Management Plan Framework (CTMPF) in Appendix A of Technical Report 10.

[775] Summarised in the AEE, Chapter 13.1, p416 onwards.

[776] Statement of Primary Evidence, Hopkins, para 11.23–24.

(d) Plans that set out specific measures developed to provide for accidental discovery protocols, cultural monitoring, monitoring and management for the Māngere Inlet, and communication.

[1208] The relationship between the Outline Plan process mentioned previously[777] and the management plan framework is explained in Section 13.1.2 of the AEE. This includes:

(a) The Outline Plan process enables Auckland Council to review and provide input to the detailed design;

(b) A number of Outline Plan(s) may be staged to reflect the final Proposal phases or construction sequencing;

(c) The Outline Plan(s) will address the matters required under s176A(3) of the RMA, including how the Proposal meets the conditions of the designation; and

(d) A number of the management plans will form part of the Outline Plan documentation addressing construction related matters, including:

(i) The CEMP;

(ii) The Construction Noise and Vibration Management Plan (CNVMP);

(iii) The finalised Construction Traffic Management Plan based on the CTMPF contained as Appendix A to Technical Report 10: Construction Traffic Impact Assessment;

(iv) The Network Utilities Management Plan (NUMP);

(v) The Communications Plan and an Accidental Discovery Protocol; and

(vi) A number of topic specific management plans (for example, eplans that address construction noise and vibration, construction traffic and heritage) and Urban Design and Landscape Master Plan(s), as per the evidence of Ms Hopkins.[778]

[1209] Turning to the detail of the management plans, Ms Hopkins explained that:

> "*For this Project, drafts of some of the proposed management plans (the Construction Traffic Management Framework and the Contaminated Land*

[777] Chapter [6.1] of this Report, from para 127.

[778] Statement of Primary Evidence, Hopkins, para 11.24.

*Management Plan) were included with the application to allow the Board, the Auckland Council and potential submitters to understand how those particular plans will be structured and the matters that they will cover. In my experience, it is uncommon for all draft management plans to be submitted with the application as the construction contractor needs to provide critical inputs into the management plans reflecting the final design and construction methodology. For this reason, my focus has been to ensure that the management plan conditions provide a robust framework and performance standards for ensuring effects are adequately addressed once detailed design and construction details have been advanced.*"

[1210] Suffice to say that further detail may have assisted by reducing the Hearing time and to alleviate some of the concerns of those submitters directly affected by the construction (and operation) of the Proposal. This is not intended as a criticism, rather a mere observation.

## Particular concerns

[1211] Moving now to address a number of general and site-specific construction concerns, with particular reference to the management plans and other construction-related conditions. To the extent that adverse effects have been addressed earlier in this Report, it will suffice to provide a brief comment on the Board's findings and cross-reference.

[1212] The Board acknowledges that the environment includes the people who live, work, visit and commute through the area. Many submitters who live in the residential pockets told the Board that they were concerned at having to endure the disruption to their lives from construction activities and, once constructed, operation of the EWL.

[1213] Such concerns were articulated by Ms Rich on behalf of a number of residents and owners in the Onehunga Mall Cul-de-Sac. In her closing, Ms Rich summed up her concerns by referring to NZTA's impact on the Onehunga Mall Cul-de-Sac neighbourhood in recent years, based on other recent roading projects in the area, namely:

(a) The Manukau Harbour Crossing #2; and

(b) The Waterview Connection (recently opened in 2017).

[1214] For the EWL, the primary concerns of Ms Rich related to air quality, access and parking, noise and vibration, and community liaison. A number of these matters relate to final design and operation of the road, and are addressed elsewhere of this Report.[779] Ms Rich specifically sought conditions to maintain safe access

[779] Throughout this Report, in particular at para [859].

through the intersection of Onehunga Mall Cul-de-Sac and Onehunga Harbour Road, including during construction. The Board is satisfied that this will be appropriately addressed through the development and implementation of the relevant Site Specific Construction Traffic Management Plan. Long-term functions of this intersection will be addressed through design considerations required under Condition DC.11B.

[1215] The concerns of K and M Maras, and Ms Ransom on behalf of the Owners' Committee of 2 Onehunga Harbour Road, who own a unit at 2 Onehunga Harbour Road, regarding the location of the proposed driveway to the property, were addressed by NZTA in liaison with Auckland Council in a memorandum.[780] The Board accepts that any remaining concerns can be addressed during the detailed design process.

[1216] Mr Styles, in his evidence for Auckland Council, was particularly concerned about the level of protection and engagement the noise and vibration conditions afforded properties within or adjacent to the construction footprint. When Mr Styles appeared at the Hearing, his concerns had largely been resolved through updates to the conditions:[781]

> "*At this stage of the process it has been most efficient to focus on the conditions to deal with issues not resolved. In terms of those issues that are resolved, a number have been resolved directly through expert conferencing and those are addressed in the joint witness statements, of which there are three. Other issues have been resolved indirectly by updates and improvements to conditions.*
>
> *The main matters that have been resolved are that a draft CNVMP has not been provided but there has been significant strengthening of condition CNV.4 which requires the plan to the extent that while the draft plan in my view would still be helpful to understand the way that the CNV effects would be managed, I do not consider its provision necessary at this time.*
>
> *…*
>
> *In terms of the issues not resolved, it is important to note here that while discussions are ongoing with the Agency on conditions, a final set of noise and vibration conditions has not been finalised and some refinements to those currently being referred to may be required to ensure that the concerns I have noted in evidence are fully resolved. However, I anticipate that agreement on the conditions relating to these matters can be reached.*"

[1217] It is apparent from Mr Lanning in his closing[782] and the final set of amended conditions provided by NZTA[783] that Auckland Council and NZTA have had further

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[780] Memorandum of Transport Agency regarding the proposed driveway at 2 Onehunga Harbour Road, dated 12 September 2017.

[781] Transcript, Styles, p 3114–3115.

[782] Closing Statement, Lanning.

[783] Attachment 1 – Conditions, dated September 2017.

discussions and for the most part agreed to the wording of the relevant noise and vibration related conditions. Auckland Council requested changes to LAeq (15 min) construction noise criteria provided in condition CMV.4(a) being a reduction from 60 dB to 55 dB from 0630 to 0730 hours (applying within the period 0630 Sunday to 0630 Friday) and 65 dB to 45 dB from 1800 to 2000 hours (applying within the period 0630 Friday to 0630 Saturday). The Board accepts these changes.

[1218] A number of other site-specific construction concerns, including those from Fonterra, Stratex, and utility providers (including Auckland Transport, Transpower, KiwiRail, Spark and First Gas), have been resolved with NZTA either through redesign or through various conditions, including management plan conditions. These concerns are addressed in greater detail throughout chapter 15.4 of this Report.

[1219] The construction-related concerns of Mercury have been addressed in chapter 15.4 of this Report.

[1220] The remaining temporary and permanent acquisition of land required for construction and construction yard activities also presented a number of issues at the Hearing. The main unresolved issues related to the use of Waikaraka Park South as a construction yard, the T&G Global site, and the Turners and Growers site. These are addressed in the relevant sections within chapter 15 of this Report.

### Findings and conclusion

[1221] The inquiry into construction effects was understandably focused on the concerns of near neighbours and the potential for construction activities to generate unacceptable noise, vibration, air quality, health and safety, and traffic-related effects (including access and parking). As mentioned, NZTA was able to reach agreement with a number of land owners and operators (including utility and infrastructure providers), including via proposed conditions and/or via management plans.

[1222] In terms of construction noise and vibration in particular, the Board is satisfied that the amendments made to the conditions at the end of the Hearing are adequate as summarised by Mr Mulligan:[784]

> "*In response to concerns raised by Council, OBA and others, amendments have been made to the construction noise and vibration management plan conditions. The conditions now require early and timely engagement with the receivers for major construction work areas and further specificity as to mitigation options [Condition CNV.2]. The communications plan condition has also been amended to provide for early notification to businesses of*

[784] Closing Statement, Mulligan, para 18.2(b).

*construction activities with provision for any feedback to be looped into the management plan process [Condition CS.2].*"

[1223] NZTA has given focus to reducing the extent of the designation that occurred throughout the Hearing, the proposed roll backs of the designations post-construction, and the relevant conditions relating to site-specific concerns. There may be some residual concerns, but the Board considers that adverse construction effects for the most part will be of a temporary nature and appropriately managed.

[1224] The Board has accepted the compensation condition proffered by NZTA to mitigate the effects on Waikaraka Park South. Auckland Council will be in no worse position.

[1225] After considering the various other construction-related concerns before the Board, overall it is satisfied that it has received sufficient evidence to understand the nature and scale of likely effects of the Proposal, and that they will be adequately avoided, remedied or mitigated through the conditions. On that basis, the Board is satisfied that the detailed management of effects can be appropriately addressed through the management plan approach proposed by NZTA.

[1226] The Outline Plan approval process and the certification conditions imposed give the Board a further level of comfort that construction-related effects will be appropriately considered and addressed through the detailed design of the Proposal.

## 15.10 CONCLUSION ON EFFECTS OF NOR1 AND NOR2

[1227] The Board has considered the NoR sectors 1–6, both individually and cumulatively, and it is satisfied that that there will be a number of benefits and that adverse effects that can be appropriately avoided or mitigated, including through conditions imposed. Those effects that cannot be mitigated can be addressed through the PWA. NZTA, through its robust route selection process, combined with design elements that address specific effects and benefits throughout NoRs 1 and 2, has shown that those designations are reasonably necessary to achieve the Proposal objectives. The Board has no doubt that alternatives have been appropriately considered. The extent to which significant and competing issues have been balanced in refining the route illustrates the challenges that NZTA has faced in its detailed consideration of the Proposal.

[1228] In making this sector-by-sector evaluation, both individually and cumulatively, the Board has, of course, given consideration to Part 2 of the RMA. None of the provisions in that Part alter or impede the sector-by-sector conclusions the Board reached. Inevitably there is an overlap with the factors the Board considered when dealing with related resource consent applications. These are dealt with elsewhere.

## 15.11 SECTION 171(1)(A) ASSESSMENT OF RELEVANT PROVISIONS

[1229] Further to the Board's earlier findings relating to the s104D gateway test and s104(1)(b) of the RMA, the Board is obliged under s171(1)(a) of the RMA to consider the effects on the environment of allowing the requirement, having particular regard to any relevant provisions of: (i) a national policy statement; (ii) a New Zealand coastal policy statement; (iii) a regional policy statement or proposed regional policy statement; and (iv) a plan or proposed plan. Elsewhere in this Report, in chapter 12.2 onwards the Board has set out the legal framework against which s171(1)(a) assessments are to be made. The Board has followed this.

[1230] Invariably there is a degree of overlap, namely with the Board's substantive assessment of the applications for resource consent and the relevant AUP:OP objectives and policies and the assessment of the NoRs and designations under s171(1)(a) that follows. To avoid unnecessary repetition, the following chapters should be read in conjunction with the resource consent chapters of this Report, along with the planning instruments and provisions as set out in chapter 7 of this Report. As required by s171(1) the Board has considered relevant effects while having particular regard to the matters listed in that provision.

[1231] As mentioned earlier in this Report, when making its assessment the Board accepts the proposition that it is not necessary for a proposal to meet every single aspect of every single policy.[785] The Board also notes that, consistent with various case law, while making a full assessment of planning provisions, the Board is not compelled, nor is it efficient, to quote and individually report on every relevant policy.

### Section 171(1)(a)(i) – National Policy Statements

[1232] The national policy statements relevant to the NoRs and designations have been introduced and a brief overview provided in chapter 7 of this Report. These are:

(a) NPS – Urban Development Capacity

(b) NPS – Renewable Electricity Generation

(c) NPS – Electricity Transmission

[785] Closing Statement, Mulligan, para [21.37].

*NPS – Urban Development Capacity*

[1233] The Board has addressed the relevance of the NPS – Urban Development Capacity earlier in this Report. It is relevant. The Board now turns to the key provisions, which were correctly set out in the AEE[786] and succinctly covered in the evidence of Ms Rickard:[787]

(a) Objective Group A – Outcomes for planning decisions;

(b) Objective Group C – Responsive planning;

(c) Objective Group D – Coordinated planning evidence and decision-making; and

(d) The related policies.

[1234] Two key provisions were drawn to the Board's attention by the Board's Planner:[788]

> "***Objective OD1***
>
> *Urban environments where land use, development, development infrastructure and other infrastructure are integrated with each other.*
>
> ***Policy PA3***
>
> *When making planning decisions that affect the way and rate at which development capacity is provided, decision-makers shall provide for the social, economic, cultural and environmental wellbeing of people and communities and future generations, whilst having particular regard to:*
>
> *…*
>
> *(b) Promoting the efficient use of urban land and development infrastructure and other infrastructure; …*"

[1235] The position of NZTA, and that of Ms Rickard, is that the Proposal is consistent with and helps achieve the NPS, which significantly favours approval under both ss104 and 171.[789] No serious contest to this was made by those parties opposing the Proposal.

[1236] The Board finds a high level of support for the Proposal in the policy direction of the NPS – Urban Development Capacity. The Board agrees with Ms Rickard that the EWL is a good example of achieving the type of integrated urban planning envisioned by Objective OD1.[790] The Proposal clearly promotes the efficient use

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[786] Technical Report 2.

[787] Statement of Primary Evidence, Rickard, para 10.24.

[788] Memorandum of Board Counsel and Planner.

[789] Closing, Mulligan, para 21.46.

[790] Statement of Primary Evidence, Rickard, para 10.24.

and development of land and infrastructure to support the growth of Auckland and its development capacity.

*NPS – Renewable Electricity Generation*

[1237] The relevance of the NPS – Renewable Electricity Generation is also agreed. A matter lightly touched on in chapter 7 of this Report relates to the planning evidence of Mr Grala in relation to the potential for reverse sensitivity effects on the Mercury's Southdown site.[791] There is common ground that NZTA accepts these are "effects", but not in the sense of "reverse sensitivity" put forward by Mr Grala on behalf of Mercury.

[1238] The first issue relates to the Solar Research and Development Centre at the Southdown site.

[1239] Policy D is one of the policies at the heart of this:

> "***POLICY D***
>
> *Decision-makers shall, to the extent reasonably possible, manage activities to avoid reverse sensitivity effects on consented and on existing renewable electricity generation activities.*"

[1240] Ms Rickard remained firmly of the view that the concerns of Mr Grala did not represent a reverse sensitivity situation on the Solar Research and Development Centre.[792] Nonetheless, she acknowledged the valid concerns and the evidence regarding dust effects (and conditions proposed to address such adverse effects).

[1241] In support of her position on the matter Ms Rickard opined that:[793]

> "*Reverse sensitivity is, in my opinion, the risk that the operation or expansion of (in this case) infrastructure is constrained due to complaints and actions of other parties. My experience is that those other parties are nearly always identified as sensitive activities where people reside or are present for a long period of time, and includes residential activities. The primary purpose of control on reverse sensitivity is to prevent or manage the establishment of those sensitive activities. An example of how this plays out in the Unitary Plan is the prohibition or strict control on sensitive activities establishing in the HIZ [Heavy Industry Zone] where a lower standard of amenity is necessarily provided for. I am not aware of a situation where a road or pedestrian/cycle link has been considered as a sensitive activity.*"

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[791] Statement of Primary Evidence, Grala, para 70 and 201 onwards.

[792] Transcript, Rickard, p 2528-2529.

[793] Statement of Rebuttal Evidence, Rickard, para 6.19.

[1242] It is also helpful here set out the following proposition advanced by Mr Mulligan in his opening:[794]

> "*[24.11] The simple answer to this issue is that the EWL will not give rise to reverse sensitivity effects on the Solar Research and Development Centre. Reverse sensitivity in this situation requires:*
>
> *(a) A sensitive activity ie one that is sensitive to the effects generated by infrastructure; and*
>
> *(b) A real risk of complaints or actions by people from that sensitive activity that lead to restrictions on operations or expansion of that infrastructure or related activity.*
>
> *[24.12] The evidence filed by Mercury gives no indication of:*
>
> *(a) The operational effects the Solar Research and Development Centre and how that will impact on people using the EWL;*
>
> *(b) How the users of the EWL would be affected, given that most of them will move relatively quickly through the area (much like the current train passengers); and*
>
> *(c) How those users of the EWL could complain or bring about restrictions on Mercury's Solar Research and Development Centre.*"

[1243] During cross-examination by Mr Mulligan, Mr Grala conceded that his concerns regarding dust and Mercury's solar panels were indeed an operational effect (rather than reverse sensitivity).[795] The relevance of Policy D in this regard has fallen away.

[1244] The remaining reverse sensitivity concern from Mr Grala relates to Mercury having to potentially change its operations at the Southdown site to comply with health and safety obligations as a result of the Proposal introducing people, cyclists, and drivers into the area.

[1245] During cross-examination Mr Grala made the following concession:[796]

> "*MR GRALA: I think health and safety effects is a type of effect and that's both from the proposal going on to the power station as we have heard and also the other way around. But I think this is really Mercury having to change their operation as a result of having to meet their health and safety obligations. I think at the June facilitated meeting Mr Flexman gave a really good reason about why the power station is there. It is in a heavy industrial zone, end of a cul-de-sac, away from effectively any sensitive uses, away from people, and that won't be the case as a result of the proposal. So it's how Mercury will have to change the way they do things as a result of the proposal being there.*

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[794] Opening Statement, Mulligan, para 24.11 to 24.12.

[795] Transcript, Grala, p 6122.

[796] Transcript, Grala, p 6122.

*MR MULLIGAN: It could just be described more broadly as an effect.*

*MR GRALA: It's a part of an effect, absolutely.*"

[1246] Returning now to the Solar Research and Development Centre, Ms Devine, in her re-examination of Mr Grala, sought to clarify to what extent the NPS – Renewable Electricity Generation is relevant to the reverse sensitivity and the solar operation.[797] Mr Grala referred to Policy A:

> "***POLICY A***
>
> *Decision-makers shall recognise and provide for the national significance of renewable electricity generation activities, including the national, regional and local benefits relevant to renewable electricity generation activities …*"

[1247] In this regard, it appears Mr Grala's main concern is that if the Proposal forced a reconfiguration or move of the power station, there is only really one spot to move to that will ensure the residual health and safety effects were acceptable, which is to the north. This leads to a potential effect that the solar operation would be displaced by either the power station or other assets that need to be retained and, in turn, essentially limiting the ability at the Southdown site for renewable energy generation to be developed (as envisioned by Policy A of the NPS).

[1248] Mercury did not seriously pursue the matter of reverse sensitivity in its closing.[798]

[1249] The Board agrees with Mr Mulligan in that the evidence presented by Mercury to support its concerns regarding reverse sensitivity was somewhat scant. Mr Grala, although with good intentions, was drawing a long bow to find additional support in the policy direction.

[1250] Overall, the Board prefers the evidence of Ms Rickard, and with the imposition on appropriate conditions, the Proposal is not contrary to the NPS – Renewable Energy Generation (or the corresponding AUP:OP provisions relevant to promoting renewable energy).

*NPS – Electricity Transmission*

[1251] It is clear that NZTA and Transpower have worked constructively to ensure that in relocating transmission lines and towers the national grid will not be compromised

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[797] Transcript, Grala, p 6140.

[798] Ms Devine submitted during her closing that "*[I]n addition to the unitary plan, unless there are conditions imposed … the policies in the NPS around renewable energy would also be inconsistent …*" – Transcript, Devine, p 4133.

by the Proposal. There is no contest. However, Mr Gardner-Hopkins alerted the Board to an unresolved appeal[799] regarding the AUP:OP and its failure to give effect to the NPS – Electricity Transmission.[800] In an interim decision the High Court has agreed that there was some error in how the plan had in a limited way failed to give effect to the NPS.[801] This is unresolved pending the High Court's approval of amended text. In any case, the issue has little or no relevance to the interface between EWL and Transpower's pylons and lines.

[1252] The Board agrees with the approach suggested by Mr Gardner-Hopkins:[802]

> "*The NPS is a relevant consideration. Whether because of how it's found expression in the unitary plan you need to go back up to it is perhaps a little unclear at this point in time, but my submission would be that the safest approach for this Board is to have specific regard to the NPS on Electricity Transmission together with the relevant objective in the unitary plan and that provides a policy framework to approach your decision.*"

[1253] Policy 10 of the NPS – Electricity Transmission is of particular and overarching relevance:

> "***Policy 10***
>
> *In achieving the purpose of the Act, decision-makers must to the extent reasonably possible manage activities to avoid reverse sensitivity effects on the electricity transmission network and to ensure that operation, maintenance, upgrading, and development of the electricity transmission network is not compromised.*"

[1254] The AUP:OP[803] is similar but goes one step further to direct that the efficient development, operation, maintenance and upgrading of the national grid is not compromised.

[1255] Mr Horne agreed that the Proposal is consistent with this policy framework.[804] The Board is satisfied and notes that NZTA and Transpower have agreed on a suite of conditions.

### Section 171(1)(a)(ii) – New Zealand Coastal Policy Statement

[1256] The NZCPS (and HGMPA) have been appropriately addressed in the resource consent chapter of this Report. No further comment is necessary; it would take up

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[799] *Transpower New Zealand Limited v Auckland Council* CIV-2016-404-002330 [2017] NZHC 281.

[800] Transcript, Gardner-Hopkins, p 337-341.

[801] The key issue on appeal as explained by Mr Gardner-Hopkins relates to the extent of development under the transmission lines and the extent to which the AUP:OP appropriately recognised the need to avoid further under-build or the development under transmission lines.

[802] Transcript, Gardner-Hopkins, p 339.

[803] AUP:OP – D26.2. Objective (1).

[804] Transcript, Horne, p 4894.

unnecessary space to repeat it here. To the extent that the relevant NZCPS provisions assist with assessment of the NoRs, the Board will return to this in the following chapters.

### Section 171(1)(a)(iii) – A regional policy statement or proposed regional policy statement

[1257] To avoid doubt, unless otherwise mentioned, the Board is of the view that any relevant considerations at the regional policy statement level relating to the NoRs and designations are appropriately addressed by having particular regard to the lower order plan objectives and policies of the AUP:OP. The Board proceeds on that basis. The Board is unaware of any lacuna or inconsistencies between the plans involved, nor have there been any submissions to that effect.

[1258] A key tension does exist.

[1259] The authors of the Key Issues Report succinctly summarised the context and this tension at both the regional policy statement level and in the lower order provisions of the AUP:OP: [805]

> "*[63] The project area is heavily utilised by different forms of infrastructure. As recorded in the local context section, the concentration of infrastructure reflects both the longstanding industrial land uses and the narrowness of the Auckland isthmus through which linear infrastructure runs, and on which Auckland relies. Some infrastructure in the project area serves a wider area still: for example KiwiRail's North Island Main trunk line, Transpower's electricity line that serves Northland, and the applicant's own state highway network.*
>
> *[67] The tension between provision of infrastructure necessary for Auckland's economic future while maintaining the quality of the environment and the quality of life for Aucklanders is an RPS issue carried through objectives and policies. The RPS recognises that infrastructure can have adverse effects on the communities that it serves, and particular scheduled values that are protected but at the same time infrastructure is necessary to provide for the economic and social well-being of people and communities. A balancing of factors is necessary.*"

[1260] At the regional policy statement level there was a great deal of support for the Proposal from both the NZTA and Auckland Council planning witnesses. There is no real contest to the Proposal's consistency with the key infrastructure and transport provisions of the AUP:OP$^{RPS}$ (other than Mercury's site-specific concerns regarding the operation of the Southdown site). Thus, it is sufficient to note these provisions:

(a) B1.5 – Indicates that the RPS should be read as a whole; and

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[805] Key Issues Report, pp 19-20.

(b) B3.2 – Policy set relating to infrastructure.

[1261] The concerns of Mercury in part relate to Policy B3.2.2.(5), to ensure that use and development do not occur in a location or a form that constrains (among other things) the development and operation of infrastructure. Notably, this policy sits under the sub-heading 'Reverse Sensitivity', a matter the Board has already addressed.

[1262] Notwithstanding her view that a reverse sensitivity situation does not arise, Ms Rickard conceded during cross-examination[806] that the designation will constrain the power station activities at the Southdown site, although such constraints could be minimised through a designation roll back and conditions to move the road as far south within the designation.

[1263] The Board will return to this and its substantive findings elsewhere in this Report.

### Section 171(1)(a)(iv) – A plan or proposed plan

[1264] As the Board has said earlier, as the AUP:OP is a unitary plan, encompassing the regional policy statement and regional and district plans, it is appropriate and efficient to consider these matters together. The relevant provisions of the AUP:OP and the legacy plans are listed in Technical Report 2[807] of the application material and chapter 7 of this Report. The completeness of those lists was not contested.

[1265] The Board's earlier conclusions and findings on the relevant provisions relating to the applications for resource consent also apply to some extent here in respect of the NoRs. These include:

(a) Coastal activities and Anns Creek East;

(b) Natural Character (and Landscape) – to the extent that the reclamation activities are relevant; and

(c) Waikaraka Cemetery – to the extent that it extends into the CMA.

[1266] Of particular relevance is the Board's findings in relation to the route selection, and importantly, that there is an operational need for the EWL to be located within the CMA.

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[806] Transcript, Rickard, p 2544.

[807] Technical Report 2, Appendices D2, D3 and D4.

*Infrastructure*

[1267] In the resource consent chapter of this Report the Board found that the Proposal positively responds to the infrastructure provisions of the AUP:OP, in particular a number of the provisions contained in the Objectives E26.2.1 and Policies E26.2.2.

[1268] The following expands on that assessment with a particular focus on the NoRs and designations.

[1269] It is not surprising that NZTA emphasised at every opportunity the support for the Proposal contained in the policy thrust of the infrastructure provisions. There was no real contest that the Proposal finds a high level of support in relation to the AUP:OP objectives and policies that focus on enabling the development of infrastructure and recognising the benefits of infrastructure to the communities within Auckland and beyond.

[1270] Central to NZTA's case was the view expressed by Ms Rickard that:[808]

> "*Whilst there are provisions, particularly in the NZCPS and the Unitary Plan, that are clearly more directive than others by seeking to 'avoid' or 'protect', there is also strong direction seeking to 'promote' or 'achieve' certain outcomes. The provisions recognise that Auckland is a well-established urban area with an increasing population where growth needs to be provided for, and that infrastructure is a critical component of that growth.*"

[1271] The authors of the Key Issues Report concluded that:[809]

> "*In our view, the infrastructure policy provisions echo the overall broad considerations required under Part 2 of the Act. Tensions exist between enabling infrastructure with its localised effects (particularly in sensitive or highly valued locations) against its enabling characteristics that can support economic activity and general quality of life.*"

[1272] This was echoed throughout the Hearing. Parties opposing the EWL were critical of a lack of site-specific assessment, and raised concerns about consistency with the statutory planning framework. In contrast, few drew attention to the enabling provisions relating to infrastructure, growth and economic development at both a regional and national level.

[1273] The key policies in E26.2.2. of the AUP:OP reflect this tension:

> "*(1) Recognise the social, economic, cultural and environmental benefits that infrastructure provides…*
>
> *(2) Provide for the development, operation, maintenance, repair, upgrade and removal of infrastructure throughout Auckland…*

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[808] Statement of Primary Evidence, Rickard, para 1.3.

[809] Key Issues Report, para 68.

*Adverse effects on infrastructure*

*(3) Avoid where practicable, or otherwise remedy or mitigate adverse effects on infrastructure from subdivision, use and development, including reverse sensitivity effects, which may compromise the operation and capacity of existing, consented and planned infrastructure.*

*Adverse effects of infrastructure*

*(4) Require the development, operation, maintenance, repair, upgrading and removal of infrastructure to avoid, remedy or mitigate adverse effects …*"

[1274] In addition, Policies (5) and (6) provide a number of considerations relating to assessing the effects of infrastructure and matters where new infrastructure or major upgrades to infrastructure are proposed within scheduled areas, respectively.

[1275] A particular site-specific challenge came from Mercury in relation to the Southdown site. Ms Devine cross-examined Ms Rickard on the Proposal's consistency (or inconsistency) in relation to:[810]

(a) Policy (3) and the extent that the design of the Proposal has avoided adverse effects on the Southdown power station, and remedied or mitigated operational effects through conditions; and

(b) Policy (4) and the Proposal's ability to avoid, remedy or mitigate adverse the safe and efficient operation of other infrastructure relating to the Southdown site (a similar policy also exists in B3.2.2.(4) of the AUP:OP[RPS]).

[1276] Ms Rickard remained steadfast.

[1277] Turning now to the substantive matter at hand, it will suffice to say that the Board's earlier findings in the resource consent chapter, as they relate to the infrastructure provisions, are also pertinent to its assessment here of the NoRs. The Board's findings include:

(a) Policy E26.2.2(5) is particularly germane to the balanced consideration of this Proposal;

(b) For the reasons provided elsewhere in this Report, the Board is satisfied that the Proposal is justified in the context of Policy E26.2.2.(5), has taken account of the specific characteristics and values of the proposed

[810] Transcript, Rickard, p 2540 onwards.

alignment; the avoidance, mitigation or offset of adverse effects; and the benefits that will be afforded by the EWL; and

(c) The Board finds that the Proposal positively responds to the Chapter E26 provisions, and appropriately addresses the matters that must be considered.

*Historic Heritage*

[1278] The Proposal brings in the provisions relating to historic (or built) heritage to the potential impacts on the three scheduled heritage places in the wider Onehunga area:

(a) The Aotea Sea Scouts Hall;

(b) The Landing; and

(c) The Waikaraka Cemetery (which is also addressed in part in the resource consent chapter of this Report).

[1279] Heritage NZ did not file any evidence, although during their representation they expanded on a number of concerns regarding the Proposal's impact on built heritage:[811]

(a) Exacerbating the loss of historic connection between the harbour and Onehunga town;

(b) Adverse effects on the visual appreciation and setting of the Aotea Sea Scouts building;

(c) Adverse effects on Waikaraka Cemetery; and

(d) Adverse effects on the setting of The Landing.

[1280] These concerns were also shared by members of the community and to some degree Auckland Council, whose concerns also extended to the impacts on the open space of Waikaraka Park. The Board has addressed these effects earlier in this Report.

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[811] Transcript, p 6044.

[1281] The focus here is on the key objectives and policies of the AUP:OP found in Chapter D17.

[1282] Mr Mulligan contended that as there are no physical effects of the Proposal on the extent of place in relation to either the Aotea Sea Scouts Hall or The Landing, none of the specific heritage polices apply.[812]

[1283] However, Mr Gouge, at least in relation to the Aotea Sea Scouts Building, concluded that:[813]

> "*While the focus of the Chapter D17 provisions refer to works on the scheduled buildings or within their extent of place, common themes are encouraging and enabling repair and maintenance of buildings (D17.3(1)), enabling the adaption of scheduled buildings (D17.3(3), D17.3(5)), and ensuring development respects the historic heritage values of a site (D17.3(3), D17.3(8)-(10)). While not inconsistent with these policies as the works do not physically affect the mapped extent of place, I consider the proposal impacts significantly on the heritage values of the scheduled site and is therefore* ***inconsistent*** *with the objectives of D17.2.*"

[1284] Objective D17.2 states that:

> "*(1) The protection, maintenance, restoration and conservation of scheduled historic heritage places is supported and enabled.*
>
> *(2) Scheduled historic heritage places are protected from inappropriate subdivision, use and development, including inappropriate modification, relocation, demolition or destruction.*
>
> *(3) Appropriate subdivision, use and development, including adaptation of scheduled historic heritage places, is enabled.*"

[1285] Mr Gouge found support in the AUP:OP[RPS] with regard to managing development adjacent to significant historic heritage places. The policy of particular relevance is B5.2.2.(8):

> "*Identification and evaluation of historic heritage places*
>
> *…*
>
> *Encourage new development to have regard to the protection and conservation of the historic heritage values of any <u>adjacent</u> significant historic heritage places.* [Emphasis added]"

[1286] Neither counsel for NZTA nor counsel for Auckland Council advanced submissions in this area. While it is true that the heritage building addressed by Mr Gouge, the Aotea Sea Scouts building, is not directly affected by the Proposal, nonetheless its activities and ambience are affected. The Sea Scouts will be moving elsewhere. The effect on The Landing is less significant and the effects on Waikaraka

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[812] Closing Statement, Mulligan, para 21.58.

[813] Statement of Rebuttal Evidence, Gouge, para 2.36.

Cemetery are dealt with elsewhere (and below). The Board agrees with Mr Gouge's assessment of Objective D17.2, rather than Mr Mulligan's submission that the policy is only triggered by some direct effect. This approach is similar to that by Brown J in *Basin Bridge*.

[1287] Turning now to the impacts within the Waikaraka Cemetery. There was agreement among the experts who gave evidence that the Proposal will result in moderate adverse effects on the heritage values.[814] However, for the reasons given elsewhere throughout this Report, the Board has found that the severance effects of the Proposal at the southern edge of Waikaraka Cemetery will be significant as a result of the new road and embankments, and that views from, and amenity within, the cemetery will be adversely affected. Its current rather tranquil setting will be no more.

[1288] It follows that the Board finds a level of inconsistency with the objectives and policies of D17.

*Mana Whenua (and Te Hōpua ONF)*

[1289] The consideration of activities for which resource consents are sought that may impact on Mana Whenua values, including Te Hōpua a Rangi volcanic tuff ring, is provided in chapters 13 and 14.8 of this Report. Ngāti Whātua Ōrākei and Te Kawerau ā Maki maintained their position that the Proposal is contrary to the most relevant and important objectives and policies relating to reclamation and ecology.[815] The Board has not favoured this interpretation, for the various reasons already explained.

[1290] Thus, the focus here is whether the proposed activity will affect cultural landscapes and sites of significance to Mana Whenua[816] and avoid adverse effects on Mana Whenua values associated with ONFs,[817] in particular, Te Hōpua a Rangi.

[1291] The Board acknowledges the evidence presented by witnesses for Ngāti Whātua Ōrākei and Te Kawerau ā Maki on cultural landscapes, cultural features and waahi

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[814] Closing Statement, Mulligan, para 21.58.

[815] Closing Statement, Enright, para [1].

[816] Policy 10(2)(f) of the NZCPS, which as we note earlier does not feature in the relevant AUP policies.

[817] Policy D10.3.(3)(c) of the AUP – Outstanding Natural Features Overlay and Outstanding Natural Landscapes Overlay.

tapu,[818] and who oppose the Proposal, and that of Te Ākitai Waiohua, including their cultural values associated with Te Hōpua a Rangi, who would be less likely to oppose the Proposal provided certain other prerequisites are adhered to.[819] Consequently, Te Ākitai are part of the Mana Whenua Tribes Agreement.

[1292] Te Hōpua a Rangi is scheduled as an ONF, although it is acknowledged that this status afforded is not for its cultural values. Further, it is not included in the schedule of Sites and Places of Significance to Mana Whenua Overlay.[820] Upon questioning, Mr Gouge indicated that Auckland Council is implementing a plan change process for sites of significance to Mana Whenua and more sites are being added over time.[821] The Board has no evidence before it to suggest that Te Hōpua a Rangi will be added. Nonetheless, it is common ground that the cultural values associated with Te Hōpua are important.

[1293] The main issue relates to the proposed roading trench in the vicinity of Neilson Street, which is proposed on the outer tuff ring (and which sits outside the extent of the ONF overlay).

[1294] The key policy in question is D10.3.(3) of the AUP:

> "*Protect the physical and visual integrity of outstanding natural features, including volcanic features that are outstanding natural features, by:*
>
> *(a) avoiding the adverse effects of inappropriate subdivision, use and development on the natural characteristics and qualities that contribute to an outstanding natural feature's values;*
>
> *(b) ensuring that the provision for, and upgrading of, public access, recreation and infrastructure is consistent with the protection of the values of an outstanding natural feature; and*
>
> *(c) avoiding adverse effects on Mana Whenua values associated with an outstanding natural feature.*"

[1295] Mr Enright put the following proposition to Ms Coombes during cross-examination:[822]

> "*If universally Mana Whenua, and certainly Te Kawerau ā Maki and Ōrākei are opposed to the trenching into Te Hōpua and they see it as a trenching into one of their ancestors, or a cutting into one of their ancestors, would you agree that that means the proposal is contrary to that limb [s104D – objectives and policies limb] or to that policy [D10.3.(3)(c)]?*"

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[818] Dr Patterson, Mr Blair and Mr Taua.

[819] Transcript, Wilson, p 4760.

[820] D21 of the AUP.

[821] Transcript, Gouge, p 3950.

[822] Transcript, Enright, p 3794.

[1296] Ms Coombes conceded that would be contrary to sub-clause (c) of Policy D10.3.(3).

[1297] A tension exists. During cross-examination, Ms Evitt put to Mr Brown that the trench has been designed to address potential effects or concerns relating to connectivity and community aspirations. Mr Brown conceded this was a legitimate community issue in this Proposal and, putting aside his concerns that the wrong route has been selected, he conceded that the Proposal has sought to balance a number of considerations, including impacts on Te Hōpua.[823]

[1298] It is apparent that Policy D10.3.(3) is a policy set that includes providing for infrastructure consistent with the protection of the values of an ONF (sub-clause (b)) and avoiding adverse effects on Mana Whenua values associated with an ONF (sub-clause (c)).

[1299] The Board is cautious of not conflating the policy directives relating to Te Hōpua a Rangi as an ONF, and the cultural concerns that go into and extend beyond the ONF overlay. On the first of these, Mr Lanning confirmed for the Board during his closing that, based on the expert evidence, Auckland Council is satisfied with the degree of mitigation proposed (or the process for refining this through the Proposal's detailed design) and the state in which Te Hōpua a Rangi will be left.[824] The Board agrees, and no material policy issue exists. Turning to the cultural concerns, the Board finds that on balance the Proposal is consistent in part with the thrust of the policy direction.

[1300] Overall, the Board does not consider the Proposal will be contrary to Policy D10.3.(3).

### Summary of Findings and Conclusions

[1301] Having paid particular regard to the s171(1)(a) matters, the Board finds that conflict with the policies set out in the relevant planning instruments is in most cases minimal. The Board has identified some areas of conflict and has balanced these against the benefits clearly flowing from those policies that support the Proposal. Subject to the imposition of appropriate conditions to avoid, remedy, mitigate, the Board finds that the Proposal achieves a level of consistency with the higher order planning instruments, and in particular the AUP:OP, that reflects the overall benefits of the Proposal. As in its s104(1)(b) assessment, the Board finds that the Proposal responds in a strong positive manner to transport (including freight, public transport, walking and cycling) and economic provisions, as well as the key provisions relating to infrastructure. This is further supported by the Board's findings on the strategic

[823] Transcript, Brown, p 4436.

[824] Transcript, Lanning p 6424.

need for the Proposal and the clear regional and national benefits to be gained. A key area where the Proposal falls short relates to the heritage provisions, but this does not represent a fatal flaw and conditions imposed will hopefully go some way to preserving the heritage values of the area, including the Waikaraka Cemetery.

## 15.12 SECTION 171(1)(B) ASSESSMENT OF ALTERNATIVES

[1302] Section 171(1)(b) of the RMA requires the Board, when considering effects on the environment, to have particular regard to whether adequate consideration has been given to alternative routes.

[1303] It is not, of course, for the Board to designate a route for the proposed highway that might appeal to it more than the route proposed by NZTA. Nonetheless, the Board must be satisfied on the evidence that there has been adequate consideration given to alternative routes. The Board, however, in a different context, will need to consider the issue of "practicable alternatives" when weighing AUP:OP policies.

[1304] A number of submitters raised the s171(1)(b) requirement in some shape or form. There were submitters who were generally satisfied with NZTA's proposed highway but considered that the proposed alignment should avoid their property. There were submitters who considered that the route of the proposed highway should be radically different from that proposed by NZTA. For some submitters it would merely be a matter of moving the alignment by a few metres. Other submitters advanced carefully designed proposals involving flyovers and bridges across the Māngere Inlet.

[1305] It is, in the event, unnecessary for the Board to traverse all the submissions of this type. The Board has, however, considered them carefully. Some critical submissions in this area should be mentioned. These came from:

(a) Mercury, who considered that, because the site of its Southdown power station was strategically significant, a designation should avoid its site completely. It submits that NZTA's consideration of alternatives was inadequate. The Board deals with this submission below.

(b) T&G, who submitted that the alignment should avoid any adverse impact on its banana-ripening and crate-washing facilities on its site.

(c) Fonterra was concerned that construction of the highway in particular might impact adversely on the truck turning circle at its site at Tip Top corner.

(d) TOES and Others submitted that the alignment of the proposed highway would sever the Onehunga community from the Manukau Inlet foreshore

and that there were alternative routes that would avoid such severance. This submission was supported by Onehunga Business Association (OBA).

(e) Ports of Auckland submitted that the proposed construction of the Port Link Road was unnecessary and that there was preferable alternative access from existing roads to various industrial sites that Port Link Road would serve.

(f) Ngāti Whātua Ōrākei and Te Kawerau ā Maki Iwi Tribal Authority criticised the selection of the preferred route, describing it as prioritising transport objectives ahead of other cultural and ecological considerations, particularly the need to avoid reclamation.

[1306] The obligation imposed on the Board by s171(1)(b) is to assess the adequacy of NZTA's consideration of alternative routes. It is the process that must be the focus, not the outcome. The focus is not on whether there might have been a more appropriate route or whether the proposed route is the best route, nor is the Board required to evaluate fully alternative routes that might have had the potential for reduced environmental effects. Certainly the adequacy of a Requiring Authority's consideration might be influenced by the level of significant adverse effects or the extent to which land might be required, both of which might lead to a more careful consideration of the consequences. But ultimately, the s171(1)(b) issue is whether the consideration of alternatives has been adequate.

[1307] There was no challenge made to the above legal propositions during the course of the Hearing, authority for which is to be found in *New Zealand Transport Agency v Architectural Centre*[825] and *Queenstown Airport Corporation Limited v Queenstown Lakes District Council*.[826]

[1308] Part D of the AEE devotes 43 pages to describing the manner in which NZTA considered alternative routes for the EWL and the process it adopted. There was no serious challenge to that general process in the cross-examination of relevant Transport Agency witnesses, nor has there been any evidence to the contrary. However, there were a number of sector or site-specific challenges that were premised on alternative routes across or around those sites being preferred.

[1309] The evaluation process was designed to arrive at a preferred corridor for the EWL and then a preferred alignment within that corridor. Some 16 corridor options were created to form a long list. From that long list, six short list corridor options were

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[825] *NZ Transport Agency v Architectural Centre* [2015] NZHC 1991 at [140], [152] – [156], and [175] – [198].

[826] *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347 at [121].

identified (Options A to F), which were then considered in greater detail. Both the long list options and the short list options were subjected to an MCA, which assessment used an 11-point scoring method. Two of the options (Options E and F) were identified as conferring the most enduring transport benefits. The MCA weighed a large number of factors (reflected in the scoring system), which included road safety, construction, performance against the Proposal's objectives, natural environment, cultural and heritage factors, operational factors, and social and economic factors.

[1310] NZTA's chosen alternative for a corridor was Option F, inside which the fine details of the NoR alignment fit.

[1311] NZTA's witness, Ms Linzey, described the MCA process as:

> "*A robust and replicable process that has assisted the team to understand the potential positive and negative impacts of various alignment options and assisted to inform decision makers on identifying the preferred alignment option.*"[827]

[1312] Ms Linzey's hearing summary, which was read to the Board, and her answers in cross-examination did not resile from that proposition. She recognised that the EWL involved a complex urban, coastal and coastal marine environment. Consideration had been given to impacted sites such as those owned by Mercury, T&G and Fonterra. The MCA process was consistent throughout. That process and those involved in the Proposal had given close consideration to alternatives once significant potential effects had been identified.

[1313] Ms Linzey's evidence on NZTA's selection, consideration and analysis of alternatives was corroborated by the evidence of both Mr A Murray and Mr Wickman. Their evidence in that regard was challenged by some counsel. However, the Board's view is that so far as NZTA's assessments of alternatives and its overall methodology are concerned, Ms Linzey's evidence remained unscathed.

[1314] There was also evidence given by Mr C Bauld of Tonkin & Taylor to the effect that the MCA and consideration had been given to the alternative proposal presented by the OBA. Although the Board understands OBA's concern that the preferred alignment (Option F) had already been chosen by NZTA before OBA's alternative proposal had been finalised and assessed, nonetheless the Board is satisfied that OBA's design proposal (understandably bereft of much construction detail) was not rejected by NZTA out of hand.

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[827] Statement of Primary of Evidence, Linzey, para 11.1.

[1315] OBA's reworked and final option was in fact not presented to NZTA until early 2017, by which stage NZTA's final selection had been made. Nonetheless, the process was peer reviewed by Mr Bauld. The Board accepts Mr Bauld's conclusion that NZTA's analysis and scoring of the OBA option was "relatively consistent" with the MCA process and was robust.

[1316] It is also apparent from the evidence, and established to the Board's satisfaction, that critical environmental effects such as the effects on Mercury's power generation site, the effects on the adjoining coastal marine area, the effects on Waikaraka Cemetery and Waikaraka Park, effects on significant ecological areas such as Anns Creek, heritage and social effects, and effects on the Onehunga community, were all subject to close consideration and scrutiny throughout the processes of assessing long list and short list options.

[1317] The evidence of Campaign for Better Transport, presented by Mr Curtin (who had made no compelling criticism of NZTA's assessment of alternatives), was to the effect that Option F did not produce the best benefit-to-cost ratio[828]. Mr Mulligan submitted that this criticism of Option F was flawed. A benefit-to-cost ratio is but one factor to be weighed by NZTA in considering alternatives. There are many other factors and interests to be weighed. Mr Curtin's evidence is entitled to respect but ultimately a benefit-to-cost ratio need not be a decisive criterion for a Requiring Authority. Mr Curtin favoured Option B of the various shortlisted options considered by NZTA. However, unlike the final choice of Option F, Option B did not provide an enduring transport solution.

[1318] Ms Devine for Mercury submitted that NZTA's assessment of alternatives was inadequate for s171(1)(b) purposes because it failed to take into account the safety implications of the close location of Mercury's power station with the EWL, and had further failed to consider in its overall assessment the possibility of the Mercury power station being recommissioned. Citing a High Court authority, *Kett v Minister for Land Information,*[829] Ms Devine submitted that an assessment of alternatives cannot be "adequate" if it failed to take into account a material relevant consideration.

[1319] *Kett*, however, is not an authority directly related to s171. Rather it involves consideration of a different statute, the Public Works Act. As will be apparent elsewhere in this Report, Mercury's stance at the Board's Hearing was certainly not apparent to NZTA when it selected Option F as its preferred corridor. Though NZTA

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[828] Mr Curtin's evidence did, however, express his view that there was no full explanation as to why Option F was preferred or why it had outweighed other options considered by NZTA.

[829] *Kett v Minister for Land Information,* AP 404/151/00, M 404/1974/00, Paterson J.

may have assumed when it made its Option F selection that the Mercury power station would be mothballed (which it was to be) and combined with the location of Option F to the north of the Mercury site that there would not be serious safety considerations flowing from the power station's proximity to the EWL, the Board does not consider those assumptions, valid at the time they were made, to be a fatal flaw so far as NZTA's assessment of alternatives was concerned. There was nothing arbitrary, cursory, or inadequate about the route selection in the vicinity of the Mercury site at the time it was made.

[1320] In large measure, the Board accepts Mr Mulligan's closing submissions on this topic. He was correct in his submission that there was no evidence called by any party that the process adopted by NZTA was inadequate, arbitrary or cursory.

[1321] In its totality, and having particular regard to the consideration of alternative routes, the evidence satisfies the Board that in fixing upon its preferred route NZTA has given all relevant matters careful and close scrutiny. Its preferred route is not the result of arbitrary conduct or cursory consideration. The preferred route was chosen as a result of careful consideration and analysis of the pros and cons of a large number of options. The Board is, for these reasons, satisfied that in terms of s171(1)(b) there has indeed been adequate consideration of alternative routes.

## 15.13 SECTION 171(1)(C) ASSESSMENT OF REASONABLE NECESSITY

[1322] Section 171(1)(c) RMA requires the Board to have particular regard to whether the works and designations are reasonably necessary for achieving the objectives of NZTA for which the two NoRs are sought. This includes a consideration of whether the work itself, as well as the designations, are reasonably necessary to achieve the objectives of NZTA.

[1323] The stated Project objectives are:

(a) To improve travel times and travel time reliability between businesses in the Onehunga-Penrose industrial area and SH1 and SH20;

(b) To improve safety and accessibility for cycling and walking between Māngere Bridge, Onehunga and Sylvia Park, and access into Ōtāhuhu East; and

(c) To improve journey time reliability for buses between SH20 and Onehunga Town Centre.

[1324] Mr Mulligan referred to the High Court in *Queenstown Airport Corporation Limited v Queenstown Lakes District Council,*[830] which described the test as an objective one with the meaning of "reasonably necessary" falling between "desirable" and "essential", allowing some tolerance. He noted, "*The definition allowed the Court to apply a threshold assessment that is proportionate to the circumstances of the case in order to assess whether the proposed work is clearly justified*".[831]

[1325] The evidence of NZTA witnesses addressed these objectives and described the integration of all the components, including connections between Onehunga-Penrose and SH20 and SH1 alongside a range of new cycling and walking connections, as being essential to achieve the Project's objectives.

[1326] Of particular relevance is the Board's consideration of the *Strategic Need for the Proposal* as set out in chapter 9 of this Report and recognition that the creation of a highway on the south side of Neilson Street is the only feasible solution to providing an enduring solution to fulfil the Project's objectives. The Board has already recorded that this would be a highway of strategic and national importance.

[1327] At the outset, four submitters sought that the designation be removed or rolled back on the grounds that such land was not reasonably necessary for the designation: EnviroWaste, TR Group, POAL and Ward Demolition. The agreements reached with EnviroWaste and Ward Demolition are referred to in chapter 10.1 of this Report. POAL raised the reasonable necessity for the Port Link Road to be included within the designation as it failed to achieve its named purpose. The Board addressed this in chapter 15.7 of this Report.

[1328] The only remaining issue by the close of the Hearing was that raised by TR Group, which is discussed earlier in this Report.

[1329] The Board finds that, in terms of s171(1)(c), the evidence demonstrates the EWL is long overdue and is urgently needed to provide better freight transport links in and to an area of national and regional significance. The evidence satisfies the Board that the Project is reasonably necessary to assist NZTA to achieve its wider objectives as well as the objectives of the Project. The Board is satisfied that with the amendments to the limits of the designated areas, agreements reached with individual property owners, the roll back provision contained in the conditions and the specific conditions related to the TR Group's land that the NoRs are reasonably necessary for the purposes of meeting s171(1)(c) of the RMA.

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[830] [2013] NZHC 2347 at [93] – [98] as referred to in Opening Submissions, Mulligan, para 25.17.

[831] Ibid.

## 15.14 SECTION 171(1)(D) ASSESSMENT OF OTHER RELEVANT MATTERS

[1330] A number of non-RMA statutory instruments and non-statutory documents are identified as relevant to the NoRs and resource consents throughout this Report.[832] These include but are not limited to:

(a) The Auckland Plan (2012);

(b) The 2015 – 2018 National Land Transport Programme;

(c) NZTA's Statement of Intent 2015 – 2019, which identifies the Proposal as part of the Accelerated Auckland Transport Programme;

(d) The Auckland Transport Alignment Programme (2016);

(e) Waitangi Tribunal 1985 Manukau Report (WAI 8);

(f) Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed;

(g) Transform Onehunga, High Level Project Plan – March 2017;

(h) New Zealand Electrical Code of Practice (NZECP 34: 2001);

(i) New Zealand Electricity Code of Practice for Electrical Safe Distances: 2001 (NZECP34);

(j) Auckland Transport Code of Practice (ATCOP);

(k) NZTA's Pedestrian Planning and Design Guide;

(l) NZTA's Urban Design Guideline – Bridging the Gap;

(m) Auckland Transport Code of Practice;

(n) Auckland Council Erosion and Sediment Control Guide for Land Disturbing Activities in the Auckland Region Guideline Document 2016/005; and

(o) A number of other documents in [Appendix 9: List of Documents and Exhibits Produced at the Hearing].

[832] Chapters [1.3], [9], [13], [14] and [15].

[1331] These other matters need to be given appropriate weighting, and it is well settled that generally they should be given less weight than the RMA statutory planning instruments.

[1332] The Board found many of these documents, in particular the Auckland Plan (2012), helpful in understanding the strategic framework established by Auckland Council (and Auckland Transport and NZTA to varying extents). It is clear that the Proposal is designed to implement a roading connection anticipated by the Auckland Plan; one that supports the continued growth of Auckland. The Board's findings on the strategic need for the Proposal, which are contained in chapter 9 of this Report, stand.

[1333] The Proposal engages a number of other matters relevant to Mana Whenua. The Board's assessment and findings elsewhere in this Report address the range of matters that are engaged. The Board relies on the submissions of Mana Whenua received prior to the Hearing and the evidence or representations made during the Hearing in its findings on the benefits and adverse effects of the Proposal in relation to cultural values. The Board acknowledges the Mana Whenua Tribes Agreement, but does not rely on it in making its decision.

[1334] The AEE records that regard has been given to Iwi Management Plans, which are planning documents for the purposes of Section 74(2A) of the RMA and provide general guidance on the role iwi might have in managing resources in the region. The following documents were made available to NZTA:[833] the Ngāti Whātua Ōrākei Iwi Management Plan 2012; and the Ngāti Whātua Ōrākei Strategic Plan 2010-2020. These documents were not the focus of submissions nor evidence to the Board on the part of Mana Whenua. Instead particular emphasis was given to the more site-specific Cultural Values Assessments attached to the submissions of Ngāti Te Ata, Te Kawerau ā Maki and Ngāti Paoa, NZTA's Cultural Values Report and the Vision for the Māngere Inlet document.

[1335] One document not previously commented on in this Report is the strategy report titled *A Vision for the Māngere Inlet*, which was also attached to the Cultural Values Report. The AEE succinctly sets out the relevance of this strategy report:[834]

> "*This Vision for the Māngere Inlet has been jointly prepared by Mana Whenua, NZTA, Auckland Council, Auckland Transport, KiwiRail, and*

[833] NZTA AEE, p 478, Table 15-2.

[834] NZTA AEE, p 478, Table 15-2.

> *Watercare to provide a joint and long term focus on improving the health of the Māngere Inlet. The Project is entirely consistent with this strategy, being a first step on a path towards restoring the Inlet.*"

[1336] Upon questioning by the Board, Ms Rutherfurd assisted with its understanding the context:[835]

> "*The intention of it was to get an overall strategy moving forward for outcomes for the inlet itself. It was worked on by Mana Whenua with the vision in mind of getting an overarching strategy and vision on outcomes, ie see your feet when you're standing in the water, be able to swim without fear of becoming ill, eat the kai from the harbour. Whilst it was the vision for the Māngere Inlet, it was also envisioned that if we did the work right at the upper level that we could then pick up that strategy and move it to, yes, the Pahurehure Inlet and perhaps even at stage over the entire Manukau Harbour itself. But the Manukau is still in its infancy as far as getting any kind of a management plan for it is concerned. It started out being for the Māngere Inlet but, yes, it was envisioned that you could then pick that up and move it elsewhere, even the Kaipara, I guess, at the end of the day or the Waitematā, it should fit.*"

[1337] The Board accepts that the vision and strategy report is a fair reflection of Mana Whenua aspirations and intentions for the Manukau Harbour as a taonga, both individually and separately, and to the aspirations of the other parties involved in developing the strategy. The Board concludes that the Proposal will contribute towards an improved Manukau Harbour for the reasons discussed elsewhere in this Report.

[1338] In terms of managing effects, the Proposal responds positively to the various codes of practices and guidelines as discussed throughout this Report.

[1339] The Board was referred to a number of documents that set out the aspirations of the Onehunga community, the Local Boards, and Paunku. These are addressed in chapters 8, 15.2 and 15.8 of this Report. The Board accepts that NZTA has made a reasonable attempt to consider and not preclude future aspirations of the community and the governing bodies. Not everything on their wishlists can be met and in some cases (for example, undergrounding of transmission lines) are outside the jurisdiction of this Board.

[1340] Accordingly, the Board acknowledges that when having regard or particular regard to the various considerations under ss104(1) and 171(1), respectively, the Board must consider them in the context of the non-RMA statutory instruments and non-statutory documents in accordance with ss104(1)(c) and 171(1)(d). For the reasons discussed throughout this Report and where reasonably necessary to do so, the Board has done this.

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[835] Transcript, Rutherfurd, p 5907.

# 16. CONDITIONS

[1341] Overall, the Board has adopted the conditions provided by NZTA after the close of the Hearing. Those conditions incorporate amendments made throughout the Hearing in response to matters raised by, and negotiated with, submitters, as well as matters raised by the Board. As the Board has already stated, those conditions will, if fully implemented, adequately address the potential adverse effects of the Proposal, and ensure the delivery of the benefits that have been presented by NZTA and acknowledged by the Board. The conditions the Board considers necessary are all contained in Volume 3 of this Report.

[1342] As discussed throughout this Report, a number of specific amendments or additions to conditions have been made by the Board, the detailed reasons for which have been explained. Those and other minor additions and amendments are summarised and briefly explained below in [Table 1] and [Table 2]. These include a number of amendments or additions sought by Auckland Council and supported by the Board, with particular recognition of the regulatory role that Auckland Council will play during implementation of the Proposal. Further adjustments to conditions incorporated after receipt of comments on the draft decision are recorded in Volume 2, Appendix 14 of this Report.

[1343]

**Table 1: Board amendments to conditions**

| Condition | Wording of Change or Addition | Reason |
|---|---|---|
| DC.1A | For Notice of Requirement to Alter Designation 6718 (NoR 2) dated December 2016, the conditions only apply to Construction Works and land described in NoR 2 and include Construction Works on land within the existing designation for SH1 between approximately Clemow Drive and the location where Trenwith Street passes under SH1. | Wording of the condition re-ordered to avoid ambiguity, ensuring it can only be interpreted as applying to NoR 2. |
| DC.10 | The CNVMP, CTMP, HMP and ULDMP may be amended following submission of the Outline Plan(s) if necessary to reflect any changes in design, construction methods or management of effects. Any amendments are to be discussed with and submitted to the Manager for information without the need for a further Outline Plan process, unless those amendments once implemented would result in a materially different outcome to that described in the original plan. | Addition of second paragraph to ensure that all site-specific management plans continue to engage persons affected by activities, as is the intent of the relevant conditions. |

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| | For the avoidance of doubt, this condition does not apply to any Site Specific Construction Noise Management Plan, Site Specific Construction Vibration Management Plan, Site Specific Traffic Management Plan or other management plans required by the conditions of these designations. | |
| DC.11AA | When preparing the Outline Plan(s) under section 176A of the RMA, the Requiring Authority shall consider options for providing the design features listed below. The Outline Plan(s) must include the features unless it is not reasonably practicable to do so. Where a design feature has not been incorporated into the Outline Plan(s), the reasons why shall be set out.<br><br>A 3.0m wide at grade shared use path along the southern side of Sylvia Park Road to the south east corner of the Great South Road intersection (between chainage 5100 and 5500 as illustrated on Drawings AEE-AL-108 and AEE-AL-109); and<br><br>A crossing facility for active modes between Gloucester Park Road North and destinations to the south of Neilson Street. | Inserted at Auckland Council's request and is consistent with evidence presented – Sector 4. |
| **DC.15C** | (a) The Requiring Authority shall consult with the owner of the land at 781 Great South Road (Lots 1 and 2 DP 328383) and 791-793 Great South Road (Section 1 SO 69440) during the detailed design phase in relation to the post-construction use of land immediately south east of the EWL viaduct and adjacent to Great South Road (791-793 Great South Road) ("the residual land").<br><br>(b) If the Requiring Authority ~~confirms that the residual land will not be required for on-going operation, maintenance or mitigation of effects of the Project, the Requiring Authority~~ shall make reasonable provision for heavy vehicle access, for the types of vehicles normally in use at 781 Great South Road, under the EWL viaduct, between 781 Great South Road and the residual land.<br><br>(c) The access shall be located and designed to provide suitable vertical | TR Group holds consent for the formation and use of Stage 2 fill area. NZTA should make provision for access to that area by TR Group under the EWL. |

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| | clearance under the EWL viaduct and to minimise, to the extent practicable, further encroachment into Anns Creek East.<br>(d) The Outline Plan prepared in accordance with Condition DC.7 shall include information to demonstrate how the requirements of this condition have been achieved. | |
| DC.15CC | Refer to [Table 2] | TR Group site designation roll back to address purpose of designation and avoid lacuna between TR Group and NZTA obligations. |
| CS.3 | Addition of Onehunga Mall Cul-de-Sac into clause (a)(i). | Specific recognition of concerns raised by K. Rich and others that is distinct from Onehunga Harbour Road. |
| ROS.6 | (b) Details of proposed <u>grades and</u> grass surfacing of Waikaraka Park South to a standard which reasonably accommodates Council's future implementation of the Waikaraka Park South Development Plan | Inclusion of final grades such that they do not unreasonably inhibit redevelopment as sports fields. |
| HH.1 to HH.4A and Advice Note | Auckland Council closing submission version of conditions adopted. | Auckland Council conditions preferred. The AUP:OP and Heritage New Zealand Pouhere Taonga Act 2014 requirement operate under separate legislation. |
| CNV.4 | Modification of two levels. | As requested by Auckland Council. |
| CT.6((f) | Directly affected property and business owners and operators, <u>including (for the relevant works) the Onehunga Business Association and the residents of Onehunga Mall Cul-de-Sac.</u> | Addition at request of these specific parties who expressed concern of general and site-specific impacts within Onehunga. |
| SD.1C<br>Advice Note | ***Advice Note:***<br>*If the alignment cannot be adjusted to achieve an Acceptable or Tolerable Risk Level required under Condition SD.1C, the Requiring Authority may acquire all or part of the balance of Lot 1 DP 178192 under the Public Works Act 1981 <u>and permanently de-commission the gas fired power generation</u>* | For the avoidance of doubt, the risk will not occur. |
| CL.1 | Prior to excavation in areas of known or potentially contaminated land, the Consent Holder shall engage a Suitably | New clause 2 explicitly requires consultation. |

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| | Qualified Environmental Practitioner (SQEP) to prepare a **Contaminated Land Management Plan** (CLMP).<br><br>The purpose of the CLMP is to detail the measures to manage health, safety, and environmental risk associated with works in contaminated material in the Project area, including closed landfills, during construction.<br><br>The preparation of the CLMP shall include consultation with the owners and operators of the affected land. | |
| CL.12 | (e) The trigger level established under (d) above and the actions to be taken to comply with the requirements of (e) and (f) below shall be documented by the Consent Holder and provided to and obtain the approval of the Manager prior to being implemented. | New clauses added at Auckland Council request. Reflects the regulatory role that Council plays in the absence of triggers presented through evidence. |
| CL.12 | Minor edits to clause (g). | Clarifies wording. |
| D.0 | Sub-tidal dredging shall be limited to works associated with the relocation of the Anns Creek tidal channel. This consent does not authorise sub-tidal dredging within the areas denoted as 'Proposed Area For Marine Dredging' and '50m Dredging Channel For Access To Foreshore' on drawing *Coastal Occupation Embankment – Overview*, AEE-CMA-101 Rev 0, dated 1/12/16 or any subsequent amendment to that drawing. | New condition based on the Board's findings on dredging. |
| D.1(c) | Details of equipment and methods to be used including the option to use an environmental dredge bucket (with a closing lid to reduce sediment dispersal). | Addition at request of Auckland Council, consistent with evidence, and to make clear the need to consider this option. |
| EM.2A | Addition of 'pest animal' into various clauses. | As requested by Auckland Council. |
| EM.2B | Addition of 'pest animal' into various clauses. | As requested by Auckland Council. |
| C.1BB | The headlands of reclamation Landforms 2 and 3 shall be deleted or modified (in the form of islands) to maximise tidal flows past the landforms and minimise sediment accumulation rates between the headlands and the between the landforms. | Inserted in accordance with the Board's findings. |
| L.2 | (c) The trigger level NH4N concentration which shall be derived from the Australian and New Zealand Environmental | As requested by Auckland Council. Reflects the regulatory role that Council |

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| | Conservation Council, *Australian Guidelines for Fresh and Marine Waters*, 2000 (ANZECC 2000) marine water quality guideline, 90% level of protection (1.2 mg/L) allowing for reasonable mixing in the receiving water and treatment in the stormwater wetland/biofiltration system. ~~The trigger level shall be provided to the Manager.~~<br><br>(d) The trigger level established under (c) above shall be provided to and obtain approval of the Manager prior to being implemented. | plays in the absence of triggers presented through evidence. |
| **PS.2** | NZTA shall use its best endeavours to legally formalise vehicular access, including for heavy goods vehicles, between 8 Sylvia Park Road and Pacific Rise, prior to the date on which right turns into and out of 8 Sylvia Park Road frontage are no longer possible. | As requested by Syl Park. |

[1344] The following condition addresses the TR Group site designation roll back and avoids the lacuna between TR Group and NZTA obligations. It is to be read in conjunction with the combined terms below it, which are also included in the conditions document.

**Table 2: Condition relating to TR Group site**

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| DC.15CC | If, after completion of the 10 year period post Completion of Construction as set out in consent EM.3A(c), the Consent Holder receives confirmation that the Covenants have been registered against the certificates of title for the TR Group Land then, the Requiring Authority shall give notice to the Manager in accordance with section 182 of the RMA for the removal of those parts of the designation on the TR Group Land no longer necessary for the on-going operation, maintenance or mitigation of effects associated with the Project. |
| Covenants | Means covenants (or similar legal mechanisms) in favour of Auckland Council on the same terms (or substantially similar terms) as those covenants required by the TR Resource Consents which protect and restrict the use of the Lava Shrubland Management Area and Wetland Management Area and require ongoing pest plant and pest animal control. |
| Lava Shrubland Management Area and Wetland Management Area | The lava shrubland and wetland areas identified in the TR Resource Consents |

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| TR Resource Consents | Means the following resource consents held by TR Group:<br>R/LUC/2008/4724 – land use (earthworks, vegetation removal);<br>Permit 36055 – diversion and discharge of stormwater from new impervious surface;<br>Permit 36056 – earthworks/land disturbance associated with construction of new hardstand;<br>Permit 36058 – streamworks/culverting and reclamation; and<br>Permit 30316 – disturbance and remediation of contaminated land. |
| TR Group Land | The land at 781 Great South Road (Lot 1 DP 328383, CT 115789), 785 Great South Road (Lot 2 DP 344775, 1/3 SH Lot 5 DP 328383, CT 183736), 787 Great South Road (Lot 3 DP 328383, 1/3 SH Lot 5 DP 328383, CT 115791) and 791-793 Great South Road (SEC 1 SO 69440, CT NA125B/43). |

## 16.1 LAPSE AND EXPIRY

[1345] As mentioned in chapter 2 of this Report, and in accordance with s184 of the RMA, NZTA sought a 15-year lapse period for the designations relating to the NoR1 and NoR2 from the date they are included in the AUP:OP. The Board has no issue with the lapse periods sought.

[1346] NZTA, in accordance with s125 of the RMA, sought a 10-year lapse period for each of the resource consents. The Board accepts those lapse periods sought.

[1347] NZTA sought a 15-year expiry date for the ancillary and construction related resource consents and a 35-year expiry date for all other resource consents, with the exception of the coastal permits for the reclamations, which have an unlimited duration. The Board accepts those periods sought.

[1348] All lapse and expiry dates are provided in the Conditions (Volume 3).

# 17. OVERALL JUDGMENT

## 17.1 THE BOARD'S FUNCTION

[1349] The Board is a creature of Part 6AA of the RMA. It is unnecessary to repeat the history of the Board's creation and the legal powers it can exercise. These are covered at the outset in chapter 3 and in the key legal issues chapter 12.1 of this Report.

[1350] NZTA's Proposal has been assessed at the ministerial level as being a proposal of national significance. Central to the Board's function is to decide, under the relevant provisions of the RMA, whether or not it will cancel, confirm or modify the two NoRs sought by NZTA (s149P(4)(b)), and whether or not to grant the various resource consents that NZTA requires (s149P(2)), to construct and operate the EWL.

## 17.2 MANDATORY CONSIDERATIONS

[1351] In addition to exercising powers normally exercised by consent authorities and territorial authorities, the RMA requires the Board to consider additional matters. First, the Board must have regard to the Ministers' reasons for directing a Board of Inquiry (s149P(1)(a)). The Board has done this. The Ministers' reasons are set out in chapter 3.2 of this Report. A number of the Ministers' reasons point to the strategic implications of the Proposal. Further, the reasons foreshadow the complex RMA issues that the Proposal brings into play. Inevitably, the Ministers' reasons, cast as they are at a relatively high level, have been central to the inquiry and to the Board's deliberations.

[1352] Secondly, the Board must consider the information provided to it by the EPA (s149P(1)(b)). The EPA has fulfilled its obligations under s149G and provided the Board, at the outset and prior to the Hearing, the application and all its supporting documentation, which ran to three volumes (over 10 ring binders), and some 689 submissions received. Additionally, as s149G(3) required it to do, the EPA obtained a Key Issues Report from Auckland Council. All these materials (including the AEE), many of which are listed in [Appendix 3: Summary of Application Documentation] have been carefully considered and weighed by the Board.

[1353] The Board is satisfied that the above materials have correctly identified the environmental issues and effects arising from NZTA's various notices and applications relating to the Proposal. Many of those issues have been central to the evidence and submissions of Parties appearing before the Board at the Hearing. The Hearing ran for some 49 sitting days over a three-month period.

## 17.3 CENTRAL ISSUES

[1354] NZTA's Proposal has thrown up a large number of complex issues with which the Board has had to grapple. This is unsurprising, given both the proposed route for the EWL highway and the nature and use of the land adjacent to it. This complexity, as mentioned in the previous chapter, was foreshadowed by the Ministers' reasons.

[1355] The Board lists the central issues below. In compiling this list, the Board is not overlooking or minimising the many other issues dealt with in this Report. Rather it is highlighting those issues that have needed the greatest care. They give rise to finely balanced RMA considerations that required close scrutiny. These central issues are:

(a) Whether NZTA's proposal will provide an enduring transport solution for the needs of the industrial area it is designed to service, including the need to ameliorate traffic congestion.

(b) Whether NZTA has given adequate consideration to alternative routes.

(c) The proposal to reclaim some 18 ha of the northern shore of the Manukau Harbour's Māngere Inlet and associated effects on fauna, landscape, amenity, and severance.

(d) The effects of the Proposal on the cultural landscape, and in particular on the Manukau Harbour, which harbour and landscape are taonga and of importance to the many Mana Whenua iwi associated with the Manukau Harbour.

(e) The consequences of the Proposal for the Onehunga area, and in particular the Proposal's potential to increase severance of the Onehunga community from the foreshore and Onehunga Wharf, and further severance effects on Waikaraka Cemetery and Waikaraka Park.

(f) The relevant objectives and policies of the overarching AUP:OP.

(g) The effects of the Proposal on biodiversity and the significant Anns Creek area.

(h) Whether, as a non-complying activity, the EWL can pass through one of the relevant s104D gateways.

(i) Mercury's opposition. Mercury owns a site at Southdown on which sits a gas-fired electricity generation plant, of considerable capacity but currently mothballed and lacking essential turbines to power the generators. Mercury retains various consents, which, should it ever be so minded,

might permit it to recommission the power station. The Proposal involves an encroachment over the corner of Mercury's site by a viaduct and because of this, Mercury is opposed to the designation. It considers its site to be of strategic importance to the future supply of electricity to the Auckland region and on that ground submits that the Board should decline the NoR sought over its site.

## 17.4 STRUCTURE OF THE BOARD'S REPORT

[1356] The route to the Board's final decision passes through earlier chapters of this Report. This chapter is in large measure a brief summary of decisions reached elsewhere.

[1357] In chapter 9, the Board examines in some detail what it has termed the "strategic need" for "an EWL". The Board found the evidence presented by NZTA compelling. The nature of the Onehunga-Southdown-Penrose industrial area, coupled with increasing congestion on the current access roads, Neilson Street and Church Street, require action. "An EWL" in some shape or form has been in an embryonic planning state for approximately half a century. The need has become acute. The Board accepts that such a need is a product of historic inadequate funding and investment in both Auckland's infrastructure and public transport. Public transport needs in Auckland have been the focus of considerable attention and investment in recent years. However, the lead time necessary to provide Auckland with some form of public transport system sufficient to wean more Aucklanders from their cars will be too long to provide relief for the congestion problem the Proposal before the Board is designed to address.

[1358] In RMA terms, the positive effects of the Proposal (s3(a) of the RMA) will be significant in terms of reduced travel time, an easing of congestion, more efficient fuel use, more efficient deliveries to the various transport hubs in the area, and greater productivity on the part of those many business users whose daily tasks are inhibited by traffic congestion. That overall positive effect must be given considerable weight.

[1359] The same chapter also addresses the evidence that has satisfied the Board that the route proposed by NZTA for the EWL highway is a route that will provide the most enduring transport benefits. The Board's task would have been simpler if another route, which did not involve reclamations of the foreshore of the Māngere Inlet, had been chosen. But such routes were incapable of providing the same enduring transport benefits.

[1360] These factors are discussed in greater detail elsewhere in this Report[836] where the Board discusses, sector by sector and overall, the NoRs and s171(1)(a) of the RMA. The same factors also have high relevance when the Board makes its various assessments under the AUP:OP and those objectives and policies that require judgments on whether there were "practicable alternatives".

[1361] In chapter 12 the Board sets out the statutory framework under which it has operated. In particular, the Board has applied relevant dicta in *King Salmon*[837] and have analysed the two High Court authorities of *New Zealand Transport Agency v Architectural Centre Incorporated & Ors* and *Davidson Family Trust v Marlborough District Council,*[838] which some counsel have seen as conflicting authorities.

[1362] The same chapter also examines helpful authorities under s104D, which has high relevance for NZTA's application since the Proposal is clearly non-complying and must pass through a statutory gateway before relevant assessments under s104 and other provisions can be made.

[1363] Chapter 14 deals with the various resource consents sought by NZTA. It assesses effects on the environment, the adverse effects of the Proposal as a whole and, unsurprisingly, adopts a close focus on the proposed reclamations of the Māngere Inlet foreshore and proposed dredging, along with their effects.

[1364] The chapter also scrutinises the Proposal through the lens of s104D and concludes that, although non-complying, the application squeezes through the s104D(1)(b) gateway because it is not contrary to the objectives and policies of relevant plans, in particular the AUP:OP[RCP]. Despite the fact that some activities, particularly reclamation with its consequential effects on bird feeding areas, are, at first blush, contrary to relevant AUP:OP policies that use the word "avoid", nonetheless, given the overall objectives and policies of the AUP:OP, the extensive historic reclamation that has already occurred in and around the Māngere Inlet, and it not being practicable to locate the EWL highway infrastructure elsewhere, the Board's overall judgment (in accordance with relevant authorities) is that the Proposal is not contrary to the objectives and policies of the relevant planning instruments and in particular the AUP:OP.

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[836] See chapter [14.8] – [14.7] and in particular chapters [15.2] – [15.9]

[837] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38.

[838] *New Zealand Transport Agency v Architectural Centre Incorporated & Ors* [2015] NZHC 1991 and *Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

[1365] In making its decision, the Board appreciates the AUP:OP does not constitute a blanket prohibition on reclamation. Further, in assessing the unique challenges that finding an enduring and practicable route for the EWL present, the Board is not succumbing to the temptation of seeing "infrastructure" as a pretext to read down or diminish those highly relevant policies that exhort planners to "avoid" reclamation and associated activities. The non-complying activity, which the EWL clearly is, regrettably cannot sensibly be constructed elsewhere.

[1366] In chapter 15, the Board focus on the two NoRs, dealing with all six sectors one by one. The Board also examines the effects on cyclists and pedestrians, and the effects of construction.

[1367] As required by s171(1), the Board, both sector by sector and overall, has made its assessment of the effects of confirming the NoRs subject to the overarching provisions of Part 2 and has had particular regard to the four stipulated matters in subsection(1). The Board is satisfied that NZTA indeed gave adequate consideration to alternative routes. It is satisfied to a high degree that the work and designation are reasonably necessary for achieving NZTA's objectives for which it seeks the designations.

## 17.5 SOME CENTRAL ISSUES REVISITED

### An enduring transport solution

[1368] This issue has been covered both in this chapter and elsewhere.[839]

### Route selection

[1369] As stated earlier in this chapter (and elsewhere),[840] the Board is satisfied that the proposed route for the EWL is the product of adequate consideration of alternative routes, that the route will provide enduring transport benefits, and that it is reasonably necessary for achieving NZTA's objectives. The Board is further satisfied that the route is the result of there being no "practicable alternatives" for the purposes of relevant policies and the AUP:OP.[841]

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[839] Chapter [9]

[840] Chapters [9], [14] and [15] and in particular chapters [15.12]–[15.13]

[841] Chapter [14.3]

[1370] In chapter 15.4, the Board has considered with some anxiety the NoR on the TR Group site designed to protect the important ecological area at Anns Creek. It was strongly argued by TR Group's counsel that, in terms of s171(1)(c), the designation at that point was not "*reasonably necessary for achieving the objectives for which the designation is sought*".[842] NZTA is in the business of constructing and operating national roads. It is not a central part of its function to carry out ecological protection, particularly when the area in question, and subject to the designation, was already subject to a covenant imposed on TR Group to carry out what was essentially the same preservation work. In a principled way, TR Group saw the designation as being *ultra vires* and an unnecessary infringement of its rights as a private property owner.

[1371] The Board considers that the risk of adverse effects on the ecologically sensitive area of Anns Creek can be appropriately mitigated by a unified strategy implemented by NZTA, with the designation being rolled back after 10 years, restoring control of this unique area to TR Group or its successor in title. The Board's finding on this matter also reflects the lacuna that would occur if NZTA undertook filling within the TR Group site without associated mitigation, as neither NZTA nor TR Group would be compelled to undertake such mitigation.

### Reclamation and biodiversity

[1372] The Board, for the reasons stated earlier in this Report, is satisfied that the Proposal is generally consistent with, and not contrary to, policy F2.2.3.(1) of AUP:OP. The reclamations will provide significant regional, and indeed national, benefits. There are regrettably no practicable alternative ways of providing a corridor for the EWL route on land outside the CMA. Certainly efficient use will be made of the CMA, by limiting the extent of reclamation to that necessary for the road and associated mitigation of landscape, visual, amenity and severance effects and by providing a sophisticated stormwater treatment plant for the 611 ha catchment hinterland, and leachate treatment system, thus providing benefit in improving the quality of water discharging into the Manukau Harbour. There certainly is no practicable alternative method of treating stormwater from that catchment. Given that the reclamation landforms are proposed as mitigation for the road alignment, the Board is satisfied that their dual use as stormwater treatment wetlands for the developed 611 ha hinterland catchment does significantly increase the efficiency of that use of the CMA.

[1373] The Proposal does impact on feeding and roosting grounds of shorebirds, some of which are threatened or endangered. These effects challenge the biodiversity

[842] Closing Submissions, Littlejohn, para 3.7.

provisions of the AUP:OP[RP] particularly where they are engaged through the AUP:OP[RCP]. The biodiversity provisions are also engaged by the effects of the Proposal through Anns Creek, and particularly Anns Creek East. This has required very careful consideration by the Board. For the reasons discussed in chapter 14.2 of this Report, the Board's finding is that the effects will be adequately avoided, mitigated or off-set and that the effects will not put at risk species populations, or types of habitat.

[1374] Two elements of the Proposal that were not universally supported by experts were the sub-tidal dredging as a source of material for the construction of the reclamation, and the headland features of headlands 2 and 3. Evidence indicated that the sub-tidal dredging (with the exception of the realignment of Anns Creek tidal channel) was probably not necessary, i.e. there would be sufficient material available without that source. The ecologists agreed it would be better avoided. The Board has found accordingly. Likewise, the headland features were not generally considered to be essential features and their deletion or modification would likely improve tidal flows, reduce sedimentation rates, and reduce the total volume of material required to construct the reclamations. Thus, the Board has imposed three conditions that those features be duly deleted or modified.

### Section 104D

[1375] For the reasons stated elsewhere in this Report, the Board is satisfied that this non-complying activity passes through the s104D(1)(b) gateway.[843]

### The cultural landscape

[1376] Chapter 13 deals extensively and sensitively with Mana Whenua interests. The Board accepts absolutely that the Manukau Harbour, including the Māngere Inlet, is a taonga. The Board is impressed by the extensive engagement there has been between Mana Whenua iwi and NZTA, resulting in part in the Cultural Values Report. The Proposal passes close to a number of sites of cultural interest and indeed infringes on the already degraded site of Te Hōpua a Rangi.

[1377] The Board notes, as described and explained in chapters 14.2 and 14.8, that, as is their right, various iwi with close connections to the Manukau Harbour have weighed values differently and have reached different conclusions, particularly with respect to reclamation. The Board has dealt fully in chapters 14.2 and 14.8 with the objections and opposition advanced by Ngāti Whātua Ōrākei, Te Kawerau ā Maki and Te Ākitai Waiohua. The Board has no doubt that s8 of the RMA is engaged. The Board accepts that, in its consultation with Mana Whenua, NZTA

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[843] Chapter [14.3].

has endeavoured to give effect to the partnership principles of the Treaty of Waitangi. The s6(e) matter of national importance, the relationship of Māori, their culture and traditions with ancestral lands and water, are matters the Board has recognised and provided for. The Board has also had particular regard to s7(a) as it relates to kaitiakitanga.

[1378] It is trite to observe that these provisions of the RMA, properly embedding both the principles of the Treaty of Waitangi and matters of cultural and historical importance to Māori, are not intended to give to any iwi the right of veto. Indeed, no one has so submitted and the Board would have regarded any such submission as misconstrued and simplistic.

[1379] The fact that a number of iwi have entered into an agreement with NZTA, the Mana Whenua Tribes Agreement,[844] is not in any way decisive. Rather, it is illustrative of the diversity of legitimate Māori views. Nor can the Board be influenced by the fact that, arguably, the existence of such an agreement might be regarded as an affront to the mana of other iwi who were adamantly opposed to the Proposal.

[1380] The effects to the cultural landscape flowing from the EWL must be weighed beside the various cultural benefits. These include treatment of stormwater runoff from a developed 611 ha catchment to the north of the Māngere Inlet, improved capture and treatment of leachate from adjacent landfills, ecological enhancement and protection of feeding and roosting areas, pest management of bird breeding areas, and the removal of culverts from the SH1 crossing of Otāhuhu Creek. While the world view varies between iwi, those within the Mana Whenua Tribes have concluded that on balance the Proposal, if implemented in full, will result in an overall improvement in the taonga.

[1381] All these Part 2 matters have been carefully considered and weighed by the Board when considering the cultural landscape and in particular the submissions of Mana Whenua.

### Onehunga community and severance

[1382] Certainly, particularly during its construction phase, the EWL will be disruptive to the Onehunga community. There will be severance, in addition to that already caused by SH20, between Onehunga and the Manukau foreshore. There will be a loss of tranquillity for the Waikaraka Cemetery.

[1383] Positive effects that will flow to the Onehunga community will be the ultimate reduction in traffic congestion on Church Street and Neilson Street, reduced traffic

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[844] Closing Statement, Warren, para 3.

on Onehunga Harbour Road, which currently functions as the SH20 off-ramp, improved bus travel times into Onehunga, diminution of traffic flows on those Onehunga local roads currently used to access the Onehunga-Southdown-Penrose industrial area, and the future benefit of reduced traffic congestion as Onehunga becomes a more dense residential area in accordance with the provisions of the AUP:OP. Further mitigation, which will offset in part the loss of tranquillity at Waikaraka Cemetery, will be the creation of the public walkways and cycleways on the reclaimed land.

[1384] The Board is unable to impose conditions on either NZTA or Transpower to force the undergrounding of unsightly transmission lines and the removal of associated pylons.

[1385] The creation of a land bridge over the EWL at its western end will certainly avoid what would otherwise be serious severance between the Onehunga community and the Onehunga Wharf.

**Mercury**

[1386] The Board regrets that NZTA and Mercury, both being responsible entities in which the Crown has interests, were not able to resolve their differences, by mediation or otherwise, before the conclusion of the Hearing. The Board afforded every opportunity to the parties to reach a solution. They were unable to do so and the Board is not minded (it being unnecessary) to be critical of either.

[1387] It is possible, with the advantage of hindsight, that NZTA, for its part, once it became aware that Mercury had effectively decommissioned its Southdown power plant, underestimated Mercury's reaction. It is also possible that Mercury, for its part, abandoned what at the outset seemed to be a co-operative stance and dialogue with NZTA and became more hard-nosed. The Board does not have to make any findings in this area and declines to do so.

[1388] The Board, at the end of the Hearing, was faced with an unsatisfactory situation. Mercury still retained consents (which might or might not require modification) that may permit it, in the event of it deciding, for commercial or other reasons, to recommission its gas-fired generation power plant. The Board accepts the evidence of Mr Heaps and Mr Noble that whether or not the power plant would be brought back into operation is ultimately a commercial decision for Mercury alone. The Board does not need to make any finding on Mercury's submission that, although a lead time of some months would be required, some electricity supply crisis might require the plant to be recommissioned.

[1389] The Board considers that NZTA has prepared a Qualitative Risk Assessment (QRA) that is a satisfactory first step in the overall risk assessment process. That

assessment is appropriately conservative. It does need to incorporate a small number of additional hazards. Mercury's risk expert, Mr Phillis, did not state outright that the QRA findings were wrong. He supported a second step in refining the assessment. The Board is satisfied that it has received sufficient evidence to support the approval of NoR 1 in relation to the Southdown site.

[1390] The solution that the Board has reached is to accept the conditions proposed by NZTA's counsel in closing submissions. Those conditions will oblige NZTA to address the safety issues prior to construction of the EWL highway. It is more likely than not that all risks can be adequately avoided or mitigated. In the event that all risks cannot be adequately avoided or mitigated, then the EWL will not proceed at that location, or NZTA will purchase the site and permanently decommission the gas-fired power generation.

## 17.6 ADVERSE EFFECTS

[1391] The Board is indeed satisfied that the Proposal will create adverse effects, both during its construction phase and during its operation. These adverse effects have been identified in chapters 14 and 15 of this Report. The Board's conclusion is that such adverse effects can be avoided, remedied or mitigated, both during the construction phase and during the operation of the EWL, by the design and identification of specific mitigation measures, which are included and stipulated in the conditions that the Board has imposed for both the designations and the resource consents.

## 17.7 OVERALL JUDGMENT UNDER PART 2

[1392] The Board, as is clear from both this chapter and the relevant parts of chapters 14 and 15, has, in the exercise of its functions and powers, recognised and provided for s6 matters of national importance; had particular regard to the other matters listed in s7; and has taken into account the principles of the Treaty of Waitangi.

[1393] At the statutory high policy and purpose level in s5, the Board considers, in making these planning judgments that it has, that sustainable management of New Zealand's natural and physical resources has been promoted. The Proposal enables people and the Auckland community to provide for their social, economic and cultural wellbeing, and for their health and safety; the EWL will provide significant community, social and transport benefits; and will further provide significant infrastructure to meet the transport needs of the region. It will also provide benefits through ecological off-sets. Section 5(2)(a), (b) and (c) matters have not been overlooked by the Board. Adverse effects are avoided, remedied, or mitigated (or off-set). Particular regard has been paid to the life-supporting capacity of water, soil and ecosystems. The Board sees the dual use of the

reclamation aspect of the Proposal as sustaining the potential of the degraded Māngere Inlet (by some modest improvements) to meet the reasonable foreseeable needs of future generations.

[1394] The Board, for all these reasons, considers (and so finds) that the confirmations, consents, and conditions it has imposed do not infringe the s5 purpose of the RMA. The Board stresses that it has not endeavoured to use s5 or Part 2 as mechanisms to read down or dilute the imperatives contained in the primary planning instruments, including in particular the AUP:OP and the NZCPS.

## 17.8 CONCLUSION

[1395] At the risk of being unnecessarily repetitive, the Board confirms it has carefully considered all submissions, evidence and reports received. It has considered the minutes of facilitated conferences. It has examined the various conditions flowing both from those conferences and from the parties who offered such conditions. The Board has applied the purpose and principles of the RMA and has considered and applied the relevant sections of the RMA, including in particular ss104, 104D, 105 and 107 and 171(1). It has, of necessity, given careful consideration to the provisions of the RMA to inform the statutory powers conferred upon it by s149P. It has also, as required by s149P(1), had regard to the Ministers' reasons and has considered all information provided to it by the EPA under s149G.[845]

[1396] The Board considers and determines that the management and mitigation methods proposed, the conditions that it imposes, and the positive effects of the Proposal will achieve sustainable management of the natural and physical resources involved. It thus follows that the EWL is consistent with the purposes and principles of the RMA set out in Part 2, subject to the conditions imposed. The exception is the coastal permit relating to sub-tidal dredging (other than that required for realignment of the Anns Creek channel), which the Board has found to be in conflict.

[1397] The Board is satisfied that by granting, for the most part, the resource consents sought and by confirming the NoRs requested by NZTA relating to the Proposal, it is appropriately exercising its statutory powers and has struck the correct balance.

[1398] The Board's unanimous decision is thus that, subject to the extensive and carefully crafted conditions set out in a separate volume of this Report, the NoRs should be confirmed and the various resource consent applications should be granted (with

[845] The Board was of the view that specific statutory provisions in Part 2 required an assessment when Māori cultural issues required consideration.

the exception of the coastal permit for dredging, which should be granted in part) under the RMA.

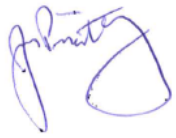
[1399] The Board's reasons and analysis are apparent in summary form in this chapter, but in particular in its discussion of the various issues raised and dealt with in chapters 13, 14 and 15 of this Report. Those chapters contain relevant factual findings germane to the issues discussed.

[1400] The Hearing has been lengthy and arduous, and would undoubtedly have taken its toll on all Parties, including their witnesses, and counsel. The Board is grateful to all who were involved in the Hearing for the competent, good natured, and professional way in which they conducted themselves.

# 18. DECISION

[1401] The Board, constituted under Part 6AA of the Resource Management Act 1991, confirms the two Notices of Requirement (as modified during the Hearing and shown in the Land Requirement Plans in Appendix 11: Key Plans and Drawings) and grants the 24 resource consents (nine land use consents, four coastal permits, six water permits, and five discharge permits) sought by the New Zealand Transport Agency, subject to the conditions in Volume 3.

Dated: 21 December 2017



**Dr John Priestley CNZM, QC**
Retired High Court Judge
Chair

**Alan Bickers MNZM, JP**
Deputy Chair

**Michael Parsonson**
Member

**Sheena Tepania**
Member

BOARD OF INQUIRY

Transmission Gully Notices of Requirement and Consents

# Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal

**Produced under Section 149R of the Resource Management Act 1991**

## Volume 1

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June 2012

**BEFORE THE BOARD OF INQUIRY CONCERNING REQUESTS FOR NOTICES OF REQUIREMENT AND APLICATIONS FOR RESOURCE CONSENTS TO ALLOW THE TRANSMISSION GULLY PROJECT**

| | |
|---|---|
| **IN THE MATTER** | of the Resource Management Act 1991 and the deliberations of a Board of Inquiry appointed under Section 149J of the Act to consider requests for notices of requirement and applications for resource consents by New Zealand Transport Agency, Porirua City Council and Transpower New Zealand Limited in respect of the Transmission Gully Project |
| **HEARING AT:** | Wellington commencing on 13 February 2012 and ending on 14 March 2012 |
| **REPRESENTATIONS:** | See Section 10 |

Board: Environment Judge Brian Dwyer (Chairperson)
Environment Commissioner Russell Howie (Member)
David McMahon (Member)
David Mitchell (Member)
Glenice Paine (Member)

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## FINAL DECISION AND REPORT OF BOARD OF INQUIRY UNDER SECTION 149R OF THE ACT

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# 1. INTRODUCTION

[1] This report addresses applications by the New Zealand Transport Agency (NZTA), Porirua City Council (PCC) and Transpower New Zealand Limited (Transpower) (jointly - the Applicants) for Notices of Requirement (NoRs) and/or resource consents to allow what is known as the Transmission Gully Project (TGP/the Project). The report has been prepared by the Board of Inquiry (the Board) in accordance with section 149R(1) Resource Management Act 1991 (RMA).

[2] In accordance with section 149R(3)(a)-(d) RMA this report states our decision and reasons for our decision, includes a statement of the principal issues that were in contention and the main findings on these issues.

[3] TGP is a proposal to establish a new road in the Wellington region from Linden (in the south) to MacKays Crossing (in the north). We will outline the details of the proposal and why the Applicants wish to undertake it in the following section of this report.

[4] The reason there are three Applicants is that all three have functions to undertake in establishing TGP. We will discuss those functions elsewhere in more detail in this report. Put briefly however:

- NZTA is the national roading authority and most of the works are being undertaken by it as part of its function of managing the New Zealand state highway system. Some of the works proposed by NZTA will be undertaken pursuant to NoRs and some pursuant to resource consents;
- PCC is the local roading authority at the southern end of TGP and is required to undertake works to link TGP to that local roading system. Some of the works will undertaken by PCC pursuant to NoRs and some pursuant to resource consents;
- Transpower manages the national electricity grid which runs alongside the proposed TGP route in places. It is necessary for Transpower to relocate 24 transmission towers, strengthen 10 towers and remove one tower entirely for TGP to proceed. The works to be undertaken by Transpower are to be undertaken pursuant to resource consents.

[5] Each Applicant has applied for the NoRs and consents for their respective components of the proposal separately, however, they are inextricably linked and have been lodged concurrently. On this basis we have largely considered the effects of each project as if they were one although we have undertaken a separate consideration of the Transpower applications in reaching our decision.

# 2. OUTLINE OF TGP PROPOSAL AND REASONS FOR IT

**The applications for the construction, operation and maintenance of TGP**

[6] TGP is a proposed 27km inland road that will run between Linden and MacKays Crossing. The application documents describe the roading aspects of the proposal to be undertaken by NZTA and PCC in these terms[1]:

> ***1. Introduction***
>
> *The Transmission Gully Project (the Project) consists of three components:*
>
> - *The Transmission Gully Main Alignment (the Main Alignment) involves the construction and operation of a State highway formed to expressway standard from Linden to MacKays Crossing. The NZ Transport Agency (NZTA) is responsible for the Main Alignment.*
> - *The Kenepuru Link Road involves the construction and operation of a road connecting the Main Alignment to existing western Porirua road network. The NZTA is responsible for the Kenepuru Link Road.*
> - *The Porirua Link Roads involve the construction and operation of two local roads connecting the Main Alignment to the existing eastern Porirua road network. Porirua City Council (PCC) is responsible for the Porirua Link Roads.*
>
> ***1.1 Transmission Gully Main Alignment***
> *The Main Alignment will provide an inland State highway between Wellington (Linden) and the Kapiti Coast (MacKays Crossing). Once completed, the Main Alignment will become part of State Highway 1 (SH1). The existing section of SH1 between Linden and MacKays Crossing will likely become a local road.*
>
> *The Main Alignment is part of the Wellington Northern Corridor (Wellington to Levin) Road of National Significance (RoNS). The Wellington Northern Corridor is one of the seven RoNS that were announced as part of the Government Policy Statement on Land Transport Funding (GPS) in May 2009. The focus of the RoNS is on improved route security, freight movement and tourism routes.*
>
> *The Main Alignment will be approximately 27 kilometres in length and will involve land in four districts: Wellington City, Porirua City, Upper Hutt City and Kapiti Coast District.*
>
> *The key design features of the Main Alignment are:*

[1] Application documents - Technical Report 4 (TR4).

- *Four lanes (two in each direction with continuous median barrier separation);*
- *Rigid access control;*
- *Grade separated interchanges;*
- *Minimum horizontal and vertical design speeds of 100 km/hr and 110 km/hr respectively; and*
- *Maximum gradient of 8%;*
- *Crawler lanes in some steep gradient sections to account for the significant speed differences between heavy and light vehicles.*

***1.2 Kenepuru Link Road***

*The Kenepuru Link Road will connect the Main Alignment to western Porirua. The Kenepuru Link Road will provide access from Kenepuru Drive to the Kenepuru Interchange. This road will be a State highway designed to following standards:*

- *Two lanes (one in each direction);*
- *Design speeds of 50 km/h;*
- *Maximum gradient of 10%; and*
- *Limited side access.*

***1.3 Porirua Link Roads***

*The Porirua Link Roads will connect the Main Alignment to the eastern Porirua suburbs of Whitby (Whitby Link Road) and Waitangirua (Waitangirua Link Road). The Porirua Link Roads will be local roads designed to the following standards:*

- *Two lanes (one in each direction);*
- *Design speeds of 50 km/h;*
- *Maximum gradient of 10%; and*
- *Some side access will be permitted.*

[7] TGP is intended to provide an alternative route to the existing SH1. Much of SH1 presently runs along the shoreline of Porirua Harbour and the west coast of the Wellington region. For this reason many of the participants in our proceedings referred to it as the *coastal route* and we will similarly use that expression on occasions.

[8] There are a number of identified problems with the coastal route. The application documents defined those problems and how they might be remedied by TGP in these terms[2]:

---

[2] Application documents - TR4.

***Problem Definition & Benefits of the Transmission Gully Project***

*The problems experienced in the existing SH1 corridor are self-evident to regular travellers in this area. The use of models has assisted in quantifying these problems, the degree to which these will intensify in the future and the extent of benefits which will be provided by the Transmission Gully Project:*

***Congestion***

- *The corridor is currently subject to regular congestion during weekday peak periods. More severe congestion is experienced during holiday periods, or when incidents occur (such as crashes, slips etc).*

- *This results in increased travel times and a greater variability of travel times, making journey planning difficult for individuals and businesses (such as freight operators).*

- *A consequence of these conditions is that people change their travel behaviour to avoid expected congestion by travelling at other times, to alternative destinations, at lower frequencies or by other modes. Together, these changes result in inconvenience for travellers in the corridor and some suppression of traffic demand along the existing SH1 route.*

- *By the provision of a new four-lane route, the Transmission Gully Project will reduce travel times and allow journeys to be planned with a greater level of certainty around travel times. Whilst the risks of any temporary closures will be significantly reduced, the consequences in terms of potential delays will also be reduced. As a result, travellers will benefit through being able to travel at times and in a manner which is most convenient for them, with efficiency benefits for both individuals and businesses.*

***Accessibility***

- *Access between the Hutt Valley and SH1 to the north is currently poor, requiring the use of indirect routes by means of SH1 and SH2 via the Ngauranga Gorge, Grays Road or SH58 around the Pauatahanui Inlet.*

- *The Transmission Gully Project will provide a route between SH58 at Haywards and SH1 (north) which is significantly shorter and faster, resulting in an improved level of accessibility between these areas.*

- *Similarly, poor road conditions for north-south travel along SH1 and resulting in peak period congestion restricts accessibility between Kapiti/Horowhenua and areas to the south.*

- *The Transmission Gully Project will allow reduced and more certain travel times at all time periods, removing deterrents to travel in the corridor and improving accessibility and regional cohesiveness.*

***Use of Inappropriate Routes***

- *Routes such as the Paekakariki Hill Road, Grays Road and SH58 along the Pauatahanui Inlet suffer from poor geometry but are used*

*by significant volumes of traffic between the Porirua/Kapiti areas and the Hutt Valley.*

- *The Transmission Gully Project will provide a high standard route for these traffic movements, resulting in significant benefits to the existing routes.*

***Safety***

- *Although some improvements have been achieved in recent years along the existing SH1 route, the ability to achieve further reductions in the frequency and severity of crashes is constrained by the geometry of the route. Similarly, high traffic volumes using the inappropriate routes (above) results in a poor crash record.*

- *The Transmission Gully Project will be constructed to appropriate design standards, with limited access, continuous overtaking opportunities and grade-separated intersections. As a result, the frequency of crashes will be significantly reduced. Furthermore, the diversion of traffic away from roads with poor geometric standards will provide benefits in terms of a reduction in the overall number of crashes.*

***Severance***

- *A number of existing communities in the corridor suffer severance and problems of accessibility arising from the barrier represented by high volumes of through traffic. In Paremata, Mana, Plimmerton and Paekakariki, community facilities are separated from residential areas by SH1. Crossing the route involves detours, delays and safety concerns. Pauatahanui village also experiences inappropriate volumes of through traffic with resulting severance and safety concerns, particularly for the movement of children to and from the primary school.*

- *With the removal of large volumes of extraneous traffic by the Transmission Gully Project, all of these communities will benefit from improved levels of connectivity, accessibility and safety.*

***Vulnerable Road Users***

- *Whilst the SH1 corridor has seen some improvements in pedestrian and cycle facilities in recent years, these road users can feel intimidated by the high volumes of traffic which affects the perceived safety and enjoyment of travel by these modes of transport.*

- *The much lower volumes of traffic along the existing SH1 route will create opportunities for the implementation of measures to encourage walking and cycling, more consistent with local function of the route.*

***Route Security***

- *The existing SH1 route is vulnerable to long-term closure after a major natural event such as an earthquake or tsunami.*

- *Although the Transmission Gully Project will itself be at some risk of closure, the availability of a secondary route will offer benefits in*

*terms of a lower risk and duration of Wellington being isolated following such an event.*

[9] We have set out the definition of the problem and benefits above, from the application documents in full and verbatim. Although some parties to the proceedings challenged the extent to which TGP might remedy the problems, not one party challenged the identification of problems with the coastal route in any substantive evidence which we heard. The inadequacies of the coastal route are accordingly *givens* in our considerations. We will address the issue of benefits of TGP in more detail elsewhere in this report.

# 3. BACKGROUND, REFERENCE TO BOARD OF INQUIRY, AND MINISTER'S REASONS

[10] On 15 August 2011, the NoRs and resource consent applications from the three Applicants were lodged with the Environmental Protection Agency (EPA) in accordance with s145 RMA. The NoRs and resource consent applications will hereafter be referred to collectively as *the applications*. The applications comprised NoRs for designations in the Kapiti Coast District, Upper Hutt City, Porirua City and the Wellington City District Plans, applications for resource consents under Wellington Regional Plans and applications under the National Environmental Standard for Electricity Transmission Activities.

[11] When such applications are lodged with the EPA, s146 RMA requires the EPA to seek a direction from the Minister for the Environment (the Minister) under s147. On 24 August 2011, the EPA recommended to the Minister that the matters be referred to a board of inquiry for a decision.

[12] On 13 September 2011, the Minister confirmed that the applications seek to allow works which form part of a proposal of national significance and directed that these matters be referred to a board of inquiry for determination under s171 RMA. In accordance with s149C, on 17 September 2011, the applications were publicly notified, calling for submissions. A correction notice was issued on 1, 4 or 6 October. Submissions closed on 31 October 2011.

[13] Section 142(3) RMA sets out a number of matters the Minister may have regard to in determining whether or not a matter is, or is part of, a proposal of national significance. The Minister's reasons for directing the matters to the Board, in accordance with s142(3) were:

**Matters lodged by NZTA**

**a) Has aroused widespread public concern or interest regarding its actual or likely effect on the environment (including the global environment).**
*The Main Alignment and Kenepuru Link Road, being the 27km state highway inland alternative to the existing coastal route, have had a long history of media and public attention, part of which relates to the actual or potential effects of the proposal on the environment.*

**b) Involves or is likely to involve significant use of natural and physical resources**
*The Main Alignment and Kenepuru Link Road involves the construction of a state highway 27km in length, which in turn requires forming new link roads and the relocation of transmission lines in order to proceed. Construction will involve approximately 6.3 million cubic metres of cut material and 5.8 million cubic metres of fill material. There are approximately 112 stream crossings, requiring culverts and bridges, and the permanent realignment of approximately 6.5km of streams. The proposal traverses mainly rural*

*land, with urban development at the northern end, at MacKays Crossing, and the southern end around Whitby, Linden, Waitangirua, Cannons Creek and other eastern suburbs of Porirua. Land within the proposal area is highly modified, comprising mostly pasture, with some areas of regenerating native bush and exotic forestry.*

*The proposal traverses nine hydrological catchments, which are part of four different watersheds. Five of the catchments (approximately 65% of the length of the proposal) drain into the Pauatahanui Inlet, which is considered to be relatively an extensive unmodified estuarine area in the southern part of the North Island.*

*Multiple areas of land will need to be acquired by NZTA for the Main Alignment and the Kenepuru Link Road. Hence the construction and subsequent occupation of land and water by TGP will involve significant use of natural and physical resources. The project is estimated to cost more than $1 billion.*

**c) Affects or is likely to affect a structure, feature, place or area of national significance**

*The Main Alignment and Kenepuru Link Road are the primary components of the TGP. The PCC and Transpower matters are consequential to, and would not have been lodged without, the NZTA matters. The Main Alignment and Kenepuru Link Road are part of the Wellington Northern Corridor Road of National Significance (which runs between Wellington Airport and north of Levin), a roading route identified in the Government Policy Statement on Land Transport Funding as a route requiring significant investment to reduce congestion. The Main Alignment and Kenepuru Link Road are considered to be a key section of the NZTA Wellington Northern Corridor.*

*The national significance of the TGP is further enhanced by its intended status as the primary state highway linking with the greater North Island and the South Island via Wellington and through the Cook Strait.*

*The Pauatahanui Inlet, into which 65% of the length of the proposal drains, is identified in the Wellington Conservation Management Strategy as "a productive estuarine habitat, a site of national significance in the Sites of Special Wildlife Interest (SSWI) database and the only large area of salt marshes and seagrass in the Wellington Region."*

*Construction of the Main Alignment requires relocation of transmission lines forming part of the national electricity grid, which is a structure of national significance.*

**e) Results or is likely to result in or contribute to significant or irreversible changes to the environment (including the global environment)**

*The Main Alignment and Kenepuru Link Road are likely to result in irreversible changes to the environment. The proposal will involve large scale earthworks (approximately 6.5 million cubic metres of cut material and 5.8 million cubic metres of fill material), diversion of approximately 6.5km of streams, culverting or bridging of approximately 112 streams, removal of exotic and regenerating native vegetation and changes to the hydrology within the catchments impacted.*

**h) Will assist the Crown in fulfilling its public health, welfare, security, or safety obligations or functions**

*The Main Alignment and Kenepuru Link Road are expected to provide an alternative route into and out of Wellington City. An alternate inland state highway route is intended to provide greater resilience to natural hazards, such as sea level rise, and provide an alternative route into and out of the western side of Wellington in the event of a natural disaster. Construction of the Main Alignment and associated link road is intended to improve travel times, reliability, reduce congestion within the western road corridor, and provide a safer driving environment. These provisions will assist the Crown in providing a safe and secure transport alternative, particularly in the event that the current State Highway 1 is impacted by unforeseen events.*

*The Kenepuru Link Road will help improve access to key regional and inter-regional destinations by linking the western Porirua road networks to the Main Alignment. The proposal to relocate parts of the transmission line to enable the construction and operation of the Main Alignment will ensure connection to the National Grid is maintained, thereby assisting the Crown in fulfilling its public health and welfare functions.*

**i) Affects or is likely to affect more than 1 region or district**

*The Main Alignment and Kenepuru Link Road traverse the jurisdictions of four territorial authorities (Wellington City Council, Porirua City Council, Upper Hutt City Council, and the Kapiti Coast District Council) and are within the jurisdiction of the Greater Wellington Regional Council.*

**j) Relates to a network utility operation that extends or is proposed to extend to more than 1 district or region**

*The network utility operation for the Main Alignment and Kenepuru Link Road components extends to the four territorial authorities (Wellington City Council, Porirua City Council, Upper Hutt City Council, and the Kapiti Coast District Council).*

**Matters lodged by PCC**

**h) Will assist the Crown in fulfilling its public health, welfare, security, or safety obligations or functions.**
*The Porirua Link Roads assist the Crown in meeting its security and safety functions and obligations because they will provide an alternative route into and out of Wellington City. Access to an alternate inland state highway route is intended to provide greater resilience to natural hazards, such as sea level rise impacting the coastal route (State Highway 1), and provide an alternative route into and out of the western side of Wellington in the event of a natural disaster. Construction of the Porirua Link Roads, which would provide access to the Main Alignment, is intended to also improve travel times, reliability, reduce congestion within the western road corridor and provide a safer driving environment.*

**Matters Lodged by Transpower**

**c) Affects or is likely to affect a structure, feature, place or area of national significance**
*The national electricity grid extends across New Zealand, including towers, poles, lines, cables and substations. It includes over 12,000km of high-voltage transmission lines and more than 170 substations. Both the transmission lines and the proposed Main Alignment are nationally significant structures. Without relocation of the Paekakariki-Takapu Road A transmission line, which is located within the proposed route of the Main Alignment, construction of the Wellington Airport to north of the Levin Road of National Significance would be affected, as the transmission lines run along the proposed route. Similarly, interruption to and removal of the transmission lines is not a viable option given the national significance of the national electricity grid of which the lines are a part.*

**i) Affects or is likely to affect more than 1 region or district**
*The national electricity grid is a strategic infrastructure link, providing electricity across New Zealand. The relocation works are located within the Kapiti Coast District, Porirua City and the jurisdiction of the Greater Wellington Regional Council.*

## 3.1 TGP PLAN CHANGE TO THE WELLINGTON REGIONAL FRESHWATER PLAN AND EXISTING DESIGNATION

[14] For the sake of completeness we record that on 6 September 2010, NZTA had filed a request for changes to the Wellington Regional Freshwater Plan (the Freshwater Plan) with the EPA. The plan change request was intended to enable the consideration of future TGP resource consents under the Freshwater Plan. The change sought to insert one new policy and amend existing policies in the Freshwater Plan.

[15] That application was also referred to a Board of Inquiry. Following a submission and hearing process the Board of Inquiry approved the plan change which altered the wording of existing Policies 4.2.10, 7.2.1 and 7.2.2

and inserted a new Policy 4.2.33A into the Freshwater Plan. An appeal to the High Court against the Board's decision on the plan change was dismissed and the plan change became operative on 25 January 2012. The amended Freshwater Plan is a relevant consideration for this proposal.

[16] Also for the sake of completeness we note that part of the TGP route subject to these applications is presently subject to a designation by NZTA approved in 2001. These current applications propose a different route to the existing designation although there is substantial overlap between the two.

# 4. CONDUCT OF THE INQUIRY AND MATTERS TO BE CONSIDERED UNDER SECTION 149P OF THE RMA

[17] This Board was appointed in accordance with sections 149J and 149K RMA. Section 149L RMA provides:

> *(1) A board of inquiry appointed to determine a matter under section 149J may, in conducting its inquiry, exercise any of the powers, rights and discretions of a consent authority under sections 92 to 92B and 99 to 100 as if –*
>
> *(a) the matter were an application for a resource consent; and*
>
> *(b) every reference in those sections to an application or an application for a resource consent were a reference to the matter.*

[18] The Board must determine the applications in accordance with s149P of the Act which specifies the matters that we are required to consider in making our decision. Section 149P relevantly provides:

> *(1) A board of inquiry considering a matter must—*
>
> *(a) have regard to the Minister's reasons for making a direction in relation to the matter; and*
>
> *(b) consider any information provided to it by the EPA under section 149G; and*
>
> *(c) act in accordance with subsection (2), (3), (4), (5), (6), (7), (8), or (9) as the case may be.*
>
> *(2) A board of inquiry considering a matter that is an application for a resource consent must apply sections 104 to 112 and 138A as if it were a consent authority.*
>
> *(4) A board of inquiry considering a matter that is a notice of requirement for a designation or to alter a designation—*
>
> *(a) must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority; and*
>
> *(b) may—*
>
> *(i) cancel the requirement; or*
>
> *(ii) confirm the requirement; or*
>
> *(iii) confirm the requirement, but modify it or impose conditions on it as the board thinks fit; and*

*(c) may waive the requirement for an outline plan to be submitted under section 176A.*

# 5. MINUTES AND DIRECTIONS ISSUED

[19] In administering the inquiry process we issued 27 minutes, directions and memoranda in relation to the following topics:

- Hearing procedures and process;
- Sedimentation and planning conferencing, conditions and noise issues;
- Amended/late evidence and extended timeframes for some evidence exchange;
- Pre-hearing conferences;
- Consideration of late/non-complying/amended submissions;
- Response to Memorandum of Counsel;
- Hearing start date;
- Expert and officer conferencing.

[20] We will not describe the content of each minute here but will refer to the relevant minutes, directions and memoranda as necessary throughout this report.

# 6. PROCEDURES

## 6.1 SUBMISSIONS

[21] Seventy submissions were received on the applications, 26 were in opposition, 33 were in support, three did not state a position of support or opposition and the other submissions were either neutral, or in partial support and partial opposition.

[22] Six submissions were received after the close of the statutory submission period. We resolved to formally accept the late submissions[3]. In a Minute of the Board dated 30 November 2011 we also resolved to formally receive an amended Kapiti Coast District Council (KCDC) submission[4].

## 6.2 PRE-HEARING CONFERENCES

[23] Three pre-hearing conferences were held in the lead-up to the hearing. The first conference was held on Thursday 10 November 2011. The purpose of this conference was to outline procedures for the hearing, and to allow the Applicants and submitters to raise any issues they had with the draft hearing procedures and any other procedural matters. Directions from this pre-hearing conference were provided in a Minute of the Board dated 30 November 2011.

[24] The second pre-hearing conference was held on Thursday 1 December 2012. The purpose of this conference was to discuss issues regarding site access. Directions from this pre-hearing conferencing were provided in a Minute of the Board dated 1 December 2011.

[25] The final pre-hearing conference was held on Tuesday 17 January 2012. The purpose of this conference was to discuss ongoing access issues to a site at the northern end of the route. We also considered requests for waivers for supplementary evidence and late submitter evidence. Directions arising from this prehearing conference were provided in a Minute of the Board dated 18 January 2012.

## 6.3 GENERAL

[26] Pursuant to s37(1)(a) RMA we extended the time between the close of the submission period and the commencement of the hearing from 40 working days to 69 working days [5].

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[3] Minute of the Board dated 9 November 2011 (also Minutes undated 10 November 2011 and 16 November 2011).

[4] As per Memorandum Counsel for Kapiti Coast District Council of 17 November 2011 regarding the amendment to the Kapiti Coast District Council's submission (Submission Number 0023) by way of correction to the submission cover sheet.

[5] Minute dated 10 November 2011.

[27] We declined a request by Radio New Zealand (RNZ) to record the hearing. Facilities were available at the hearing for an RNZ reporter at the media bench and the reporter was able to take hand written notes. Copies of statements of evidence and transcripts were posted on the EPA website as they became available. We approved a request by Fairfax Media to take photographs at the hearing. However, we directed that no photographs may be taken of witnesses giving evidence or of Counsel during cross-examination of witnesses[6].

## 6.4 EVIDENCE

[28] The Applicants' evidence in chief (EiC) was received by the EPA by 18 November 2011. Expert evidence on behalf of the submitters was received on 21 December 2011. The Applicants provided rebuttal evidence to the EPA by 20 January 2012, with various further supplementary statements of evidence coming in up until 20 February 2012. Additionally, at the request of the Board, NZTA provided information (circulated to other parties) regarding possible covenanting of land for protection purposes after the conclusion of the hearing.

[29] We agreed to a time extension for receiving the Applicants' rebuttal evidence in relation to sedimentation issues and this was received by the EPA on 27 January 2012.

[30] We allowed submitters' experts to provide supplementary evidence in relation to the Te Puka Stream section of the route and updated proposed conditions. This was received by the EPA on 3 February 2012.

[31] We also allowed submitters' planning experts to provide supplementary evidence with regard to updated proposed conditions and evidence from other experts. The EPA received this evidence on 9 February 2012.

[32] We resolved[7] to formally accept late evidence[8] from submitters Rational Transport Society (RTS), Mana Cycle Group and Living Streets Wellington and an amendment of the evidence provided by the New Zealand Historic Places Trust (Pouhere Taonga).

[33] We also accepted an extension of time for submission of rebuttal evidence from witnesses Fisher, Malcolm and De Luca[9] for NZTA.

## 6.5 CONFERENCING

[34] An active programme of expert witness conferencing was established by the Board. The purpose of this programme was to identify the substantive and determinative matters in dispute between the witnesses.

[35] Additionally, we directed the three Applicants and the five local authorities (Wellington Regional Council, Wellington City Council, Porirua City Council,

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6 Minute dated 9 February 2012.

7 In a Minute of the Board dated 17 January 2012.

8 By exercising powers under s37(1)(b) RMA.

9 In a Minute of the Board of 19 January 2012.

Kapiti Coast District Council and Upper Hutt City Council) to undertake on-going officer conferencing regarding conditions[10].

[36] There were 30 conferencing statements received. The various groups of experts participated constructively in conferencing, and produced helpful reports as to the facts and issues agreed, facts and issues unresolved, and (generally) reasons for the latter. We have considered these statements, along with other submitters' concerns, in our deliberations later in this report.

[10] In a Minute and Directions of the Board dated 24 November 2011 we directed that these parties provide a joint status report on progress of the conferencing to the EPA by 21 December 2011.

# 7. OUTLINE OF PROPOSAL

## 7.1 INTRODUCTION TO THE PROPOSAL

[37] We refer to our earlier description of the TGP proposal[11].

[38] TGP is to form part of what is known as the Wellington Northern Corridor which is identified as one of seven projects described as Roads of National Significance (RoNS) in a Government Policy Statement prepared under the Land Transport Management Act 2003. In 2009, the Minister of Transport announced that TGP was the preferred option for that section of the Wellington Northern Corridor between Linden and MacKays Crossing.

[39] For the purposes of description and administration, NZTA has divided the Main Alignment of TGP into 9 sections. We describe those sections from north to south to give some appreciation of the extent of the Project.

**Section 1: MacKays Crossing**
This section is approximately 3.5km long, and extends from the tie-in at the existing MacKays Crossing Interchange on SH1 to the lower part of Te Puka Stream valley.

**Section 2: Wainui Saddle**
Section 2 starts approximately 03500m[12] and climbs for about 2km to the top of the Wainui Saddle, approximately 262m above sea level (at about 05500m). This will be the highest point of the Main Alignment.

**Section 3: Horokiri Stream**
This section is approximately 3km long and extends from the southern end of the Wainui Saddle to the northern end of Battle Hill Forest Farm Park (BHFFP). For the entire length of this section, the Main Alignment will run generally parallel to the Horokiri Stream. From 06500m to approximately 08550m the Main Alignment will be to the west of the Horokiri Stream, while from 08550m to 09500m it will be to the east of the stream. As the Main Alignment runs parallel to the stream it will cross a number of its minor tributaries which generally run perpendicular to the Horokiri Stream and the Main Alignment.

Over this section, the Main Alignment will cross the Horokiri Stream once with a bridge at 08540m. The section finishes towards the northern boundary of the BHFFP at approximately 09500m.

**Section 4: Battle Hill**
This section is approximately 3km long and extends from the northern boundary of the BHFFP to the Pauatahanui Golf Course. Shortly after the

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11 Section 2, paras [7]-[9] above.

12 Metric references are contained throughout this description. Starting point zero is the northern most point of TGP. Section 2 accordingly starts approximately 3.5km from that point.

Main Alignment enters the BHFFP from the north, it crosses over the Horokiri Stream with a bridge at approximately 09720m. Over the remainder of this section, heading south, the Main Alignment will follow the Horokiri Valley floor, which widens from north to south though the BHFFP.

At about 11750m it will cross an unnamed stream with a bridge. Access across the Main Alignment will be available underneath this bridge.

**Section 5: Golf Course**
This section is approximately 3km long, and extends from north to south through rural land adjacent to the Pauatahanui Golf Course and Flighty's Road. The Main Alignment will cross a small number of tributaries along this section but there will be no major stream crossings requiring bridges.

**Section 6: State Highway 58**
This section is approximately 3km long and starts at 15500m. The SH58/Pauatahanui Interchange will be located at approximately 17500m. At this interchange, the Main Alignment will be elevated above a roundabout which will provide access to and from the Main Alignment for traffic travelling in both directions on existing SH58. Immediately south of this interchange, at approximately 17660m, there will be a bridge across the Pauatahanui Stream.

**Section 7: James Cook**
This section starts just south of the State Highway 58/Pauatahanui Interchange, at approximately 18500m and climbs up to the James Cook Interchange at approximately 19500m. From James Cook Interchange, the Main Alignment continues southwards for a further 2km. This section finishes at approximately 21500m.

**Section 8: Cannons Creek**
This section begins at 21500m and is approximately 3.4km long. Throughout this section the Main Alignment will run along the eastern side of Duck Creek valley, and across an undulating weathered greywacke plateau between Duck and Cannons Creeks. There will be four bridges in this section.

**Section 9: Linden**
This southernmost section is approximately 2.8km long. From the start of the section at approximately 24900m, a third lane will be provided in the northbound carriageway heading uphill. There will be two bridges in this section.

[40] TGP involves approximately 112 stream crossings by either bridges or culverts. The Project will require the permanent realignment of approximately 6.5km of streams. There will be approximately 6.3 million cubic metres of earthworks. Enabling works will involve works on the existing electricity transmission lines, the formation of construction access tracks and site compounds. The main site compound will be located next to the proposed SH58 interchange and will be accessed directly from SH58. This will contain a concrete batching plant. Construction of TGP is expected to take about six

years and will be staged with a number of crews working simultaneously on different fronts. It is expected that there will be up to 12 earthworks crews and eight bridge crews working during peak construction.

## 7.2 STATUTORY APPLICATIONS, AND APPROVALS NEEDED

[41] Eight NoRs are required under s145(3) RMA, six by NZTA and two by PCC. NZTA applied for 16 resource consents, PCC applied for 4 resource consents and Transpower applied for 2 resource consents. The NZTA resource consents are for non-complying activities, the PCC resource consents are for discretionary activities and the Transpower consents are for restricted discretionary activities. We identify the consents below.

**NZTA applications**

[42] Designation of land required for the construction, operation and maintenance of the Main Alignment in the following district plans:

- NoR 1 – Kapiti Coast;
- NoR 2 – Upper Hutt City;
- NoR 3 – Porirua City;
- NoR 4 – Wellington City.

[43] Designation of land required for the construction, operation and maintenance of the Kenepuru Link Road in the following district plans:

- NoR 5 – Porirua City;
- NoR 6 – Wellington City.

[44] Resource consent for bulk earthworks and construction, erosion and sediment control:

- RC1 – RC3.

[45] Resource consent for crossing, occupation and realignment of streams:

- RC4 – RC14.

[46] Resource consent for concrete batching:

- RC15 – RC16.

**PCC applications**

[47] Designation of land in the Porirua City District Plan for the construction, operation and maintenance of:

- The Whitby Link Road (NoR 7);
- The Waitangirua Link Road (NoR 8).

[48] Resource consent for bulk earthworks and construction erosion and sediment control:

- RC17 – TC19.

[49] Resource consent for occupation of Duck Creek and its tributaries:

- RC20.

[50] Transpower applications

- Resource consent for the relocation of 6 towers in Kapiti Coast District;
- Resource consent for the relocation of 18 towers in Porirua City.

## 7.3 PROJECT DOCUMENTATION

[51] The project documentation comprised a suite of six volumes (a number of the identified volumes themselves included more than one volume) as follows:

1. Assessment of Environmental Effects Report (AEE);
2. RMA application forms;
3. Technical reports and supporting documents;
4. Plan set;
5. Draft management plans;
6. Transmission Lines Relocation Project – Application Documents.

[52] Twenty-three technical reports were included in volume three. These were:

1. Design philosophy statement: Roading design;
2. Design philosophy statement: Bridges and retaining walls;
3. Geotechnical engineering assessment;
4. Assessment of traffic and transportation effects;
5. Assessment of landscape and visual effects;
6. Terrestrial vegetation and habitats: Description and values;
7. Herpetofauna and terrestrial macro-invertebrates: Description and values;
8. Avifauna and bats: Description and values;
9. Freshwater habitat and species: Description and values;
10. Estuarine habitat and species: Description and values;
11. Ecological impact assessment;
12. Assessment of acoustic effects;

13. Assessment of air quality effects;
14. Assessment of hydrology and stormwater effects;
15. Assessment of water quality effects;
16. Contaminated land assessment;
17. Social impact assessment;
18. Cultural impact assessment;
19. Assessment of built heritage effects;
20. Assessment of archaeological effects;
21. Statutory provisions report;
22. Consultation summary report;
23. Urban design and landscape framework.

For the rest of this report we will refer to the Technical Reports by their abbreviated reference. For example, Technical Report 1 will be TR1.

[53] The following draft management plans were included in volume five:

- Construction environmental management plan;
- Construction noise and vibration management plan;
- Construction air quality management plan;
- Construction traffic management plan;
- Contaminated land management plan;
- Ecological mitigation and monitoring plan;
- Te Puka site specific environmental management plan;
- Upper Horokiri site specific environmental management plan;
- SH58/Pauatahanui site specific environmental management plan;
- Waitangirua site specific environmental management plan;
- Duck Creek site specific environmental management plan;
- Kenepuru/Linden site specific environmental management plan.

[54] The Transmission Lines Relocation Project was contained in volume six and consisted of the following documents:

- Assessment of Environmental Effects report;
- RMA forms;

- Addendum to TR5: Assessment of ecological effects;
- Addendum to TR11: Assessment of landscape and visual effects;
- Addendum to TR16: Contaminated land assessment;
- Addendum to TR17: Assessment of social impacts;
- Addendum to TR19: Assessment of built heritage effects;
- Addendum to TR20: Assessment of archaeological effects.

## 7.4 PROJECT HISTORY

[55] The concept of an alternative inland route for SH1 in this vicinity has been discussed for many decades. The AEE detailed key events in the development of TGP. These can be summarised as follows:

- 1919: First talk of an inland state highway between Wellington and Kapiti;
- 1981-1989: Western Corridor Study (GATS) – inland state highway selected as preferred option;
- 1990: Parliamentary Commissioner for the Environment audit and verification of Environmental Impact Report Findings;
- 1996 - 2003: Inland corridor designated;
- 2006: Western Corridor Plan confirmed inland route;
- 2007- 2008: Phase 1: Scheme assessment;
- 2009 – 2011: Phase 2: Preliminary design – Engineering and environmental assessment.

# 8. STATUTORY FRAMEWORK FOR DELIBERATIONS

[56] RMA provides the framework for our deliberations. Of particular relevance are provisions detailing the jurisdiction of the Board and the process regarding NoRs and resource consent applications. The statutory framework is explained in the balance of this section. An analysis of the proposal against this framework is provided later in this report.

## 8.1 JURISDICTION OF THE BOARD OF INQUIRY

[57] Section 140 RMA outlines the purpose of Part 6AA which addresses Proposals of National Significance. Section 149P identifies the matters that must be considered by the Board in determining such applications. We must have regard to the Minister's reasons for making a direction in relation to the matter, and consider any information provided by the EPA.

## 8.2 NOTICES OF REQUIREMENT FOR DESIGNATION

[58] A NoR for a designation may only be issued by a requiring authority. Section 166 defines a requiring authority as:

*(a) A Minister of the Crown; or*

*(b) A local authority; or*

*(c) A network utility operator approved as a requiring authority under s167.*

[59] NZTA is the requiring authority for the Main Alignment and Kenepuru Link Road. NZTA was approved under s167(3) RMA as a requiring authority by Resource Management (Approval of Transit New Zealand as Requiring Authority) Notice 1994, which was notified in the Gazette on 3 March 1994. PCC is a requiring authority in accordance with s166(b) RMA, and is the requiring authority for the Porirua Link Roads.

[60] In determining a matter that is a NoR for a designation, in accordance with s149P(4)(a), the Board must have regard to the matters set out in s171(1) RMA and comply with s171(1A) as if it were the territorial authority. We will address those matters in due course.

## 8.3 APPLICATIONS FOR RESOURCE CONSENTS

[61] In the case of a resource consent application, under s149P(2) RMA, the Board must apply sections 104 to 112 and 138A RMA as if it were a consent authority.

[62] Prior to determining applications for non-complying activities, the decision maker must determine whether the applications satisfy at least one of the limbs of the s104D threshold test. Again we will address those matters in due course.

[63] In addition to consideration under s104D, there are further considerations for particular classes of activities:

- Discretionary and non complying, under section 104B;
- Restricted discretionary, under section 104C;
- Discharge permits under sections 105 and 107.

[64] All of the relevant statutory considerations are subject to Part 2 RMA.

## 8.4 NATIONAL ENVIRONMENTAL STANDARD FOR ELECTRICITY TRANSMISSION ACTIVITIES (NESETA)

[65] Sections 43A, 43B, 43D RMA apply to the consideration of resource consents under National Environmental Standards. NESETA came into effect on 14 January 2010 and sets out a national framework of permissions and consent requirements for activities that relate to existing transmission lines which were operational (or able to be operational) on 14 January 2010.

[66] Regulation 4(1) of NESETA identifies the activities which are covered by the Standard and specifically provides for the relocation of an existing transmission line including activities which relate to that activity, construction, use of land and an activity relating to access tracks to an existing transmission line.

[67] Restricted discretionary land use consent is required for the relocation of towers in accordance with Regulation 16(1)(a) and 16(1)(b). The matters for discretion are set out in Regulation 16(4).

# 9. REPORTS TO THE BOARD

## 9.1 S149G RMA

[68] Section 149G requires the EPA to commission a report from the relevant local authorities on the *key issues* in relation to the matter. The EPA commissioned reports from the Wellington Regional Council (the Regional Council), Wellington City Council (WCC), PCC, Kapiti Coast District Council (KCDC) and Upper Hutt City Council (UHCC) which were provided to us for our consideration.

[69] Each of these reports responded to a Statement of Work from the EPA which defined the scope of the reports to identify the key issues arising from TGP. The Statement of Work specified that the reports should address the following:

*a) Any relevant provisions of a national policy statement, a New Zealand coastal policy statement, a regional policy statement or proposed regional policy statement, and a plan or proposed plan; and*

*b) A statement on whether all required resource consents in relation to the proposal to which the matter relates have been applied for; and*

*c) If applicable, the activity status of all proposed activities in relation to the matter;*

*d) Confirmation of the status and weighting, if proposed, of any relevant regional policy statement, and or relevant plan; and*

*e) Details of the permitted baseline and existing environment for the resource consents applied for within the jurisdiction. This will include:*

- *The permitted baseline and details of any relevant consents held in the areas that form the existing environment within your authorities' jurisdiction;*
- *Comment on whether the proposed consents applied for within your authorities' jurisdiction will affect any relevant existing consent holder's ability to implement their existing consents should the proposed consents be granted.*

*f) Identify any sensitive land use: in relation to Transpower consents in your jurisdiction as defined in the National Environmental Standards for Electricity Transmission Activities.*

*g) Any other matter which is relevant to the key issues associated with the applications.*

## 9.2 REPORT FROM THE WELLINGTON REGIONAL COUNCIL

[70] The report from the Regional Council identified a number of objectives and policies that the Applicants either had not identified which the Regional Council considered were relevant or had identified that are not relevant.

[71] This report noted that the Applicants appeared to have applied for all necessary resource consent applications for the proposal, with 3 possible exceptions and detailed areas where further information may be necessary.

[72] The Regional Council concurred that the activity status list for the proposed activities was correctly identified by the Applicants but noted that further consents may be required.

[73] The report identified other key issues relating to construction discharges (earthworks), ecological impact, mitigation, offsetting and uncertainty with regard to conditions and management and monitoring plans.

## 9.3 REPORT FROM KAPITI COAST DISTRICT COUNCIL

[74] The KCDC report agreed with the objectives and policies identified in the AEE, that all necessary consents have been applied for, and that the appropriate activity statuses have been identified.

[75] The other key issues identified by KCDC related to character/amenity, landscape, future status/treatment of the current section of SH1, KCDC's water supplies, noise, heritage, and conditions/mitigation.

## 9.4 REPORT FROM PORIRUA CITY COUNCIL

[76] The report identified a potential conflict due to PCC being a requiring authority for two of the subject NoRs. PCC provided a comprehensive assessment of the relevant provisions of the operative Porirua City District Plan.

[77] The report noted that there could be some further consents required, but these could be applied for at a later stage. The report identified that there are residential buildings approximately 850m from Transpower Tower 20, and one at 60m and 3 approximately 150m – 200m from a line between Towers 30 - 33A.

[78] This report also detailed the permitted baseline, the existing resource consents on the subject land (none current), existing resource consents on land adjoining subject sites, the underlying zoning and results of an analysis of aerial photographs.

[79] Other key issues identified by PCC included plan changes, non-statutory documents (Porirua Development Framework, Draft Porirua Harbour Catchment Strategy and Action Plan, Inventory of Ecological Sites in Porirua City), the designation boundary and conditions.

## 9.5 REPORT FROM UPPER HUTT CITY COUNCIL

[80] The report from UHCC identified relevant objectives and policies from the operative Upper Hutt City Plan and defined activities that require consent and

the appropriate activity status of proposed activities. This report also provided a brief explanation of the permitted baseline and existing environment. Other key issues raised in this report related to earthworks, rural and visual amenity, biodiversity and construction.

## 9.6 REPORT FROM WELLINGTON CITY COUNCIL

[81] The WCC report identified relevant objectives and policies. WCC noted that consideration of the activity status was not relevant to this report as no resource consents are presently required within WCC's jurisdiction, but noted that the operational District Plan and Plan Change 72 are relevant. This report did not provide detail on the existing environment. Other key issues raised in this report were noise, rural character, visual, conditions and mitigation.

## 9.7 S42A RMA

[82] Section 42A RMA allows a local authority (or the Board) to require a local authority officer, a consultant or any other person to prepare a report.

[83] We commissioned Mitchell Partnerships Limited (Mitchell Partnerships) to prepare a s42A report. Mr J Kyle was the primary author of this report. This report comprised an independent planning report. Part 1 of the s42A report was received by the EPA in November 2011 and identified relevant statutory matters, provided an initial assessment of the applications in terms of adequacy of information provided from a planning perspective, summarised submissions and provided an initial review of the conditions proposed by the Applicants.

[84] A second part of the report was prepared following the review of evidence that had been prepared by the Applicants and submitters and receipt of additional material which the Board had commissioned. Part 2 provided a more evaluative assessment of the Project against the statutory considerations and in terms of issues raised by submitters. The Part 2 report was received by the EPA in February 2012.

[85] We commissioned an independent peer review of sediment generation modelling used by the Applicants in preparation of their applications. This was prepared by Dr D M Hicks of the National Institute of Water & Atmospheric Research Ltd (NIWA) and was received by the EPA in January 2012. Dr Hicks provided an addendum to this paper.

[86] We also commissioned an independent peer review of sediment control and reduction measures. This was prepared by SouthernSkies Environmental Limited (Mr G McLean) and was also received by the EPA in January 2012.

[87] On 6 December 2011, the Regional Council requested that the Board consider appointing a s42A author in the area of mitigation/compensation in relation to the effects arising from the diversion and reclamation works. The Board decided that such a report was not appropriate at that time as adequate evidence was expected from parties on that topic[13].

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[13] Minute of the Board dated 19 December 2011.

[88] In a Minute dated 9 February 2012 the Board resolved to instruct Mr N Lloyd of Acousafe Consulting and Engineering to prepare a report about operational noise. This report was received by the EPA in February 2012 and expressed Mr Lloyd's opinion as to the interpretation of NZS 6806:2010. Supplementary evidence was received from NZTA in response to the issues raised in this report.

[89] The s42A reports were circulated to all parties and supplemented by additional evidence. Each of the authors was available for questioning at the hearing.

[90] Additionally, the Board had the benefit of legal advice on a number of issues from Mr P Milne (Barrister), Counsel to the Board.

[91] The Board was greatly assisted by the contribution of all of the above persons.

# 10. SPECIFIC ISSUES

[92] The 70 submissions received on the TGP applications contained (in summary) 14 issues which were commonly raised by submitters in one form or another. These were as follows:

**Opposition**

- Impacts of the proposed works on neighbouring properties;
- Criticism of the process and application;
- Ecological effects;
- Inadequate conditions and management plans;
- Unnecessary and/or inappropriate proposal;
- Adverse impacts on the towns, communities and utilities;
- Relevant planning documents;
- Concern about funding.

**Support**

- Concern about transport efficiency;
- Benefits in case of natural disaster/road closure;
- Economic benefits;
- Social and/or community benefits.

**Suggestions**

- To enhance the proposal or further mitigate effects;
- For minor/partial route realignments.

[93] Many of these issues were discussed in further detail by submitters and experts on their behalf at the hearing. We confirm that we have considered the content of each submission received. The issues raised by submitters are addressed in our following assessment.

[94] The following parties presented evidence and submissions at the hearing:

**Applicants**

**PCC** and **NZTA** (represented by Mr J Hassan, Ms N McIndoe and Ms J Meech), and **Transpower** (represented by Mr M Slyfield and Mr I Gordon) provided evidence from:

- Mr P A Bailey regarding the PCC Link Roads. Mr Bailey is General Manager, Asset Manager and Operations, PCC.

- Mr I A Bowman regarding built heritage. Mr Bowman has almost 30 years' experience and is a principal in his own practice. His qualifications include a Bachelor of Arts in History and Economic History, a Bachelor of Architecture and a Master of Arts in Conservation Studies. Mr Bowman is a Fellow of the New Zealand Institute of Architects. Mr Bowman is an elected member of ICOMOS and the International Scientific Committee on the Conservation of Earthen Architectural Heritage, a member of the New Zealand National Committee of ICOMOS, and a member of the New Zealand Conservators of Cultural Material

- Mr P Brabhaharan regarding geology and geotechnical engineering. Mr Brabhaharan is Technical Principal (Geotechnical Engineering and Risk) and a partner with Opus International Consultants Ltd with 29 years' experience in geotechnical, earthquake and civil engineering and risk management. He holds a Bachelor of Science of Engineering (Hons) in Civil Engineering, a Master of Science of Engineering in Foundation Engineering and a Master of Business Administration.

- Dr L S Bull regarding avifauna. Dr Bull is an Associate Principal and Senior Ecologist with Boffa Miskell Ltd (BML) and has worked as an ecologist for nine years. Dr Bull holds a Bachelor of Science (Zoology), Master of Science with Honours (Ecology) and PhD (Ecology) and is a Certified Environmental Practitioner with the Environment Institute of Australia and New Zealand.

- Dr S G Chiles regarding acoustics assessment. Dr Chiles is a Principal Acoustics Engineer with URS New Zealand. He holds a Bachelor of Engineering and Doctor of Philosophy in Acoustics. Dr Chiles is a Chartered Professional Engineer and is a Fellow of the UK Institute of Acoustics and is accredited as a commissioner.

- Mr M C Copeland regarding economics. Mr Copeland is the Managing Director of Brown, Copeland and Company Ltd and has over 35 years of experience in the application of economics including transport economics and resource management. He holds a Bachelor of Science in Mathematics and a Master of Commerce in Economics.

- Dr S B De Luca regarding marine ecology. Dr De Luca is a Principal Ecologist with BML. Dr De Luca holds a Bachelor of Science (Zoology) and Doctor of Philosophy (Environmental and Marine Science). She is a registered member of The Royal Society of New Zealand, the New Zealand Marine Sciences Society and the New Zealand Coastal Society. Dr De Luca is a Certified Environmental Practitioner with the Environment Institute of Australia and New Zealand and has nine years' experience as an environmental scientist.

- Mr M A Edwards regarding project design and construction. Mr Edwards is a Team Leader with Opus Road Design Team and a partner with Opus International Consultants. He has 24 years' experience in the planning, design and management of road design projects and holds a BTEC Higher National Certificate in Civil Engineering.

- Mr G W Fisher regarding air quality. Mr Fisher is a consultant with Endpoint Ltd. He holds a Master of Science in Physics and has 32 years' experience in atmospheric science and 21 years' experience in air pollution modelling, transport effects and meteorology.

- Dr T S R Fisher regarding water quality and erosion and sediment control. Dr Fisher is Senior Water Engineer and Director at Tonkin and Taylor Limited. Dr Fisher holds a Bachelor of Civil Engineering (1st Class Hons) and Master of Civil Engineering (Distinction) from the University of Canterbury and a PhD in Civil Engineering from the University of British Columbia, Canada, specialising in environmental hydraulics. He holds a Diploma in engineering management. He has 17 years of experience in engineering research and consulting, spanning the transport, mining, hydropower, land development, urban water infrastructure and river management sectors. He is a member of the Institute of Professional Engineers New Zealand and is a Chartered Professional Engineer.

- Mr S A Fuller regarding terrestrial ecology. Mr Fuller is an Associate Director and Principal Ecologist with BML. Mr Fuller holds a Bachelor of Science in Zoology and Botany, and a Diploma of Applied Science in Ecology. He is also a Certified Environmental Practitioner with the Environment Institute of Australia and New Zealand and has worked as an ecologist over much of the last 28 years. Mr Fuller is a member of the New Zealand Ecological Society.

- Mr A Gough regarding erosion and sediment control. Mr Gough is a Senior Project Manager and Civil Engineer with Sinclair, Knight Merz Ltd (SKM) and is the Leader of the Urban Infrastructure Team in SKM's Auckland office. Mr Gough holds a Bachelor of Engineering (Engineering Science) (Hons) and a Master of Engineering (Engineering Science). He is also a Chartered Professional Engineer on the International Professional Engineers' Register and a member of the Institution of Professional Engineers of NZ.

- Ms L R Hancock regarding urban design. Ms Hancock is a Technical Director Urban Design at Beca Pty Ltd with 16 years' experience as a planner working in both the private and public sectors. She holds a postgraduate Bachelor of Architecture Degree (Hons), a Bachelor of Arts in Architecture, a Bachelor of Arts (Hons) in English Literature, a Diploma in Management Studies and a Master in Philosophy.

- Ms L A Hopkins regarding planning: transmission line design and resource consent applications. Ms Hopkins is a planning Associate with Beca Carter Hollings & Ferner Ltd and has 11 years' experience. She holds a Bachelor of Planning (Honours) and a Post-Graduate Diploma in Development Studies.

- Mr R S James. Mr James is NZTA's Regional State Highway Manager and has 15 years' experience in the management and direction of major projects. He holds a Bachelor of Engineering (Hons) in Civil Engineering and a Master of Business Administration.

- Dr V F Keesing regarding freshwater ecology. Dr Keesing is currently a Principal and Senior Ecologist of BML in Christchurch. He has worked for BML as a practising ecologist for the last 13 years. Dr Keesing holds a PhD in Ecology and a Bachelor of Science with First Class Honours in Zoology and is a member of the Ecological Society of New Zealand.

- Mr T M Kelly regarding transportation and traffic. Mr Kelly has over 27 years in the transportation planning area and has been operating his own consultancy business since 2000. Mr Kelly holds a Bachelor of Arts degree in Geography and a Master of Science degree in Traffic Engineering and Transportation Planning.

- Ms M A Lawler regarding community development. Ms Lawler is General Manager Strategy and Planning, PCC and has 25 years' experience in community development, local economic development social and economic policy and strategic planning in New Zealand. Her qualifications include a Master of Public Policy.

- Mr G C Lister regarding landscape and visual. Mr Lister is a director of Isthmus and has a Bachelor of Arts, a Post-Graduate Diploma in Landscape Architecture and a Master of Urban Design. Mr Lister has twenty-three years' experience as a landscape architect and is a registered member and a Fellow of the New Zealand Institute of Landscape Architects.

- Ms T A Maize regarding contaminated land. Ms Maize is a Senior Environmental Engineer with Aurecon New Zealand Ltd, and an Energy and Sustainability Engineer with Spotless Company New Zealand Ltd. Ms Maize holds a Bachelor of Science degree in Civil/Environmental Engineering and has 28 years of experience in environmental management. Ms Maize is a member of the Waste Management Institute of New Zealand and a member of the Contaminated Land Steering Committee within that organisation.

- Ms M K Malcolm regarding water quality. Ms Malcolm is a Senior Environmental Consultant at SKM. She has 15 years' experience working in urban catchment management, stormwater treatment, water quality effects assessments and flood risk assessment. Ms Malcolm has a Bachelor of Science (Hons) (Physical Geography) and is a Certified Environmental Practitioner with the Environment Institute of Australia and New Zealand.

- Mr C M Martell regarding hydrology. Mr Martell is a Senior Associate with SKM. He has 15 years' experience in the analysis of peak flows (hydrological modelling) and assessing hydraulic impacts (hydraulic modelling). Mr Martell holds a Bachelor of Science (Hons), Master of Science (hydrology) and is a member of the NZ Water and Waste Association.

- Mr J F Mason regarding transmission line construction. Mr Mason is a Project Manager with Transpower and has 30 years of experience in the

construction industry. He holds a Diploma in Project Management and a Certificate in Civil Engineering.

- Mr P T McCombs regarding strategic transport issues. Mr McCombs is the Director of Traffic Design Group Ltd and is possibly New Zealand's most experienced traffic engineer. He is a chartered professional engineer and holds a Bachelor of Civil Engineering and a post-graduate qualification in traffic engineering and transportation planning.

- Mr C S Nicholson regarding NZTA NoRs and applications for resource consent lodged with the EPA. Mr Nicholson is the Principal Project Manager – Transmission Gully and has 19 years of experience in traffic engineering, road safety engineering, transportation planning and project management. He holds a Master of Civil Engineering and Bachelor (Hons) of Civil Engineering.

- Ms M P O'Keeffe regarding archaeology. Ms O'Keeffe is a consultant archaeologist, and has managed her own consultancy (Heritage Solutions) for the last 15 years. Ms O'Keeffe holds a Bachelor of Arts, a Post-Graduate Diploma in Anthropology, and a Master of Literature in Anthropology. She is the current secretary and past president of ICOMOS in New Zealand, a member of the New Zealand Archaeological Association, a member and previous New Zealand Councillor for the Australasian Institute of Maritime Archaeology and the NZAA representative on the Royal Society's Social Science Committee.

- Ms M L W Pomare regarding cultural effects. Ms Pomare is currently self-employed as a consultant specialising in the areas of Maori resource management and the Treaty settlement process. Ms Pomare is an accredited Hearing Commissioner with almost 10 years' experience.

- Mr G M Rae regarding social effects. Mr Rae is currently the Director of Incite. Mr Rae is a resource management planner with 27 years' experience; he holds a Bachelor of Science, a Diploma in Town Planning and is a full Member of the New Zealand Planning Institute (NZPI), and Chair of the Nelson/Marlborough Branch of the NZPI.

- Ms A J Rickard regarding planning, NoRs, resource consent applications and AEE preparation. Ms Rickard is the Technical Director of Planning at Beca Carter Hollings and Ferner Ltd and has 16 years of planning experience. She holds a Bachelor of Arts in Geography and Planning (Hons).

- Mr C J Roberts regarding Porirua harbour modelling. Mr Roberts is currently the Managing Director of DHI New Zealand. He has over 20 years' experience in hydraulic engineering and modelling. Mr Roberts holds a Bachelor of Engineering majoring in Civil Engineering (Distinction) and a Master of Science in Hydraulic Engineering.

- Dr D A Sim regarding probability of coincident rainfall and wind event during construction. Dr Sim is a statistical consultant at the Victoria University of Wellington School of Mathematics, Statistics and Operations Research. She has over 10 years' experience collaborating with

researchers in various biological and medical fields, providing statistical consultation. Dr Sim has a Bachelor of Arts in Mathematics, Master of Philosophy (1st class) in mathematics and has a PhD in Biostatistics.

- Ms H L Yorke regarding transmission line engineering. Ms Yorke is a Technical Director specialising in High Voltage transmission lines for Beca Carter Hollings & Ferner Ltd and has 20 years of experience. She holds a Bachelor of Engineering (Hons) Civil Engineering.

**Parties with representation and or expert witnesses**

**Director General of Conservation** (the Director General) (represented by Ms S Bradley and Mr J Hardy) provided evidence from:

- Ms L K Adams regarding terrestrial ecology (bats & lizards). Ms Adams holds a Bachelor of Science and Master of Science in Biological Sciences and has 19 years of experience. Ms Adams has worked for the Department of Conservation (DoC) for 16 years. Ms Adams currently leads the NZ Lizard Technical Advisory Group and is a member of the Ornithological Society of NZ and Society of Research on Amphibians and Reptiles of NZ.

- Dr M J Baber regarding terrestrial ecology & avifauna. Dr Baber is a Senior Ecologist at Tonkin & Taylor Limited and holds a Bachelor of Science in Zoology, Master of Science (Hons) in Conservation Ecology and PhD in Ecology. Dr Baber is a member of the NZ Ecological Society; a DoC permitted herpetologist, and an Affiliate Assistant Professor at the University of New Hampshire.

- Dr L R Basher regarding sediment generation. Dr Basher is a Senior Scientist and Research Programme Leader for Landcare Research and has a PhD in soil science and 34 years' experience in erosion research and consultancy with Landcare Research. Dr Basher is a member of the NZ Society of Soil Science, NZ Hydrological Society, NZ Association of Resource Management and NZ Society of Geosciences.

- Mr B A Handyside regarding sediment management. Mr Handyside is a Director of Erosion Management Ltd, and holds a Bachelor of Agricultural Science. He is also a member of the NZ Association of Resource Management. Mr Handyside has over 30 years' applied erosion and sediment control experience.

- Ms H A Kettles regarding coastal ecology. Ms Kettles is a Technical Support Officer at the Wellington-Hawke's Bay Conservancy of DoC. She holds a Bachelor of Science and Master of Science (First Class Hons), both in the Biological Sciences.

- Dr B G Ogilvie regarding freshwater ecology. Dr Ogilvie is a Senior Environmental Scientist and Director of Tonkin & Taylor Limited and has 20 years' experience in environmental research and consulting. Dr Ogilvie holds a Bachelor of Science (Zoology), Master of Science (Hons) (Zoology – Limnology) and Doctor of Philosophy (Environmental Biology). Dr Ogilvie will graduate in April 2012 with a Bachelor of Arts in

Environmental & Natural Resource Economics. He is a Chartered Biologist and Member of the Society of Biology (UK), a Member of the Chartered Institute of Water and Environmental Management (UK) and a Member of the NZ Freshwater Sciences Society. Dr Ogilvie is an Honorary Lecturer in Biological Sciences at the University of Waikato and is a certified Hearing Commissioner.

- Dr L D Solly regarding planning. Dr Solly has a Bachelor of Arts (Hons) in Natural Sciences and a PhD in Botany. He is a Community Relations Officer in the Nelson Marlborough Conservancy of DoC specialising in resource management planning.

The Director General supported the proposal in part and opposed in part.

**KCDC** (represented by Mr M Conway) provided evidence from:

- Dr M K Joy regarding freshwater ecology. Dr Joy holds a BSc, MSc (First Class Hons) and a PhD in Ecology. For the last 17 years he has been a researcher in freshwater ecology, especially native fish distribution and freshwater bioassessment. Dr Joy has been employed at Massey University, Palmerston North since 2003 as a lecturer (now Senior Lecturer) in Ecology and Environmental Science. He is a member of the New Zealand Freshwater Sciences Society, the New Zealand Ecological Society, the Australian Society of Fish Biology and the New Zealand Royal Society.

- Ms S C Myers regarding terrestrial ecology. Ms Myers holds a Bachelor of Science and Master of Science (Hons) (ecology and botany). She has 27 years' experience as an ecologist in regional and central government agencies, and more recently in private consultancy. Ms Myers is a Senior Ecologist and Manager of the Auckland Office of Wildland Consultants Ltd and is currently the secretary of the New Zealand Ecological Society, a past-President of that Society, and a current board member of the International Association for Ecology.

- Ms S B Peake regarding landscape and visual issues. Ms Peake is a landscape architect and Principal of Peake Design Limited. She has over 30 years' experience in design, assessment, and preparation of landscape analysis and development projects. Ms Peake holds a Diploma in Landscape Architecture), Diploma in Urban Design, and holds a Master of Architecture. She is a Fellow and Registered member of the NZILA, is Vice-President of the NZILA, and a committee member of the Auckland Branch of the NZILA. Ms Peake is also a member of the Resource Management Law Association and Urban Design Forum (Auckland), as well as panellist on the Auckland City Urban Design Panel.

- Ms E J Thomson regarding planning and heritage. Ms Thomson is a Senior Policy Planner at KCDC and has held this position since October 2004. Ms Thomson holds a Bachelor of Landscape Architecture (Hons) and a Bachelor of Science. Ms Thomson is in the process of completing her thesis for a Master of Resource and Environmental Planning. She has nine years' experience in local government resource management.

- Mr D R Wignall regarding road design and local resilience. Mr Wignall is a transport planner contracted to KCDC. His qualifications are a Master of Science (Transportation and Traffic Planning) and Master of Civic Design (Town Planning). Mr Wignall is a member of the Chartered Institute of Logistics and Transport and of the Royal Town Planning Institute. Mr Wignall is principal of Transport Futures Limited, and has eight years' experience of professional transport planning work in New Zealand.

- Mr T M Wood regarding water supply. Mr Wood is the Water and Wastewater Asset Manager for the KCDC. Mr Wood holds a Bachelor of Civil Engineering, a New Zealand Certificate in Engineering (Civil) and is a Chartered Professional Engineer. His practice areas are Civil and Environmental Engineering. Mr Wood is a Member of the Institution of Professional Engineers NZ, and of Water New Zealand with 18 years' experience in local government and private water engineering practice.

- Mr D J Yorke regarding stormwater and runoff. Mr Yorke is a Chartered Professional Engineer and holds a New Zealand Certificate in Engineering (Civil). His practice areas are Civil and Environmental Engineering and he is a Member of the Institution of Professional Engineers NZ, the Association of Local Government Engineers NZ and of the New Zealand Water and Wastes Association. Mr Yorke has in excess of 30 years' engineering experience.

KCDC supported the proposal in part.

**Living Streets Wellington** represented itself at the hearing (Ms E Blake spoke on its behalf) and provided evidence from:

- Ms E S Thomas regarding pedestrian issues. Ms Thomas worked as executive director of Living Streets Aotearoa for five years. She is trained in street audit methodologies and has undertaken pedestrian audits for the NZTA. Ms Thomas was previously a local body councillor for Golden Bay County Council and the Wellington City Council.

Living Streets Wellington opposed the proposal.

**Mana Cycle Group** represented itself at the hearing (Mr A Hulme-Moir spoke on its behalf), and provided evidence from:

- Mr K W Gywnn regarding mountain biking issues. Mr Gywnn has been an active mountain biker for 10 years. Mr Gywnn has knowledge of cycling in the Wellington Region and of the regional track network, specifically the Mana region. Mr Gywnn holds a Bachelor of Engineering.

- Mr P Morgan regarding cycling transport issues. Mr Morgan is employed as a Project Manager at Cycling Advocates Network, also known as CAN.

Mana Cycle Group opposed the proposal.

**New Zealand Historic Places Trust** (NZHPT) (represented by Ms G Baumann) provided evidence from:

- Ms S Walters regarding heritage architecture and heritage planning. Ms Walters currently works for NZHPT as a Planning Heritage Adviser. Ms Walters holds a post graduate degree in Marine Studies and a Bachelor of Resource Management.

NZHPT supported the proposal in part.

**Powerco Limited** (Powerco) (represented by Mr T Anderson) provided evidence from:

- Ms G B McPherson regarding planning. Ms McPherson is a Senior Planner with Burton Planning Consultants Limited. Ms McPherson holds a Bachelor of Resource and Environmental Planning.

  Powerco was neutral in its position on the proposal.

**Rational Transport Society Inc** (RTS) (represented by Mr T Bennion) provided evidence from:

- Mr P E Bruce regarding meteorology. Mr Bruce is a Class 1 Meteorologist (WMO qualification), having 35 years' experience mostly as a Lead Weather Forecaster at MetService NZ Ltd. Mr Bruce holds a Bachelor of Science (Physics) (Hons).

- Dr R B Chapman regarding climate change, economics and related matters. Dr Chapman is the Director of the Graduate Programme in Environmental Studies and an Associate Professor at Victoria University of Wellington. Dr Chapman holds a Bachelor of Engineering (Hons), a Master in Public Affairs and a PhD in Economics.

- Mr J C Horne regarding recreation issues. Mr Horne has extensive experience in undertaking and managing recreational activities for walkers and runners in the area. Mr Horne is involved with the Tararua Tramping Club and the Wellington Botanical Society.

- Dr S Krumdieck regarding transport demand. Dr Krumdieck is an Associate Professor in Mechanical Engineering at the University of Canterbury. Since 2003 she has led a sustained and focused research programme focused on energy and transportation. She is a former member of the Royal Society of New Zealand Energy Panel (2005 - 2007) and is a principal investigator and steering committee member for the New Zealand Centre for Sustainable Cities (2009 - present). Dr Krumdieck holds a Master in Energy Systems Engineering.

- Mr M J Mellor regarding transport planning in Wellington region. Mr Mellor has been the Environmental Sustainability representative on the Wellington Regional Transport Committee since 2005, and has worked in transport and related industries for 35 years. He is a Chartered Member of the Chartered Institute of Logistics and Transport in New Zealand, and is a member of the Institute of Transport Administration, the NZ

Automobile Association, Living Streets Wellington, the NZ Historic Places Trust (NZHPT) and Public Transport Voice. Mr Mellor holds a Bachelor of Arts (hons) in Economics.

- Dr M T O'Sullivan regarding health issues. Dr O'Sullivan is a lecturer in public health at the Wellington School of Medicine, University of Otago. Dr O'Sullivan holds a PhD in psychology.

- Mr J G Vannisselroy regarding rail service (levels and infrastructure). Mr Vannisselroy has 39 years' experience in the rail industry including design, construction and operation of railway vehicles.

- Ms P G Warren regarding ecology and policy issues. Ms Warren is currently employed as a Principal Policy Analyst in the Department of Conservation. She presented evidence in a private capacity, not as an employee of the Department. Ms Warren has 24 years' professional experience as a central government policy analyst, primarily working on legislation and systems reforms for conservation and environmental management. Ms Warren holds a Bachelor of Science (botany and ecology).

- Mr K M Wood regarding traffic trends. Mr Wood is a retired engineer and a member of the Institute of Professional Engineers NZ since 1971. Mr Wood has practiced as a consulting engineer in sustainable transport, his last job before retiring was a Senior Adviser with the Ministry of Transport, 2005 – 10. Mr Wood holds a Master in Transportation Studies.

RTS opposed the proposal.

**Wellington Regional Council** (represented by Ms K Anderson and Mr A Cornor) provided evidence from:

- Ms T J Grant regarding planning. Ms Grant is a Team Leader at the Regional Council's Environment Regulation Department. Ms Grant holds a Master of Science (Hons) (Geography) and a Bachelor of Science (Geography).

- Ms N Hayes regarding transport planning. Ms Hayes is the Senior Transport Planner in the Regional Council's Strategy and Community Engagement Department. Ms Hayes holds a Bachelor of Resource and Environmental Planning.

- Mr M D Kennedy regarding site access. Mr Kennedy is the General Manager for the Regional Council's Development Group. Mr Kennedy holds a Bachelor of Engineering (Civil) and a Master in Business Administration; he is also a chartered professional engineer.

- Mr A J McCarthy regarding bulk water supply. Mr McCarthy is Project Manager in the Development Group of the Regional Council. He has over 40 years' experience in infrastructure engineering, 25 of which have been with water supply and irrigation. Mr McCarthy holds a Bachelor of Engineering (Civil).

The Regional Council supported the proposal in part.

**Mrs N Senadeera** represented her husband and herself at the hearing and provided evidence from:

- Ms M J Grinlinton-Hancock regarding planning issues. Ms Grinlinton-Hancock is a Senior Resource Management Planner with Cuttriss Consultants Limited. She has 12 years' experience working as a planner in New Zealand. Ms Grinlinton-Hancock holds a Bachelor of Resource and Environmental Planning (Hons).

The Senadeeras opposed the proposal in part.

**Parties who represented themselves and did not call evidence**

**Mr D & Mrs C Christensen** represented themselves at the hearing and Mr Christensen, spoke on their behalf. The Christensens opposed the proposal in part.

**Mr G Corleison** represented himself at the hearing. Mr Corleison supported the proposal.

**Mr E Deuss** represented himself at the hearing. Mr Deuss opposed the proposal in part.

**Mr M Faulls** represented himself at the hearing. Mr Faulls both supported and opposed the proposal in part.

**Paremata Residents Association**, represented itself at the hearing and its Vice-President, Mr R Morrison spoke on its behalf. The Association supported the proposal in part.

**Pauatahanui Inlet Community Trust and Guardians of Pauatahanui Inlet** represented themselves at the hearing and Dr J McKoy spoke on their behalf. The Trust and the Guardians supported the proposal in part.

**Poppe Family Trust** represented itself at the hearing and Mr P Poppe spoke on its behalf. The Poppe Family Trust opposed the proposal in part.

**Public Transport Voice** represented itself at the hearing and Mr G Bodnar, spoke on its behalf. Public Transport Voice opposed the proposal.

**Pukerua Bay Residents Association** represented itself at the hearing and their Chairperson, Mr I MacLean, spoke on its behalf. The Pukerua Bay Residents Association was neutral in its position on the proposal.

**Mr P Skrzynski** represented himself at the hearing. Mr Skrzynski opposed the proposal.

**The Coastal Highway Group**, represented itself at the hearing and Mr R Jessup spoke on its behalf, and provided a technical paper in support of its position. The Coastal Highway Group opposed the proposal.

**Transmission Gully Action Group** represented itself at the hearing and their Chairperson, Ms G Osvald, spoke on its behalf. The Transmission Gully Action Group supported the proposal.

**Wellington District of the Automobile Association** represented itself at the hearing and its Chairperson, Mr M Gross, and fellow council member, Mr A Gray, spoke on its behalf. The Automobile Association supported the proposal.

**Whitby Coastal Estates Ltd** (WCEL) represented itself at the hearing and its managing director, Mr D Bradford, spoke on its behalf. WCEL opposed the proposal in part.

**Parties who appeared for the Board**

As we have noted previously, the authors of s42A reports to the Board appeared at the hearing. They spoke to their reports and were questioned on them. For the sake of completeness, we set out their experience and qualifications.

- Dr Hicks is a principal scientist at NIWA and has 34 years' experience. He holds a Bachelor of Science (Hons)(Geology), a Bachelor of Engineering (Hons)(civil engineering) and a PhD (coastal processes).
- Mr Kyle is a partner at Mitchell Partnerships, and has 24 years of planning and resource management experience. He holds a Bachelor of Regional Planning (Hons).
- Mr Lloyd is an acoustic consultant at Acousafe Consulting and Engineering Ltd and has over 30 years' experience in noise control and acoustical related work. He holds a Bachelor of Mechanical Engineering.
- Mr McLean is a director of Southern Skies Environmental Limited and has over 15 years' experience in environmental management. He holds a Bachelor of Arts (Geography, Environmental Planning), and Post Graduate Diploma in Resource Management

# 11. LEGAL ISSUES

[95] It became apparent to the Board early on in this process that the outcome of these applications and NoRs would largely depend on an assessment of their effects. There were however a number of legal issues which arose during the process which we are required to address. They are as follows:

- The objectives of the requiring authority;
- Consideration of alternatives;
- Greenhouse gas emissions;
- The existing designation for TGP;
- Additional consents;
- Revocation of existing state highway status;
- Section 107 RMA;
- Adaptive management;
- Approval/certification of management plans.

## 11.1 OBJECTIVES OF THE REQUIRING AUTHORITY

[96] Section 171(1)(c)RMA provides that when considering a notice of requirement a territorial authority (in this case the Board) must have particular regard to -

*(c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought.*

[97] The objectives of NZTA and PCC in issuing their requirements for TGP were identified in the AEE provided with the application[14]. Those objectives were:

**NZTA**

- To provide an alternative strategic link for Wellington that improves regional network security;
- To assist in remedying the safety concerns of, and projected capacity problems on, the existing SH1 by providing a safe and reliable route between Linden and MacKays Crossing in an environmentally sustainable manner;
- To assist in enabling wider national economic development by providing a cost-optimised route that better provides for the through movement of freight and people; and

[14] Volume 1, Folder 1, pg 39.

- To assist integration of the land transport system by enabling the existing SH1 to be developed into a safe multi-functional alternative to the proposed strategic link.

**PCC**

- To provide more efficient, safer and more reliable road access between eastern Porirua suburbs and the Hutt Valley, Wellington City and Kapiti Coast;

- To improve amenity values and the quality of the environment in Porirua by encouraging the use of Transmission Gully for regional and inter-regional trips as opposed to the existing coastal route through Mana, Plimmerton, Pukerua Bay and Paekakariki;

- To reduce the adverse effects of traffic on the environment in Porirua by encouraging the use of Transmission Gully for regional and inter-regional trips, as opposed to roads directly adjacent to the Pauatahanui and Onepoto Inlets of the Porirua Harbour;

- To provide alternative arterial routes and connectivity within eastern Porirua suburbs to support an integrated approach to regional and local land transport and development; and

- To support the development and revitalisation of Waitangirua Village Centre as a focus for activity within the community by improving connectivity.

[98] We briefly consider whether the objectives identified by NZTA and PCC fall within the statutory mandate of those bodies, as in our view they must, in order to be appropriate objectives.

[99] In the case of NZTA, its objective and functions are set out in the Land Transport Management Act 2003 (LTMA). In particular:

- Section 94 LTMA provides:

  ***94 Objective of Agency***

  *The objective of the Agency is to undertake its functions in a way that contributes to an affordable, integrated, safe, responsive, and sustainable land transport system.*

- Section 95 LTMA relevantly provides:

  ***95 Functions of Agency***

  *(1) The Agency has the following functions:*

  *(a) to promote an affordable, integrated, safe, responsive, and sustainable land transport system;*

  *(c) to manage the State highway system, including planning, funding, design, supervision, construction, and maintenance and operations, in accordance with this Act and the Government Roading Powers Act 1989.*

[100] Insofar as PCC is concerned, it is a local authority in terms of the Local Government Act 2002 (LGA). Section 10 LGA provides that the purpose of local government is (inter alia):

> *(b) to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.*

[101] Section 11 LGA provides in turn that the role of a local authority is to give effect to the purpose contained in s10. Section 11A then provides:

> ***11A Core services to be considered in performing role***
>
> *In performing its role, a local authority must have particular regard to the contribution that the following core services make to its communities:*
>
> *(a) network infrastructure;*
>
> *(b) public transport services:*

[102] We do not think that it can be disputed that the objectives identified by NZTA and PCC are objectives which have been set or identified to enable them to undertake their statutory functions or roles. In our view they are appropriate objectives for NZTA and PCC to have identified.

[103] Section 171(1)(c) requires the Board to consider if the work and designation are *reasonably necessary* for achieving the objectives of NZTA and PCC. In common usage the word *necessary* implies that something is essential, however the word can have a wider meaning in RMA terms. In *Countdown Properties (Northlands) Limited v Dunedin City Council*[15] the High Court concurred with a finding of the Planning Tribunal that the word necessary should be interpreted in relation to achieving the purpose of the Act and the functions of local authorities identified in s32(2) RMA (now amended). The High Court held that the word had a meaning similar to *expedient or desirable rather than essential*[16].

[104] We propose to adopt a similar meaning of the word necessary in these proceedings. The context in which s171(1)(c) is to be interpreted is that of two authorities seeking to undertake their statutory functions and exercising judgement and discretion in doing so. Use of the term *reasonably necessary* (our emphasis) in s171(1)(c) indicates that something less than absolute necessity or essentiality is contemplated in application of the provision. In any event, the evidence of NZTA and PCC satisfied us that the construction of TGP was essential to achieve the objectives of the two authorities in this case and so would satisfy any higher test if we were found to be mistaken in our interpretation of the term reasonably necessary. We will return to s171(1)(c) in our ultimate determination on the NoRs.

## 11.2 ALTERNATIVES

[105] The Board must consider the issue of alternatives for two reasons:

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15 [1994] NZRMA 145 (HC).

16 At 179.

- Firstly, s88(2)(b) RMA requires that applications for resource consent include an AEE in accordance with Schedule 4 RMA. Clause 1(b) Schedule 4 requires that where it is likely that an activity will result in any significant adverse effect on the environment (as it is conceded that TGP will) an AEE should include ...*a description of any possible alternative locations or methods for undertaking the activity;*

- Secondly, s171(1)(b) RMA requires the Board to have particular regard to:

  *(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if -*

  *(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or*

  *(ii) it is likely that the work will have a significant adverse effect on the environment.*

The question of alternatives is accordingly a live issue for the Board.

[106] Part E of the AEE was a consideration of the alternatives which had been considered in developing the proposed TGP route. It contained a comprehensive description of the option evaluation and design process undertaken by NZTA and PCC in fixing the proposed route. Part E was detailed in its assessment and contained the following *Overview* which was a summary of the assessment of alternatives. It stated:

> *A consideration of alternatives in* [sic] *required in two contexts for the Project; in relation to the NoRs and in relation to some aspects of the activities for which resource consent is sought.*
>
> *An extensive option evaluation exercise was undertaken during the scheme assessment phase and this resulted in some fundamental alignment decisions that provide environmental (particularly ecological) benefits over the existing designated alignment. In particular, through the Te Puka and Horokiri valleys and Battle Hill, the road alignment was shifted to the west to reduce the impact on streams and terrestrial habitat. During the scheme assessment, the location of the interchange to connect to eastern Porirua (via the Porirua Link Roads) was also moved to enable an additional local road connection from Whitby (rather than just from Waitangirua).*
>
> *During the more recent E&EA phase, further design refinements have been made. Relatively minor alignment changes have resulted in avoiding the loss of some features, such as a significant area of native bush through the Wainui Saddle and a heritage feature at the bottom of the Te Puka Valley.*

[107] We consider that the above Overview is an accurate description of the process undertaken by NZTA and PCC. We do not describe the alternatives to the proposed TGP route in any greater detail than above as (with two exceptions), we understood that all parties to the proceedings accepted that if TGP was to proceed through Transmission Gully, the route chosen was the

best alternative. Even RTS which maintained a position of unbending opposition to TGP conceded that the shifting of the presently designated road alignment to the west through the Te Puka and Horokiri Valleys and Battle Hill was a significant improvement on the previously designated route.

[108] There are two exceptions to those observations and they relate to route alternatives at Takapu Road and MacKays Crossing. These will be considered in more detail in our Traffic and Transport evaluation. Overall, however, we are satisfied that the route alignment proposed is the best alternative for TGP and has been fixed having regard to issues raised in consultation and after detailed environmental and engineering investigations.

[109] In addition to the consideration of alternatives for the TGP route itself, we have also had regard to wider alternatives. There were a number of alternative proposals including routes and methods advanced to the Board which some parties contended were preferable to TGP. Those alternatives can be summarised as:

- Upgrade of the coastal route. This was the preferred alternative of the Coastal Highway Group and had for some years been the preferred option of NZTA;
- The status quo with some improvements. This was (as we understood it) the ultimate position of RTS and was to be combined with public transport improvements;
- A two lane (i.e. one lane in each direction) road along the proposed TGP route. This was the *fallback* position of RTS and Public Transport Voice;
- An alternative route through the use of existing roads such as the Akatarawa Road which was an alternative suggested by submitters such as Public Transport Voice.

[110] None of the alternatives above were supported by evidence of sufficient detail or reliability to enable us to assess whether they were achievable, viable alternatives to TGP. Ultimately, the evidence of NZTA explaining why TGP was preferable to any of the suggested routes, although challenged by some parties, was not seriously controverted. We accept that evidence.

[111] Part A (Chapter 2) of the AEE set out the background to the Project and contained a detailed description of the various considerations undertaken by NZTA in determining to proceed with TGP as opposed to the most obvious alternative of upgrading the existing coastal route. We will discuss a number of the relevant issues in our consideration of transport and traffic matters. In particular, we will consider the state of the existing coastal route and its vulnerability to natural hazards in the form of earthquakes or tsunami.

[112] In addition to those matters, however, it became apparent during the course of the hearing that there would be substantial hurdles to be overcome by any proposal to obtain NoRs and resource consents for an upgrade of the coastal route. Such a proposal was likely to be opposed strongly by a number of groups representing residents along that route such as the Transmission Gully Action Group for whom Ms Osvald made a succinct but compelling

representation. Ms Pomare was very clear in her view on behalf of Ngati Toa that *...from a cultural perspective the coastal route simply isn't sustainable*[17]*.* Additionally, we are aware that the 1990 report of the Parliamentary Commissioner for the Environment expressed strong opposition to any proposal to develop the coastal route[18]*.* Setting aside the likely degree of opposition, upgrade of the coastal route must encounter major issues relating to sea level rise and route security in the case of tsunami and earthquake, which TGP avoids.

[113] Part A (Chapter 2) contained an Overview which was a summary of that chapter. It stated:

> *The Project has a long history with the concept of an inland alternative route for SH1 being discussed over many decades. A number of strategic studies and investigations have concluded that an inland alternative for SH1 between Wellington City and the Kapiti Coast is preferable to an upgrade of the existing SH1 as it will provide greater benefits in terms of route security, travel time savings and safety. It will also substantially reduce the levels of severance currently experienced by communities along existing SH1.*

The evidence which we heard led us to the view that the Overview was substantially correct.

## 11.3 GREENHOUSE GAS EMISSIONS

[114] The issue of greenhouse gas emissions and how they might be affected by TGP was raised by RTS. That was primarily through the evidence of Dr Chapman who argued that the cost of carbon emissions and the cost of climate change were material to consideration of the benefit cost ratio (BCR) analysis of TGP. The Applicants had not addressed these issues in their AEE.

[115] Counsel for the Applicants contended that the emission of greenhouse gases resulting from construction or operation of TGP is not a relevant consideration under RMA because:

- No consents are sought for the discharge of greenhouse gases. The Regional Air Quality Management Plan (provision 5.1.1) explicitly states that discharges to air from vehicles are not controlled by the Plan;
- Section 104E RMA precludes consent authorities considering applications for discharge permits pursuant to ss15 and 15B from having regard to the effects of such discharges on climate change, except to the extent that the use of renewable energy enables a reduction in the discharge of greenhouse gases. The Board is bound by that provision;
- Designations do not authorise discharges to air, but only land use. The Applicants submitted that it would be nonsensical to prohibit consideration of the effects of climate change when determining discharge applications

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17 Notes of Evidence (NoE), pg 139.

18 Parliamentary Commissioner for the Environment *Audit of the "Future State Highway Number One Route" Environmental Impact Report* (March 1990).

under ss15 and 15B and yet allow their consideration in relation to notices of requirements for designations;

- Carbon emissions are regulated at the national level by the Government's Emissions Trading Scheme (ETS) introduced through the Climate Change Response Act 2002 and to endeavour to also regulate them on a project by project basis through land use consent authorisations would constitute double regulation which would not assist in promoting the purpose of RMA.

[116] The issue of greenhouse gases is addressed in the Regional Air Quality Plan which notes ...*central government's primary responsibility for negotiating and implementing national responses to global air quality problems...*[19] but acknowledges that there may be appropriate regulatory responses at a regional level having regard to the effects of activities on the environment.

[117] Objective 4.1.2 specifically seeks to avoid, remedy or mitigate adverse effects of discharges to air on *the global atmosphere*.

[118] Policy 4.2.23 of the Plan is:

> *To promote improved air quality in the Region through regional and district transport planning practices which:*
>
> *(1) encourage the development of an efficient and effective public transport system;*
>
> *(2) promote the use of non-motorised forms of transport such as walking and cycling; and*
>
> *(3) aim to reduce growth in motor vehicle numbers and motor vehicle congestion in urban centres.*

[119] Policy 4.2.25 is:

> *To support and promote, as appropriate, central government initiatives to control and minimise greenhouse gas emissions.*

[120] The commentary to this policy again notes the primary responsibility of central government for co-ordinating a reduction of greenhouse gas emissions but also acknowledges that emissions from motor vehicles are significant sources of greenhouse gases.

[121] Notwithstanding those very specific objectives and policies, Provision 5.1.1 of the Plan provides that the regional rules as to discharges to air ...*do not apply to discharges from mobile transport sources...and no resource consents are required for such discharges.*

[122] We consider that there was some merit in the submissions for NZTA and PCC. Those submissions appear to be founded on and are consistent with

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[19] Issue 2.4.1.

the findings of the Court of Appeal in *Genesis Power Ltd v Greenpeace New Zealand Inc*[20].

[123] In any event, the information received by us did not identify what the net effect in greenhouse gas emissions would be of the operation of TGP. We are uncertain whether or not it is possible to calculate that. It appears to us that any such calculations would need to include factors such as the present greenhouse gas effects of congestion, time delay and inefficiency and the increases in those effects from projected increases in traffic volumes without TGP. Those factors would then need to be measured against greenhouse gases generated by use of TGP (having regard to factors such as improvements in technology, improved traffic flows, removal of congestion, shorter journey times and the like) including induced travel.

[124] In his second s42A report to the Board Mr Kyle observed[21] that the net outcome of greenhouse gas emissions as the result of TGP may be a reduction. We accept that is a possibility but the evidence which we heard does not enable us to determine that one way or the other. We note that Dr Chapman's comments were made in the specific context of a benefit cost ratio (BCR) analysis of TGP rather than in a wider environmental context and we will address that BCR issue elsewhere in this report. We will not otherwise assess the benefits or dis-benefits of TGP in terms of greenhouse gases.

## 11.4 THE EXISTING DESIGNATION FOR TRANSMISSION GULLY

[125] We have previously noted that a substantial part of the proposed TGP route is already subject to designations granted in 2001. On the face of it, construction and operation of a highway on that designated route is an activity whose adverse effects are permitted by a district plan and which we had a discretion to take into account in our considerations. However, the Applicants conceded that effect could not be given to the existing designation without obtaining further regional resource consents. Accordingly, they did not contend that effects authorised by the currently proposed designations are part of the existing baseline.

[126] The Applicants did submit that the existing designations were relevant to our considerations in the following respects:

- They are evidence that a state highway along the general route of the TGP has previously been found to be acceptable;
- Since the designations were confirmed in 2001 they have influenced land uses and people's expectations have developed to accommodate the proposed TGP and its likely effects;
- Residents and others affected by the existing SH1 have considered the designations as signalling the first step in development of TGP and a consequent reduction in traffic effects on the coastal route.

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20 [2008] NZLR 803.
21 Para 2.1.19.

We concur with that submission although we do not consider that those matters are factors of great weight in our considerations.

## 11.5 ADDITIONAL CONSENTS

[127] The NZTA and PCC applications are comprehensive in their extent. The notices of requirement and applications for resource consent are intended to include all of the activities which were anticipated to be required for TGP at the time the applications were lodged. However, Ms Rickard explained that because of the scale of TGP and its complexity it is highly likely that further resource consents will be required in due course as detailed design is progressed and exact construction methods are developed[22].

[128] Transpower sought consents to relocate five sections of its line involving 24 tower relocations. The detail presently available in the NZTA and PCC applications enabled Transpower to complete a design process broadly identifying the relocation requirements of the line. The Transpower applications identified sites for its proposed new towers within a tolerance of 20m (with 4 identified exceptions). Further design of line realignment is dependent on final alignment and construction methodology for TGP. Once that has been completed, Transpower will design site specific tower foundations and access tracks for construction and maintenance of its lines.

[129] Until relocation design evolves to the final level of detail, Transpower cannot identify with any precision the extent of earthworks necessary to enable relocation and accordingly cannot apply for earthworks consents for tower sites and access tracks. It acknowledged that there will be a need for consents at that stage. It also anticipated that the possible use of helicopters during construction may require resource consent.

[130] It is a long established principle that all resource consents required for a proposed activity should be applied for at the same time[23]. Section 91 RMA provides that a consent authority may determine not to proceed with notification or hearing of an application for resource consent if it considers that other consents will also be required and it is appropriate for applications for those other consents to be made at that time.

[131] Although the principle identified in *Affco* is one which is commonly applied in administration of resource consent applications, it is not a rule which is *set in stone* and must be applied in context. It is significant in that regard that the power to defer an application until a receipt of further applications contained in s91, is expressed on a discretionary basis. Even if a consent authority does determine that further consents are required for a proposal it is not obliged to defer their consideration pending receipt of those consents. It has a wide discretion in that regard.

[132] In this instance we consider that the approach taken by all three Applicants is reasonable and appropriate. In the case of NZTA and PCC their evaluation of TGP has been exhaustive and the notices of requirement and consents applied for encompass all of the consents which were identifiable as being

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22 Evidence in Chief (EiC), (first statement), para 25.

23 *AFFCO NZ Ltd v Far North District Council (No 2)* [1994] NZRMA 224 (PT).

required at the time the applications were lodged. Although it is possible that further consents might be required once more detailed design work is completed, those consents cannot presently be identified.

[133] In the case of Transpower, it acknowledged that further consents (particularly for earthworks for access tracks, culverts and site works) are almost certain to be required but the extent of those consents cannot be ascertained until such time as the final NZTA and PCC works are designed. We understand that in calculating the extent of earthworks required for TGP overall, NZTA has made an allowance for earthworks likely to be necessary as part of Transpower's aspect of the proposal.

[134] We consider that the applications which have been made enabled people to fully understand the effects which TGP and Transpower's line realignments would have on them. It is difficult to see how NZTA and PCC can be criticised for not applying for consents which have not as yet been identified as being required or Transpower for delaying final design of its line relocations until precise details of such relocations are known.

[135] We do not consider that there is any reason for us to delay determining the applications before us, notwithstanding the acknowledged likelihood of further resource consents being required.

## 11.6 REVOCATION OF STATE HIGHWAY STATUS

[136] The Applicants calculate that if TGP proceeds, traffic on the existing SH1 coastal route will drop to approximately 5,900 vehicles per day (vpd) at the southern end of Pukerua Bay and 3,100vpd along the coast north of Pukerua Bay. It is anticipated that at that time substantial sections of the existing SH1 will no longer be required as state highway and their state highway classification will be revoked. In that case the sections of road whose status has been revoked will vest in either PCC or KCDC being the adjoining territorial authorities.

[137] The process for revocation of state highway classification is found in s103 LTMA. In summary, s103 provides that:

- On the recommendation of NZTA, the Secretary for Transport may revoke a state highway classification[24];
- Before making a recommendation to revoke state highway classification, NZTA must consult with any affected regional council or territorial authority[25];
- Revocation of a state highway constitutes the road as a *local road* (which is therefore vested in the relevant territorial authority)[26].

[138] In its opening submissions, KCDC expressed concerns about revocation of the state highway status in these terms:

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24 Section 103(1) and (4) LTMA.
25 Section 103(8) LTMA.
26 Section 103(5) LTMA.

*At sometime in the future, State Highway status may be revoked and the Council may be given part of the old State Highway. The Council wants to know that the road will be safe and fit for its new purpose, not a road that the Council has to reconfigure in order for it to be safe and functional*[27].

[139] KCDC sought the imposition of a condition on the notices of requirement in these terms:

*(a) As part of the detailed design of the Project, and in consultation with KCDC and PCC, the Requiring Authority shall assess the need for treatment measures for the bypassed sections of SH1 to ensure that those sections will be fit for purpose and operate safely once Transmission Gully main alignment is open to traffic.*

*(b) The requiring Authority shall provide a report to KCDC and PCC setting out recommended treatment measures, and including a clear explanation of any requests from KCDC and PCC that have not been included in the treatment measures and explain why.*

*(c) The Requiring Authority shall implement the report's recommendations prior to the opening of the Transmission Gully main alignment to traffic*[28].

[140] KCDC was not the only submitter seeking conditions pertinent to existing sections of SH1 and their future treatment.

[141] RTS proposed a series of conditions at the behest of various submitters with interests in cycling and walking facilities. The proposed conditions required NZTA to (inter alia):

- Provide an off-road cycling and walking facility from Paremata Railway Station to Porirua CBD to be in operation by 2015;
- Provide unspecified dollar amounts to PCC and KCDC to improve various identified cycling access routes;
- Ensure that walking and cycling travel between Paekakariki and MacKays Crossing is safe[29].

[142] Paremata Residents Association raised the issue of previous commitments to demolish the existing Paremata Bridge and remove clearways through Mana in conjunction with the opening of TGP. The Paremata Bridge comprises two parallel bridges located within a few metres of each other, one carrying 2 lanes of north-bound traffic and one 2 lanes of south-bound traffic. The bridge is situated at the entrance to Pauatahanui Inlet.

[143] The Residents Association contended that the presence of two sets of bridge foundations at this point has an influence on flushing and siltation of the Inlet and sought removal of one of the bridge structures on the opening of TGP and the consequent anticipated decrease of traffic on the bridges. If that was to

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27 Para 4.12 opening submissions for KCDC.

28 Exhibit 25.

29 RTS and the groups concerned sought an imposition of a series of other conditions relating to cycling and walking matters. We will address those matters elsewhere.

occur the road at this point would reduce to one lane in each direction over a single bridge. The Residents Association sought inclusion of a condition in our decision requiring NZTA to *...undertake all the steps necessary to allow demolition of the old Paremata Bridge and removal of the clearways at Mana by no later than 6 months after the TGP route is open, and to take such other actions as are necessary to restore the Highway between Paremata and Plimmerton to a local road.*

[144] Insofar as the KCDC condition is concerned, Mr Nicholson gave evidence as to the process to be undertaken by NZTA to ensure that any portions of road handed over to the Council were fit for purpose. Mr Nicholson expressed the view that it was unnecessary to have a condition requiring consultation as sought by KCDC as that was the process undertaken by NZTA in any event. For that reason he conceded that such a condition would not be offensive although he thought it was unnecessary.

[145] Counsel for NZTA contended however, that there was a legal issue with imposition of such condition. Counsel submitted that in deciding whether to make a recommendation that state highway status be revoked, NZTA was exercising a statutory right or power under s103 LTMA and that it would be unlawful for the Board to impose a condition which sought to constrain when or how such statutory right or power could be exercised.

[146] We did not understand NZTA to suggest that the possible revocation of state highway status of parts of the existing coastal route was not an effect of granting consent to TGP. The revocation is a foreseeable outcome of the establishment of the TGP route. Its occurrence is dependent upon NZTA recommending to the Secretary for Transport that state highway status be revoked and the Secretary accepting that recommendation. However, it was implicit in the evidence of Mr Nicholson for NZTA and Mr Bailey for PCC that such revocation was likely to occur. One of the beneficial effects of TGP which was identified by NZTA was the likely upgrade and improvements to the coastal route which could occur once TGP was in place and the roads in question were vested in PCC and KCDC. We consider that revocation of SH1 falls within the definition of effect contained in s3(e) RMA ...*any potential effect of high probability.*

[147] We do not accept NZTA's contention that we cannot impose a condition requiring works to be carried out on portions of the coastal route whose state highway status might be revoked as a consequence of TGP. A consent authority is entitled to impose conditions on confirmation of a notice of requirement or grant of a resource consent. To be valid, those conditions must satisfy the *Newbury* tests[30] and be in accordance with s108 RMA (in the case of resource consents - s108 does not apply to designations). NZTA's obligation to comply with such a condition (if one was imposed) arises out of its status as a requiring authority or consent holder whose designation or consent is subject to conditions. That condition may have a constraining effect on how NZTA might exercise rights and powers under its empowering legislation but that cannot limit a consent authority's (or the Board's) powers to impose valid conditions under RMA.

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30 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL).

[148] That said, we do not consider that it is appropriate to impose a condition of the type sought by KCDC in this case. There are three reasons for that:

- Firstly, we had no evidence before us enabling us to identify the outcomes which might be required to make sections of state highway fit for purpose as a local road at such future time as their status might be revoked. From the evidence which we heard, that time could be as much as two to three years after opening of TGP, allowing an appropriate period of observation of its effects on the existing road network. Only at that time will it be known precisely what treatments (if any) the road will require prior to its vesting in the territorial authorities. KCDC's suggestion that such assessment be made before the opening of TGP seems to disconnect treatment measures from actual effects of TGP;

- Secondly, we consider that the suggestion that NZTA be required to make the revoked highway fit for purpose at the time of transfer to KCDC may require works which extend beyond remedying effects of TGP and may require the remedy of existing inadequacies of the road;

- Thirdly, the condition proposed by KCDC appears to create no greater obligation on NZTA than the statutory obligation it presently has under s103(8) LTMA in any event. The statutory obligation to consult contained in s103(8) requires real consultation and the consideration of other parties' views[31]. However, there can be no guarantee of outcome (in terms of having its views accepted) for KCDC under either its proposed condition or s103(8) LTMA. It appears to us that KCDC is seeking to set up a parallel process to that contained in s103(8) under the conditions of the NoRs and that appears neither necessary nor desirable.

[149] Accordingly, although we consider that we have power to impose a condition directing works to be undertaken on the present coastal route when the need for such works arises as an effect of TGP, we decline to impose the condition sought by KCDC. We do however have a concern about operation of the coastal route in the period between operation of TGP and revocation of state highway status (if that occurs). We will return to that matter elsewhere in this report.

[150] Insofar as the conditions advanced by RTS are concerned, NZTA submitted that these conditions are either ultra vires or seek to use the RMA to intrude into the statutory responsibilities of NZTA for the operation and control of the state highway network. NZTA contended that the request of payment of unspecified sums of money is a form of financial contribution not authorised by RMA. It submitted that there is nothing in s149P(4) or 171(2) RMA which empowers consent authorities to impose conditions on designations requiring payment of a sum of money. It also contended that the proposed RTS conditions cut across the statutory responsibilities of NZTA under the Government Roading Powers Act 1989 and the LTMA as they sought to impose conditions on operation and control of the roading network.

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[31] *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA).

[151] The provisions of s108 RMA which authorise the imposition of conditions on resource consents and which enable the imposition of financial contributions, do not apply to notices of requirement for designations. In this case the Board's power to impose conditions is contained in s149P(4) RMA which relevantly provides:

> *(1) A board of inquiry considering a matter that is a notice of requirement for a designation or to alter a designation-*
>
> *(b) may-*
>
> *(iii) confirm the requirement, but modify it or impose conditions on it as the board thinks fit* (our emphasis).

It is clear that the Board's power to impose conditions is very wide. It is not, however, unconstrained. The Board is obliged to act reasonably and as we have previously noted, specifically in accordance with the requirements of *Newbury.*

[152] In this instance, we see no connection between the conditions suggested by RTS and the adverse effects of TGP which the proposed conditions supposedly address. The alleged shortcomings in walking and cycling facilities, which the conditions seek to rectify, exist now. There was no substantive evidence that they would be made any worse should TGP proceed. We accept that there is no guarantee such shortcomings will be overcome should TGP proceed, however that does not mean that NZTA should be required to meet the costs of remedying those existing failures. The proposed conditions seem like an opportunistic attempt to obtain funds from a body seen as having deep pockets.

[153] It appears to us that possible revocation of state highway status (if it occurs) will create the potential for NZTA and the territorial authorities to greatly enhance walking and cycling facilities on the existing road. That is a positive effect of TGP, not one which requires the imposition of a financial contribution on NZTA.

[154] Similar comments to those which we have made in respect of the KCDC submission and contained in para's [146] to [149] (above), apply to the submission of Paremata Residents Association. However, we are not prepared to impose a condition requiring removal of part of the Paremata Bridge at this time. It appears to us that the need for removal of the bridge is something which must be considered once TGP is operating and traffic patterns on the old section of state highway have been established with sufficient certainty to identify what the requirements for efficient operation of that road are. However, the Association's position is understandable.

[155] Removal of part of the bridge if TGP went ahead was previously considered by the Environment Court in 2000 when approving Transit New Zealand's notice of requirement for an upgrade of the Urban Section of SH1 from

Plimmerton to Paremata [32]. A condition was imposed on the designation for that work in the following terms:

> *59. Prior to the completion of the construction of Transmission Gully Motorway Transit shall:*
>
> *59.1 Consult with PCC, WRC, Paremata Residents Association Inc, Plimmerton Residents Association Inc, and Ngati Toa Rangitira in relation to its proposals for the Work following the construction of the Transmission Gully Motorway, including the following matters:*
>
> *(a) Ownership and control of the Work;*
>
> *(b) Options relating to the future of the existing Paremata Bridge;*
>
> *(c) The continuation of four laning of St Andrews Road between Acheron Road and James Street;*
>
> *(d) Measures (to the extent that they are legally available) to restrict or discourage heavy vehicle movements through the Work;*
>
> *(e) Other measures required to ensure an adequate level of service for the traffic volumes and traffic type expected to use the Work;*
>
> *(f) Provision of arrangements for cyclists;*
>
> *(g) Alteration of footpath widths;*
>
> *(h) Removal of traffic lights;*
>
> *(i) Changes to the operation of the clearway or HOV lanes;*
>
> *(j) Alteration of arrangements in relation to capacity;*
>
> *(k) Any changes to be sought to the designation in relation to those matters; and*
>
> *59.2 Report on the outcomes of that consultation to PCC and WRC for the purposes of ensuring that PCC and WRC are fully informed of the views of the public and those bodies, and of Transit's intended response to that consultation.*

[156] The condition clearly did not impose an obligation on NZTA to remove part of the bridge should TGP proceed but rather to consult with the identified bodies regarding future options. It appears to us that in the event of revocation of state highway status for this portion of SH1, the designation under RMA may also be revoked and the conditions imposed by the Environment Court in 2000 would no longer apply.

[157] We are conscious of our earlier comments regarding s103(8) LTMA but we see the situation regarding the Paremata Bridge somewhat differently to the matter raised by KCDC. The Environment Court saw fit to impose

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[32] *Porirua City Council v Transit New Zealand* Decision W52/2001.

requirements requiring consultation with identified parties on a specific series of issues relating to road usage at Mana in the event of a Transmission Gully road proceeding. The consultation required by the conditions goes beyond that required by LTMA in terms of who must be consulted and parties to that decision are entitled to rely on those conditions. For that reason we will impose a similar but appropriately amended condition on the designation in this case. We will not go to the extent sought by the Residents Association of directing removal of part of the bridge. The evidence which we heard did not enable us to determine whether removal is appropriate or not. That must be determined in light of traffic requirements once TGP is operational. The Residents Association will be participants to any discussions in that regard. Any obligation imposed on NZTA by such a condition is no more onerous than its existing obligation.

## 11.7 SECTION 107 RMA

[158] RTS advanced the proposition that s107 RMA precluded the grant of consent to TGP. Section 107 relevantly provides:

> ***Restriction on grant of certain discharge permits***
>
> *(1) Except as provided in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section15 or section 15A allowing-*
>
> *(a) The discharge of a contaminant or water into water; or*
>
> *(b) A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or*
>
> *(ba) The dumping in the coastal marine area from any ship, aircraft, or offshore installation of any waste or other matter that is a contaminant,-*
>
> *if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:*
>
> *(c) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:*
>
> *(d) Any conspicuous change in the colour or visual clarity:*
>
> *(e) Any emission of objectionable odour:*
>
> *(f) The rendering of fresh water unsuitable for consumption by farm animals:*
>
> *(g) Any significant adverse effects on aquatic life.*

> *(2) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied-*
>
> *(a) That exceptional circumstances justify the granting of the permit; or*
>
> *(b) That the discharge is of a temporary nature; or*
>
> *(c) That the discharge is associated with necessary maintenance work-*
>
> *and that it is consistent with the purpose of this Act to do so.*

[159] As we understood the RTS submission, it contended that the discharge of sediment laden runoff water from TGP works into the streams on the TGP route would contravene the provisions of s107(1)(a), (c), (d) and (g). RTS contended that none of the exceptions contained in s107(2) applied to the discharges in this case. It was the position of RTS that these provisions precluded the grant of the discharge consents sought by NZTA.

[160] NZTA rejected those propositions. It appeared to accept that discharges of sediment laden runoff water into streams on the TGP route might not be in accordance with the provisions of s107(1)(d) and (g) and it appeared to us that a breach of (c) is also possible. NZTA's position, however, was that such discharges fell within two of the three exceptions provided in s107(2), namely that:

- Exceptional circumstances justified the granting of the permit;
- Any discharge would be of a temporary nature.

[161] NZTA identified what it considered were exceptional circumstances in this case:

- That TGP is the largest earthworks project to be proposed for the Wellington region and its sheer size and community importance make it *out of the ordinary*[33].
- Any discharges which might breach the receiving water standards would not be intentional but would occur despite the best efforts of NZTA and PCC to prevent them;
- It is not possible to build TGP in a way that would completely avoid the possibility of such effects occurring;
- The Applicants had explored all options for preventing a discharge and have suggested conditions and work practices designed to reduce the risk of such events occurring but ultimately the determining factor is the weather;

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[33] *Te Rangatiratanga O Ngati Rangitihi Inc v Bay of Plenty Regional Council* (2010) 16 ELRNZ 312 (HC) at [73].

- Sediment laden discharge is an inevitable result when heavy rainfall events occur during construction earthworks;
- Other options to control the risk of sediment discharge such as damming would have worse ecological effects than the proposals for which consent is sought;
- TGP is anticipated by a number of national, regional and territorial planning instruments.

[162] NZTA further submitted that the term temporary could mean *not permanent* and that another alternative meaning was for a *short period of time*. It further contended that any discharges would be temporary because they would only occur during the construction period and were predicted to occur only during specific periods of high rainfall, wind from particular directions and peak earthworks being underway in a catchment, all occurring simultaneously.

[163] We note the observation of Wylie J in *Te Rangatiratanga O Ngati Rangitihi Inc v Bay of Plenty Regional Council*[34] that whether or not exceptional circumstances exist is essentially an issue of fact. In our view there are certainly exceptional circumstances in this case:

- The first and most obvious of these is the nature of the Project itself. TGP is part of a RoNS which has been identified in the Government Policy Statement on Land Transport Funding as a route requiring significant investment to reduce congestion. TGP is an essential section of that RoNS;
- TGP is intended to be the primary state highway linking North and South Islands via Wellington and through Cook Strait;
- Construction of TGP requires relocation of transmission lines forming part of the national electricity grid which is a structure of national significance;
- TGP is intended to provide an alternative route into and out of Wellington City which will provide greater resilience to natural hazards such as sea level rise, tsunami and earthquake;
- TGP is being built to overcome an existing situation of excessive travel times, unreliability, congestion and poor safety record on the existing SH1.

[164] We do not consider that s107(2)(a) requires that in order to be exceptional, circumstances must be unique, although the combination of factors described above may well put TGP into that category even when considered in relation to other RoNS. We take the word exceptional to mean *unusual or not typical*[35] and in our view very few projects indeed could point to the above combination of features. Accordingly we have no hesitation in holding that TGP fits within the exception contained in s107(2)(a).

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34 (2010) 16 ELRNZ 312 (HC).

35 J Pearsall (ed) *Concise English Oxford Dictionary* (10th ed revised, Oxford University Press, Oxford, 2002).

[165] Insofar as the question of whether or not the discharges are temporary is concerned, we understand the normal meaning of the word temporary to be *for a limited period of time* or *not permanent*[36]. Whether or not a discharge is permanent, must be considered in context. In this case, that context is that the maximum duration of any discharge permit is 35 years from the date of grant[37]. Taken literally, no discharge could be regarded as permanent in the sense that it would continue indefinitely, and accordingly no discharge would ever be permanent. That cannot be the case.

[166] In determining whether or not any discharges are temporary in this case we have considered the following factors:

- Any such discharges will be intermittent and limited in duration, depending on a specific combination of rain, wind and construction conditions which may or may not occur during construction;
- Any such discharges will be limited to the life of construction of TGP (six or so years). Although that period is not insubstantial, it too must be considered in the context that proposed conditions of consent limit the area of earthworks which are to be open at any given time thereby creating a combination of both temporal and spatial controls that limit the extent of any possible discharges.

[167] Having regard to all of the above factors, we determine that the discharges in question are temporary in nature and also fall within the second exception contained in s107(2)(b).

[168] We conclude that discharges from TGP are not excluded from the grant of consent pursuant to s107 RMA as they fall within the exceptions contained in ss107(2)(a) and (b).

## 11.8 ADAPTIVE MANAGEMENT

[169] At the heart of the NZTA and PCC applications is a system of avoiding, remedying or mitigating adverse effects of TGP through the use of adaptive management techniques.

[170] Put briefly, adaptive management is a system for managing the effects of (generally) large projects where the nature and extent of those effects is uncertain and the outcome of methods proposed to avoid, remedy or mitigate them is similarly uncertain. Adaptive management regimes are commonly established through conditions of consent incorporating management plans which seek to manage the effects of any given activity in a flexible and responsive manner.

[171] Mr Kyle described that process in these terms[38] ...*my preference is for conditions and management plans to be light on their feet, so to speak, such*

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36 J Pearsall (ed) *Concise English Oxford Dictionary* (10th ed revised, Oxford University Press, Oxford, 2002) and *Collins Concise Dictionary* (Revised 3rd ed, HarperCollins Publishers, 1995).

37 Section 123(d) RMA

38 NoE pg 1870.

*that effects that might be incurred and that are unforeseen or more adverse than expected, are dealt with on the hoof as it were*.

[172] In his s42A report to the Board, Mr McLean made the following helpful observations[39]:

> *Adaptive management plans are to enable an adaptive management approach whereby environmental management of a particular activity, or effect can evolve and adapt in response to measured data or best management practices.*
>
> *Adaptive management enables a 'plan-do-check-act' approach to be undertaken whereby the on-going monitoring and reporting that is proposed creates a continuous feedback loop from the effects being created, allowing for the most appropriate solution to be utilised or change of method made for any particular environmental effect, however adaptive management must not be used as a substitute for industry best solutions to mitigate a potential adverse effect.*

[173] For the sake of completeness we refer to the definition of adaptive management contained in the New Zealand Biodiversity Strategy[40] (although it does not greatly enhance our understanding):

> *Adaptive Management: An experimental approach to management, or "structured learning by doing". It is based on developing dynamic models that attempt to make predictions or hypotheses about the impact of alternative management policies. Management learning then proceeds by systematic testing of these models, rather than by random trial and error. Adaptive management is most useful where large complex ecological systems are being managed and management decisions cannot wait for final research results.*

[174] However adaptive management might be defined, an essential part of adaptive management regimes is the use of management plans which set out in a structured fashion how a consent holder proposes to deal with various identified aspects of the environment affected by a development. We have previously identified that 12 draft management plans dealing with a range of effects generated by TGP were included in Volume 5 of the application documents[41]. The management plans for TGP will not be confined to those contained in Volume 5. A more detailed description of the management plan structure for TGP will be provided later in this report.

[175] There are however two *overarching* management plans which between them define the overall management plan process. Those are:

- An outline plan prepared by NZTA and PCC pursuant to 176A RMA;
- A Construction Environmental Management Plan (CEMP).

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39 McLeans report, pg 4.

40 New Zealand Government "New Zealand Biodiversity Strategy" (February 2000) www.biodiversity.govt.nz Glossary.

41 Para 7.3 above.

[176] The outline plan pursuant to s176A is not a management plan in the usual understanding of that term. Section 176A obligates a requiring authority to provide an outline plan to relevant territorial authorities. It provides:

> ***176A Outline plan***
>
> *(1) Subject to subsection (2), an outline plan of the public work, project, or work to be constructed on designated land must be submitted by the requiring authority to the territorial authority to allow the territorial authority to request changes before construction is commenced.*
>
> *(2) An outline plan need not be submitted to the territorial authority if—*
>
> *(a) The proposed public work, project, or work has been otherwise approved under this Act; or*
>
> *(b) The details of the proposed public work, project, or work, as referred to in subsection (3), are incorporated into the designation; or*
>
> *(c) The territorial authority waives the requirement for an outline plan.*
>
> *(3) An outline plan must show—*
>
> *(a) The height, shape, and bulk of the public work, project, or work; and*
>
> *(b) The location on the site of the public work, project, or work; and*
>
> *(c) The likely finished contour of the site; and*
>
> *(d) The vehicular access, circulation, and the provision for parking; and*
>
> *(e) The landscaping proposed; and*
>
> *(f) Any other matters to avoid, remedy, or mitigate any adverse effects on the environment.*
>
> *(4) Within 20 working days after receiving the outline plan, the territorial authority may request the requiring authority to make changes to the outline plan.*
>
> *(5) If the requiring authority decides not to make the changes requested under subsection (4), the territorial authority may, within 15 working days after being notified of the requiring authority's decision, appeal against the decision to the Environment Court.*
>
> *(6) In determining any such appeal, the Environment Court must consider whether the changes requested by the territorial authority will give effect to the purpose of this Act.*
>
> *(7) This section applies, with all necessary modifications, to public works, projects, or works to be constructed on designated land by a territorial authority.*

[177] In this instance NZTA and PCC advised that they do not seek to avoid submitting an outline plan pursuant to s176A(2). They further advised that the outline plan will incorporate the following individual management plans:

- Landscape and Urban Design Management Plan (LUDMP);
- Construction Air Quality Management Plan (CAQMP);
- Construction Noise and Vibration Management Plan (CNVMP);
- Construction Traffic Management Plan (CTMP);
- Heritage Management Plan (HMP).

We consider that the incorporation of these management plans into the outline plan is authorised by the provisions of s176A(3)(f).

[178] The draft CEMP was included in Volume 5 of the application documents. It defines its purpose in these terms:

> *1.1 Purpose of the CEMP*
>
> *The purpose of this CEMP is to describe the environmental management and monitoring procedures to be implemented during the Project's construction phase to manage compliance with all of the conditions of consent and designations. The CEMP provides a methodology and framework of management plans and protocols for implementing the environmental controls specified in relevant consent and designation conditions. The final CEMP submitted by the Contractor will outline all details required to enable the NZTA, PCC and the Contractor to construct the Project with the least adverse environmental effects. Overall, the implementation of the CEMP will manage:*
>
> - *Compliance with the conditions of resource consents and designations;*
> - *Compliance with environmental legislation;*
> - *The requirements of Section 176A (outline plan) for construction of the Project;*
> - *Adherence to the NZTA's and PCC's environmental objectives; and*
> - *Environmental risks associated with the Project are properly managed.*

[179] The CEMP identifies a number of lower level management plans (i.e below the CEMP) and site specific environmental management plans which will flow from its operation. We will discuss the structure and relationship of the various management plans and the conditions of consent later in this report. The issues for determination in this section of the report are:

- Whether or not use of adaptive management regimes is an appropriate means of managing environmental effects;

- What are the essential features of such regimes.

[180] Insofar as the first issue is concerned, the answer is clearly yes. The essential test of any method of managing effects under RMA is whether or not it achieves the purpose of the Act set out in s5(2). There is no reason why an adaptive management regime cannot achieve that purpose. The Environment Court has previously accepted the use of adaptive management regimes in decisions such as *Clifford Bay Marine Farms Limited v Marlborough District Council*[42], *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council*[43] and *Crest Energy Kaipara Limited v Northland Regional Council*[44]. Whether or not any particular proposal for use of an adaptive management regime achieves the purpose of RMA is a matter to be determined by the relevant consent authority in any given instance.

[181] In this instance, the planning witnesses who appeared before us reached agreement in these terms[45]:

> *8. All agree that management plans are an appropriate tool for managing effects in a project of this nature and scale.*
>
> *9. All agree that tying the consents down to specific construction methodologies and techniques is not appropriate, and that it is more desirable to allow for flexibility where it meets the intent/purpose of the management plan.*
>
> *10. All agree that the conditions should clearly specify the outcome that is intended from the management plans. In this regard, all agree that 'what' needs to be achieved is best specified in the conditions, with 'how' it is to be achieved being set out in a management plan.*
>
> *11. All agree that the broad issues and topics that need to be addressed are covered by the conditions.*

[182] The Board's planning advisor, Mr Kyle, agreed that an adaptive management regime was the most appropriate way to deal with complex effects in this case[46].

[183] We received evidence, submissions and advice from witnesses, counsel and the Board's own legal and planning advisors as to the necessary components of adaptive management regimes. In his legal advice to the Board, Mr Milne identified not less than 17 *key components* of the management plan process[47].

[184] It appeared to us that there was very little difference in principle in the views of all those who commented on this issue to us although there were differences of emphasis. In their opening submissions, Counsel for NZTA and PCC

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42 Decision C131/2003.
43 Decision C80/2009.
44 Decision A132/2009.
45 Witness Conference Statement dated 12 December 2011.
46 Para 3.3.1.2, pg 48, Section 42A Report - February 2012.
47 Para 2.5 - Legal Advice to the Board - 6 March 2012.

described the key elements of the adaptive management regime proposed by the Applicants in these terms (footnotes excluded)[48]:

*121.1 The setting of objectives in the consent conditions to provide focused management plan development. The consent conditions also contain performance criteria which operate as directly enforceable 'bottom lines' as this was the preference of the Regional Council;*

*121.2 A requirement to design and plan for management of the Project. The proposed resource consent conditions require each management plan to be finalised prior to construction commencing. In addition Condition G.15E requires the Applicant to consult with DoC, Ngati Toa and the Regional Council in relation to the updating and finalisation of the Ecological Management and Monitoring Plan (EMMP);*

*121.3 Management of construction in accordance with the management plans and conditions;*

*121.4 Monitoring and evaluation as required by the management plans and conditions (including pre-construction monitoring). Monitoring is required by the draft EMMP and by many proposed conditions. A new condition requiring the provision of an annual report on all monitoring, is suggested in Ms Rickards' rebuttal evidence;*

*121.5 Review of monitoring results, by the Applicants and their expert advisors, by the Regional Council, and in some instances by stakeholders and a peer review panel. This monitoring will occur regularly to help ensure that, where relevant, steps can be taken before any significant adverse effects occur;*

*121.6 Refinement of management plans and programmes in response to such review.*

[185] We agree that the matters identified above constitute key elements of an effective adaptive management regime although we may have placed greater emphasis on some elements of that regime.

[186] Although the Applicants' submission referred to the need for pre-construction monitoring as part of monitoring and evaluation, we would have separately identified pre-construction monitoring to emphasise that it is a fundamental component of the monitoring regime. Detailed pre-construction monitoring is vital to establish the existing state of the environment at the time of commencement of any project. That must be established to provide a base line against which environmental effects of works might be identified and measured. We note, in this instance, that there has been extensive monitoring already undertaken by the Applicants in respect of many of the components of the environment likely to be effected by TGP.

[187] We also emphasise the importance of conditions of consent if adaptive management regimes are to operate properly. In his advice to the Board,

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[48] Opening submissions, para 121, pgs 30-31.

Mr Milne identified the need for conditions to be clear, certain and enforceable. Conditions need to contain quantifiable standards and performance criteria against which proposed management plans can be assessed and subsequent operation of the management plans measured. The Board considered that the conditions proposed by the Applicants at the conclusion of the hearing generally achieved those objectives.

## 11.9 APPROVAL/CERTIFICATION

[188] Those comments bring us to address issues relating to approval/certification of management plans by Council Officers. A feature of the initial conditions and draft management plans provided to the Board was that a number of them required either approval or certification of the management plans by various Council Officers. The Board had two concerns regarding these matters:

- Firstly, the extent to which the Board might be delegating its functions through the process of certification and/or approval of management plans by Council Officers;

- Secondly, the issue of just what it was that Council Officers were being directed to certify or approve.

[189] Insofar as the first matter is concerned, the powers to approve resource consents and impose conditions and to cancel or confirm the notices of requirement or impose conditions on them, lie with the Board. Those powers may not be delegated to a third party, either in principle or in practice.

[190] The Board was initially concerned that the extensive use of management plans which were to be approved or certified by Council Officers rather than the Board, might mean that we were in effect delegating our decision making obligations. Ultimately, we determined that was not the case, provided the conditions of consent imposed contained clear objectives to provide focus to management plan provisions and performance criteria which operate as bottom lines which the management plans must achieve. In other words, the conditions imposed by the Board would identify the performance standards which had to be met and the management plans would identify how those standards were to be met.

[191] The second issue which the Board considered related to the nature of certification/approval of management plans and what was being certified or approved.

[192] Insofar as certification or approval is concerned, we understood there to be a distinction between the two terms. Use of the word *certify* or *certification* suggests that the role of any certifying person is simply to check and ensure that requirements contained in conditions have been met. On the other hand we understand the term *approval* to require the exercise of discretionary powers and judgment to determine whether or not a proposed management plan is satisfactory. However, it became apparent to us that the words are in fact used interchangeably. We shall use the word certify.

[193] The Board received very helpful evidence, submissions and advice on this issue from a number of parties including the Regional Council, territorial

authority regulatory officers, the Applicants and Messrs Kyle and Milne. Ultimately, we refer to Mr Milne's advice to the Board in these terms[49]:

*2.10 The other aspect of management plans that has moved on from earlier case law is the principle relating to certification versus approval. It is now more common (particularly for large and lengthy infrastructure projects) for the applicant/requiring authority to agree to the consent authority or independent reviewer having somewhat more than a certification role (although it is often still called such). In particular the consent authority needs to have the ability to direct changes to draft and final management plans (other than objectives).*

*2.11 Management Plans are a key component of large projects. In essence they allow matters of detail (often very important details) to be left until after the approval process. They provide desirable if not essential flexibility for both the consent holder and the consent authority.*

*2.12 The quid pro quo for obtaining this flexibility is that applicants must accept that the consent authority needs to have the ability to reject inadequate management plans, or more usually to require changes to the plans other than by way of review of conditions. The review process will usually be too time consuming to ensure necessary changes (adaptive management) occur before unacceptable risks arise or adverse effects occur.*

*2.13 In summary, an applicant cannot expect the flexibility of relying on adaptive management without also accepting that the consent authority officers will need to have a right to require changes to management plans when they are being finalised and if changes are required later, but not embraced voluntarily by the consent holder.*

*2.14 This can either be achieved by the applicant agreeing to the council approving the management plan (utilising the Augier Principle) or by decision maker ensuring that a very robust 'certification' and adaptation process.*

*2.15 The latter approach as a minimum requires:*

- *Clear objectives for the certifier to check the plan against.*
- *The ability for the certifier to withhold certification until he/she is satisfied that the plan will achieve those objectives.*
- *The ability for the consent authority to be able to require changes to operating management plans or to be able to halt works until changes are made.*
- *Minimum environmental standards so that if breached the consent authority can request or require changes to the management plan and/or take enforcement action.*

[49] Advice from Counsel – 6 March 2012.

[194] We concur with and adopt Mr Milne's advice on this matter. In particular we emphasise the need for conditions to contain *clear objectives* against which the certifier must check management plans. Conditions imposed by the Board will identify the standards that activities must meet. The certifier will ensure that the proposed management plans achieve those standards.

[195] Counsel for the Applicants described the process undertaken by Council Officers as being one of *certification* whilst at the same time acknowledging that the certification required the exercise of a degree of discretion and therefore (effectively) approval.

[196] Mr Cornor for the Regional Council made the point that the certifying authority needs the ability to say yes or no at times during the adaptive management process and that the task goes beyond a bare assessment of whether a particular matter is addressed or a certain item is provided. The authority is required to consider the effectiveness of the methods proposed but it is not the role of the authority to *reinvent or second guess* objectives and benchmarks set out in consent conditions. Mr Cornor submitted that the proposed conditions as finally put to the Board were consistent with those principles.

[197] We consider that the process for certification of management plans in this case requires the following determinations:

- Does the management plan generally accord with draft management plans submitted with the application or provided in evidence to the Board. In that respect, we note that not all proposed management plans, particularly site specific environmental management plans, will have been previously submitted. However such plans must be consistent with the provisions of the *higher order* management plans which form part of the application documents;

- Has the management plan in question been prepared in accordance with the relevant conditions of consent;

- Has consultation been carried out in accordance with the relevant conditions of consent;

- Does the management plan meet the objectives or standards prescribed by the relevant conditions of consent. In making that determination the certifying authority will (indeed must) exercise judgement and apply expertise. Where it is determined that a management plan does not meet the objectives prescribed by conditions, the authority may direct changes to the management plan which satisfy it that the objectives are met.

We will return to the matter of conditions later in this decision but we observe that the final conditions proposed by the Applicants at the conclusion of our hearing have been drafted generally in accordance with the requirements we have identified.

[198] The final matter which we consider under this head is the question of which authority must certify management plans where that is required. That question arose in the context of the CEMP which largely (but not exclusively) relates to effects arising under Regional Council consents. The Applicants

sought that any management plans for approval under the CEMP *umbrella* ought be certified only by the appropriate officer of the Regional Council, even if that management plan traversed some issues within the jurisdiction of a territorial authority. We understood that the Applicants took that position because they were concerned about costs, delay, uncertainty and potential conflict which could result if more than one local authority was responsible for certification of a management plan. We understand their concern but ultimately disagree.

[199] We accept that it may be appropriate for the Regional Council to have certifying power in relation to management plans which have a territorial component, if the effects which the management plan seeks to address arise out of the operation of regional consents. We consider that the provisions of s30(1)(a) RMA and the interconnected nature of mitigation measures involving mitigatory works which cross over regional and territorial functions in this case, mean that there will frequently be an integrated approach required to the operation of management plans.

[200] However we do not accept that territorial authorities can be excluded from the certification of management plans which impinge upon territorial functions under s31 RMA. Territorial authorities have the statutory functions of implementing methods to achieve integrated management of the effects of use of land[50] and the control of effects of development of land[51].

[201] In our view, a requirement for certification of management plans which have regional and territorial components by both regional and territorial authorities is an example of a method to achieve integrated management of the natural and physical resources of the region or district.

[202] We also concur with the advice given to the Board by Mr Milne[52] that enforcement of district plan requirements is a matter for district councils and that it would be inappropriate for the authority certifying a management plan provision to be different to that enforcing it.

[203] For the above reasons we require that where management plans which are to be certified impinge on both regional and territorial functions, then they are to be certified by the regional and territorial authorities (each as to their respective jurisdictions). The conditions of consent and notices of requirement adopted by the Board for the NZTA/PCC projects reflect that requirement. The management plans whose parts require certification by the respective regional and territorial authorities are:

- Construction Environmental Management Plan (CEMP);
- Ecological Management and Monitoring Plan (EMMP);
- Landscape and Urban Design Management Plan (LUDMP);
- Site Specific Environmental Management Plans (SSEMPs).

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50 Section 31(1)(a) RMA.
51 Section 31(1)(b) RMA.
52 Legal advice to Board - 6 March 2012.

(The conditions applying to certification of the various management plans (or their parts) are incorporated in the consents or Notices of Requirement requiring preparation of those management plans. These conditions require certification by territorial authorities of aspects of plans imposed pursuant to regional consents and by the regional authority of aspects of plans imposed by territorial authorities pursuant to Notices of Requirement. It was suggested in comments from one party on our draft report and decision that it was not open for us to do so and that it was necessary to impose corresponding conditions as part of either regional or territorial consents. In our view any condition must be included in the appropriate consent or Notice of Requirement, but may require action (in this case certification) by a third party.)

# 12. REGIONAL AND PROJECT-WIDE EFFECTS

## 12.1 INTRODUCTION

[204] The AEEs and Technical Reports lodged by the Applicants provided a comprehensive assessment of a wide range of identified effects. In this section of the report we address what we consider to be the determinative regional and project wide effects of TGP. These effects constitute the *principal issues* which the Board is obliged to identify pursuant to s149Q(2)(c) RMA. We summarise those effects as follows:

- Traffic and Transport effects;
- Effects of sediment generation and discharge;
- Hydrological effects;
- Effects on terrestrial ecology;
- Effects on freshwater ecology;
- Effects on marine ecology;
- Effects of noise and vibration;
- Air quality and related health effects;
- Effects on Tangata Whenua
- Effects on archaeology and built heritage;
- Social effects;
- Landscape and visual effects;
- Direct property effects.

We consider this range of effects in the context of the overall TGP projects. We will carry out a separate appraisal of some aspects of the Transpower application.

## 12.2 TRAFFIC AND TRANSPORT

**Issues Identified**

[205] Around 44 separate submissions raised various transportation issues. These can be summarised under the following heads:

- Road design;
- Route resilience;
- Travel demand management;
- Construction traffic;

- Operational effects;
- Economic analysis;
- Forest removal;
- Rail infrastructure;
- Treatment of the existing state highway (coastal route);
- During operation – travel times;
- Pedestrian/cycle issues;
- Local road from Paekakariki to MacKays Crossing;
- Public transport.

**Road Design**

[206] Mr Edwards outlined the road design standards to be used for TGP. The design is based on expressway standards, although the road would initially be designated as a motorway. Mr Edwards[53] said that the key difference between an expressway and motorway is that no direct side access is permitted on a motorway. For a motorway, all interchanges are grade separated whereas there can be at-grade intersections (i.e. traffic signals or a roundabout) on an expressway. The design provides for a four lane highway with additional crawler lanes where required on steeper uphill and downhill sections. Pull-off shoulder areas and a central median with barriers are proposed, in accordance with design best practice. The fundamental geometric design criteria for the proposed road were not challenged by any party to these proceedings.

[207] Mr Edwards noted that a key design philosophy for the road is that it does not collapse and that limited access can be restored quickly in the event of a major earthquake. Crossing fault lines on embankments rather than bridges has therefore been preferred, as even if there is movement or rupture, embankments can be reinstated in days to weeks and significantly faster than the time needed to reinstate a bridge. Mr Edwards advised that a series of independent road safety audits considering a number of design options were conducted on the Project. A more detailed audit was then undertaken on the preferred alignment. Changes to the design were made as a result of this second audit, particularly around the northern tie-in area near MacKays Crossing.

[208] Ms Warren for RTS had suggested that the road should be constructed with only one lane in each direction. Mr Nicholson[54] carried out a fundamental capacity analysis which showed that the assessed capacity of a possible two lane road was significantly less than the predicted traffic volumes on the TGP route. Mr Edwards testified that because of the topography of the route, the volume of earthworks required for a two lane option would be only 10 - 15%

53 EiC, para 20.
54 Rebuttal evidence.

less than for the proposed four lane design[55]. In other words such a proposal would have most of the adverse earthwork and related effects (and cost) of the current proposal without addressing existing capacity problems. NZTA considered that this option was not practicable and we accept that.

[209] Mr Faulls supported the proposal in part but said that early planning for the TGP route had the southern termination at Takapu Road and not at Linden. He contended that the change to a Linden tie-in was driven by local politics and should be revisited.

[210] Mr Nicholson referred to concerns expressed when an environmental impact report for TGP was audited by the Parliamentary Commissioner for the Environment in 1990. At that time, the proposed TGP route traversed the Takapu Valley, with the southern connection to SH1 being via the existing Takapu Road interchange at the southern end of Tawa. After the Parliamentary Commissioner's audit, but before the existing TGP route designations were lodged in 1996, the proposed route was altered from Transpower's Takapu Road substation, to traverse the hills above Cannons Creek and Ranui Heights, with the southern connection to SH1 being via a new interchange at Linden. This was in response to concerns about the impact of the proposal on Takapu Road. Our site visit indicated that such concerns were well founded.

[211] Mr McCombs and Mr Edwards testified that several options were modelled which resulted in relocation of the southern terminal at Linden. This route was found to be more cost effective in better serving the Porirua East and Whitby communities and relieving traffic pressures on the Mungavin Avenue Interchange, but also better provided for the Kenepuru Link by incorporating it as an integral component of the overall plan. We accept their views in that regard.

[212] Mr I Rowe (Submitter 002 who did not appear before the Board and who otherwise supported TGP) recommended a full motorway-to-motorway interchange at the southern end of TGP (allowing southbound traffic on the TGP route to turn onto SH1 northbound and SH1 southbound to turn onto the TGP route northbound) instead of the proposed motorway-Y junction (merge and diverge movements only) with a link to Kenepuru Drive. This option was considered and evaluated during the Phase 1 investigations, but it was found to provide poorer network flexibility and greater social environmental effects than other options in that section of the route. NZTA concluded that this was not the preferred option for this section of the route and we accept that conclusion.

**Route Resilience**

[213] A significant purpose of NZTA's Project objectives was to provide a route which has greater resilience to natural occurrences (tsunami, earthquakes, etc) than the existing coastal route.

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55 EiC, para 131.2.

[214] Mr Edwards[56] identified that the TGP route is wider than the existing highway. It will provide four lanes of sealed road which, for most part, is elevated above the existing ground. This would provide greater resilience if there is a significant event on the highway compared with alternatives at ground level. He considered that the proposed option provides better route resilience than the existing SH1.

[215] Mr Brabhaharan provided a detailed brief of evidence dealing with route security issues. He is a highly experienced geotechnical engineer with earthquake expertise. He identified the vulnerability of the coastal route to landslides, liquefaction and lateral spreading from a large earthquake[57]. In the event of a characteristic Richter Magnitude 7.5 earthquake on the Wellington fault, current road access into Wellington is likely to be closed for between three and six months. It is also vulnerable to tsunami.

[216] Mr Brabhaharan acknowledged that in the event of a large local earthquake, parts of TGP could also be closed, although most sections would remain open for access. The use of earth embankments to cross the Ohariu fault line and where the alignment is close to fault lines would enable quick reinstatement. He considered that most sections of the route would be re-opened in two weeks. The most difficult section would be north of Battle Hill Farm Forest Park where a closure could extend for between two weeks and three months. In other small to moderate earthquakes, events, storms or tsunamis which might close the coastal route, TGP will remain open.

[217] Mr Brabhaharan's evidence was unchallenged by any credible contrary evidence. We accept that TGP will provide a resilient alternative route to the vulnerable coastal route and will improve regional route security.

**Travel Demand Management**

[218] RTS contended that a travel demand management (TDM) condition should be included in any consents, to manage travel demand and encourage public transport usage. That proposition was based on the evidence of Dr Krumdieck and Mr Vannisselroy who noted that a TDM condition would not be as effective without a high quality public transport system.

[219] Mr Bennion[58] submitted that the Board had jurisdiction to impose conditions relating to TDM and cited two examples, an Environment Court consent order for an indoor sports and recreation centre in Kilbirnie (*Mellor v Wellington City Council,* 2009) and the Board of Inquiry decision for Waterview. He noted that this particular example made it apparent that conditions can extend well beyond the designation footprint.

[220] Ms Hayes noted that a relevant policy under the PRPS was Policy 9, Promoting Travel Demand Management. The explanation under Policy 9 describes mechanisms such as travel behaviour change programmes, road pricing, and network efficiency improvements to achieve this policy. It also

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56 EiC, para 118.
57 EiC, paras 46-49.
58 RTS Counsel Closing Submission, para 2.14-2.15.

recognises the role of planning for new development in locations with good access to public transport and good transport options.

[221] In closing, Mr Hassan for NZTA submitted that the decisions cited by Mr Bennion were based on the particular circumstances of those cases which were materially different from the TGP situation. We agree.

[222] We do not propose to impose a condition of the type sought by RTS. TGP is part of an integrated upgrade of regional transport facilities, including upgrade of rail facilities which have largely been completed. TGP comprises the roading component of those upgrades and ought be completed if the full benefits of the Western Corridor Plan are to be achieved.

**Construction Traffic**

[223] The AEE identified the following construction traffic effects:

- Actual and potential effects on local roads;
- Site offices and longer term construction access locations.

[224] A number of submitters raised concerns about construction related traffic effects including effects on individual properties and on local road networks. Mr Kelly considered these issues for the Applicants and referred to a range of controls to ensure that effects on road users and residents during construction would be largely mitigated[59].

[225] NZTA had identified a number of key locations where construction activities are likely to affect operating conditions on existing roads. Mr Kelly explained the proposed mitigation to minimise traffic disruptions, including the use of a Construction Traffic Management Plan (CTMP) and Site Specific Traffic Management Plans (SSTMP)[60]. For areas of key concern, consideration has been given to requirements for temporary lane closures, speed restrictions and diversions.

[226] Mr Kelly clarified that Condition NZTA.35 (as it was referenced at that time – now NZTA.28) requires site specific traffic management plans which provide for the safe and efficient movement of construction vehicles to and from construction sites. In his view that sufficiently encapsulated the effect of additional movements on both Paekakariki Hill Road and Takapu Road[61].

[227] Construction traffic management needs to be carefully considered through the life of the Project. In an essentially *greenfields* project, the main impact arises from workers' vehicles and materials being brought onto the site through various access points. The cartage of aggregate and water were identified as two possible major contributors in this regard. The Board is satisfied that the conditions proposed by way of management plans provide an effective way of managing and controlling construction traffic.

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59 EiC, para 172.

60 EiC, para 94.

61 NoE, pg 180.

**Operational Effects**

[228] A number of submitters contended that TGP was unnecessary or inappropriate[62]. Issues were raised about the costs compared to the benefits of the proposal. Submitters suggested that there are better alternatives and that the proposal will adversely affect the transport system, including working against the modal shift to public and active modes of transport.

[229] The AEE identified (in summary) the following operational traffic and transport effects of TGP:

- Changes in traffic volumes;
- Effects on total travel demand and mode of travel;
- Effects on the road network;
- Effects on freight movements;
- Effects on route security;
- Effects on intersection performance;
- Traffic safety effects;
- Wider (regional) effects;
- Effects on public transport.

[230] Forecast changes to traffic volumes resulting from construction of TGP were outlined in TR4 and discussed primarily in the evidence of Mr Kelly. The existing Wellington SH1 corridor presently carries approximately 23,500vpd north of Plimmerton, increasing to 32,600vpd along the Mana Esplanade and 52,000vpd between the Whitford Brown intersection and Porirua ramp bridges. These volumes are predicted to increase (without TGP) to 24,100vpd, 35,100vpd and, 60,600vpd respectively between a base year of 2006 and 2026. Mr Kelly testified that this growth would lead to an increase in the frequency and severity of congestion on the SH1 corridor with a deteriorating level of service and uncertain travel times[63]. He observed that over this 20-year period there is forecast to be an 84% increase in heavy vehicle movements on the northern part of the corridor[64].

[231] The result of providing an alternative strategic route is that an estimated 20,000vpd (between 18,300vpd north of Linden, and 22,300vpd south of Paekakariki), (based on the 2026 prediction), would use the new TGP. Predicted volumes of traffic on the coastal route would then drop to 20,470vpd on the Mana Esplanade, 5,930vpd south of Pukerua Bay and 3,090vpd south of Paekakariki.

[232] Ms Lawler referred to the Porirua Development Framework which identifies future growth areas throughout the city, including areas adjacent to the

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62 Mitchell Partnerships Section 42A Report, Part 1, pg 67, para (f).
63 EiC, para 36.
64 EiC, para 44 and NoE, pg 177.

existing SH1 which would have traffic volumes reduced with implementation of TGP. In cross-examination she agreed that if the coastal route is left unchanged, in those areas where there might be significant urban growth and intensification, increased development might produce more people wanting to use the road infrastructure[65]. The areas from Paremata through to Mana/Plimmerton/Camborne in particular have been identified as areas for possible future expansion.

[233] Dr Krumdieck discussed the global economic situation and speculated that peak congestion in Wellington may have already occurred. She concluded that TGP was at considerable risk of not providing long term benefit to the city[66]. Dr Krumdieck suggested that it was negligent for traffic planners to continue to plan on the basis of historic growth rates which will not be applicable into the future[67].

[234] Mr Wood[68] contended that the traffic growth rate had been declining since at least 1997 which is consistent with overseas trends. Mr Wignall for KCDC also raised concerns regarding traffic growth estimates and the substantial difference between the figures adopted by NZTA and those identified in the NZTA's Economic Evaluation Manual (EEM1and EEM2). He noted that while some of the reasons referred to by Mr Kelly were valid, they were not quantified and could not account for the large variance in traffic growth.

[235] Although Mr Kelly's predictions as to increases in traffic volumes were subject to attack in cross examination they were not seriously shaken. His prediction as to an increase in vehicle movements was based not just on an extrapolation of historical growth but included consideration of economic development and demographic factors which are the underlying factors behind traffic demand[69]. His prediction as to the extent of increase in heavy vehicle movements was explained and justified in a supplementary statement of evidence which he supplied at the request of the Board and which we accept.

[236] What the evidence of all the various witnesses on this topic demonstrated is that traffic growth may be influenced by a wide range of economic, social, demographic and other factors and that these factors and their relative significance may change from time to time. We accept that there is an element of uncertainty involved in the predictions either way but we consider that it is proper for NZTA to proceed on the basis of the growth projections which it has presented. Time will tell who is right. What is apparent is that if Mr Kelly's predictions are correct, NZTA will be seen to have neglected its statutory obligations if it had not moved to provide the necessary roading capacity.

[237] In any event, arguments about the rate of traffic growth seem to ignore the existing inadequacies of SH1 on its present route. We have accepted that

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65 NoE, pg 224.
66 EiC, para 17.
67 NoE, pg 1196.
68 NoE, pg 1196.
69 NoE, pgs 172-173.

there are real capacity problems with the road at present which require remedy. Any increases in volume will exacerbate those problems.

**Economic Analysis**

[238] Mr Nicholson discussed the overall economic analysis of TGP and confirmed an updated benefit cost ratio (BCR) of 0.82, calculated in accordance with NZTA's Economic Evaluation Manual. When considered as part of the wider RoNS package, the BCR including agglomeration benefits was 1.2, evaluated in late 2009. The BCR for TGP calculated in 2009 was 0.6.

[239] Mr Nicholson discussed the criteria which NZTA uses to determine whether or not a project is eligible for funding[70]. These include strategic fit, effectiveness and economic efficiency (i.e. the BCR). Each of these is assessed as being; high (H), medium (M) or low (L) and then combined to form an assessment profile for the activity. The Wellington Northern Corridor package, of which TGP is a part, has been evaluated as having an HHL profile. That is high strategic fit, high effectiveness and low economic efficiency. The HHL profile for TGP is the third highest out of 11 possible priority rankings.

[240] Mr Copeland said that a BCR for a project of less than 1.0 indicates that the rate of return is less than 8%. In the case of TGP, Mr Copeland estimated that the rate of return could be 6 - 7%. He referred to the relationship between economic efficiency (s7(b) RMA) and the provisions of s5(2) RMA which seek to enable people and communities to provide for their economic wellbeing.

[241] Possible tolling of the route was raised by several submitters. Mr Nicholson discussed the issue of tolling TGP[71] and confirmed that NZTA does not currently propose to do so. Drivers' willingness to pay a toll could influence the volume of traffic which might transfer from the existing (untolled) route. We assume that a significant reduction in estimated numbers using TGP might affect NZTA's BCR calculations but we have not factored the effect of tolling into our considerations and had some difficulty in identifying its relevance to us.

[242] Ms Lawler outlined the reasons for PCC's support of TGP. She agreed with Mr Copeland that the project is likely to result in increased levels of economic activity in the city and would support various Council strategies in this regard.

[243] Dr Chapman discussed the uncertainty of TGP and the effect the low L (efficiency) score had on the overall Project ranking. He concluded that it might be wise to defer the project as the benefits could be overstated. Several other submitters questioned the wisdom of proceeding with the Project in light of the low BCR, with concerns similar to those expressed by Dr Chapman. Mr Copeland disagreed with suggestions that the Project should be deferred to eliminate uncertainty, citing the overall HHL assessment process as establishing a high priority for TGP.

[244] Mr Nicholson contended that issues related to funding are not relevant to the Board as it is up to NZTA to decide whether or when TGP is funded, in

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70 EiC, paras 97-104.

71 EiC, para 112 – 115 and Rebuttal para 33-41.

accordance with NZTA's statutory function under LTMA. He was correct that the allocation of funding to TGP is a function for NZTA. However, while it is not for the Board to tell NZTA how to spend its money, the efficient use of natural and physical resources is a matter to which the Board is required to have particular regard pursuant to s7(b) RMA. That particular regard extends to issues of economic efficiency.

[245] However, we did not understand TGP to be driven primarily by economic imperatives but rather by the need to address the existing problems with SH1 and to provide a secure alternative. We accept that remedying these problems has economic benefits and may be quantified in economic terms. We accept the evidence of Mr Nicholson that the BCR for TGP, even considered in isolation, is better than that for upgrading the coastal route. To the extent that it is relevant, we consider that the BCR for TGP ought be assessed on the basis that it is part of the wider Western Corridor upgrade, of which it is an integral part.

[246] We accept the evidence of Messrs Copeland and Nicholson in general terms. We note that in NZTA's evaluative terms TGP has high strategic fit and high effectiveness. Ultimately it appears to us that how to weight TGP's economic efficiency in determining whether or not to proceed with the Project is a matter for NZTA to decide in undertaking its statutory duty of managing the road transport system. Factors relating to the present inadequacies of the coastal route and the provision of a secure alternative route appear to us to be of substantial weight in any such consideration.

**Forest Removal**

[247] Approximately 10ha of existing pine forest will be removed to enable construction activities. Ms Grant noted that forest removal in the Wellington region typically requires construction of access tracks, skid sites, and stream crossings. Effects during forestry removal can include sediment discharge, vegetative matter in streams, forestry trucks fording streams and/or culverts. She suggested that a condition was required to produce a Forest Harvest Plan to manage the potential effects from forestry operations and removing logs from the sites. She considered that approval of the management plan by the Regional Council was appropriate.

[248] Mr Edwards[72] supported Ms Grant's proposed condition for inclusion of a Forest Harvest Plan because it will ensure that forest removal is managed and carried out using best management practices.

[249] A condition to this effect will be imposed if consent is granted, as proposed by NZTA in E.27.

**Rail Infrastructure**

[250] Mr Vannisselroy gave evidence for RTS. He outlined various improvements which could be made to rail service delivery on the Kapiti line. These could reduce factors adversely affecting service and potentially counteract induced traffic effects of TGP. He identified existing structural and service limitations

[72] Rebuttal evidence, para 13.

and how they could be remedied to create a rail system which would attract more users.

[251] Mr Kelly considered that rail could not realistically meet the needs of many movements including freight. He said that each mode of transport had an important role to play and that improvements to the rail network would not replace the need for upgrades of the road network.

[252] Mr Nicholson[73] referred to the Western Corridor Transportation Study undertaken by the Regional Council and NZTA in 2004 and the subsequent adoption of the Western Corridor Plan in 2006. The Western Corridor Plan sought an improved road and rail corridor with investment in both. TGP was the preferred roading component.

[253] Improvements to the rail system and services have been undertaken, although there was no challenge to Mr Vannisselroy's evidence that there could be further improvements. Mr Vannisselroy did not suggest that rail could replace the need for a more reliable road corridor notwithstanding RTS's apparent preference for modes of transport other than by private car. The evidence which we heard was that with the rail improvements and TGP in place there was predicted to be an increase in real numbers using rail.

[254] None of the evidence which we heard led us to the view that operation of TGP would have an adverse effect on rail services or that rail could replace the need to upgrade the road transport system identified in the Western Corridor Plan.

**Treatment of the Existing State Highway (Coastal Route)**

[255] Much of the discussion regarding the coastal route, centred around the form and function of the coastal route following opening of TGP. We consider that there are two aspects of that issue which warrant consideration.

[256] The first is the treatment of sections of the coastal route which have ceased to be state highway and which are to be vested in the adjoining local authority. We have discussed that matter in the Legal Issues section of this report and take it no further here.

[257] The second aspect is what treatment may be required on the coastal route following the opening of TGP, irrespective of whether or not state highway status is revoked. There will be an intervening period of (possibly) two years or so between opening of TGP and revocation of state highway status, indeed that status may ultimately not be revoked at all, although all parties anticipate that it will be.

[258] In his rebuttal evidence, Mr Nicholson accepted that the coastal route will need to be treated or modified to ensure that it operates safely with the lower traffic volumes that are anticipated on the road after the opening of TGP[74]. Mr Wignall stated that as a result of TGP implementation, a range of treatment

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73 EiC, paras 33 - 39.

74 Rebuttal evidence, para 31.

and management measures on the existing SH1 are required[75]. Mr McCombs considered that treatment and management measures are not required because the road will be capable of carrying the lower volumes, but rather that management measures would produce a better outcome for the community[76].

[259] Ms Blake identified works that she considered need to be undertaken on the coastal route[77]. In closing, Mr Conway submitted that the conditions need to include a requirement to consider and implement treatment measures before TGP opens[78]. Mr MacLean[79] considered that safety measures should be implemented now and not following construction and identified the pedestrian bridge at Pukerua Bay as a particular concern.

[260] Mr Nicholson explained that treatment of the existing coastal route is not intended to comprise part of TGP. However, he accepted that maintenance issues and safety implications that may arise as a direct result of the revocation of the state highway status should be considered as part of TGP[80]. We consider that principle should apply irrespective of revocation and that the effects on the coastal road of TGP (such as reduction in traffic numbers) should be appropriately assessed.

[261] During expert witness conferencing the experts agreed that a ...*package of measures to address such conditions for all road users including aspects such as speed, safety, capacity, amenity, should be applied to the existing SH1 coastal route. This should be appropriately linked with the development of the project*[81]. At the hearing Mr McCombs stated that it is his view that it should be *appropriately linked* in terms of timing[82]. We shall return to this issue in the Conditions section of this report.

**During Operation - Travel Times**

[262] Mr Kelly stated that users of TGP will experience significant reductions in travel times between Linden and MacKays crossing. By 2026 weekday morning peak southbound travel times are predicted to reduce by 9.5 minutes (36%) and the weekday evening peak northbound by 18.6 minutes (52%), if TGP proceeds. Mr Kelly also said that there would be much greater travel time savings for motorists travelling between the Hutt and SH1 so that time saving benefits extended substantially beyond just commuters between Kapiti and Wellington**[83]**. Additionally, motorists on these routes would be subject to less variability of journey time and experience a safer road environment.

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75 EiC, para 5.3.

76 NoE, pg 158.

77 NoE, pgs 1277-1279.

78 Concluding Comments on Conditions on Behalf of Kapiti Coast District Council, 13 March 2012, pg 5.

79 Pukerua Residents Association – Submission 0046.

80 NoE, pgs 123, 129 and 130.

81 Expert Conferencing Joint Report to the Board of Inquiry (Second Meeting of Experts) Traffic and Transport, 19 December 2011, pg 3 para 6.

82 NoE, pg 156.

83 NoE,pg 171.

[263] As noted previously, Mr Kelly testified that the main alignment of TGP will carry between 18,300vpd north of Linden, and 22,300vpd south of Paekakariki. He acknowledged however, that some sections of existing roads will experience increases in traffic volumes as a result of TGP. These sections are in the vicinity of the access points to TGP, including the section of Kenepuru Drive immediately to the south of the proposed Kenepuru Link Road intersection. Mr Kelly considered that this area will be able to accommodate increased traffic volumes although users of those routes may experience increased delays[84]. NZTA and PCC submitted that such issues are able to be addressed as part of their normal roading functions as and when appropriate.

[264] Mr Kyle[85] considered that a monitoring programme would ensure appropriate action is undertaken should an adverse effect be detected. Minor and consequential effects and downstream changes to the network will undoubtedly happen as a result of TGP. These would be managed as part of normal Council roading operations and may not require any physical changes to the network.

[265] Other areas which may experience increased traffic volumes include the area between SH1 (north) and the Hutt Valley from vehicles using SH58 between TGP and SH2. NZTA has programmed a number of safety and capacity improvements to SH58, and Mr Kelly concluded that these will be sufficient to manage the proposed increase in traffic volume[86].

[266] We accept that operation of TGP will bring about substantial improvements in terms of journey time reduction, variability of journey time and safety compared to the existing SH1 system. Those improvements will apply to motorists using both the Wellington - Kapiti and Hutt - Kapiti routes. Consequential effects on the local roading network can be adequately dealt with by roading authorities managing the network in accordance with their normal functions.

**Pedestrian/Cycle Issues**

[267] There are two different aspects of pedestrian and cycle connectivity to consider for the Board, on-road and off-road. On road relates to commuter and recreational use of local roads and the coastal route while off-road relates to recreational and mountain bike use in and around TGP using cycle trails.

[268] On-road issues were addressed by Mr Kelly[87]. He noted that the removal of vehicular traffic from the existing SH1 and SH58 will create opportunities for the provision of improved and safer walking and cycling facilities. Mr Kelly said that the safety and amenity of cycle and pedestrian movements at the tie-in points of the Project had been a key design principle[88]. At MacKays Crossing, a segregated cycle path will be created between the existing SH1

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84 EiC, para 57.

85 MPL Section 42A report, Part 2, pg 8.

86 EiC, paras 59.

87 Including Mana Cycle Group and RTS.

88 EiC, para 76.

and the Queen Elizabeth Park entry, allowing the regional cycling network to be extended to and beyond this point.

[269] Mr Morgan for the Mana Cycle Group contended that creating opportunities is not the same as actually delivering a better level of service[89]. He claimed that it is not clear how people riding bikes will benefit from TGP unless improvements are made to current cycling facilities and that the level of service along this route is poor for walkers as well as cyclists[90]. Mr Morgan considered that the increase in daily traffic volumes on the section of Kenepuru Drive immediately south of the link road is likely to have a major negative impact on people riding bikes who have no option but to use this route[91]. He also testified that TGP will not contribute to increasing the modal share of cyclists. He said that the provision of additional cycle lanes on the existing SH1 route would make cycling easier, providing traffic speeds are controlled[92].

[270] In closing, NZTA accepted that a proposed condition in relation to the joint pedestrian and cycle path under the SH58 junction should be altered to include additional consultation so that the best practicable option was used in the design.

[271] Mr Kelly noted that an off-road cycle route is already available between Paremata and Paekakariki[93], but Mr Morgan claimed that the level of service of this section is very low and that TGP will result in no improvement, regardless of any decline in traffic numbers along the route[94].

[272] Ms Hayes stated that *...it is important that this project be considered as part of the western corridor package of improvements which is including rail, walking, cycling, demand management projects, and also in the scheme of the regional and transport programme as a whole*[95].

[273] Ms Blake was concerned that the impacts on pedestrians in Wellington City do not appear to have been analysed and that TGP will re-route traffic through urban areas that already struggle to adequately provide for pedestrians and other transport users (SH58 and Kenepuru) or previously unaffected areas (Waitangirua and Whitby)[96].

[274] With regards to an increase in heavy vehicle movements, Mr Kelly stated that *any change in traffic volumes in theory has some potential impact on cycle movements where those share the same road space but in this corridor, there is a separate space available for cyclists for most of its length*[97].

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89 NoE, pg 1295.
90 NoE, pg1293.
91 NoE, pg1293.
92 EiC, para 28.
93 Rebuttal Evidence, para 70.
94 NoE, pg 1294.
95 NoE, pg 863.
96 NoE, pg1279.
97 NoE, pg 911.

[275] Ms Thomas for Living Streets Aotearoa contended that to realise the benefits anticipated by TGP, some measures to improve pedestrian amenity on existing roads would have to be undertaken. She noted that there are currently severance issues affecting the existing coastal communities which are not addressed by the current proposals.

[276] We do not consider that TGP of itself makes the existing unsatisfactory situation for pedestrian or cycle users of the coastal route better or worse. What TGP does is create the potential for substantial improvements to the existing situation once TGP is constructed and the roading authorities have had the opportunity to assess volumes of use and driver behaviour on the coastal route. That is the time to develop appropriate pedestrian and cycling facilities. It is not possible for us to predict what those might be or impose conditions about those matters at this time.

[277] Off road issues relate to movements along and across the route itself associated with recreational usage, in particular use of Battle Hill Farm Forest Park and Belmont Regional Park. We analyse the evidence and submissions in that regard in the Conditions section of this report where we address these issues in conjunction with consideration of the relevant management plans.

[278] For the record, we note that as TGP will be designated as motorway[98], there will be no cyclist or pedestrian access to the road itself. At the northern end of the route between Paekakariki and Queen Elizabeth Park, there will be a cycle path created, but this is one of only two new specific on-road cycling or walking facilities proposed as part of TGP (together with investigation of a cycleway associated with the SH58 interchange). NZTA has confirmed that no other upgrades are proposed as part of TGP and that any future upgrades to existing roads would be the subject of discussions with local authorities and community groups as part of the state highway revocation process which is discussed separately.

**Local Road from Paekakariki to MacKays Crossing**

[279] KCDC sought the construction of a local link road at Paekakariki as a possible addition/alternative to on and off-ramps proposed to connect the existing SH1 to the TGP route. The current design would require vehicles travelling between Paekakariki and MacKays Crossing (in either direction) to use the TGP route for a short section of some 500m between on and off-ramps. The road proposed by KCDC would provide a connection from what is known as Sang Sue Corner to the MacKays interchange. Mr Wignall gave evidence on this proposal for KCDC. He considered that this connection was required *…for reasons of resilience, safety and local convenience, and for the development of a continuous local route through the district*[99]*.*

[280] Mr Wignall provided an indicative plan showing the possible route. More detailed plans were subsequently provided by Mr Edwards from NZTA[100]. Counsel for NZTA advised that Mr Edwards' plans resulted from questions raised by the Board in relation to the practicality of the design and did not

98 AEE, Section 1.2.1.
99 EiC, para 3.2.
100 Exhibits 12 and 13.

represent the views of NZTA. The fact that NZTA had to prepare plans for a KCDC proposal says something about the somewhat undeveloped nature of that proposal.

[281] The specific issues raised by Mr Wignall were:

- Resilience is a key principle of KCDC's Sustainable Transport Strategy and if no alternative route is provided between Paekakariki and MacKays crossing, this would be the only section without an alternative road between Wellington and Levin;
- He did not consider that the current road design adequately addressed safety issues involving a weaving section of the proposed TGP alignment;
- The continuous local route would increase accessibility to economic activity and better integrate the wider Kapiti community.

[282] Mr Nicholson commented on the local road in his rebuttal evidence[101]. He questioned why KCDC first raised this issue during our inquiry, particularly given KCDC's participation in a 2008 options assessment workshop and agreements that were made at that time which did not include any mention of an additional link road. Mr Nicholson stated that NZTA was …*happy to discuss the feasibility of a local road with KCDC during the detailed design phase of the TGP and to make available any land within the designation that is not required for the main TGP alignment or the on and off-ramps*[102].

[283] Mr Edwards[103] commented that the safety issues raised by Mr Wignall had been appropriately considered and addressed. Following two independent safety audits[104], specific design changes were made to address auxiliary lane lengths, weaving considerations and local connections.

[284] Mr McCombs testified that the proposed local route provided little practical gain as there would be little demand for a local connection between Paekakariki and MacKays Crossing. Mr McCombs confirmed that no BCR analysis had been produced on this option but that he had considered the proposal and considered the link described by Mr Wignall was …*a convoluted way of solving a relatively simple problem*[105]*.* We found it surprising that KCDC which was promoting the local road should suggest that NZTA was responsible to undertake the BCR analysis on that proposal.

[285] The Board has considered the local road in terms of the issues raised by Mr Wignall; resilience, safety and local accessibility, as well as the NZTA Project objectives.

[286] In terms of resilience, the Board notes that the NZTA objectives include providing an alternative strategic link which addresses safety and capacity issues on the existing SH1. It is clear that the proposed TGP alignment will achieve NZTA objectives. We accept that providing a parallel road in addition

101 Rebuttal Evidence, paras 10-26.
102 Rebuttal Evidence, para 26.
103 Rebuttal Evidence, paras 28-39.
104 Exhibits 4 and 5.
105 NoE, pg 155.

to the proposed TGP alignment would further improve the resilience of the roading system in this vicinity albeit over a quite short distance. However we accept Mr McCombs' reservations about the limited value of the parallel road in this instance. In terms of the objectives for the Project, the Board considers that the NZTA proposal will achieve its stated objectives, and an additional road (be it state highway or local road) is not required in this respect.

[287] Turning to the issue of safety, NZTA has conducted two separate safety audits throughout the design process and made changes to address significant issues raised. The safety audit process did highlight the merging and weaving section between MacKays Crossing and the existing SH1. NZTA made amendments to the design in line with the recommendations. The design changes appear to address issues raised by Mr Wignall and the weight of evidence is that the design of this section of TGP is appropriate.

[288] We consider that there may be something of a *disconnect* between the NZTA aim of moving traffic on the wider strategic network and the more locally focused access and accessibility issue raised by KCDC. There are clearly some options to achieve both aims which may be achievable by discussion between the parties, as highlighted by Mr Nicholson.

[289] We find that the TGP design advanced by NZTA is a safe and efficient method of providing for local and regional traffic needs in this vicinity and we accept the adequacy of the designation in that regard. Ultimately if KCDC wants an alternative local route it is not precluded from advancing such a proposal in its own capacity as a roading authority.

**Public Transport**

[290] Mr McCombs stated that a net outcome for TGP is promotion of a positive shift to public transport[106]. He acknowledged that TGP will divert some trips from rail to road, but will result in overall improvement in public transport use[107].

[291] Ms Hayes stated that based on the modelling undertaken by Mr Kelly there will be an increase in public transport mode share between 2006 and 2026, with or without TGP in place[108].

[292] At the hearing Mr Vannisselroy suggested that off-peak services may not be sustainable without considerably more growth than is indicated[109][110]. Mr Bodnar, on behalf of Public Transport Voice, raised a concern with the expected induced traffic[111].

[293] Mr Mellor contended that, without TGP, the peak period mode share of rail would be higher[112]. He discussed the impact of TGP on public transport

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106 NoE, pg 161.

107 NoE, pg 171.

108 NoE, pg 863.

109 NoE, pg 1192.

110 Table 2 of the Expert Conferencing Joint Report to the Board of Inquiry (Second Meeting of Experts) Traffic and Transport, 19 December 2011.

111 NoE, pg 1324.

112 NoE, pg 1214.

usage, using figures from Mr Kelly's[113] evidence suggesting that construction of the road would result in a reduction in public transport usage. Mr Kelly's evidence identified that the existing public transport usage during the morning commuter peak period is 29% of person trips, with this figure rising to 41% in 2026 without TGP and 32% with TGP. When questioned by the Board[114] regarding interpretation of these figures, Mr Mellor confirmed that these figures included other upgrade works identified through the Western Corridor study. He noted however that he considered TGP as a discrete project in the package of projects outlined for the Western Corridor.

[294] We understood Mr Mellor's point to be that if the rail improvements are undertaken (as we understand they largely have) and TGP is not undertaken, then rail will have a higher level of use than it would if TGP is undertaken. However that approach overlooks the fact that rail improvements and TGP are part of an integrated Western Corridor upgrade proposal which will lead to increased rail usage above present levels. Only doing half the job as Mr Mellor suggests will result in even higher rail usage but at the expense of leaving the existing problems with the coastal route unresolved and in the face of increasing demand.

**Main findings on traffic and transport effects**

[295] The evidence related to road design indicates that the design meets all current roading standards and has been through operation and safety reviews expected to be undertaken for a project of this size. There was some discussion regarding the appropriateness of the southern tie-in point at Linden, but the evidence of NZTA was that this is the most appropriate tie-in point and the Board accepts that evidence.

[296] TGP will bring about a substantial reduction in vehicle numbers on the coastal route and will provide a resilient alternative route with capacity to accommodate projected levels of traffic. It will remedy existing problems of delay and variability of journey times. It creates the potential for significant improvements on the coastal route for vehicles, pedestrians and cyclists and resolution of community severance issues.

[297] TGP generated construction traffic will be significant but will be mitigated to some extent by the use of internal haul roads. General construction traffic will be managed through management plans. Such plans have been used on many sizable infrastructure projects throughout the country and have proved to be a safe and efficient way of managing construction traffic.

[298] NZTA addressed the operating conditions following completion of the Project, and established that four lanes (two in each direction) were required to provide sufficient capacity to accommodate future traffic flows. NZTA modelling showed that the Project will reduce variation in travel times and does not require TDM measures to manage traffic on or accessing TGP.

[299] Although there was much debate in respect of the economic analysis of the project, we have accepted NZTA's evidence as to the strategic fit and

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113 Traffic and Transport Conferencing, 19 January 2012, Table 2.

114 NoE, pg 219.

effectiveness of the route. Those factors appear to be of signicant consequence in determining the efficiency of the Project.

[300] The Regional Council proposed a condition for a Forest Harvest Plan to ensure the management of timber removal is appropriately managed. This proposal was acceptedby NZTA.

[301] Various improvements to rail infrastructure were identified that could encourage increased rail usage. The Board is supportive of these goals, but identified no link to the effects of TGP which required the imposition of conditions on these applications.

[302] We find that there should be a process in place to verify the safety of the coastal route after opening of TGP and we will address that matter in the Conditions section of this report.

[303] In terms of on road pedestrian and cycle facilities on the coastal route, the Board received conflicting evidence from NZTA and submitters and there appears to be no common ground. Our conclusion is that there is no appreciable link between the effects of TGP and the need for mitigation to include construction of additional on-road pedestrian and cycle lanes on the coastal route. Those are existing issues. Construction of TGP creates the opportunity for roading authorities to remedy them. We will deal with off-road issues in the Conditions section of this report.

[304] In respect of the KCDC proposal to develop a local road connection between Paekakariki and MacKays Crossing, the Board understands the strategic desire of KCDC to have this link, but has concluded that the methodology used by NZTA has produced a design that is a safe and efficient method and provides for local and regional connectivity needs. As NZTA has indicated, there is an option for further discussion in relation to local connectivity issues that may result in a different ultimate design, but in terms of these designation applications, the Board finds that the design as proposed by NZTA is appropriate.

## 12.3 SEDIMENT

[305] TGP is a massive earthworks project, some 27km long, involving 6.3 million cubic metres of cut and 5.8 million cubic metres of fill with 0.5 million cubic metres of surplus fill. Cut batters of up to 80m and fill depths of up to 60m are required in the hilly terrain traversed. Most of the construction occurs in the catchment draining to the Porirua Harbour (Pauatahanui Inlet and Onepoto Arm). A northern portion of the Project lies in the Te Puka catchment that drains to the west coast. The management of the production and the control of sediment from the construction activities and the effects of sediment released to the streams and in particular to the Pauatahanui Inlet is a particularly important issue arising out of TGP, if not the most important.

[306] Extensive analysis was undertaken by the Applicants of the sediment production process, of the control of the sediment on site, of the transport of sediment in the streams and of the fate of the sediment reaching the Porirua Harbour. Associated with this work, evaluation was required of the hydrology

(rainfall, stream flow, sediment transport) expected during the six year project. Also modelling of the currents and settlement patterns in the Pauatahanui Inlet and Onepoto Arm needed assessment. This work was provided by the Applicants in the technical reports that formed part of the AEE prepared for the applications.

[307] The Director-General challenged the results of this work. It was the opinion of this submitter that the quantity of sediment that would be produced and released into the environment would be much greater than had been estimated and that the risk of even larger volumes entering Porirua Harbour than the Applicants had calculated was very significant. Consequential effects in the Pauatahanui Inlet would be drastic and unacceptable.

[308] The Director General considered the production of sediment from the earthworks to be seriously under-estimated by the Applicant, the effectiveness of control measures to be over stated, the effects of storms to be under-estimated and the sediment deposition in the Pauatahanui Inlet to be overwhelming.

[309] So, in respect of the effects of sediment discharges, the issues before us were:

- What is the background sediment runoff from the catchment;
- How much sediment is likely to be generated by the earthworks;
- What is the likely storm pattern during the construction period;
- How effective are the available sediment capture and control methods;
- What is the fate and effect of the sediment reaching the Pauatahanui Inlet and the Onepoto Arm;
- What is the probability of more severe outcomes; and
- What monitoring, corrective actions and conditions ought to be required.

[310] Over the following paragraphs we will work our way through these issues drawing on the evidence presented to us and the reports we commissioned under the provisions of section 42A RMA.

**Baseline sediment yields**

[311] Ms Malcolm was called by the Applicants to give us evidence on the baseline sediment yield from the catchments affected by the project and the additional production of sediment from the construction site during the earthworks activity. She also provided estimates of the sediment generation from storm events during construction. Besides confirming her evidence she advised that she was the co-author and lead reviewer of TR15.

[312] The baseline average annual sediment loss for each of the catchments affected (expressed as Kg/hectare/year) was calculated using the Universal Soil Loss Equation (USLE). This formula included factors related to rainfall, soil erodibility, ground slope, ground cover and ground surface roughness. By

altering the factors, changes in land use can be assessed. The formula does not include sediment arising from gully erosion, mass movement or stream bank erosion and it applies to plot scale areas[115].

[313] Another estimate of sediment yield from the catchments is provided by a formula developed by NIWA. It is referred to as the Suspended Sediment Yield Estimator (SSYE) and has been calibrated against a large NZ data set, but it cannot be used to assess changes in landuse.

[314] So Ms Malcolm compared the results for the two approaches and in order to achieve equality between the two methods of estimating the average annual baseline sediment yield at the receiving environment (i.e. in the harbour) she applied a correction of 0.17 to the results of the USLE formula. She styled this factor as the Sediment Delivery Ratio (SDR) and said ...*For the baseline scenario, this SDR simplification is acceptable, because the interest is in sediment yield from all sources, to provide the context for the additional sediment that will be generated from the road construction*[116].

[315] Results from this exercise were recorded in TR15 at Table 15.19. The estimated baseline annual sediment yields from the eight catchments range from 793 tonnes from the Ration catchment to 5889 tonnes from the Pauatahanui catchment. These results represent a sediment yield of between 65 and 197 tonnes per square kilometre (or g/m2). (Note there seems to be an error in the heading of the fourth column of the table where it refers to tonnes per km instead of per sq km.) Table 15.19 is reproduced in part below.

| Catchment | Annual Sediment Yield (tonnes) |
|---|---|
| Duck | 1144 |
| Horokiri | 5296 |
| Kenepuru | 826 |
| Pauatahanui | 5889 |
| Porirua | 3970 |
| Ration | 793 |
| Te Puka/Wainui | 1520 |
| Whareroa | 2022 |

[316] Ms Malcolm developed sediment rating curves for estimating the sediment generation of storm events. Observed data were used to define the sediment rating curves for the Horokiri and Pauatahanui catchments. Synthesised stream flow data and sediment generation estimates from the scaled USLE methodology were used to define the sediment rating curves in the other catchments. The rating curves together with particular storm flows were then used to estimate the sediment discharges during storm events.

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115 EiC, para 22.
116 EiC, para 110.

[317] Historic rates of sedimentation in the Onepoto Arm 1974 – 2009 have been 5.7mm per year or 13,500 – 14,000 cubic metres per year. In the Pauatahanui Inlet, over the same period, sediment deposition has been 9.1mm per year or 42,000 – 43,000 cubic metres per year.

[318] Harbour sedimentation rates from the predicted baseline sediment yields of the catchments over a 20 year period are given as 2.5mm per year (5900 cubic metres per year) in the Onepoto Arm and in the Pauatahanui Inlet 3.4mm per year (15,500 cubic metres per year). These results are just 44% and 37% respectively of the measured sedimentation.

[319] Ms Malcolm considered that sedimentation in the harbour during 1974 – 2009 will have been higher than natural because of the extensive subdivision developments of Whitby, Papakowhai and Browns Bay. There will also have been a contribution of sand from the marine area. She considered, after allowing for the catchment developments, that the harbour sedimentation comparison confirmed the reality of the baseline sediment yields from the catchments.

[320] Ms Malcolm described a further method to check the accuracy of the sediment yields from the eight catchments. A long term simulated flow record was generated from measured flow records and combined with the sediment rating curves to estimate the long term discharge of sediment to the harbour. The result compared favourably with measured harbour sedimentation.

[321] Dr Basher gave evidence for the Director General about the estimation of baseline sediment generation from the catchments and on the project sediment generation. Dr Basher is well versed and highly experienced in soil erosion research and consultancy.

[322] With reference to estimating the baseline sediment yield from the catchments Dr Basher considered the use of the USLE analysis to be inappropriate because it does not adequately include catchment wide processes that affect the actual yield of sediment from the catchment. He preferred the SSYE approach for catchment wide baseline estimates of sediment generation. Ms Malcolm agreed because, using an SDR of 0.17, she scaled her baseline sediment yield estimates from the USLE approach so that they matched the SSYE results.

[323] Dr Basher also told us that other systems of analysis for catchment sediment yield estimation were available and could give more accurate results than USLE or SSYE methods. He mentioned GLEAMS (Groundwater Loading Effects of Agricultural Management Systems) and WEPP (Water Erosion Prediction Project) but acknowledged that significantly more detailed information would be required to apply these other analysis systems than was available at this time for the TGP.

[324] Ms Malcolm's work was peer reviewed by Dr Fisher. Dr Fisher accepted that scaling the baseline sediment yield results from the USLE analytical process so that they match the results from the SSYE approach is a satisfactory way of estimating baseline sediment yields from the catchments to the harbour. He

noted that the GLEAMS methodology is a better model but it requires more detailed information than is available for this project at this time.

[325] The Board considered the effects of the discharge of sediment from the construction and its comparison with the baseline discharge of sediment were key matters and that these were complex subjects. Like Dr Basher we found the explanations difficult to follow so we instructed Dr Hicks to provide us with a *Peer Review of Sediment Generation and Yield Aspects*. This he provided in January 2012.

[326] With respect to the baseline estimate of sediment yields from the catchments Dr Hicks considered that calibrating the USLE results with the SSYE estimate effectively means the later method is relied upon. He retained the view that ...*there remains an approximately factor-of-two uncertainty on the baseline mean annual sediment yields*. If the baseline estimates are low and the project generated sediment discharges are higher than the estimates the signature of the project on the downstream environment will be higher[117].

[327] To reduce the uncertainty of the baseline sediment discharge to the harbour Dr Hicks recommended that stream flow and sediment discharge be monitored for two years prior to commencing construction.

[328] Finally on this subject, we refer to the several expert caucusing reports provided to us. The experts were generous in meeting seven times, including four times during February 2012 and once with the planners, to discuss their opinions and their differences and we are grateful for the resulting advice we were given.

[329] The experts agreed that the SSYE is the best model for providing the baseline sediment estimates and appeared to agree with the scaling of the USLE results to match the SSYE results[118].

**Main findings on baseline sediment yields**

[330] We know that estimates are just that. They often have wide uncertainty ranges especially when dealing with the sediment discharge of streams. They have to be viewed as a guide as to the magnitude of the sediment discharge, not an absolute value. No doubt more monitoring might reduce the uncertainty, that is obvious, but here we are charged with evaluating whether or not sufficient is known about the subject to make an informed and reasoned decision. Taking into account the evidence and the assistance the experts gave us through caucusing, we are satisfied that the baseline sediment yields from the catchments have been estimated satisfactorily for the purpose and are appropriately recorded in Table 15.19 of TR15 (reproduced in part in para [315] above).

**Sediment production from earthworks**

[331] Ms Malcolm provided us with estimates of the quantity of sediment likely to be produced by the earthworks including an allowance for the Transpower works

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117 Hicks Updated Statement 20 February 2012.

118 Expert conferencing Joint Report to the BOI of 7 & 8 December 2011, paras 10 and 11.

required to relocate the transmission line. She used the USLE analysis method to estimate the sediment generated by the earthworks including the scaling down by the SDR of 0.17. The analysis is also undertaken for discrete rainfall events as they are the triggers for erosion and the discharge of sediment.

[332] Estimates of the effect of construction sediment on streams were made for the peak year of construction in each catchment. In respect of the harbour some 37.5ha of open earthworks were assumed in the Pauatahanui Inlet catchment and 17.5ha of open earthworks in the Onepoto Arm catchment. The areas of active earthworks in each of the catchments is given in Table 15.2 of TR15 and reproduced below:

| Catchment | Active length (km) | Active area (ha) |
|---|---|---|
| Whareroa | 0.6 | 4.5 |
| Te Puka | 2 | 15 |
| Horokiri | 2.8 | 21 |
| Ration | 3.2 | 24 |
| Collins | 0.4 | 3 |
| Pauatahanui | 1.8 | 13.5 |
| Duck | 1.8 | 13.5 |
| Kenepuru | 1.1 | 8.25 |
| Porirua | 1.8 | 13.5 |

[333] To undertake a comparison of the total suspended sediment in the streams without TGP and with TGP, Ms Malcolm chose four discrete rainfall events to analyse; the $^1/_3$ of the two-year Annual Return Interval (ARI), the two-year ARI and the 10-year and 50-year ARI rainfalls. She said ...*these storms were chosen because they reflect a range of events from small events that are almost certain to occur during the construction programme through to a large event that could occur but is unlikely.*[119]

[334] The range of increases in total suspended sediment (TSS) in the streams are given by Ms Malcolm[120] as 2% in the Pauatahanui and Porirua and 75% in the Collins for the $^1/_3$ of the two-year ARI rainfall. For the 50-year ARI rainfall, the increases in TSS range from 4% in the Porirua to 158% in the Collins. She concluded that effects on the streams are likely to be limited to up to a 1mm of deposition on the stream bed, although there could be up to 8mm deposition on the Whareroa stream bed in a 50-year ARI rainfall.

[335] Turning now to the discharge of sediment to the harbour, Ms Malcolm assessed there would be an additional 200 tonnes of sediment (a 5%

119 EiC, para 50.
120 EiC ,para 51.

increase) discharged to the harbour in a two-year ARI rainfall from TGP. In a 10-year ARI rainfall the increase would be 271 – 645 tonnes (4 – 9%)[121].

[336] Following a similar approach, Table 15.23 in TR15 recorded the sediment loads being discharged from each of the streams to the harbour with TGP and without TGP for the three rainfall events, two-year ARI, 10-year ARI and 50-year ARI. These figures show that sediment discharged to the Pauatahanui Inlet from TGP, is 160 tonnes (5.7% of total sediment discharge) in a two-year ARI rainfall, 818 tonnes (5.6%) in a 10-year ARI rainfall and 3656 tonnes (11.1%) in a 50-year ARI rainfall.

[337] Table 25 of TR15 recorded the estimated additional sediment load into the harbour for the six-year construction period as follows (catchments with zero values removed).

| Catchment | Additional Sediment Load (tonnes) |
|---|---|
| Collins | 23 |
| Duck | 762 |
| Horokiri | 1717 |
| Kenepuru | 167 |
| Pauatahanui | 241 |
| Porirua | 84 |
| Ration | 30 |

[338] The total is 3024 tonnes of sediment discharged to the harbour during the construction period which is 4.6% of the baseline sediment discharge during the 6 year period.

[339] Dr Basher considered that the Applicants have underestimated the likely sediment yield from construction activities. He had several reasons for this view.

[340] While he accepted the use of the USLE methodology for estimating sediment yields from discrete construction sites he considered the SDR should be 0.5 for slopes up to 10 deg and 0.7 for slopes over 10 deg instead of the 0.17 used by Ms Malcolm. That is a three to four fold increase in the estimate.

[341] He was concerned that not all sources of construction sediment had been included in the assessment. In particular, he mentioned haul roads, extensive culverting and works associated with bridging and transmission tower relocation.

[342] He also considered that adopting an efficiency of 75% removal for the sediment control practices and 70% for sediment ponds up to the 10-year ARI was optimistic.

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[121] EiC, paras 59 and 60.

[343] At several places he referred to a difficulty in understanding some of the analytical processes used by Ms Malcolm (e.g. derivation, adjustment and use of the rating curve approach to storm event sediment loads)[122].

[344] He also raised the uncertainty inherent in the sediment production estimates and said that compared to other major roading projects he considered the level of detail of design for this project is much less, adding to the uncertainty in the estimates. No assessment of the uncertainty was given.

[345] The criticisms of the sediment production estimates from construction given in Ms Malcolm's evidence and in TR15 caused Ms Malcolm to readdress the process and apply the USLE analysis in a more detailed fashion. She analysed sediment production at 10m intervals along the alignment and included earthworks for the stream diversions, haul roads and other works.

[346] This work was provided as a report from SKM titled USLE REVISED ANALYSIS Revision A of 20 January 2012 and was attached to the Expert Conferencing Report – Earthworks & Sediment Control Conferencing dated 20 January 2011 (presumably should have been 2012). The relevant experts, Dr Basher, Dr Hicks, Dr Fisher and Ms Malcolm agreed that the revised estimate provided a better estimation and a reduced uncertainty in modified USLE parameters.

[347] The report of the revised analysis is quite abbreviated and in places not entirely clear. Ms Malcolm, in a statement of rebuttal evidence, gave us further explanations which clarified some of the matters.

[348] The revised USLE analysis began by revising the area of earthworks in each catchment. Some were reduced and some increased but overall the total area was reduced by 5.7ha or 5.4%. Then account was taken of the different soil types encountered along the route with the erosivity factor being governed by the areas of rock and colluvial material expected. Realistic length and slope factors were set based on the cross sections and long sections of the road and associated works. Soil surfaces were assumed to be bare earth except in the Ration catchment where earthworks are to take just nine months so some of the time the soil will be grassed. Rough irregular surfaces were assumed for the active earthworks. Then a major change to the sediment delivery ratio was adopted. Instead of the factor being 0.17 it was made 0.5 and 0.7 depending on the slope and proximity to a stream.

[349] Results were presented in a series of tables that are not fully self explanatory. For example the revised USLE analysis for the Kenepuru catchment from Table 14 labelled *Revised results kg/ha/yr* is reproduced below.

| **Catchment** | | **Road** | **Fill Sites** | **Stream Works** |
|---|---|---|---|---|
| Kenepuru | Area | 12.1 | 2.2 | 0.1 |
| | Untreated kg/ha | 68035 | 22756 | 11225 |
| | Treated kg/ha | 7266 | 6827 | 7858 |

[122] EiC, paras 52e, 53, 55c, 55d and 56.

[350] The revised area in the Kenepuru catchment given in Table 1 is 17.0ha, not 12.1 or a total of 14.4ha as per Table 14. The gross production of sediment is 102,016 kg/ha, but the table is labelled kg/ha/yr, so one must assume that is the annual average from the USLE methodology. It is not clear what area the results relate to so the total contribution cannot be ascertained. The next row refers to a *treated* result. The treatment is not specified but is assumed to include onsite erosion prevention techniques and sediment retention devices. It produces a reduction of 79%. How the discharge of sediment after treatment compares with the earlier estimate of sediment discharge during construction from the Kenepuru catchment of 167 tonnes is unclear.

[351] And so the table goes on for the other catchments together with the uncertainties.

[352] In Table 17 the 24 hour storm sediment yields from each catchment without TGP and then with TGP and the revised sediment yield are given. Then in Table 18 the revised increases in storm sediment yields from construction are given but presumably after treatment. They show that in total the revision has reduced the estimates by 25 – 27%, although in the Kenepuru catchment the revised result is some 50% greater than first estimated, mainly due to the inclusion of the surplus fill areas.

[353] Ms Malcolm concluded that ...*the revised analysis has confimed that the estimates calculated using the USLE scaled to the SSYE for the assessment of effects, provides a similar estimate to the detailed USLE calculations.* (USLE Revised Analysis 20 Jan 2012 para 5). In her rebuttal evidence[123] Ms Malcolm compared the initial estimates of sediment yields with the revised estimates and noted ...*how conservative the initial assumptions were.*

[354] Dr Hicks considered that the sediment yields from the project-affected slopes depend on the assigned USLE coefficients and the assumed efficiencies of erosion control and sediment trapping measures. He accepted that the revised USLE analysis was a more detailed and improved assessment of the sediment expected to be generated off the project-affected slopes. He emphasised that a key factor will be that the planned erosion and sediment control measures perform as assumed.

[355] He said the Project requires conservative erosion and sediment control measures and careful monitoring of construction practice and sediment delivery into key streams. He retained a reservation that the estimates of storm event sediment discharges might be too low. A conservative approach would be to double them.

**Main findings about the likely discharge of sediment from construction**

[356] Obviously the total amount of sediment discharged from the Project will depend on the pattern of rainfall experienced during the construction period when earthworks are open or unstable and will also depend on the area of open or unstable earthworks. To estimate the total requires consideration of the construction programme and area of open earthworks with the probability of various rainfall ARIs and the sediment yields for each of the rainfall events

[123] Para 16.

during the project work period. This does not seem to have been done for a six-year construction programme but Table 25 in TR15 records the results from a 20-year simulation. The total additional sediment contributed to the harbour from construction is estimated to be 3024 tonnes. The natural sediment load to the harbour over the 20-year period is given as 244,678 tonnes or 12,234 tonnes per year. That would be 73,403 tonnes during a six-year period and the additional contribution from construction would be 4.1%.

[357] We are acutely aware of the difficulties in deriving estimates of sediment runoff from major earthwork construction. It is an inexact science with significant uncertainties. The consequences in this case on the Pauatahanui Inlet could be significant if major exceedences from estimated levels of sediment discharge occur. Construction practices designed to minimise the production of sediment laden runoff together with the capture and treatment of the runoff are the best means to prevent unacceptable offsite environmental effects.

[358] We have also taken into account the reducing effect on the baseline sediment generation of retirement and planting of some 534ha (initial estimate - now 625ha proposed) of land in the TGP catchments. Table 15.26 of TR15 shows a reduction of 457 tonnes of sediment generation per year. This is an ongoing and permanent improvement. Once the planting has matured sufficiently to have full effect it will take 6.6 years to offset the additional sediment discharge from TGP. Thereafter the baseline sediment generation is permanently reduced by 3.7%.

[359] The significant benefit from the Project's offset planting alleviates uncertainty about the ultimate level of additional sediment to the harbour. If it turns out to be twice as much, as suggested by Dr Hicks, then full offsetting of the effects of increased sediment volumes would still occur but it would take 13 years.

[360] Both Dr Basher and Dr Hicks expressed difficulty in understanding and following the sediment generation analysis. We did too. We were not helped by the sometimes incomplete description of processes, unclear assumptions, poorly defined nomenclature and confusing comparisons. The USLE methodology was incompletely explained in the evidence to which we were referred and appeared to us to be just a series of coefficients with arbitary values and no units and which was said to produce the annual average sediment yield in tonnes/ha/yr. The investigation and design of cuts, fills, roading, culverts, bridges etc use well defined terms, assumptions and analyses. It would be helpful for erosion control experts to apply the same kind of engineering rigour to their analysis and reporting.

[361] The saving grace for us is that the experts through conferencing have been able to advise that there remain no serious matters of disagreement on the overall quantities of sediment likely to be produced by TGP. Differences remain over the estimates of sediment from storm events. In general, the experts say the key to avoiding the discharge of excessive amounts of sediment lies in careful on-site management to minimise the generation of sediment, limiting the extent of active earthworks in each catchment,

stabilising areas before storm events, the capture of runoff containing sediment and the efficient removal of the sediment before discharge.

[362] We are satisfied that on the information available the additional sediment likely to be discharged to the harbour during construction has been reasonably estimated to be about 3024 tonnes and is of the order of 4 – 5% of the baseline sediment discharge without TGP construction. This conclusion relies on the assumptions related to:

- The areas of open earthworks at any particular time;
- The adoption of best practice for limiting the generation of sediment runoff;
- Stabilising active earthwork areas before storm events;
- Capturing and treating all sediment laden runoff from active earthwork areas so that 70% of the sediment is retained; (although Ms Malcolm[124] referred to 75%)
- Monitoring the actual discharge of sediment and adjusting practices to ensure sediment discharges from construction do not exceed the estimates given in the AEE;
- Planting and retirement is undertaken of at least 534ha of catchment.

[363] We are also satisfied that long term there will be a net improvement in the baseline sediment discharge brought about by the project.

[364] Conditions are required to ensure the validity of the assumptions.

**Storms during the construction period**

[365] Construction is estimated to take six years. During that time some heavy rainfall events can be expected. As noted above, storms considered by the Applicants when analysing likely sediment discharges were $^{1}/_{3}$ of the two-year ARI, the two-year ARI, the 10-year ARI and the 50-year ARI.

[366] Dr Sim advised us about the probabilities of these events happening during the construction period of six years. She told us that there is a 95% probability that at least one rain event with a rainfall at the ARI two-year level or greater will occur over a six-year period. She also advised that there is a 45% probability that at least one rain event with rainfall at the ARI 10-year level or greater will occur over a six-year period. These are as recorded in Table 15.35 of TR 15.

[367] Rarer events such as the 50-year ARI and 100-year ARI rainfalls have relevant lower probabilities of 11% and 6% respectively.

[368] Dr Hicks raised the likelihood that rarer events might cause greater sediment discharges to the harbour, and while this is inherently true, Ms Malcolm referred to Dr De Luca's opinion that baseline sediment discharges are

[124] EiC, para 45.

proportionately higher and so the effects of the construction sediment are less than those estimated for the 10-year ARI.

[369] Ms Malcolm also revised the estimated sediment discharges from the various catchments for the two-year ARI and 10-year ARI storms. As recorded in paragraph [352] the revised estimates are 25 – 27% less than those given in TR15 except for the Kenepuru catchment which had increased by about 51%.

[370] The experts in their report of 13 February 2012[125] agreed that climate change impact on erosion processes within the construction timeframe is likely to be within the inherent variability of the existing climate.

[371] Dr Hicks retained a reservation that the revised estimation of sediment discharges from storm events might be too low. Ms Malcolm advised that the environmental effects in the harbour remain based on the earlier higher estimates. She also described further sensitivity analyses assuming 30% more sediment during storms and reported only small changes in the distribution of the sediment in the harbour.

**Main findings on the treatment of storms**

[372] We are satisfied that the range of storms, their probabilities and their effect on the discharge of sediment from construction have been adequately assessed. Uncertainties in the assessments do not lead us to doubt the overall estimates of sediment generation from the project.

**Sediment capture and control**

[373] The ecological assessment of effects assumed that effective erosion and sediment controls are established and maintained during construction. Mr Gough presented evidence for the Applicants concerning the control of sediment during construction. He said the steps involved were to minimise erosion and control and retain sediment within the work site.

[374] He described erosion and sediment control measures as including; minimising disturbed surfaces and bare soils, stabilising soil surfaces and steep slopes, installing clean water perimeter controls, collecting internal surface water for treatment and treatment facilities to retain sediment. Details are to be included in site specific erosion control plans. He said that the erosion and sediment control (ESC) design for the project is at the concept stage with only enough detail to determine whether the ESC measures could be applied.

[375] Mr Gough referred to a target erosion control performance rate of 75% as recorded in paragraph 9.6.1 of TR15. He said ...*this performance rate can be achieved by restricting the area of earthworks and unstabilised areas along the extent of the alignment to no more than 25% of the total area*[126]*.* With a construction footprint of 270ha the maximum area of active earthworks would then be 67.5ha. Later he amended this requirement to reflect Ms Malcolm's preference to restrict non-stabilised earthworks to particular lengths of road corridor within specific catchments.

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125 Para 8.
126 EiC, para 45.

[376] Separately he referred to sediment control measures that are designed to capture sediment that is not retained by the erosion control measures. Devices include ponds, earth decanting bunds and proprietary devices such as shipping containers or tanks. He assessed the average long term pond efficiency rate as 70% sediment removal. Table 15.16 in TR15 gave the sediment removal efficiencies of sediment ponds adopted for the project as 70% for the two-year and 10-year ARI storm events and 40% for the 50-year ARI storm event.

[377] Mr Gough then referred to conditions needed to achieve these requirements and to monitoring.

[378] Mr Handyside presented evidence for the Director General. He raised issues about the lack of detail in the ESC measures proposed, the efficiencies to be achieved in the sediment ponds and other sediment control devices, the use of the USLE method for estimating sediment generation from earthworks and the additional contribution of sediment from the stream diversions, culvert construction and surplus fill sites.

[379] Mr Handyside was particularly critical of the draft site specific erosion management plan (SSEMP) for works in the Te Puka stream. He said the plan ...*would not comply with a number of the proposed conditions, does not comply with the GW guideline* and that *the proposed control measures do not, in my view, represent best practice and the SSEMP does not demonstrate that effective erosion and sediment control can be achieved*[127].

[380] In respect to the use of the USLE method of estimating sediment yield Mr Handyside described an example of its use in the Duck Creek catchment. From his analysis he concluded that the actual discharge of sediment to the Porirua Harbour could be twice the Project's assessed sediment yield. He also showed how effective limiting the area of open earthworks can be in reducing the discharge of sediment.

[381] Mr Handyside agreed with the proposed erosion and sediment control philosophy, practice measures, chemical treatment of all ponds and decanting earth bunds, and that the stricter of either the Regional Council or the NZTA guidelines be followed. He considered that the draft SSEMPs proposed need more detail and that the efficiency of overall treatment might be over-estimated.

[382] Mr Handyside also provided detailed comment on the proposed conditions. Development of the conditions began with a draft set provided by the Applicants and were modified as the case progressed and expert conferencing continued.

[383] Mr Gough responded by providing further details of SSEMPs for the Te Puka Stream works and for the Duck Creek bridge works. He considered these details showed how effective sediment control would be implemented. Notwithstanding Mr Handyside's reservations, he remained confident that once detailed SSEMPs were designed and agreed by the Regional Council the required 70% removal of sediment would be achieved. He agreed with a

[127] EiC, para 43.

suggestion by Ms Grant for the Regional Council that levels triggering a review of sediment removal performance be set at 75% removal or a 5% drop in performance.

[384] As for the estimates of sediment yield from the earthworks, the Board was concerned to get further expert advice on the provision of erosion and sediment control. The Board engaged Mr McLean from SouthernSkies Environmental Ltd.

[385] Mr McLean concluded that the management of the effects of sediment discharges proposed for TGP is industry best practice. He considered that the SSEMPs still lack sufficient detail but expected that to be remedied when submitted to the Regional Council for acceptance. Limiting the area of active earthworks and effective stabilisation are the two most effective means for controlling the generation of sediment. He took part in the expert conferencing and has contributed to the development of appropriate conditions. He supported monitoring of stream water quality before and during the construction and restricting further the discharge of sediment if that proves necessary.

**Main findings on sediment capture and control**

[386] The detailed provisions proposed to control sediment generation and to control the discharge of sediment during construction have not been yet determined so the key matter for us is to ensure definite and measurable results are stipulated for these works. The uncertainty in estimates of the discharges of sediment from the Project reinforce the need to require strict, enforceable and predictable treatment standards for sediment laden runoff.

[387] An approach that was obvious to us after reading the evidence before the hearing was to have a requirement that the sediment laden runoff from all, or up to 95%, of the Project earthworks area ought to be captured for treatment in a compliant sediment retention device. Physical reasons might prevent runoff from some small areas not being fully captured so an allowance of up to 5% was permitted provided each case was accepted by the Regional Council.

[388] In our view a requirement of this nature provided certainty that the sediment laden runoff would be treated adequately to ensure the assumptions made in assessing the environmental effects of the sediment discharged were achieved. It also has the benefit of encouraging on site erosion prevention measures to minimise the generation of sediment runoff and effective perimeter drainage to keep clean water from being contaminated.

[389] The Board conveyed this to the parties at the beginning of the hearing for their consideration.

[390] In the end the Applicants proposed some amendments to the conditions that gave partial recognition to the suggestion, but the explicit requirement we suggested was missing. Under a heading *Erosion and Sediment Control objectives, standards and design criteria* a suggested condition attached to the earthworks and discharge consents labelled E.7(f) requires ...*Treat all sediment laden discharges from the site arising from the works using erosion*

*and sediment control measures implemented in general accordance with the ESCP and any relevant SSEMP.*

[391] We consider this condition to be close to meeting our concerns but not quite precise enough. We want all sediment laden runoff from the site arising from the works to be treated in a compliant sediment retention device.

[392] A compliant sediment retention device is defined as ...*A device which has a volume of 3% of the contributing catchment, 3 to 1 length to width ratio, floating decants and a rainfall initiated chemical treatment system and meets the design criteria specified in the ESCP, and otherwise meets the design criteria specified in NZTA's Draft Erosion and Sediment Control Standard for Highway Infrastructure and Draft Field Guide for Contractors or the GWRC Erosion and sediment Control Guidelines for the Wellington Region whichever is the more stringent.*

[393] Condition E.7(f) should therefore read ...*Treat all sediment laden runoff from the site arising from the works using a compliant sediment retention device together with any other erosion and sediment control measures implemented in general accordance with the ESCP and any relevant SSEMP.*

[394] We realise that in some locations it may be impractical to use a compliant sediment retention device. In these locations other methods of sediment retention may be used but only with specific acceptance by the Regional Council and only to the extent of in total 5% of the Project earthworked area.

[395] Such a condition would read ...*E.7(g)...Notwithstanding the requirements in condition E.7(f) above, other sediment retention devices may be used where it is impractical to use a compliant sediment retention device, provided the WRC accepts each proposal and the total area from which runoff emanates does not exceed 5% of the total Project earthworks area.*

[396] The Applicants have provided draft conditions covering the development and acceptance of management plans, monitoring requirements and corrective measures if required. We are satisfied that they are comprehensive and adequately address the other matters raised during the hearing.

## 12.4 HYDROLOGY

[397] The project traverses the catchments of the Te Puka Stream at the northern end, the Horokiri Stream south of the Wainui Saddle, the Ration Stream by the Pauatahanui Golf Course, the Pauatahanui Stream in the vicinity of Haywards Road (SH58), then Duck Creek behind the suburb of Whitby, the Kenepuru Stream behind the Porirua suburb of Waitangirua and finally the Porirua Stream. At its northernmost end there will be some tie in works within the Whareroa Stream catchment. Some works are also located in the bottom of the Wainui Stream where it joins the Te Puka Stream.

[398] Mr Martell provided us with a statement of evidence covering the hydrological aspects of these streams on behalf of the Applicants. He was the senior advisor, contributing author and reviewer of TR14, Hydrology and Stormwater Effects.

[399] Each stream affected by TGP has been evaluated carrying a 10-year ARI event (Q10), a 100-year ARI event (Q100) and a 100-year ARI event increased to account for a climate change (Q100cc). The evaluation was made without TGP and with TGP. Flood effects of the Project arise mostly from alterations to natural or existing drainage, encroachment of embankments into flood plain storage and additional runoff from the impervious surface of the new road. Some fine tuning of the culverts, bridges and alignments have been made to avoid or minimise flooding effects.

[400] Design of the culverts and bridges is conceptual at this stage of the Project so it is important to record the basis for their detailed design. Relevant standards were given by Mr Martell[128] so conditions of consent need to reflect these. In particular, culverts are to be sized to convey the critical duration 10% annual exceedence probability rainfall storm event without heading up above the culvert soffit. The road surface level should be at least 500mm above design stormwater levels for a 1% exceedence probability event.

[401] We now record the more important flooding effects from the new road at sites where the effects have required a more detailed consideration.

[402] At Pauatahanui the new road crosses the Pauatahanui Stream and SH58, the Paremata/Haywards Highway. There is to be an interchange here with the new road on an embankment passing over the roundabout interchange below. There is to be a bridge over the stream and two bridges over the lower interchange roundabout legs.

[403] This area is already flood prone even in the Q10 event. Two existing bridges form additional constrictions on the flood flows and in a Q100 there is flooding over residential properties and an electrical substation.

[404] The solution proposed to deal with increased flooding caused by the new road embankment is to provide a maximum single span 28m bridge across the Pauatahanui Stream and to keep the new roundabout road level low enough to act as a secondary flow path in extreme flood events when up to 500mm water depth would occur over the roundabout road. Some additional flooding would occur upstream and downstream of the new bridge including the low lying land at the back of four residential properties in Joseph Banks Drive. If the rare and not severe additional flooding of those sections needs avoiding, a bund or other solution is possible. Downstream of the interchange some improvement in flood levels is achieved for the substation and neighbouring residential properties.

[405] Bridges 4, 6 & 8, numerous culverts and lengths of stream realignment are involved in the new road's alignment down the Horokiri Stream. In the steeper upper reaches stream flood flows are confined but in the lower reaches, where the land alongside is flatter, flood water escapes the channel and in a Q10 threatens four buildings and in a Q100 threatens seven buildings. An existing box culvert at Paekakariki Hill road is a constriction and a Q100 would overflow the road.

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[128] EiC, para 21, footnote 5.

[406] Bridges 4 and 8 do not cause significant effects on flood flows and Bridge 6 will cause some localised upstream ponding in the channel and on pasture with a slight reduction in ponding downstream.

[407] Several stream diversions are required and these have been designed to replicate the low flow channel and its floodplain. They will not cause any significant increase in flooding and will have velocities and channel characteristics similar to the natural channels.

[408] The section of new road, between the existing SH1 in the north and the top of Wainui Saddle, crosses the Wainui Stream on twin box culverts of 3m x 2.5m and a 900mm culvert and the Te Puka stream on a bridge. Existing conditions, with culverts under both the SH1 and the North Island Main Trunk (NIMT), produce flooding between the highway and the NIMT and below the NIMT for both the Q10 and the Q100. The highway and the NIMT would be flooded.

[409] Proposed culverts, bridging and stream realignments do not aggravate the existing situation. Some slight ponding in the Q100 above the proposed twin box culvert provides a small improvement for the existing floodable area.

[410] Duck Creek drains to the Pauatahanui Inlet and rises through the suburb of Whitby and into the Belmont Regional Park. The new road runs parallel from the James Cook interchange to almost Cannons Creek. Numerous culverts and two bridges cross tributaries of Duck Creek with a further bridge where the new road crosses Duck Creek itself.

[411] Additional impervious surface is added to the Duck Creek catchment by the new road and this will cause a 2% increase in peak flows. The increase in the Q100 can be offset by storing water upstream of the culvert where the Waitangirua Link Road crosses Duck Creek. About 4000 cubic metres of water would pond up to a depth of 1.8m for up to 2 hours in this rare event.

[412] A small increase in stormwater runoff to the existing Linden stormwater system will result from the new road. The existing system becomes overloaded in Q10 year and Q100 year events. To avoid increases in flooding, ponding above the new road by limiting the size of the new culvert, PO6, is proposed.

[413] A short length, 600m, of the Waitangirua Link Road will drain into the existing stormwater system. That system already floods to a small degree in the Q10 and throughout its length in a Q100. Upgrading of the system is required in order to reduce the current flooding and to take the small contribution from the new road.

[414] A condition controlling works in the winter time has been proposed and Mr Martell has examined the rainfall patterns during the seasons. The number of days in each month where the rainfall has exceeded 50mm/day show a predominance in spring and autumn. However, because of other factors such as wet ground during winter and poor drying conditions, he supported Ms Grant's request for such a condition (Condition E.12(j) and (k)).

[415] He also supported a condition to initiate stabilisation on active earthworks based on a predicted rainfall of 50mm/day.

**Main findings in respect to hydrological matters**

[416] Mr Martell and Mr Yorke (representing KCDC) conferenced and agreed on matters affecting the Council's proposed new ground water supply bore and the avoidance of worsening flood effects on the Te Puka/Wainui floodplain. We are grateful for that assistance.

[417] We are satisfied that significant environmental effects will be avoided if the culverts and bridge waterways are designed to conform to the standards identified. Where there have been specific circumstances requiring the particular examination recorded above, the remedial steps identified are to be implemented. Conditions are to be included to ensure this.

[418] There are some timing issues inherent in the steps proposed to offset flooding effects. For example, upgrading of the Waitangirua storm water system would be required before the link road could be completed and storm water storage in Duck Creek at the culvert under the Waitangirua Link Road would be required before drainage from the motorway is provided. These timing constraints need to be resolved at time of final design.

[419] The solution to flooding at the Pauatahanui Interchange of providing the secondary flood flow path under the new road through the roundabout bridge waterways effectively retains the existing flood prone nature of the SH58. That is a surprising outcome and we would have thought the opportunity to cure the present flooding limitation on SH58 at this site would have been taken. That, however, is a matter for NZTA and we can take it no further.

[420] We consider a predicted rainfall of 50mm/day or greater is a suitable trigger for initiating stabilisation of active earthwork areas.

[421] We also agree that a condition limiting works in winter time is appropriate. We acknowledge some earthworks in rock material can benefit from more moist conditions and so the condition should not prevent earthworks in winter time, but simply require particular agreement by the Regional Council.

## 12.5 TERRESTRIAL ECOLOGY

[422] Under this head we consider the impact of TGP on the terrestrial flora and fauna located along and around the TGP route. Unsurprisingly, the 27km long TGP route traverses a wide range of habitats from improved pasture, plantation forestry, shrublands and scrub to native forest remnants. The route ranges from sea level to 280m in altitude and crosses a number of catchments. The route will involve disruption to many habitats of flora and fauna.

**Witnesses**

[423] We heard evidence from the following witnesses on issues pertaining to terrestrial ecology and effects of TGP:

- Ms Adams for the Director General;

- Dr Baber for the Director General;
- Dr Bull for the Applicants;
- Mr Fuller for the Applicants;
- Ms Myers for KCDC;
- Ms Warren for RTS.

[424] According to TR11 the ecological communities affected by the TGP route are:

- Vegetation - the majority of the route lies in a highly modified landscape. 48% is in pasture, 21% is in plantation forestry or other exotic forest and 10% in pioneer shrublands and scrub within pastures. A further 10% of the vegetation within the designation is in seral (intermediate) scrub and forest dominated by either Kanuka or Mahoe. Indigenous forest makes up less than 4% (20ha) of the plant communities potentially affected. The only plant species identified in the TGP footprint with a threatened status was a locally uncommon wetland plant, *Leptinella tenella.* The final 10% of the designation is classified as urban;
- Terrestrial fauna (lizards and invertebrates) - three species of common lizard were observed in low numbers within the proposed designation. None of these was a species of conservation concern although such species may be present but in low numbers. Other species such as *peripatus* (velvet worms) were identified;
- Avifauna - 37 species of bird were observed in and around the TGP route during the studies. Of these, five species are of conservation concern, NZ Bush Falcon, North Island Kaka, NZ Pipit Black Shag and Pied Shag (we will address the issue of coastal birds in our consideration of the marine environment);
- Bats - the TGP route does not intrude on known bat habitat but the Akatarawa Forest which borders the eastern side of the route is of sufficient size and maturity to sustain a population of native bats. No bats were identified in the vicinity of the route but an unconfirmed bat vocalisation was recorded at Wainui Saddle on the margins of the forest.

[425] The total area included in the TGP designations is about 485ha. The area of actual road footprint is approximately 170ha. TR11 identified the following effects on terrestrial ecology which would arise from construction of TGP:

- Permanent loss of about 40ha of indigenous vegetation (wetlands, shrublands and scrub, seral forest and mature or maturing forest) and habitat beneath the road footprint;
- Temporary loss or modification to a further 80ha of indigenous vegetation due to earthworks and construction activities within the wider designation;
- Potential loss of sedentary species (such as lizards) when their habitat is removed;

- Disturbance and displacement of mobile species (such as birds) by construction activity.

[426] In addition to the above construction effects, TR11 identified that operation of TGP might potentially affect sensitive bird and or bat populations.

[427] TR11 concluded that the significance of effects on vegetation and terrestrial habitat would range from very low to moderate, depending on the ecological value of affected sites and the magnitude of effects in each case. It recognised that mitigation was required for adverse effects. It contended that effects on terrestrial fauna and avifauna would be very low or low.

[428] TR11 referred to the primary avoidance measure taken in planning TGP on its current route. The change in alignment through the Te Puka Valley from the already designated eastern route to the western side of the valley means that the road alignment now avoids the fringes of the Akatarawa Forest, a 15,000ha wilderness area which borders the northern end of TGP. Additionally, it was recognised that there was the potential for avoidance of further loss of vegetation at the time of detailed design of the road itself.

[429] Other than route realignment, the principal terrestrial mitigation measure which was proposed by the Applicants was a systematic process of re-vegetation involving four broad restoration treatments. These were intended to be *like for like* and generally in the catchments where the most vegetation clearance would occur. The proposed treatments are:

- Terrestrial re-vegetation being mass planting, typically in pasture and using native pioneer species (e.g. Tauhinu, Cottonwood, Coprosma, Hebe, Kanuka, Ngaio) with some future canopy species interspersed;

- Riparian vegetation - generally the same as above but using rapid growing and strongly rooted species suited to riparian environments with some future canopy species interspersed;

- Enrichment planting - typically where there is already regeneration of open shrublands that can provide a nursery. Planting will be of future canopy species;

- Retirement - typically where natural regeneration has progressed to the point that additional planting is not required. In such cases fencing and pest control will be undertaken.

[430] Table 11.50 of TR11 contained a calculation of the extent of re-vegetation which the Applicants estimated was required to mitigate for vegetation losses brought about by TGP (we will return to that matter in our assessment). The Applicants calculated that 250ha of re-vegetation was required to mitigate the loss of 120ha of vegetation. The extent of mitigation planting initially proposed by the Applicants was 426ha which was subsequently recalculated to 534ha. By the conclusion of our hearing, that amount had been further increased and again, we will return to that matter in our assessment.

[431] NZTA has already undertaken approximately 31ha of early retirement plantings including both riparian and terrestrial vegetation over the last eight

years as part of conditions of the existing designation. Maintenance of these sites will continue and in some cases they will be expanded.

[432] NZTA will look to avoid or to minimise effects of road construction on *peripatus* by translocation of logs and debris containing these species to safe habitats adjacent to the TGP footprint prior to vegetation clearance and construction. Effects on lizards found in some habitats along the site will be minimised by capture and translocation prior to vegetation clearance and construction.

[433] There was extensive conferencing between the terrestrial ecology witnesses. Four witness conference statements identifying matters of agreement and disagreement between these witnesses were presented to the Board. The conference statements provided an iterative process whereby issues in dispute between the witnesses were identified, debated and (largely) resolved or narrowed. We will return to the conclusions reached in the conferencing statements in reaching our conclusion on the effects of TGP on terrestrial ecology. Before doing so we now briefly summarise the evidence of the various witnesses on these issues.

[434] Mr Fuller was the primary witness for the Applicants on terrestrial ecology. He has been involved in the Project since 1994. In his view the alignment now proposed is a considerable improvement in terrestrial ecological terms over the existing designation. Mr Fuller set out the methodology[129] that was used in identifying the range of terrestrial vegetation, flora, fauna and their habitats along the proposed route and quantification of likely effects arising from construction and operation of TGP.

[435] Mr Fuller stated that where it had been practicable to do so, significant adverse effects on ecosystems have been avoided through the proposed route design[130]. He noted that the proposed alignment and design changes have moved almost all of the designation into a pastoral landscape with limited habitats of indigenous flora and fauna. Where adverse effects could not be avoided, mitigation or remediation is proposed. Mr Fuller explained that a conservative approach was adopted in determining the extent of effects on terrestrial vegetation. For example it was assumed that all vegetation within the designation footprint would be affected or lost, whereas that was unlikely to be the case in practice.

[436] Mr Fuller gave evidence as to his calculation that approximately 250ha of revegetation is required in order to offset the loss of 120ha. He recognised that other more specific mitigation is proposed for potential effects on certain species, including the translocation of lizards. Mr Fuller confirmed that he was involved in the preparation of the SSEMP as well as the proposed EMMP[131]. Mr Fuller stated that these plans will be instrumental in ensuring the proposed mitigation is achieved.

[437] Dr Baber addressed effects on terrestrial ecology for the Director General. He considered that the effects on lizards, native bird species and other taxa may

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129 EiC, paras 34 to 70.

130 EiC, paras 97 and 98.

131 EiC, paras 152 to 163.

have been underestimated due to inadequate surveying. Dr Baber was concerned with the use of Environmental Compensation Ratios (ECRs) in order to calculate the necessary offsetting requirements. He was concerned that this method will not achieve a no net loss in terms of biodiversity. Dr Baber recommended that a biodiversity offset model be used to calculate appropriate mitigation. That model can be applied based on the existing information that has already been obtained[132]. He also suggested that the mitigation proposed for certain species (including lizards) is inadequate and that predator control is also likely to be required[133].

[438] Ms Warren also considered that the Applicants' assessment of the value of habitats affected by TGP was not adequate. In particular, the significance ranking system would imply low values in degraded habitats that may in fact be extremely valuable for species such as small organisms[134]. The impact of TGP on small organisms was of particular concern to Ms Warren. She described these as including non-vascular plants (mosses, liverworts, hornworts etc), fungi, insects and other invertebrates. Ms Warren provided detailed evidence about the habitat requirements of such species, their variable dispersal rates and vulnerability to fragmentation. She contended that there was inadequate investigation of small organisms by NZTA and highlighted their importance in the wider ecosystem. She expressed particular concerns about habitat loss in the Te Puka Valley.

[439] Ms Warren lodged a supplementary statement of evidence after a site inspection of the northern end of the route. She raised issues as to the conditions of wetlands and seeps and identified the presence of dense liverwort cover in what she described as *J banks* in the Te Puka and Upper Horokiri which she contended were possibly unique in the Wellington region. It was her view that these habitats were of high value and would be completely lost as a result of TGP. She commented on the value of forest remnants on the TGP route and expressed the view that if TGP proceeds, conditions are required to minimise impact on the remnants.

[440] Mr Fuller comprehensively addressed Ms Warren's comments in a supplementary statement of rebuttal evidence. He observed that the wetlands and seeps seen by Ms Warren were systems which were formed as a result of human occupation and in many instances were caused by cattle grazing. He advised that he had seen similar bank habitats to those identified by Ms Warren in a number of areas which will be avoided by TGP and contended that the relevant environmental management plan and consent conditions did seek to minimise the impact on forest remnants in the Te Puka Valley.

[441] We understood that the response that Mr Fuller had to a number of the issues raised by Ms Warren as to lack of specific knowledge about the presence or otherwise of smaller organisms, was that a habitat based approach was appropriate. We took that to mean that if the wider habitat was protected or enhanced, the species within that habitat would benefit. Mr Fuller accepted that it was appropriate for consent conditions and management plans to be

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132 EiC, para 25.

133 EiC, para 77.

134 EiC, para 49.

more explicit regarding the manner and objectives of restoration of boulderfields, and re-vegetation of barren hill slopes. This was agreed in witness conferencing on 3 February 2012.

[442] Ms Adams observed that TGP could potentially affect bat habitat by the removal of roost trees, and recommended that specific conditions to address potential effects on bats[135] be included in any consent. In relation to effects on lizard habitat, Ms Adams generally supported the proposed approach by NZTA, but recommended that more detail be provided in the management plans and conditions in this regard. She recommended that appropriate conditions include a translocation management plan, pest control, and monitoring to ensure any habitat relocation is effective.

[443] Mr Fuller generally supported the conditions proposed by Ms Adams with respect to bat surveys and lizard mitigation requirements[136] and proposed additional conditions[137]. We note that during the hearing it was identified that some of these matters will also be dealt with through wildlife permits which NZTA would require to undertake these activities[138].

[444] Ms Myers' evidence for KCDC addressed the potential effects of TGP in the Te Puka catchment which is in that Council's territory. She suggested that mitigation should include protection and covenanting of any retired areas within Te Puka and Horokiri catchments and protection of other kohekohe remnants in the catchment[139]. She also suggested greater mitigation for the wetlands systems in particular at MacKays Crossing and a small wetland in the upper Te Puka catchment.

[445] Mr Fuller stated that the activity proposed for the MacKays wetland is the expansion of an existing stormwater treatment pond, created during formation of the MacKays crossing interchange, into a more comprehensive stormwater treatment wetland. He said that the design of the wetland does not extend into core raupo wetland habitat, but lay to the south in broken brushland, sedgeland and wet pasture. Mr Fuller accepted that this site was omitted from the proposed EMMP and that it should be included[140].

[446] Ms Myers also suggested that mitigation for effects on terrestrial ecology should include predator control. The connection between TGP effects and the need for predator control in areas outside the TGP boundary was the subject of some debate[141].

[447] In his evidence in chief, Mr Fuller stated that the management of browsers is a standard requirement for the re-vegetation programme and must continue for an agreed maintenance period until the plants are established at the required density, are showing normal growth and there is realistic expectation of

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135 EiC, para 18.

136 Rebuttal Evidence, paras 14 and 17.

137 Condition G.15I.

138 NoE ,pg 642.

139 EiC.

140 EiC, paras 194 & 195.

141 NoE, pg 750.

survival. He also recommended predator control if there is a requirement to transfer lizards until populations re-establish in their transfer site. Mr Fuller disagreed that predator control should continue in perpetuity[142] as had been suggested on behalf of the Director General. He noted that in the case of those areas which are to be retired and protected by covenant there will be an ongoing obligation to manage the vegetation and protect it from browsers in any event[143]. Dr Baber confirmed that pest control undertaken for a period of at least 10 years would be very beneficial as opposed to not doing any at all[144].

[448] Mr Fuller considered that there should be a three year maintenance period for any areas of re-vegetation, with a review to confirm its success after 10 years[145]. Other witnesses disagreed and considered a longer maintenance period would be required.

[449] Mr Fuller responded to the criticisms in relation to the use of the ECR in determining appropriate mitigation in his rebuttal evidence. He said that this is a simple tool which has been used to determine mitigation requirements for the loss of terrestrial habitat. In his view, the extent of mitigation it has led to in this instance is comparable with other projects where other methods have been used. During cross examination he said that there was no fixed ratio that is used to determine an appropriate quantum of compensation[146].

[450] Mr Fuller spoke to amended calculations of mitigation which NZTA now proposed and which exceeded those originally advanced of 426ha of mitigation. Annexures 8 and 9 to Mr Fuller's rebuttal evidence of 20 January 2012 contained revised areas for retirement (Annexure 8) and the total area of mitigation if planting for purposes other than terrestrial mitigation was counted in the overall proposal (Annexure 9). The outcome was that there would be a total of 627ha of mitigation planting across the Project although not all of this was for terrestrial ecology purposes.

[451] Mr Fuller contended that the combined total of some 627ha of land retirement and re-vegetation significantly exceeds the 250ha that he had determined was appropriate to mitigate the effects of TGP on terrestrial ecology[147] (We note that proposed conditions seek to secure an area of at least 620ha). Dr Baber confirmed that this was generally appropriate also[148]. We note however that Ms Warren expressed concern at the hearing that the mitigation proposed is not sufficient to prevent the risk of loss of highly valued species.

[452] Much of the debate between the witnesses revolved around the issue of whether or not the mitigation proposal achieved a *no net loss* outcome in terms of ecology or biodiversity values and we will address that directly. The differences between the terms *ecology* and *biodiversity* was also debated by

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142 NoE, pg 597.

143 NoE, pg 637

144 NoE, pg 1089

145 NoE, pg 623

146 NoE, pgs 603, 611.

147 Rebuttal Evidence, paras 156 and 157.

148 NoE, pgs 1104 and 1114.

NZTA and the Director-General's witnesses in particular, although the debate was of little assistance to the Board. It was generally agreed that both re-vegetation efforts and ongoing pest management would be required, at least for a certain period post re-vegetation.

**Main findings on effects of TGP on terrestrial ecology**

[453] The conclusions which we have reached regarding the effects of TGP on terrestrial ecology are greatly assisted by agreements reached by the witnesses in their conferences. We will briefly summarise what we consider are the significant or determinative conclusions on this issue.

[454] Our starting point for these considerations is the first agreement reached by the witnesses in these terms[149]:

> ***NO NET LOSS***
>
> *6. The group agrees that in designing the ecological mitigation package the aim should be no net loss of biodiversity and preferably a net gain (and the Biodiversity Offsetting principles underlying this).*

[455] The no net loss principle has been identified and described in the Business and Biodiversity Offsets Programme (BBOP) which is an international collaboration between a range of governmental agencies, private companies and institutions and other organisations. The principle of no net loss enunciated by BBOP has been recognised in the draft New Zealand Policy Statement on Biodiversity.

[456] The BBOP describes the principle in these terms:

> *The concept of no net biodiversity loss lies at the heart of biodiversity offsetting. No net loss, in essence, refers to the point where biodiversity gains from targeted conservation activities match the losses of biodiversity due to the impacts of a specific development project, so that there is no net reduction overall in the type, amount and condition (or quality) of biodiversity over space and time. A net gain means that biodiversity gains exceed a specific set of losses.*

[457] The BBOP contains 10 principles relating to biodiversity offsets. Principle 1 is as follows:

> ***Principle 1: No Net Loss:***
>
> *A biodiversity offset should be designed and implemented to achieve in situ, measurable conservation outcomes that can reasonably be expected to result in no net loss and preferably a net gain of biodiversity.*

[458] The Board (previously constituted) discussed the concept of offsetting in its Plan Change decision of 5 October 2011[150]. We do not propose to revisit that discussion in this decision except to note that we did not understand any party to these proceedings to challenge the proposition that the extensive package

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149 Witness Conference Statement 16 December 2011.

150 CF para 3.1 (above).

of offsetting measures proposed by the Applicants in these proceedings constituted mitigation of the effects of TGP (as opposed to some other form of environmental compensation).

[459] We appreciate that a key element of the concept of no net loss is a detailed assessment of the ecological environment and the effects which a project might have on it, accompanied by a principled assessment quantifying the value of biodiversity offsets and the extent of gains which are required to offset losses in biodiversity. Much of the debate between the witnesses and the parties revolved around these matters and the issue of calculation of an ECR. Table 11.50 of TR11 contained the ECRs used by Mr Fuller to calculate that 250ha of re-vegetation was required to mitigate for the loss of up to 120ha of vegetation. This figure was calculated having regard to the following ratios of mitigation planting provided for habitat lost:

- In the case of shrublands presently in pasture dominated by tauhinu – 1 for 1;
- Kanuka scrub and low forest – 2 for 1;
- Wetlands, regenerating native forest and mature native forest – 3 for 1.

[460] It was not apparent to us why these particular compensation ratios were promoted and it appeared that there may have been a certain *rule of thumb* element to their selection. Ultimately we do not consider that is of any great moment in our decision, even appreciating the need for there to be a principled approach to the quantification of biodiversity offsets. It is not necessary for us to specify appropriate offset mitigation ratios in reaching our decision. There are three reasons for that.

[461] Firstly, none of the witnesses identified any universally accepted ratio for the calculation of mitigation for vegetation loss. It seems to us that such a matter will always be open for debate and that ultimately the adequacy of mitigation proposed (whether biodiversity mitigation or otherwise) is always a matter which is subject to debate and determination by a consent authority.

[462] Secondly, while we recognise the desirability of achieving a situation of no net loss of biodiversity from a project, we do not believe that it is a requirement of RMA that no net loss be achieved in any given case. The principle of sustainable management requires a broad consideration of a range of sometimes competing factors. A consent authority is entitled to conclude that consent ought be granted to a proposal notwithstanding that all adverse effects of the proposal have not been avoided, remedied or mitigated. In other words there may be a net loss of some values or aspects of the environment. The significance of that loss and its *weighting* against the benefits of any given proposal is a matter to be determined by a consent authority applying s5(2) RMA.

[463] Thirdly and most significantly, there was a certain academic ring about the debate in this regard. By the conclusion of our hearing it appeared to be generally accepted by all of the relevant witnesses, that the mitigation package proposed by the Applicants was an adequate response to the effects on terrestrial ecology generated by TGP. There were some remaining areas

of disagreement and we will address those shortly. Ms Warren remained unconvinced that the mitigation proposals would result in no net loss for all species groups but agreed that ...*the revised conditions developed by the caucusing group will address the concerns that have been raised, to the extent that current knowledge and management techniques allow*[151].

[464] Ironically, the greatest objection in principle to the mitigation package was that of Dr Baber who somewhat doggedly adhered to the view that it went considerably further than what was required having regard to appropriate mitigation ratios. He considered that this might ultimately lead to the Applicants seeking to vary the conditions of any consents or designations at a later date to reduce the amount of mitigation planting. That view was highly speculative but even if it proved to be the case, such an application would be dealt with by public process and its success would be far from assured. Any application to reduce the extent of mitigatory planting would need to be assessed not only in the light of ecological/biodiversity issues but also the soil conservation benefits of the planting which feature just as significantly in our considerations.

[465] We now briefly document the further relevant areas of agreement reached by the witnesses on terrestrial ecology as contained in the witness conference statements:

- The Te Puka Stream and upper Horokiri Stream to either side of Wainui Saddle is an *ecological hotspot* for the Project due to the concentration of terrestrial values[152];
- A number of threatened species are known to be present on this site and others are likely to be present[153];
- The methodology used by the Applicants in carrying out their ecological assessment was consistent with best practice[154];
- With certain limited exceptions, the revised conditions of consent agreed by the witnesses ...*provide greater confidence that the management during construction and mitigation for effects following construction can and will be carried out in such a way that effects that can be minimised are, and agreed mitigation is achieved*[155]*;*
- The area of disagreement between Mr Fuller and Ms Warren regarding poorly known species groups is not resolvable with current knowledge[156];
- The conditions now proposed address the values of J banks and wetlands identified by Ms Warren as far as is possible with current knowledge and methodologies[157].

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151 Witness conference joint statement 2 March 2012, para 7.
152 Witness conference statement 16 December 2011, para 7.
153 Witness conference statement 16 December 2011, para 8.
154 Witness conference statement 16 December 2011, para 8.
155 Witness conference statement 2 March 2012, para 11.
156 Witness conference statement 2 March 2012, para 11 (Fuller and Warren only).
157 Witness conference statement 2 March 2012, para 11 (Fuller and Warren only).

[466] Although not specifically referred to in the conferencing statements we again refer to our clear understanding from the evidence of all of the ecological witnesses that if TGP is to proceed, the route chosen is the best practicable route in terms of its impact on terrestrial ecology.

[467] The remaining matters of disagreement between the terrestrial ecology witnesses related to either the necessity for or form of conditions to be imposed regarding:

- Land acquired by NZTA for the purposes of TGP but outside designation boundaries;
- Animal pest control measures;
- Appropriate maintenance periods;
- Proposed Condition NZTA.47.

We briefly express our view on those issues which will be reflected in final conditions.

[468] The witnesses for the Director General, KCDC and RTS noted that the Applicants are likely to acquire land under Public Works Act powers which will not actually be required for the designations. If the land contained areas of indigenous vegetation or habitat with high ecological value, they sought that it should be ...*legally protected, with management implemented to protect ecological values*[158].

[469] Mr Fuller opposed the imposition of such a condition. We agree with his objection. This appeared to us to be an example of parties seeking to get as much as they possibly could out of NZTA irrespective of whether or not the conditions proposed sought to address adverse effects arising from TGP. The witnesses had agreed as to the adequacy of the mitigation planting already proposed by the Applicants.

[470] All of the witnesses agreed that control of animal pests within the mitigation areas was necessary to ensure the success of mitigation plantings and the (possible) transfer of species from the TGP route into other areas. We agree with Dr Baber's observations that it is necessary to employ a *multi-species approach* to pest control at the mitigation sites and we did not understand the Applicants to dispute that. However, to the extent which some of the witnesses sought to expand NZTA's obligations to pest (such as possum) control in areas such as the Akatarawa Forest outside of the TGP route, we consider that again to be an example of parties trying to extract as much as possible from NZTA irrespective of any relationship with effects.

[471] The Environmental Management Plan proposed by NZTA recommended that mitigation plantings be maintained and monitored for a period of three years after establishment, followed by a review of success and recommendations for any additional work. There would be a further review and enrichment planting after 10 years. Mr Fuller supported that approach. The other witnesses

158 Witness conference statement 2 March 2012, para 14.

sought a five-year maintenance period followed by a 10-year review. They contended that this would provide greater assurance that the intended effect of mitigation would be achieved.

[472] We concur with Mr Fuller's view. His timeframes were based on his experience at early retirement sites already established by NZTA and we believe represent reasonable timeframes.

[473] The witnesses agreed on a condition (Condition 47) providing for the setting aside and protection of mitigation areas. The difference between them was whether or not that should have to occur within five years of the granting of the designation (the position of the witnesses other than Mr Fuller) or no less than two years prior to the commencement of construction (Mr Fuller's position)

[474] Again we agree with the position of Mr Fuller as we have difficulty in linking the other witnesses' position with the mitigation of effects from TGP. The other witnesses' proposal seems to be an attempt to secure immediate reductions in sediment generation to streams through retirement and removal of stock even though those are part of the existing environment and not generated by TGP.

[475] Having regard to all of the above, we are of the view that the effects of TGP on terrestrial ecology can and will be adequately avoided, remedied or mitigated by the Applicants' proposals. We have included reference to avoidance of adverse effects because that has been achieved by the change of route for the previously designated eastern route to the now proposed western alignment. Otherwise the mitigation package proposed by the Applicants achieves a substantial degree of remedy and mitigation of the acknowledged adverse effects of works on terrestrial ecology.

[476] Other than the issue of detail of conditions discussed above no party advanced through evidence, submission or representation any other methods of remedy or mitigation of adverse effects on terrestrial ecology apart from declining the applications altogether. Only RTS sought that outcome which is inconsistent with the acknowledgements made by all other parties as to the adequacy of the TGP compensation package. It appeared to us that the position of RTS was largely driven by ideology and we reject that position.

## 12.6 FRESHWATER ECOLOGY

[477] Under this head we consider the impact of TGP on freshwater habitats and species. The TGP route passes through at least eight catchments and intersects with a number of steams and their tributaries. These streams and tributaries provide a habitat for a range of fish and aquatic invertebrates. TGP will involve alteration to or destruction of many of these habitats.

[478] We heard evidence from the following witnesses[159] on issues pertaining to freshwater ecology and the effects of TGP on that ecology:

[159] Also relevant to the issue of freshwater ecology was the evidence of those witnesses addressing hydrology, erosion and sediment control, water quality and terrestrial ecology (particularly enhancement planting, riparian vegetation etc). We also note that in some respects

- Dr Joy for KCDC;
- Dr Keesing for NZTA and PCC;
- Dr Ogilvie for the Director General.

[479] In this section of the decision we will concentrate on the streams affected by TGP rather than wider watersheds and catchments which we have addressed in the hydrology section of the decision. Those streams are:

- Te Puka Stream, which is the northern most stream affected by TGP. It has a catchment area of 372ha and runs for over 3km from above the Wainui Saddle to the Wainui Stream, which continues through the Queen Elizabeth Park Reserve to the coast;
- Horokiri Stream has a catchment area of 3380ha and drains from north to south for a distance of about 12.9km. It has a number of reaches and branches and drains into the Pauatahanui Inlet;
- Ration Stream has a catchment area of approximately 613ha and is 4.8km long. It discharges into Pauatahanui Inlet;
- Pauatahanui Stream has a catchment area of about 4200ha and has a number of tributaries and catchments. Its main stem is about 9.6km long. It discharges into the Pauatahanui Inlet;
- Duck Creek has a catchment of approximately 1000ha and drains from east to west for a distance of about 7.2km. It discharges into Pauatahanui Inlet;
- Porirua Stream is traversed by TGP at the southern end of the road alignment. It has a catchment of about 4100ha. TGP traverses the headwaters of an unnamed tributary of this stream. Porirua Stream width is typically 1 - 1.5m across with small flows. It discharges into Onepoto Inlet.
- Cannons Creek/Kenepuru Stream have a total catchment area of around 1300ha. Cannons Creek is about 3.6km in length until the point it joins Kenepuru Stream. Kenepuru Stream enters the Onepoto Inlet of Porirua Harbour.

[480] We have not referred to Wainui Stream in the above list. Wainui Stream is situated at the very northern end of the TGP route which will be bridged above the stream and will not affect it to any great extent. The Wainui and Te Puka Streams join in the vicinity of TGP and both discharge into the Kapiti Coast at the northern end of the route. However, Wainui Stream is relevant to our discussion of mitigation and we will return to it in that context.

[481] Seventeen species of fish were identified in the streams which we have described. Four of those species were tidal and only found in the lowest reaches of the streams. A number of the species are at risk species.

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Ms Warren's evidence touched on matters relevant to freshwater ecology but we have discussed those concerns under the heading of terrestrial ecology.

Additionally, 81 different aquatic invertebrate taxa were sampled in the streams.

[482] The AEE[160] summarised freshwater ecology values in these terms:

> *The Duck, Horokiri and Te Puka systems provide valuable aquatic fauna and physical habitat, although it is noted that they appear to be deteriorating in the lower reaches, particularly due to current land use practices. In particular, the Horikiri Stream supports a number of threatened native fish and a small wetland area. Nationally threatened native fish (including tuna (longfin eel), red fin bully, inanga, kokopu and occasionally the rare kakahi (freshwater mussel)) have also been found in the Horokiri Stream catchment.*
>
> *Despite their modifications, the lower reaches of the Ration, Cannon Creek (a tributary of the Kenepuru Stream) and Pauatahanui Stream catchments are also considered to be of moderate value as they still retain important fauna species. The Kenepuru and Porirua Stream systems are of lower value, although they still support an array of values, notably components of macro-invertebrate fauna.*

[483] The Applicants undertook extensive surveying of the streams in preparation of the applications. We understood that the freshwater ecological witnesses for the other parties agreed that the surveying was appropriate and comprehensive. We do not propose to describe the ecological values of the streams in any detail. Table 22.3 of the AEE provided an overall summary of those values. We accept that many stretches of the streams have high fisheries and habitat values. For the sake of completeness we note that Appendix 2B of the Freshwater Plan identifies the Horokiri, Ration and Pauatahanui Streams as being water bodies which are to be managed for aquatic ecosystem purposes.

[484] The Applicants identified that TGP would cause habitat degradation and loss as a result of works in the streams. Culverts would be installed, there would be increases in sedimentation and permanent diversions. Some culverts would be temporary and would be removed in due course. These works would result in:

- Loss of stream length;
- Changes to flow regimes;
- Loss of riparian vegetation which can influence water temperature and quality of spawning habitats;
- Impediments to fish passage.

[485] The Applicants estimated that the total length of the streams in the various catchments was somewhere in the order of 30100m (30.1km). Of that total length, 10418m (10.4km) would be lost, modified, diverted or otherwise adversely affected by TGP. The Applicants acknowledged that adverse

[160] Para 6.8, pg 115.

effects on the streams could not be avoided or remedied completely although they had endeavoured to minimise these effects to the greatest extent practicable in their route alignment. To the extent that adverse effects cannot be avoided or remedied, the Applicants sought to mitigate them to the greatest extent possible.

[486] The Applicants designed their mitigation proposals on the basis that there would be no net loss of the life supporting capacity of freshwater habitat across the wider project area as a result of TGP. In some catchments there would be a net loss in stream length but that would be offset by habitat gains in other catchments. Dr Keesing considered that overall there would be a net gain in the quality of freshwater habitat as a result of TGP. He developed the mitigation package using a model known as the Stream Ecological Valuation method (SEV). Using this method, Dr Keesing calculated that the loss and/or modification of 10.4km of existing streams required the restoration and protection of approximately 26.5km of stream to mitigate the loss of habitat value. Additionally, about 6km of ephemeral streams would also be disrupted by TGP but would be replaced by about 17km of similar ephemeral habitat.

[487] The principal restoration and protection measure proposed was the retirement of pasture and the planting of native vegetation in riparian areas. Dr Keesing advised that the total planting proposed by the Applicants to compensate for both terrestrial and fresh water habitat loss would restore and protect approximately 30km of streams, 3.5km more than the 26.5km which he had calculated as necessary to offset the adverse effects of freshwater habitat loss. This additional 3.5km was what led him to the view that there would be a net gain in habitat terms and an improvement in freshwater habitat brought about by TGP. (We note that in rebuttal evidence Dr Keesing amended the 30 km figure to 27km).

[488] In addition to restoration and planting, the Applicants proposed a programme of stream realignment and reconstruction together with the provision of fish passage in various streams where native fish were known to be present. That will be provided by using techniques such as modified culverts (incorporating features such as wooden blocks or baffles), lowering perched culverts, the use of oversized culverts with depressed inverts and fish ladders. The possible effectiveness of these measures was the topic of considerable debate between the witnesses.

[489] Dr Keesing assessed the ecological effects of TGP on freshwater values and described the measures proposed to manage or address those effects in his evidence. He described the effects which stream diversions and modifications will have[161] and summarised the extent of habitat loss and the significance of that loss. He was of the opinion that although there will be some values lost as a result of TGP, none of the water bodies affected are of sufficient quality, composition or sensitivity to require total avoidance of adverse effects[162].

[490] Dr Keesing considered that mitigation can be utilised to effectively manage any adverse effects of TGP on freshwater ecological values. He noted that

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161 EiC, para 98.

162 EiC, para 19.

effects of sediment discharges into the streams would need to be well managed in accordance with the methods set out in Mr Gough's evidence. He expressed the view that construction related sediment discharges can be managed to such an extent that adverse effects of sedimentation would be small with no long term impacts[163].

[491] Dr Keesing contended that the loss of various sections of stream can be mitigated by rehabilitating other sections of streams affected by TGP using SEV to calculate the required extent of rehabilitated mitigation[164]. He contended that the SEV approach would ensure the sufficiency of mitigation of adverse aquatic effects because it requires the mitigation to be a water body (i.e. like for like) and by default to be at least 1.5 times the linear length of the stream affected. He acknowledged that SEV does not address some characteristics of the fauna affected (e.g. threatened status), but said that he developed the mitigation package with those values also in mind. Dr Keesing accepted that the AEE did not include appropriate monitoring provisions to ensure that the mitigation is successful and his evidence addressed this[165].

[492] In this regard, Dr Keesing advocated an adaptive management approach for the mitigation package. He said that adaptive management would require detailed monitoring of mitigation outcomes which would in turn feed back into the design and ongoing management of mitigation measures. The adaptive management process would include an assessment of baseline surveys, monitoring through construction and for two years after construction. The monitoring would consist of water quality indicators, aquatic benthic macro-invertebrate community composition, sediment deposition and assessment of culvert installation and fish passage. Table 28.2 of the AEE summarised TGP effects with proposed mitigation and management measures. Dr Keesing stated that this table, together with the proposed EMMP, provided the basis for the monitoring of ecological effects[166].

[493] Dr Keesing discussed the monitoring required to ensure the effectiveness of stream enhancements and provisions for fish passage. He identified the essential parameters of the proposed aquatic mitigation monitoring programme[167].

[494] Mr Kyle agreed[168] that monitoring is a critical component of any successful adaptive management regime and noted the necessity for monitoring obligations to be reflected in conditions and also for contingency measures to be identified in conditions of consent.

[495] Dr Ogilvie considered that the SEV model is not a sufficient tool to score the biodiversity values of streams nor to quantify compensation for lost biodiversity values and that the use of SEV could result in an undervaluation

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163 EiC, para 154.

164 EiC, para 138.

165 EiC, para 25.

166 EiC, paras 162.

167 EiC, para 166.

168 Mitchell Partnerships s42A Report, Part 2, pg 18

of the biodiversity values affected by TGP[169]. He suggested that there are better, proven tools to determine appropriate offsetting measures, including Habitat/Hectares based models[170].

[496] Dr Ogilvie identified that TGP includes more than 100 culverts, at lengths of up to 265m. He said that there is no certainty that affected fish will be able to pass through the longer culverts as currently designed and recommended that these culverts have baffles installed. He considered that cascade structures will potentially impede fish passage if they are not appropriately designed.

[497] Notwithstanding Dr Ogilvie's concerns about SEV, Dr Keesing confirmed his opinion that the use of SEV in this case is appropriate and the resulting mitigation that is proposed is cautious[171]. Ultimately, Dr Keesing and Dr Ogilvie agreed that the mitigation proposed is appropriate[172] even though SEV is not the method which Dr Ogilvie would have used to calculate mitigation. Dr Ogilvie recommended that a biodiversity offset model would be useful in assessing actual success of mitigation proposals[173].

[498] Dr Joy addressed potential effects of TGP on the freshwater ecology of Te Puka Stream which presently runs along the western side of the valley in the road footprint. The Applicants' proposal is to divert 2.35km of the stream to the eastern side of the valley through artificial channels and culverts. Dr Joy considered that the proposed diversion and culverts would have *devastating* effects on stream ecology[174] and that it is not possible to mitigate these effects through diversion or culverts. He was of the view that works elsewhere were necessary to mitigate adverse effects on Te Puka Stream and suggested that this mitigation should take place in the nearby Wainui or Whareroa Streams[175].

[499] In his rebuttal evidence, Dr Keesing agreed that the formation of the diversion system for the main stem of the Te Puka Stream will be a significant challenge. However, he did not share Dr Joy's concerns that the diversion will fail to the extent that a reasonable level of mitigation will not be achieved[176]. He accepted, however, that until success has been measured following construction, the adequacy of the alternative habitat provided by the diversion will not be known. Dr Keesing agreed that monitoring was necessary to determine the success of the diversion and that offsite mitigation might be required if it was unsuccessful.

[500] Dr Keesing noted that part of the additional mitigation sought by Dr Joy was removal of a perched culvert in the Wainui Stream at the point where the stream presently goes under the existing SH1 near McKays Crossing. A perched culvert is one with its outlet elevated above the downstream water

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169 EiC, para 16.
170 EiC, para 69.
171 Rebuttal Evidence, para 44.
172 NoE, pg 535.
173 NoE, pg 1047
174 EiC, para 3.4.
175 EiC, paras 5.5 and 7.4.
176 Rebuttal Evidence, para 12.

surface so that water falls from the culvert into the water below. This requires fish seeking to migrate up stream to leap into the culvert from the downstream pool. The perched culvert on the Wainui Stream is such a height above the downstream water that fish cannot successfully make this leap and the culvert acts as a barrier for the movement of fish from downstream reaches to the upstream reaches. Dr Keesing confirmed that NZTA has decided to offer to correct the perched culvert as an additional mitigation measure[177]. This will open up an additional 11km of the upper Wainui system to native fish.

**Main findings regarding effects of TGP on Freshwater Ecology**

[501] Again, the conclusions which we have reached regarding the effects of TGP on freshwater ecology are greatly assisted by agreements reached by the witnesses in their conferences. The witnesses provided the Board with five statements identifying areas of agreement and disagreement (not all three witnesses took part in all conferences). At the end of that process there was a high degree of agreement between the witnesses as to the matters that were relevant for our considerations.

[502] As a starting point, we note that neither Dr Ogilvie nor Dr Joy suggested that there was any other possible route for TGP which they considered preferable to the proposed route, in terms of its impact on freshwater ecology. We also note that both Dr Ogilvie and Dr Joy agreed that there had been sufficient data collection and proper methods and analysis undertaken by the Applicants to allow the assessment of values of freshwater ecology on the route and the effects of TGP on those values[178]:

- Dr Keesing and Dr Ogilvie agreed that ecological values in the streams concerned are not so high as to require total avoidance of adverse effects[179];
- Dr Keesing and Dr Ogilvie agreed that in general the Applicants' proposals constituted sufficient mitigation for adverse effects[180];
- All three witnesses recognised the experimental nature of a number of the proposed mitigation measures. They agreed that given uncertainties as to the likely success of these mitigation measures there was an ongoing need for the collection of ecological data and further input as TGP developed and the success or otherwise of mitigation measures was ascertained[181];
- The witnesses recommended the establishment of a Te Puka freshwater ecological panel to determine what was required to measure and achieve

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177 Rebuttal Evidence, para 20

178 Para 9 of undated witness conference statement Keesing - Joy and Para 10 witness conference statement of 16 December 2011, Keesing - Ogilvie.

179 Witness conference statement of 16 December 2011, para 12 Keesing - Ogilvie.

180 Witness conference statement of 31 January 2012, para 9 Keesing - Ogilvie.

181 Witness conference statement of 9 February 2012, para 13 (all witnesses).

stream re-creation success and fish passage[182]. They identified the structure and functions of such a panel[183].

[503] We have previously noted that the Applicants' proposals for mitigation of effects on freshwater ecology were based on a philosophy of no net loss of ecological value. We refer to our comments on no net loss in the preceding section of this report. Again, we recognise that while no net loss of biodiversity is a highly desirable ecological outcome it is not an absolute requirement of sustainable management. That said, we consider that there was substantial merit in Dr Keesing's contention that the mitigation package proposed actually achieves no net loss and possibly a net gain in freshwater ecological terms. That was his opinion before NZTA agreed to remedy the perched culvert on the Wainui Stream, thereby opening up a further 11km of stream for migration of species from downstream. Clearly that matter should also be taken into account in assessing the adequacy of mitigation. This work appears to us to be a mitigation feature of some consequence although we do not know how the value of that should be measured in a scientific sense. Dr Ogilvie agreed that application of an adaptive management regime with post consent monitoring, assessment and (if necessary) adjustment would ensure adequate mitigation of effects on biodiversity of freshwater habitats[184].

[504] Again, consistent with our approach to the issue of calculation of ECRs for terrestrial ecology, we do not propose to step into the debate between Dr Keesing and Dr Ogilvie regarding use of the SEV method against other methods of assessing mitigation such as Habitat/Hectares. There are two reasons for that:

- Firstly, it appears to us that no matter how mitigation measures are assessed, the Applicants have offered a comprehensive, measureable and adequate mitigation package. Other than Dr Joy's suggestion regarding mitigation at the Wainui Stream (which NZTA has accepted) neither Dr Ogilvie nor Dr Joy suggested a more comprehensive package.

- Secondly, there again appeared to be a certain academic quality about the arguments in that regard, in light of the general acceptance by Drs Ogilvie and Joy as to the adequacy of the mitigation package. Dr Ogilvie clearly recognised that when he commented that it did not assist the Board to *squabble* about those issues[185]. We concur with that statement but at the same time acknowledge the desirability of mitigation being assessed on a methodical basis. We did not understand there to be any one commonly agreed method.

[505] Dr Ogilvie was requested by the Board to identify what he regarded as the remaining major points of disagreement between Dr Keesing and himself. The only remaining issues appeared to relate to the definition of ephemeral streams and whether or not fish passage ought be required on all culverts in the TGP footprint. We understood the witnesses to ultimately agree on those

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182 Witness conference statement of 9 February 2012, para 12 (all witnesses).
183 Witness conference statement of 9 February 2012, Annexure A (all witnesses).
184 Witness conference statement 16 December 2011, para 29.
185 NoE, pg 1046.

matters, subject to a pre-construction fish survey being carried out and establishment of the ecological peer review panel to which we have previously referred[186].

[506] Having regard to all of the above matters, we conclude that the acknowledged and substantial effects of TGP on freshwater ecology are appropriately avoided, remedied or mitigated by the proposed mitigation package. That was the agreed position of the three witnesses on this topic. In reaching that conclusion, we have had regard to not only the direct mitigation proposals advanced by Dr Keesing but also to benefits that would flow from other sediment and soil control measures and terrestrial vegetation mitigation which of themselves will substantially contribute to mitigation of effects on freshwater ecology.

[507] Drs Keesing, Ogilvie and Joy largely agreed as to appropriate conditions to be imposed in the event that consent to TGP was granted. In particular they agreed that there should be an ecological peer review panel established as detailed in Annexure A of the witness statement of 29 February 2012. Mr Kyle agreed with that proposition. Ms Rickard for NZTA and Ms Grant for the Regional Council opposed such a condition, as did the Applicants, notwithstanding Dr Keesing's agreement with the other ecological witnesses.

[508] We concur with the views of those who consider that the peer review panel is unnecessary in this regard. Ms Grant considered that the Regional Council would have expertise available to it to consider issues which might arise from monitoring of the mitigation techniques. We agree with her view that the peer review panel adds an unnecessary layer to management of mitigation. The mitigation offered by the Applicants in this case is very extensive, even recognising the extent of effects on Te Puka Stream. We do not see review of mitigation measures in this respect as being anywhere near comparable in importance to review of stormwater and sediment mitigation measures which are fundamental to the outcome of TGP and where we agree it is appropriate to have a review panel.

## 12.7 MARINE ECOLOGY

[509] Although the TGP route itself does not intrude into the coastal environment, works involved with the Project will have a direct and ascertainable effect on the coastal marine area during construction of the road. That is because sediment generated by construction earthworks which enters into the freshwater stream system will ultimately be discharged into the coastal marine area at Porirua Harbour or Paekakariki Beach. Accordingly the effects of TGP on marine ecology are a significant issue for consideration in these proceedings.

**Witnesses**

[510] We heard direct evidence from the following witnesses on issues pertaining to marine ecology:

- Dr De Luca for the Applicant parties;

[186] Witness conference statement 29 February 2012, paras 6 and 7.

- Mr Fuller for the Applicants (as to coastal birds);
- Dr Bull for the Applicants (as to coastal birds);
- Mr Roberts for the Applicants;
- Ms Kettles for the Director General;
- Dr Baber for the Director General (as to coastal birds).

[511] Additionally, the evidence of witnesses regarding earthworks, sedimentation and terrestrial ecology all have a direct relevance to the issue of marine ecology as they address issues relating to the generation of sediment, its control, its discharge into freshwater streams and thence to the coastal marine area and its ultimate remedy by the process of terrestrial re-vegetation and retirement which we have described in previous sections of this decision.

**Porirua Harbour**

[512] The issue of particular significance relating to marine ecology is the effect of discharges of sediment into Porirua Harbour. We have noted that two of the streams intersected by TGP (Wainui and Te Puka) discharge at Paekakariki Beach. This is a high energy marine environment where sediment would be readily dispersed. None of the evidence which we heard raised issues of adverse effects on this environment of any consequence arising from TGP. The issue which was before us was the effects of sedimentation on Porirua Harbour.

[513] The catchment area for Porirua Harbour is approximately 600km$^2$. The discharge of elevated levels of sediment (i.e. above natural levels) into the harbour from the surrounding catchment due to development earthworks has been occurring for some time and continues to be a major environmental problem. We were told that at present rates of sedimentation, the harbour would be filled in 145 - 195 years. It was accepted by the Applicants that TGP earthworks would increase sediment discharge into the harbour in the short term and had the potential to adversely affect the receiving environment.

[514] Porirua Harbour contains two shallow tidal inlets, the Pauatahanui Inlet (524ha) and the Onepoto Inlet (283ha). These inlets have a common access to the sea via a narrow 0.1km wide entrance. Maximum water depth in both inlets is about 3.0m. Approximately 60% of the Pauatahanui Inlet is subtidal and 80% of the Onepoto Inlet. The primary driver for the movement of water into and out of Porirua Harbour is tidal exchange, with wind, waves and freshwater inflows also influencing the movement of water. The two inlets have different ecological values and we describe them separately.

[515] We were told that Pauatahanui Inlet is the largest relatively unmodified estuarine area in the southern part of the North Island. It has the status of a site of national significance in DoC's Sites of Special Wildlife Interest database. It is listed in the Regional Policy Statement as a site of national significance for indigenous vegetation and significant habitats for indigenous fauna. It is recognised as an area of significant conservation value in the Wellington Region Coastal Plan. DoC manages three areas in the Inlet for

wildlife protection and one as a scenic reserve. The ecological values of the Inlet were summarised in TR10 as:

- Saline flora - the Inlet and its immediate surrounds contain a wide variety of saline, estuarine and coastal plants and vegetation some of which are rare or threatened. This vegetation provides habitat and food for a number of fish and bird species;

- Invertebrates - the Inlet contains high densities of cockles, polychaete worms and copepods. These fauna are found in both the subtidal and intertidal areas. They provide food for a range of fish and birds and many of them are vulnerable to the effects of sedimentation;

- Fish - there have been various records of fish species compiled. More than 43 species of marine fish have been identified in both Pauatahanui and Onepoto Inlets and 12 indigenous freshwater fish species have been detected in the streams which discharge into Pauatahanui Inlet. A number of these are at risk species;

- Avifauna - a wide variety of birds use the Inlet including water fowl, waders and wetland birds. A 1984 survey recorded 43 avifauna species in the Pauatahanui Wildlife Management Reserve. The Guardians of Pauatahanui Inlet (a local community group) has identified 50 bird species in the Inlet and its immediate terrestrial margins. A number of these are resident species.

[516] TR10 summarised the ecological value of the Inlet in these terms:

> *The extensive literature on the Pauatahanui Inlet indicates that a range of estuarine habitats are present, supporting diverse communities of saline vegetation, invertebrate, fish and birds. Sediment quality is largely characterised by low concentrations of contaminants. There are significant concerns raised in many of the reports reviewed regarding sedimentation rates within the estuary and stability of the cockle populations*[187]*.*

[517] TR10 identified the following ecological values of the Onepoto Inlet:

- Saline flora - there are only limited areas of saltmarsh around the margins of the Inlet due to historic reclamation and development. Approximately 17.3ha of lush and healthy sea grass has been identified. This provides an important habitat for various organisms which fish and birds feed on;

- Invertebrates – these are found in both the intertidal and subtidal areas of the Inlet. Studies of the intertidal area have identified a diverse invertebrate community containing species which are sensitive to elevated mud content. A 2009 survey recorded 26 species of invertebrates within the subtidal area;

- Fish - as with the Pauatahanui Inlet, 43 species of fish have been identified in the Onepoto Inlet;

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[187] TR10, para 3.1.2, pg 32.

- Avifauna - the diversity of avifauna in the Onepoto Inlet is low due to the lack of suitable terrestrial edge habitat. Black swans, gulls and other exotic species are however common.

[518] TR10 summarised the ecological values of the Inlet in these terms:

> *The Onepoto Inlet has lower ecological values than the Pauatahanui Inlet, due to extensive coastal edge habitat modification and the surrounding industrial landuse activities. However, the Inlet supports moderate diversity invertebrates and fish communities*[188]*.*

[519] The Applicants recognised from the outset the potential for adverse effects on Porirua Harbour from sediment generated by TGP earthworks. It was also recognised that once sediment is in the harbour, possible remediation and mitigation measures are extremely limited. The thrust of the Applicants' case was to control and minimise runoff and sedimentation at source. For this reason the preceding sections of this decision relating to those matters are important in considering this particular issue.

[520] The other factor of particular significance in our consideration on this issue is that any increase in sedimentation generated by TGP works would be a temporary effect largely confined to the life of the Project. Once the Project was completed and the terrestrial mitigation measures proposed by the Applicants are in place, the long term consequence will be a reduction in the generation of sediment from TGP catchments in the order of 457 tonnes per year. No other party provided evidence seriously challenging that proposition.

[521] The principal issue of contention (primarily between the Applicants and the Director General) revolved around the modelling of sedimentation effects on Porirua Harbour particularly during certain weather conditions. We will address that matter initially and then briefly consider the issue of coastal birds.

**The fate and effect of sediment reaching the Pauatahanui Inlet and the Onepoto Arm**

[522] Mr Roberts has developed a hydrodynamic, wave and sediment transport computer model of the Porirua Harbour. The model has been validated and used to predict the likely fate of terrestrial sediments entering the harbour from storm events and from a 20-year long simulation, both with and without TGP.

[523] Mr Roberts described the hydraulic and sedimentation processes in the Onepoto Arm and in the Pauatahanui Inlet. Both the Onepoto Arm and the Pauatahanui Inlet have central basins with mostly cohesive materials present and where there are circulation eddies. Characteristic *birds foot* deltas where stream sediments are deposited occur at the mouths of the larger streams. Average annual sediment deposit rates in the Pauatahanui Inlet are 9.1mm/yr (42,000 – 43,000 cubic metres/year and in the Onepoto Arm 5.7mm/yr (13,500 – 14,000 cubic metres/yr). Since 1974 the tidal prism has reduced by 8.7% in the Pauatahanui Inlet and by 1.7% in the Onepoto Arm. At current rates of sedimentation the Pauatahanui Inlet will cease to be a water body in 145 – 195 years. In the Onepoto Arm the process will take 290 – 390 years.

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188 TR10, para 3.1.3, pg 35.

[524] The hydraulic and sedimentation processes in the harbour were modelled and a series of event scenarios were modelled for the existing catchment conditions and for a period of peak project construction. The event scenarios assumed, for instance, calm weather with a 50-year ARI in the Kenepuru and Porirua catchments and two-year ARI rainfalls in the other catchments. 21 various scenarios were modelled, including the 20-year simulation referred to above.

[525] The long term simulation predicted sedimentation in the Pauatahanui Inlet of 3.4 – 4.1 mm/yr (cf 9.1mm/yr measured) and in the Onepoto Arm 2.0mm/yr – 2.8mm/yr (cf 5.7mm/yr measured). Mr Roberts considered the differences were explained by the influence of some marine sediment contribution and particularly increased sediment load from subdivisions that have occurred. He was of the opinion that the model predicted sedimentation patterns and sediment deposition depth adequately, notwithstanding contrary views expressed in Ms Kettles' evidence.

[526] Dr De Luca examined the effects of sediment settling out in the harbour. She used the stream sediment discharge estimates from Ms Malcolm's analysis of sediment generation from project earthworks and the settlement predictions in the harbour provided by Mr Roberts to produce maps showing the extra areas of sedimentation in the harbour. In order to gauge the effects on invertebrates of the additional sedimentation she grouped the areas into additional depths of between 5 and 10mm and areas greater than 10mm.

[527] Dr De Luca presented the results of her analysis of 13 combinations of events. For example the first map presented showed small areas of additional sedimentation, (5 - 10mm and > 10mm deep) in the Pauatahanui Inlet when there had been a two-year ARI rainfall in all the catchments and with calm wind conditions in the Inlet. All but two of the scenarios modelled showed there to be low or negligible effects on marine ecological values because sediment deposition was minimal or it occurred where there were low ecological values.

[528] A 10-year ARI rainfall in the Kenepuru and Porirua catchments with two-year ARI rainfalls elsewhere and a persistent strong southerly wind might have moderately significant effects on marine ecological values in the Onepoto Inlet due to localised small areas of sediment deposition.

[529] Also a 10-year ARI rainfall in the Duck and Pauatahanui catchments with a two-year ARI rainfall elsewhere and a persistent strong northerly wind might have highly significant effects on marine ecological values in the Pauatahanui Inlet due to localised small areas of sediment deposition.

[530] Dr De Luca observed that the base line sedimentation in the harbour has been high so the existing intertidal habitat, and to a lesser extent the near shore shallow sub-tidal habitat, must be resilient. She considered that the localised areas of additional sedimentation identified in the two cases above are small relative to the baseline effects and are likely to recover over time.

[531] Besides the event modelling mentioned above Dr De Luca also considered the marine ecological effects of a simulated 20-year period which included a

six-year construction period and 14 years of operation. That showed an accumulation of 2.5mm/yr in the central sub-tidal basins, an effect which Dr De Luca assessed as negligible given the low values of those areas.

[532] Ms Kettles gave evidence on behalf of the Director General about the nature of the Pauatahanui Inlet in particular and the risks and effects of additional sedimentation from TGP. She said the Pauatahanui Inlet is nationally significant with substantial areas of rare saltmarsh and that it has been significantly adversely impacted through sedimentation from catchment development and landuse. She said that TGP is likely to add to the fine sediment load to the Inlet and it is important not to undermine work to restore the Inlet.

[533] Ms Kettles provided us with a series of concerns she had over the estimates of additional sediment from TGP and the risk of greater quantities being discharged. In particular, rainfall events greater than analysed or cumulative rainfall events might present greater sediment loads to the Inlet. The re-suspension of deposited sediment by the wind might also affect additional areas within the Inlet. She also canvassed appropriate conditions. Key controls in her view were to carefully limit the area of active earthworks in each catchment, carry out adequate monitoring of sedimentation effects and provide compensatory actions if excess sedimentation occurred.

[534] Dr De Luca and Ms Kettles met on three occasions to discuss their views and provided the Board with one conference statement identifying matters of agreement and disagreement. The statement was particularly helpful in informing the Board's decision. The witnesses agreed that minor and acceptable effects on marine ecological values were likely from two and 10-year ARI rainfall events.

[535] A reservation remained relating to the scenarios of a 10-year ARI rainfall event in the Duck and Pauatahanui catchments and a northerly wind, and a 10-year ARI rainfall event in the Kenepuru and Porirua catchments with a southerly wind. As we have noted, Dr De Luca considered these two scenarios were the most significant but even then effects were in places of less significance and would be minor and acceptable. Ms Kettles considered that not only did those scenarios have significant effects but a further scenario of a rainfall greater than the 10-year ARI rainfall event in the Horokiri catchment (say a 50-year ARI rainfall with southerly wind) could be worse. Dr De Luca agreed that this latter scenario is the next most unfavourable but that the effects would still be minor and acceptable.

[536] The two witnesses discussed the desirability of modelling rainfall events greater than the 10-year ARI and Dr De Luca agreed to model the results of a 50-year ARI rainfall event in the Duck and Pauatahanui catchments and in the Kenepuru and Porirua catchments.

[537] Results from the further modelling of 50-year ARI rainfall events were presented by Dr De Luca in a further statement of evidence. The modelling showed that under baseline conditions (without TGP), one third of the Onepoto Arm and one third to one half of the Pauatahanui Inlet presently receive sediment deposition. This is less than stated by Dr De Luca in her

EiC. Under these extreme rainfall events and with the peak construction of TGP, disregarding the effects of stabilisation works ahead of the storms, areas of additional sedimentation above threshold depths in the intertidal area would be less than 0.37ha. In sub tidal areas it would be less than 2.67ha. Dr De Luca confirmed the opinion expressed in her initial evidence that ...*additional sediment discharged to the harbour in a Q50 event from Project related open earthworks would make a negligible contribution to the adverse effects that would occur under baseline conditions*[189].

[538] Dr De Luca also carried out further modelling of other scenarios mentioned by Ms Kettles as possibly reflecting significant sedimentation effects. The results led Dr De Luca to conclude that adverse effects from these rains were of low significance. As previously, we acknowledge the limitations of modelling. We accept that Dr De Luca's modelling has been cautious in approach and we note that no allowance was made in her modelling for the beneficial effects of site shut down and stabilisation in the event of predicted heavy rain.

[539] The witnesses agreed that careful timing and staging of earthworks, limiting active areas of earthworks, retiring land in the catchment and stabilising earthworks before significant rainfall events were required to minimise sediment discharge to the harbour. They also discussed conditions which should be imposed if consent was granted to TGP.

**Coastal Birds**

[540] TR8, which addressed the affects of TGP on avifauna, dealt only briefly with potential effects on coastal birds. It noted that the Main Alignment of TGP was 1km away from Pauatahanui Inlet but accepted the potential for indirect impact on the habitat of coastal birds by way of increased sedimentation to the Inlet. TR8 identified[190] the number of bird species known to occur in the Inlet and around its margins but dealt only briefly with these issues.

[541] In the Director General's submission it was claimed that there had been an inadequate assessment of potential effects of TGP on the habitats of coastal birds. Mr Fuller addressed that in his evidence[191] and contended that ...*the great majority of potential estuarine bird feeding habitat will be unaffected...* by TGP. He expressed the opinion that there are unlikely to be adverse effects on coastal birds or their behaviour/feeding.

[542] Dr Baber disagreed with Mr Fuller. He expressed concerns about the adequacy of the sedimentation modelling and the effect which sedimentation could have on habitat and food sources for coastal birds[192]. Dr Baber requested that a survey of coastal birds is undertaken to establish a baseline against which to monitor and adaptively manage the potential effects of TGP on coastal birds[193].

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189 Rebuttal Evidence, para 24.
190 Para 4.1.2.
191 Para 203.
192 EiC, paras 57 to 59.
193 EiC, para 90.

[543] In rebuttal evidence, Dr Bull accepted that a range of native birds utilise the Pauatahanui Inlet, but noted that due to the various foraging behaviours and diets of these species, only small numbers of a few species are likely to potentially be affected by sediment discharges. She doubted the value of a bird survey because of the existing and continued discharge of sediment into the harbour through current land use activities and the relatively low numbers of wading birds recorded in the Inlet. These factors make it difficult to detect any statistically significant results in terms of changes in foraging behaviour[194]. Instead of a bird survey, Dr Bull supported Dr De Luca's recommendation that monitoring of invertebrate indicator species is undertaken prior to, during and post construction[195]. As it is likely that these species form the diet for any wading birds, this would provide a more accurate indication of whether or not TGP has adverse effects on coastal birds through sedimentation.

[544] We concur with the evidence of Mr Fuller, Dr Bull and Dr De Luca in this regard. We do not understand there to be any dispute with the proposition that bird habitat will not be affected by the TGP route itself. It is the effects of sedimentation on bird habitat including the effect on plants and animals on which coastal birds feed that is the issue in this instance. We consider that there is some merit to Dr Bull's evidence that given bird mobility, the current high levels of sediment discharge from other land uses and the relatively low predicted sediment from TGP it would be difficult to attribute effects on bird habitat use to TGP[196]. We accept her evidence that wider monitoring of marine ecological values is an adequate proxy for direct monitoring of effects on coastal birds themselves.

**Main findings as to effects of TGP on marine ecology**

[545] Having regard to all of the above matters, we have concluded that the effect of sedimentation generated by TGP on Porirua Harbour will fall within acceptable limits, provided that appropriate controls are placed on the Project to ensure that the generation of sediment is minimised and controlled at source to the greatest extent practicable. In reaching that conclusion, we have accepted the evidence of Dr De Luca which we found to be thorough and considered. We have placed particular weight on the short term nature of the sediment generation from TGP and the reduction of sediment into Porirua Harbour from the TGP catchments in the longer term due to the remediation and retirement works to be undertaken by the Applicants.

## 12.8 NOISE AND VIBRATION (OPERATIONAL)

**Operational noise**

[546] Dr Chiles has undertaken the analysis of the incidence of operational road noise from the proposed TGP alignment and has determined the best practicable option for dealing with recipients of future high road noise. He presented this evidence on behalf of the Applicants. He also advised that he was the author of TR12 (Acoustic Assessment Report).

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194 Rebuttal Evidence, para 48.

195 Rebuttal Evidence, para 56.

196 EiC, para 49.

[547] Existing sound levels were surveyed and, as might be expected, near existing roads at Linden, SH58 and MacKays Crossing sound levels were dominated by noise from the roads. In the more remote areas around the outskirts of the eastern suburbs of Porirua, near Flightys Road, and Paekakariki Hill Road natural sounds dominate.

[548] Dr Chiles explained the new way noise mitigation measures are designed to reduce road operational noise levels. He said that the new NZS 6806:2010 Standard, *Acoustics – Road-traffic noise – New and altered roads*, promotes an integrated design process to establish the best practicable option (BPO). It specifies the types of protected premises and facilities (PPFs) for which a noise assessment was required and considers only those PPFs within 100m of the road in urban areas or within 200m in rural areas.

[549] He advised that there were three categories of noise criteria given in the Standard. The external noise criteria for category A should be achieved if it is practicable. If it is not practicable then the higher external noise levels of category B should be achieved. If these external noise levels cannot be achieved practicably then building modification should be implemented to achieve the internal noise limits in category C.

[550] The steps then required the assessment of the BPO for mitigating road noise at each of the PPFs that were estimated to receive road noise levels greater than category A levels. *The maximum external noise level criteria for category A is 64dB $L_{Aeq(24hr)}$ where there is ~~either~~ an altered road, or 57dB $L_{Aeq(24hr)}$ where there is a new road with a predicted traffic volume of 2000 to 75000 AADT.* The basis for this assessment depended on:

- Compliance with the NZS 6806:2010 criteria;
- Attenuation provided by structural (barriers and low noise surfaces) mitigation;
- Need for building-modification (ventilation/sound insulation) mitigation; and
- Value-for-money (using the acoustic benefit-cost ratio (BCR) calculation from NZS 6806:2010

[551] The options for noise mitigation at each location where it was necessary were then assessed against 18 factors that included constructability, land availability and visual and environmental effects. There were 15 areas identified along the route for specific evaluation.

[552] As an example of the evaluation, at MacKays Crossing there were 10 PPFs identified. Low noise road surfacing and roadside noise barriers were examined to reduce road noise at these receptors. Both options were found to have relatively poor BCRs so no specific mitigation is proposed, although one PPF was purchased by the Crown. Another example is at Linden. Here the existing SH1 is widened to accommodate merging traffic from and to the new expressway. Aside from properties purchased by the Crown, there is a need to erect a 2m high earth bund to achieve category A noise levels at the other PPFs.

[553] For the majority of the project north of Linden, the BPO has turned out to not require any specific noise mitigation measures. A noise bund is proposed by a section of Flightys Road extension.

[554] Around Linden there is to be a low noise road surface and the BPO requires extensive noise barriers and in three instances acoustic treatment of individual houses.

[555] Dr Chiles said that ...*Road-traffic noise levels will unavoidably increase throughout the Project area. In my opinion this will give rise to a significant change in acoustics amenity in areas remote from existing roads. This potential change in amenity has been signalled by the existing designation. While the position of the designation has moved in places, the wider area would become affected by road-traffic noise in either new or old locations. In my opinion the effect of the change in amenity is related to the change in character of noise caused by the presence of the road in the area, moreso than the specific noise levels which depend on the exact position of the road.*[197]

[556] With the mitigation measures selected as the BPO, Dr Chiles considered that road-traffic noise will be at reasonable levels as determined by NZS 6806:2010 at all locations.

[557] In respect to submitters, Dr Chiles concluded, with the noise mitigation works proposed, that for 55 Collins Avenue and the Rangitira Road residents, noise levels will be within the category A criteria and at 23 Tremewan Street road noise will slightly decrease. Increased local traffic from the Waitangirua link road was said to be small and to result in road noise increases of only 1 – 2dB. At Flightys Road residences numbers 129 E and F, predicted road noise levels are less than category A criteria so do not require special treatment and those at 247 B and C also fall within category A. Nevertheless, a noise bund is proposed along the expressway beside Flightys Road extension. In parts of Battle Hill Farm Forest Park and Belmont Regional Park road noise will be detectable but in Dr Chiles' opinion will not detract significantly from the park experience.

[558] The Board apprehended that the conclusions of Dr Chiles in his evidence relied upon criteria contained in NZS 6806:2010, their measurement in terms of $L_{Aeq(24hr)}$, the requirement for BPO and that those provisions satisfied the requirements of the RMA. Furthermore the Board was interested in how the criteria compared to the standards adopted by other countries and it needed to know whether any of the noise provisions of the district plans had any application. The Board was also aware of reservations about the use of NZS 6806:2010 expressed in the decision of the Waterview Board of Inquiry and wanted to have the benefit of Dr Chiles' views on those matters. Accordingly the Board issued a minute asking Dr Chiles to provide further evidence addressing these issues.

[559] Dr Chiles had prepared a guide on NZS 6806:2010 for NZTA but, other than being a submitter on the draft standard, he was not directly involved in the

197 EiC, para 40.

determination of the Standard. He said the experts appointed to the technical committee by Standards New Zealand represented the Department of Building and Housing, INGENIUM, Local Government New Zealand, Ministry of Health, Ministry of Transport, New Zealand Acoustical Society, New Zealand Institute of Environmental Health, NZTA, Road Controlling Authorities New Zealand and Roading New Zealand. He considered the committee had extensive and comprehensive knowledge of road-traffic noise and its effects on people. He also considered the Standard provides a robust method for the assessment of road-traffic noise and provides appropriate criteria to maintain reasonable amenity and to protect against health effects such as sleep disturbance.

[560] Dr Chiles helpfully explained the various measurement units for sound and concluded by saying that the $L_{Aeq(24h)}$ is a measure of the average sound level over a 24hr period and best matches the continuous nature of highway traffic noise and the measured responses of people to road traffic noise. Road traffic noise is the only noise source that uses this particular measure. A similar measure is $L_{dn}$ which is an average day/night noise level but where the night-time noise is penalised by an increase of 10dB. It is used where the noise emanates from airports, heliports and coastal ports.

[561] An external road noise level of up to 57dB $L_{Aeq(24h)}$ from new roads and up to 64 dB $L_{Aeq(24h)}$ from altered roads was said to be reasonable by Dr Chiles and is the criterion given in the Standard in category A. If all PPFs receive road noise at or below this level no mitigation of road noise is necessary under the Standard. Dr Chiles says that the public are more tolerant of road traffic noise partly because it is continuous, relatively bland and unobtrusive and everyone relies on road transport.

[562] Dr Chiles explained that where the external road traffic noise at a PPF exceeds either 57 dB $L_{Aeq(24h)}$ (new road) or 64dB $L_{Aeq(24h)}$ (altered road) the best practicable noise mitigation is required under the Standard to reduce the noise level to the category B level of 64dB $L_{Aeq(24h)}$ or 67dB $L_{Aeq(24h)}$. If practicable mitigation measures cannot achieve that external noise level and internal noise levels from road traffic at the PPF exceed 45dB $L_{Aeq(24h)}$ then the standard requires that the internal noise level is not to exceed 40dB $L_{Aeq(24h)}$.

[563] In respect to loud sporadic noises from vehicles, Dr Chiles advised that control of those noises relied on the Land Transport Rules for new vehicles and that a maximum noise level $L_{Afmax}$ imposed on the road controlling authority is not effective. Because of the steep grades on the expressway, Dr Chiles examined the noise level from engine brakes and concluded the maximum noise level events should remain within reasonable limits.

[564] Dr Chiles then described why he and other noise experts considered NZS 6806:2010 provided the best methodology for assessing road traffic noise and for assessing the BPO for mitigating the noise where required by the criteria set in the Standard. The methodology set out in the Standard and in the guide requires, he says, a holistic approach where visual and other environmental effects of noise mitigation options are considered against the effectiveness and cost of the options. He said the Standard sets out a process rather than a noise limit and therefore cannot be made subject to a simplistic performance

standard[198].

[565] In response to our question about the relevance of district plan rules Dr Chiles advised that the noise levels in district plans for Wellington, Porirua and Upper Hutt did not include road traffic noise. The Kapiti Coast district plan treats new roads in the rural area as a controlled activity and includes the Transit (pre NZTA) noise guidelines as the acceptable noise limits. Dr Chiles found that five houses in the MacKays Crossing area would experience road traffic noise levels above the Transit guideline. Three houses were 1 – 2dB above and two houses were 4dB above. A length of 4km of low noise road surface and 850m of noise barriers and bunds would be required to reduce the received sound to the levels specified in the district plan.

[566] Applying NZS 6806:2010 to the five houses affected the BPO was determined to be to do nothing. The cost, maintenance and visual effects of the mitigation options outweighed the acoustic benefit and the noise level was deemed acceptable by Dr Chiles, but the details supporting this conclusion were not provided.

[567] With reference to the comments of the Board of Inquiry for Waterview, Dr Chiles observed that in that case 80,000 vehicles per day were to pass through a dense residential area and more lenient noise criteria applied. He supplied an NZTA paper titled *Waterview Connection and NZS 6806:2010 NZTA Position October 2011.*

[568] The paper addresses the Waterview Board's concerns. It says a roading authority when carrying out upgrading works cannot be required by a consent to improve an existing noisy environment. It may offer but it cannot be obliged. It also says that the BPO definition and process in NZS 6806:2010 accords with the various requirements of the RMA and balances factors of health, environment, social, safety, cultural, economic and other matters. It acknowledges the Standard is not a formal National Environment Standard but says it is a robust, consistent and standardised process. It says the Standard has been carefully developed by experts in all relevant areas and is an appropriate basis for assessing the acceptability of road traffic noise.

[569] Notwithstanding the evidence of Dr Chiles, the Board, because it must apply the provisions of the RMA, remained concerned about the appropriateness of the noise criteria and the reliance on BPO in NZS 6806:2010. Accordingly it instructed Mr Nigel Lloyd to prepare a report under section 42A RMA that advised the Board on:

- The interpretation of NZS 6806:2010 including the implications of use of an $L_{Aeq(24h)}$ standard;
- Whether or not NZS 6806:2010 provides a suitable basis for consideration of operational noise effects, particularly with respect to environmental and health effects;
- The application or otherwise of relevant district plan noise rules: and

[198] EiC, supp para 33.

- The applicability of comments made by the Board of Inquiry into the Waterview proposal regarding NZS 6806:2010.

[570] Mr Lloyd has clearly and succinctly encapsulated the concerns we have had with the new Standard so a substantial part of his evidence is reproduced below.

*The purpose of the RMA is set out in Section 5. Applying the RMA in practice involves a broad judgement of whether a proposal would promote the sustainable management of natural and physical resources. To make a decision requires having an understanding of the different factors, some of which may be conflicting. However the RMA is not only about achieving balance between the benefits and adverse effects occurring from an activity but is about avoiding, remedying or mitigating the effects irrespective of the benefits that may be gained.*

*I believe NZS 6806 provides an excellent mechanism for mitigating the adverse effects by exploring the best practicable option for controlling roading noise. But it does not assist in establishing what the impacts of the actual or potential impacts will be.*

*One of the issues with NZS 6806 is that it jumps to a conclusion without showing what workings have been undertaken. An assessment undertaken in accordance with NZS 6806 therefore will not set out those matters that should be included in an assessment of effects on the environment that are laid down in Schedule 4 of the RMA. What is missing is a full assessment of the actual or potential effects on the environment and where, once the proposal is approved, effects will be monitored and by whom.*

*An AEE will normally determine:*

*(i) The existing sound environment, including background and ambient sound levels;*

*(ii) appropriate noise criteria based on community standards for health and amenity protection;*

*(iii) predicted noise levels without any noise mitigation;*

*(iv) what noise mitigation is required to meet the criteria;*

*(v) future noise levels; and*

*(vi) what noise monitoring is required.*

*NZS 6806 does not take this approach. The Standard has a sliding set of criteria that provide for different outdoor noise levels based on the ability of the road to comply with the criteria using the best practicable option. If none of the outdoor criteria can be met then an indoor criterion is set. The difference is that NZS 6806 criteria are not established using recommended limits that will protect health and amenity, but the criteria are designed to allow the road to be constructed in the most practicable way.*

*That said there seems to be a wide agreement that the Standard is only meant*

*to provide general guidance as to methodology. As pointed out by the Board of Inquiry in the Waterview Connection Proposal too much faith should not be placed on the Standard and that it should be employed more as a "Standard" than a "recommendation" which the fine print reveals the document to be.*

*The Standard works from the principle that the benefits of the proposed road will outweigh any negative noise impacts and then sets about establishing whether it is practicable to provide for noise mitigation. This is not the purpose of a Standard which should be to recommend noise criteria to be applied to new or altered roads received at the assessment positions of protected premises and facilities (as stated in the foreword of NZS 6806). The decision as to whether the adverse noise impacts have been adequately avoided or mitigated, and whether the resultant adverse noise effects will be acceptable for the community, is the province of the ultimate consent authority and the Standard should provide sufficient information to allow them to undertake that task. I do not believe the Standard provides adequate guidance in this respect.*

*If, according to NZS 6806, it proves to be impracticable to reduce noise from the new route, then nearby dwellings can be left exposed to levels that are greater than those that would normally be considered to be reasonable to protect health and amenity. This may prove to be an inevitable result of the establishment of the route but in my opinion the Standard does not allow the adverse effects to be fully described or tested into the future, or, ultimately, for appropriate indoor noise environments to be provided for.*

*An assessment using NZS 6806 therefore does not provide the decision maker with the tools to determine what residual adverse effects remain or to provide any form of noise conditions to allow the community to have confidence that the prediction methodology is correct and that they will not be exposed to future noise that is reasonable. The Standard provides a process whereby the BPO is decided upon (using a range of factors including non-acoustical considerations) and if higher noise levels result then no further action is required. I can understand why a consenting authority would be uneasy with this approach.*

*In addition the Noise Criteria in NZS 6806, while only used to trigger the determination of BPO, tend to legitimise "reasonable" noise levels that are greater than those levels generally considered to be appropriate for amenity protection. I discuss the WHO Guidelines and AS/NZS 2107:2000 recommended guidelines further below.*

*With respect to $L_{Aeq(24hr)}$ parameter I believe that longer term averaging is appropriate for traffic noise given the variations that occur throughout the day. Averaging over the whole day or a significant part of the day or night is appropriate for assessment rather than short term monitoring such as over 10-15 minutes or 1 hour. The other decision that needs to be made is whether night-time $L_{max}$ criterion should apply.*

*In the conclusions of the Land Transport New Zealand Research Report 299 entitled* Transportation and noise: land use planning options for a quieter New Zealand *under the heading "Establish the preferred noise criteria" the*

*report states:*

*The criteria for noise measurement need to be agreed. Internationally and currently in New Zealand the measurement $L_{Aeq(24hr)}$ is recommended for general road traffic noise measurement. However, this measure has been criticised as not being a close representation of the noise that people actually experience. Current Australian research recommends using both $L_{Aeq(15hr)}$ and $L_{Aeq(9hr)}$ to provide separate measures for day and night, and can be manipulated to very closely approximate $L_{dn}$.*

*Report 299 has extensive research into the traffic noise parameters used overseas.*

*In my opinion the traffic noise index used in NZS 6806 should be based on a noise monitoring parameter that recognises the greater impact of noise on evening and night-time amenity and thus would more properly protect the community from noise with respect to health and amenity. $L_{den}$ (day evening night equivalent level) is the preferred EC method of assessing noise including transportation noise. $L_{den}$ is based on the $L_{Aeq}$ parameter but imposes a 5 decibel penalty for evening events (7pm to 10pm) and a 10dB penalty for night-time events (midnight to 6am and 10pm to midnight). The other option is criteria based on daytime $L_{Aeq(15hr)}$ and night-time $L_{Aeq(9hr)}$ parameters.*

*NZS6806 uses the time-average A-weighted sound pressure level with a 24 hour reference time ($L_{Aeq(24h)}$). This has traditionally been used to describe traffic noise in New Zealand and forms the basis for the design sound levels in the Transit Guidelines.*

*The traffic noise parameter used prior to $L_{Aeq(24hr)}$ was $L_{A10(18hr)}$ which forms the basis of the UK calculation method (CoRTN) and which was used in a New Zealand modified form to predict traffic noise levels for this project. Technical Report 12 describes (in Section 4) how the modified CoRTN prediction is converted to $L_{Aeq(24hr)}$ by subtracting 3dB.*

*The prediction is therefore made based on the 18 hour traffic flow between the hours of 6am and midnight and then a -3dB correction made to arrive at the 24 hour $L_{Aeq(24hr)}$. I understand from technical report 12 that the 24hr AADT value has been used directly in the CoRTN for the 18 hour volume (instead of calculating the 18hr traffic volume separately) resulting in the calculation be slightly conservative. The accuracy of the conversion relies on there being relatively low night-time traffic volumes.*

*Night-time traffic between midnight and 6am is not specifically modelled.*

*This method relies on this assumption that different road types will, on average, produce a reasonably consistent diurnal flow pattern. For roads where significant deviations in the average conditions occur then errors in conversion may result.*

*NZS 6806 is unusual therefore because there is no differentiation made between daytime and night-time noise impacts.*

*All other New Zealand Standards provide some form of differentiation between*

*the daytime noise limit and the need for stricter night-time protection. Both NZS 6802 and NZS 6803 provide for separate stricter residential night-time controls and NZS 6805 (Airport Noise), NZS6807 (Helicopter Noise) and NZS 6809 (Port Noise) all use an $L_{dn}$ criterion which penalises night-time events such that their sound energy is calculated to be ten times (10x) that of the actual event. In other words one aircraft take-off is averaged on the basis of there being theoretically ten aircraft take-offs. This generally provides a weighting that accounts for the increase in community annoyance likely to result from noisy night-time activities.*

*NZS 6808 (Wind farms) uses a different methodology altogether ($L_{A90}$) which is designed to enable the relatively steady wind farm sound levels to be paired with the wind farm wind speeds and for any correlation to be determined. This provides for sounds to be measured during times when interference from high wind gusts might otherwise be an issue. Wind farms generate the same noise levels day and night and the noise criteria are therefore pitched at protecting the more critical night-time amenity.*

*In NZS 6806 the Health Criteria are discussed in section 4.7 which states that the approach used in the Standard, such as emphasis on land-use planning, isolation of building from traffic sources, and the selection of $L_{Aeq(t)}$ to quantify traffic noise, are consistent with the advice contained in the World Health Organisation Guidelines for community noise.*

*The noise criteria referred to in NZS 6806 are those WHO guideline values in the 1999 document, for example:*

| ***Specific environment*** | ***Critical health effect*** | ***$L_{Aeq}$ [dB]*** | ***Time base [hours]*** | ***$L_{Amax}$ Fast [dB]*** |
|---|---|---|---|---|
| *Outdoor living areas* | *Serious annoyance, daytime and evening* | *55* | *16* | *-* |
| | *Moderate annoyance, daytime and evening* | *50* | *16* | *-* |
| *Dwelling Indoors* | *Speech intelligibility and moderate annoyance, daytime and evening* | *35* | *16* | *-* |
| *Inside bedrooms* | *Sleep disturbance, night-time* | *30* | *8* | *45* |
| *Outside bedrooms* | *Sleep disturbance, window open (outdoor values)* | *45* | *8* | *60* |
| *School classrooms and pre-schools, indoors* | *Speech intelligibility, disturbance of information extraction, message communication* | *35* | *During class* | |

*An important aspect of this table is the time base shown in the 4th column. For daytime activities the time base is 16 hours but for night-time the time base is 8 hours and the guideline limit is 5-10dB stricter than the daytime limits.*

*The guidelines recommend night-time $L_{max}$ levels which are not provided for by NZS 6806 (but which Dr Chiles invokes separately particularly for truck braking noise on steep inclines).*

*These criteria are also represented in AS/NZS2107:2000 in a more detailed way.*

*Dr Chiles discusses the use of $L_{Aeq(24h)}$ in his supplementary evidence and he also recognises that while other New Zealand Standards adopt various different criteria, each of these has recognition of night-time impacts.*

*In his opinion $L_{Aeq(24h)}$ is appropriate for road traffic noise because it is the same as $L_{dn}$ used for other transportation sources but without the night-time penalty. He states that the main reason for the difference is that* "the diurnal variation of road-traffic for a particular type of road does not change significantly, and compared to say an airport operator, the road controlling authority has no influence on this variation"*.*

*In his opinion a road will be subject to daytime peak periods and reduced traffic at night but the pattern is reasonably consistent. He states that the prediction algorithm currently used in New Zealand does not allow the application of a night-time penalty as day and night levels are not separately calculated.*

*The fact is though that the dose response curves in Europe are based on $L_{den}$ rather than $L_{Aeq(24hr)}$. Dr Chiles' reasons for using $L_{Aeq(24hr)}$ are primarily that the roading authority has no control over night-time traffic and that $L_{den}$ is difficult to predict using information we have in NZ. However in my opinion the critical question is does the $L_{Aeq(24hr)}$ appropriately represent the community reaction to noise, and in particular night-time noise, as opposed to, say, $L_{dn}$ or $L_{den}$?*

*The roading authority has no control over the night-time noise level from this route. If the diurnal variations of the route are abnormal, with heavy trucks on the route at night for example, then the neighbouring community may experience high night-time noise levels with there being no ability to recognise that fact in the noise measurement parameter, or for appropriate levels of mitigation to be provided should it be required. It is the responsibility of the roading authority to deal with such a scenario should it arise and there is no process for them to do so.*

*It could be argued that enough information is known about roading systems that it can be confidently stated that diurnal patterns for Transmission Gully are expected to correspond to those found elsewhere and that the conversion factors used by Dr Chiles will therefore be appropriate.*

*I have given this matter considerable thought and what decides me that either $L_{den}$ (or $L_{dn}$) would be a more appropriate measurement parameter than $L_{Aeq(24hr)}$ are summarised as:*

*(i) The $L_{den}$ value is used in Europe to determine community dose relationship and is more appropriately applied to assess impacts on health and amenity; and*

*(ii) If the diurnal values for Transmission Gully do not vary significantly from the norm then the $L_{den}$ will be consistent with the $L_{Aeq(24hr)}$ value. Any small adjustments necessary to convert between the two can be accommodated if these differ from the WHO recommendations. It is only should the diurnal traffic flow patterns prove to be abnormal e.g. high night-time traffic flows with high percentage heavy vehicles, that this would become important. I accept that the roading authority may not be able to predict this but in my opinion that is not the issue. The issue is that this abnormal flow might have a significant impact on residents which needs to be measured and assessed.*

*Alternatively it would be appropriate to adopt $L_{Aeq(15hr)}$ and night-time $L_{Aeq(9hr)}$ if consistency with Australia was seen as beneficial.*

*Whether a night-time $L_{max}$ criterion should be applied is a difficult subject. Dr Chiles has recognised that steep sections of the route may cause truck braking noise to impact on residential amenity and has used $L_{max}$ to assess that impact. On that basis it could be argued an $L_{max}$ criterion is appropriate to assess night-time noise impact. The problem with $L_{max}$ is that it could be exceeded by one particularly noisy car, truck or motorbike. It is controlled by individual vehicle noise rather than as a function of the traffic volume. Night-time noise impacts could well become a function of the level and number of individual noise events but a single $L_{max}$ criterion may not be the best way of assessing these.*[199]

[571] In his evidence, Mr Lloyd went on to discuss the matters raised by the Waterview Board of Inquiry related to the NZS 6806:2010. He said those issues raised by TGP were the relevance of the 40dBA $L_{Aeq(24h)}$ internal noise criterion, and the existing quiet nature of the majority of the route.

[572] He observed that the night-time noise level could be expected to be 5 or 6 decibels less than the average 24-hour value.

[573] Mr Lloyd referred to the internal sound levels recommended as acceptable in the standard AS/NZS 2107 of 35dB $L_{Aeq(24h)}$ in bedrooms. NZTA adopts this internal noise level in its Planning and Policy Manual and recommends adherence to consent authorities for new houses near roads. As an example NZTA and the developers of the *Silverwood* subdivision agreed to an internal noise level in bedrooms of 35dB $L_{Aeq(24h)}$ in stage 2.

[574] This level of 35dB $L_{Aeq(24h)}$ is 5 – 17dB lower than the internal noise criterion of 40dB $L_{Aeq(24h)}$ in NZS 6806:2010, or 64-15 =49dB $L_{Aeq(24h)}$ ex category B with windows open for new roads, and 67-15=52dB $L_{Aeq(24h)}$ ex category B with windows open for altered roads. (The reduction by 15 accounts for the reduction in noise level from outside to inside assuming windows are partly

199 EiC, Section 42A Report on Noise, paras 13-48.

open.)[200]

[575] Considering the introduction of a new route into a quiet rural area, Mr Lloyd said the application of AS/NZ 2107:2000 would require maximum internal sound levels of 30dB $L_{aeqt}$ where *t* is the time over which the sound level is averaged, presumably 6 hours during the night. For normal diurnal traffic distribution this would equate to about 35 dB $L_{Aeq(24h)}$.

[576] Mr Lloyd then reported on the provisions of the relevant district plans and why they do not provide any or adequate controls of road noise, except perhaps for the Kapiti Coast District Plan which incorporates the Transit Guidelines.

[577] He concluded that NZS 6806:2010 identifies the BPO for mitigating road noise but falls short of identifying the likely adverse effects as required under the RMA. He said …*NZS 6806:2010 does not provide for appropriate indoor or outdoor noise criteria to protect community health and amenity and does not provide sufficient information to allow a consenting authority to appropriately decide on the adverse effects of noise*. He considered a night-time noise criterion should have been adopted instead of the $L_{Aeq(24h)}$ measure.

[578] Dr Chiles, after sufficient time to absorb Mr Lloyd's views, prepared a second statement of supplementary evidence. He stood by the conclusions in his evidence and the mitigation proposed. He said his evaluation used NZS 6806:2010 and as recorded in TR12 covered all the issues raised by Mr Lloyd. He said it was reviewed by experts and not found wanting. He considered the criteria in NZS 6806:2010 are reasonable.

[579] Options for the alignment of the road included consideration of noise effects before detailed evaluation under NZS 6806:2010 which then allowed the identification of the best practicable option for mitigating the road noise on the chosen alignment. Dr Chiles regarded the selected mitigation to be appropriate and said that he has provided the information necessary for others to consider the issues. Because he says road traffic noise is particularly stable the actual unit of average sound measurement (dB $L_{aeq(24h)}$ or dB $L_{Aden}$) is less important but obviously the criteria set need to be in terms of the chosen unit.

[580] Dr Chiles considered the WHO criteria to avoid health effects are idealistic and that most countries adopt criteria above those for noise levels reaching the criteria in NZS 6806:2010. Dr Chiles said that people will generally adapt their use of indoor and outdoor spaces. If windows away from the road noise are used for ventilation then indoor noise levels will not be exceeded by external noise levels at the levels in NZS 6806:2010.

[581] Dr Chiles acknowledged the difference in internal noise levels promoted by NZTA for new houses and those required by NZS 6806:2010 and said that is being reviewed.

[582] Dr Chiles and Mr Lloyd then met to discuss their views and they provided us with a statement that identified the areas they agreed on and stated there were no remaining areas where they did not agree. We are grateful for the assistance these two experts have given to the Board and for the professional

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200 NoE, pg 1795.

approach taken by them both.

[583] They agreed that the assessment of operational road-traffic noise effects under the RMA requires broader consideration than just the assessment of mitigation options in accordance with NZS 6806. They agreed road-traffic noise ought to be time averaged, not an instantaneous or short term measurement, and a separate $L_{Aeq}$ should be used for day and night criteria, especially where abnormal night time noise might occur.

[584] Provided the diurnal variation of traffic was normal, they agreed that 40dB $L_{Aeq(24h)}$ (approximately 35dB $L_{Aeq(9h)}$ at night) is a reasonable road-traffic noise level inside a bedroom with windows partly open near a major road. In remote rural areas a lower level is desirable.

[585] They also agreed that internal noise levels of 40dB $L_{Aeq(24h)}$ will not be achieved with external noise levels at category B NZS 6806:2010 and windows open. In existing noisy areas they say households will have adapted so that windows facing the road will not be used for ventilation at night. Where a new road is proposed they say most houses affected will need some adaptation for the internal noise criteria to be met and NZS 6806:2010 does not provide guidance on who must do the adaptation. They said this latter matter featured strongly in the Waterview decision.

[586] Mr Lloyd had criticised the absence of detailed sound level estimates at each affected PPF and Dr Chiles agreed to provide that information. It was presented during Dr Chiles' second statement of supplementary evidence and became Exhibit 22. It showed the predicted sound level at each PPF for existing conditions, for existing conditions in 2031, for TGP in 2031 without noise mitigation and for TGP in 2031 with the noise mitigation proposed.

[587] The two acoustics experts reviewed the proposed conditions that related to noise matters and proposed agreed amendments. The changes relate to identifying PPFs that fall into category C by an altered road or into categories B and C by a new road. They suggest these be referred to as *qualifying buildings* in the conditions. There is to be no limiting distance from the road for these PPFs, unlike the 100m and 200m limit in NZS 6806:2010 for urban and rural locations respectively. At those PPFs that require some building or structural modification the options identified by an acoustical expert are to achieve an internal level of 40dB $L_{Aeq(24h)}$ . Then additional conditions have been recommended to require compliance assessment of the noise mitigation and assessment.

**Findings about operational noise effects**

[588] We have carefully considered the debate about the nature and capability of NZS 6806:2010. We think that Mr Lloyd has captured our views well and that is the reason we have included that part of his evidence in full.

[589] The scope of the Standard does not include all the matters that are relevant to our decision under the RMA. The Standard has a philosophy that is different to the purpose of the RMA. It has an approach that seeks to find the BPO for controlling road-traffic noise rather than ensuring acceptable noise and amenity conditions are maintained for those receiving the noise.

[590] Mr Lloyd described this approach as a sliding set of criteria where category A levels were sought and if they could not practicably be met then category B levels would be accepted and if they could not practicably be met then category C internal noise levels would be accepted. We found it puzzling that neither of the experts referred to category D, or rather paragraph (d), in the criteria in the standard. That says;

> *(d) Where it is inconsistent with the adoption of the best practicable option to achieve the criteria of Category A, B, or C, the internal noise levels of any habitable space shall be mitigated to the extent that it is practicable.*

[591] Clearly the Standard really says in all cases do the best you can practicably. That is not the test under RMA. We must consider the effects that additional road-traffic noise will have on the people who will be subject to it, and whether or not with the additional noise the health and amenity of the community will be maintained. We must assess what noise level each PPF will receive and determine whether in the particular circumstances that is acceptable or not. If not, we must require the effect be avoided, remedied or mitigated. The effect might be mitigated using sound barriers or low noise road surfacing, it might be remedied by structural modifications but if the result is still unacceptable in terms of the health and amenity of the community then the effect might have to be avoided. That could be done by declining the application or by removing the susceptible PPF. It is not adequate just to do the best you can which is what the Standard seems to promote.

[592] Within the Standard noise criteria are given that are said to be *reasonable taking into account adverse health effects associated with noise on people and communities, the effects of relative changes in noise levels, and the potential benefits of new and altered roads.* External noise levels of 57dB $L_{Aeq(24h)}$ for a new road and 64dB $L_{Aeq(24h)}$ for an altered road are given as the acceptable levels. Secondary levels of 64 and 67 respectively are also given. They are category B. Satisfactory internal noise levels are given as 40dB $L_{Aeq(24h)}$ .

[593] Both Dr Chiles and Mr Lloyd consider a distinction ought to be drawn between daytime noise and night time noise as most other noise standards make this distinction. We agree.

[594] They told us that an average sound level over 24 hours would be about 5 – 6dB above the average during the night for the normal traffic distribution between night and day. So an internal sound level of 40dB $L_{Aeq(24h)}$ would be equivalent to about 35dB $L_{Aeq(6h)}$ at night assuming normal traffic distribution. Dr Chiles says that to make a significant difference to the 24hour average noise value would require a major change of the night time traffic flow, something that is unlikely, and so he considers the 24hour noise measure to be satisfactory. We think that reasoning reinforces the need to separately identify the received night time noise. Smaller but significant departures from expected night time noise will then be observable and able to be corrected so that the communities' night time amenity is maintained.

[595] The reasonable road-traffic noise criteria given in the Standard when compared to those quoted by Mr Lloyd appear to be high.

[596] Examples of acceptable road noise criteria from WHO and quoted by Mr Lloyd for outdoor living areas are 50 – 55dB $L_{Aeq(16h)}$, for indoor areas 35dB $L_{Aeq(16h)}$, for bedrooms to avoid sleep disturbance 30dB $_{Laeq(8h)}$ and outside bedrooms with window open 45dB $L_{Aeq(8h)}$.

[597] New road criteria for outside are 2 – 7dB higher and for indoor bedroom criteria are 10dB higher or allowing for the different measurement unit some 5dB higher.

[598] Altered road criteria for outside are 9 – 14dB higher. Indoor noise criteria are the same as for a new road. A particular aspect of the Standard for an altered road is that where existing noise levels exceed 64dB $L_{Aeq(24h)}$ and the BPO permits, the existing noise level is to be reduced. Previously under the Transit Guidelines where the noise level was already high it was not permitted to increase it.

[599] Both Dr Chiles and Mr Lloyd comment that most countries adopt criteria that are higher than the WHO levels for practical reasons and because road-traffic noise is more tolerable.

[600] The Kapiti Coast District Plan reflects the Transit Guidelines for controlling road-traffic noise. The criteria in the District Plan for new roads is given in the table below:

| **Ambient Noise Levels (dBA) Leq (24hour)** | **Noise Limit (dBA) Leq (24 hour)** |
|---|---|
| Less than 43<br>43-50 | 55<br>Ambient + 12 |
| 50-59 | 62 |
| 59-67<br>67-70<br>More than 70 | Ambient + 3<br>70<br>Ambient |

[601] These criteria show a maximum of 55 in quiet areas, 62 in average noise areas and a maximum of 70 in noisy areas. While based on an existing amenity measure the values appear higher than as now contained in the new Standard.

**Main findings on operational noise**

[602] We think, on the evidence we have heard, that an external road-traffic noise for new roads of 57dB $L_{Aeq(24h)}$ is acceptable, as in the Standard but that it should be adjusted to the 18 hour daytime and 6 hour night time periods.

[603] We consider, again on the evidence we have heard, that an internal bedroom noise level of 35dB $L_{Aeq(8h)}$ is acceptable for both new roads and for altered roads. For normal diurnal traffic distribution that is equivalent to 40dB $L_{Aeq(24)}$ as given in the Standard.

[604] We have not been given evidence sufficient for us to establish appropriate external noise levels for altered roads. The Standard allows up to 64dB $L_{Aeq(24h)}$ or some 7dB more than for new roads on the basis, it appears, that the existing road-traffic noise will have acclimatised those receiving the noise or caused them to adapt. For the present we accept that.

[605] Then there arises the question of the status of category B criteria in the Standard. The Standard says *where it is inconsistent with the adoption of the best practicable option to achieve the criteria in category A, the criteria in category B shall apply.* For new roads that increases the permitted external noise level by 7dB and by 3dB for altered roads. Internal noise levels remain the same. To evaluate this sliding set of criteria requires an understanding of how the BPO is selected but equally important is the concept of allowing an increase in acceptable noise levels because of the difficulty and cost of meeting category A criteria.

[606] The BPO as defined in the RMA and the Standard requires a series of matters to be considered when determining the BPO for noise mitigation. Consideration is to be given to (inter alia) the value for money delivered by the mitigation option, the benefit-cost analysis and the availability of land or the need to acquire land for the mitigation option.

[607] Obviously the cost part of the benefit-cost analysis is the cost of the noise mitigation. The benefit is determined by 1.2% of the market value of an affected property for each decibel reduction (with other modifications). If the benefit does not exceed the cost for meeting category A criteria then category B criteria may apply.

[608] Dr Chiles and Mr Lloyd agreed that for new roads in quiet rural areas an internal noise time level lower than 35dB $L_{Aeq(9h)}$ (equivalent to lower than 40 dB $L_{Aeq(24h))}$ is desirable. We suppose a similar reasoning could be applied to new and altered roads in a noisy area where higher noise level criteria might be acceptable. Having different acceptable traffic-noise criteria based on the actual amenity of an area would seem to us to be more in accordance with the RMA than allowing higher noise levels because of an inadequate BCR or the availability of land.

[609] We are not therefore able, on the evidence before us, to determine the appropriateness or the applicability of the road-traffic noise in category B.

[610] Dr Chiles provided us with a list of all 292 PPFs assessed for this proposal. Of those 182 premises, after the noise mitigation proposed, will receive external sound levels above the category A criteria for a new road of 57dB $L_{Aeq(24h)}$. Some will be affected by an altered road, not a new road, but they are not separately identified. There are 29 premises that will receive sound levels above the category A level for an altered road of 64dB $L_{Aeq(24h)}$.

[611] The applicants have suggested a series of conditions in the NoRs. They

oblige the Requiring Authority to implement the road-traffic noise mitigation measures to achieve the noise criteria in the Standard where practicable and for the detailed design to be done by an expert. Where a building requires modification to ensure a maximum inside noise level of 40 dB $L_{Aeq(24h)}$ conditions specify the procedure to be followed.

[612] Mr Lloyd and Dr Chiles also agreed upon some additions to those conditions:

- Definitions of new and altered road are added;
- Where changes to proposed noise mitigation are proposed they are to be agreed to by a planner approved by the Council in consultation with an acoustics expert;
- A new term of "Qualifying buildings" is introduced to identify those PPFs that are in category C as a result of an altered road as well as those PPFs that are in category B or C as a result of new road. Consequential changes follow to four proposed conditions replacing the term 'category C Buildings' with 'Qualifying buildings';
- Advice to building owners is to cover the modifications required to meet an internal noise level of 40dB $L_{Aeq(24h)}$;
- Additional conditions to require noise compliance assessment and corrective actions where needed are proposed.

[613] In an overall sense we need to weigh these noise effects against the benefits of the proposed road.

[614] A necessity in our view is that noise levels do not prevent a regular good night's sleep. That to us is essential. We are satisfied that can be ensured by limiting internal noise levels to 40dB $L_{Aeq(24h)}$, assuming normal diurnal traffic flows which Dr Chiles said should be achieved. A condition requiring the 40dB $L_{aeq(24h)}$ is proposed and we accept that is necessary. It is not to be an option where practicable. It is to be a clear obligation.

[615] As to the wider noise environment, we are satisfied that controlling noise levels to the category A criteria will preserve adequate levels of amenity. We have reservations about the noise levels permitted by category B criteria as we have recorded. Nevertheless bearing in mind there are areas of existing low noise levels as well as areas of existing high noise areas and there is an existing designation with noise conditions that seem to reflect the Transit guidelines, we are satisfied that the noise environment that will prevail with the proposed road and with the proposed noise mitigation measures will be acceptable.

## 12.9 CONSTRUCTION NOISE AND VIBRATION

[616] Dr Chiles examined the effects of construction noise. He said the majority of the construction activity is remote from residential areas and while construction noise may be audible he considered that it can be controlled to within reasonable levels, defined by guidelines in NZS 6803:1999, with good practice construction noise management.

[617] At Linden and other areas with houses closer to construction works there is the potential for greater construction noise and vibration effects, due to the proximity of neighbours and the likely need for some night works. He proposed additional management and control measures in these areas such as the early construction of road-traffic noise barriers. He considered the implementation of a Construction Noise and Vibration Management Plan (CNVMP), as specified in the proposed designation conditions, is an effective and appropriate method to manage adverse effects when works are close to houses and at night.

[618] In some of these instances it will not be practicable to comply with the guideline noise criteria in NZS 6803:1999, due to the proximity of houses, and some night works will be unavoidable at areas of tie-in or overlap with the existing road network due to the traffic volumes on the existing roads.

[619] NZTA has developed standard procedures that will form part of the CNVMP, including the production of individual management schedules for specific activities such as night works. The specific mitigation required for each activity will be confirmed in the schedules. Dr Chiles says a flexible approach is required to take account of the individual circumstances of residents, but in general, a hierarchy of mitigation is followed:

- Managing times of activities to avoid night works and other sensitive times;
- Liaising with neighbours so they can work around specific activities;
- Selecting equipment and methodologies to restrict noise;
- Use of screening/enclosure/barriers;
- Offering neighbours temporary relocation; and
- For long duration works, treating neighbouring buildings.

[620] Part of the management process will also include condition surveys of all buildings close to the works, before and after construction, so that any cosmetic damage due to the works can be identified and repaired.

[621] Dr Chiles has recommended that construction traffic on local roads should be minimised by utilising state highway access where possible.

[622] Blasting is an option in the areas east of Porirua as well as around the Wainui Saddle. The nearest houses in the Porirua eastern suburbs are separated from works by around 200m. If blasting is used it will only be in areas that are not immediately adjacent to houses. Dr Chiles considered that standard practices can be used to achieve compliance with the criteria, as occurs at various quarries and mines in New Zealand including some locations close to houses. The main practices controlling vibration and airblast are the selection of appropriate charge sizes, limitation of charge sizes if necessary and for larger blasts using multiple charges in a delay sequence.

[623] There are two structures of historical significance near the proposed road. St Joseph's Church by SH58 is some 20m from any works and a large brick

circular structure used to house a fuel tank during the war is some 10m from earthworks. Dr Chiles has proposed closer monitoring of these structures during construction and special care being taken to minimize vibration effects. These requirements are included in the specification for the CNVMP.

[624] Vibration effects of road-traffic were assessed for the existing road at Linden. Levels of vibration were found to be below those just perceptible in residential environments at a distance of about 7m from the road edge. Acceptable levels would therefore exist beyond the designated area.

[625] There are no adverse construction vibration effects predicted for most of the route. For areas such as Linden where there are neighbours close to construction vibration sources, there is the potential for cosmetic damage to buildings (such as cracking) and annoyance from perception of construction vibration. Any cosmetic damage due to TGP will be detected through condition surveys before and after construction and will be repaired. Annoyance will be addressed by accurately communicating the time and duration of vibration in advance and this will generally only be during the daytime.

[626] Detailed assessment of specific construction equipment and vibration monitoring has been recommended when works are close to St Joseph's Church and the brick containment vessel in the Te Puka Valley. Works would be stopped if measured levels were near to the criteria established by NZS 6803:1999, and therefore construction vibration should not have an adverse effect on these structures.

[627] If blasting is used in the Wainui Saddle area it may be audible as a *thud* at the nearest receivers, but airblast and vibration levels will be within the AS 2187-2 guideline limits.

[628] Submissions by NZHPT confirmed its concerns about vibration effects on the historic structures were satisfied by the conditions proposed.

[629] A concrete batching plant is to be located at the main laydown area by SH58. Specific resource consents have been sought for the operation of this plant for the duration of the project. Noise from the plant will exceed the guideline criteria of NZS 6803:1999 at a property on SH58. The property is included within the designation and so may be purchased. Nevertheless the owner prefers to stay at the property notwithstanding the noise. The Applicants agreed to that but continue to offer alternative accommodation if required.

**Main findings on construction noise and vibration**

[630] NZS 6803:1999 gives guideline construction noise limits. We were told they are widely followed and adequately limit construction noise. We accept that advice.

[631] Guidelines from the Standard are given in the table below.

Guideline construction noise limits

| Time of week | Time period | Duration of construction work at any one location | | | | | |
|---|---|---|---|---|---|---|---|
| | | less than 2 weeks | | less than 20 weeks | | more than 20 weeks | |
| | | $L_{Aeq(1h)}$ | $L_{AFmax}$ | $L_{Aeq(1h)}$ | $L_{AFmax}$ | $L_{Aeq(1h)}$ | $L_{AFmax}$ |
| Residential | | | | | | | |
| Weekdays | 0630-0730 | 65 dB | 75 dB | 60 dB | 75 dB | 55 dB | 75 dB |
| | 0730-1800 | 80 dB | 95 dB | 75 dB | 90 dB | 70 dB | 85 dB |
| | 1800-2000 | 75 dB | 90 dB | 70 dB | 85 dB | 65 dB | 80 dB |
| | 2000-0630 | 45 dB | 75 dB | 45 dB | 75 dB | 45 dB | 75 dB |
| Saturdays | 0630-0730 | 45 dB | 75 dB | 45 dB | 75 dB | 45 dB | 75 dB |
| | 0730-1800 | 80 dB | 95 dB | 75 dB | 90 dB | 70 dB | 85 dB |
| | 1800-2000 | 45 dB | 75 dB | 45 dB | 75 dB | 45 dB | 75 dB |
| | 2000-0630 | 45 dB | 75 dB | 45 dB | 75 dB | 45 dB | 75 dB |
| Sundays and public holidays | 0630-0730 | 45 dB | 75 dB | 45 dB | 75 dB | 45 dB | 75 dB |
| | 0730-1800 | 55 dB | 85 dB | 55 dB | 85 dB | 55 dB | 85 dB |
| | 1800-2000 | 45 dB | 75 dB | 45 dB | 75 dB | 45 dB | 75 dB |
| | 2000-0630 | 45 dB | 75 dB | 45 dB | 75 dB | 45 dB | 75 dB |
| Industrial and commercial | | | | | | | |
| All days | 0730-1800 | 80 dB | - | 75 dB | - | 70 dB | - |
| 1800-0730 | 85 dB | - | 80 dB | - | 75 dB | - | |

[632] Conditions proposed to be attached to the designation require adherence to noise levels that reflect the guidelines in NZS 6803:1999 and for vibration and airblast those levels recommended in ISO 4866:2010 and AS 2187-2:2006. The methodology for complying with these criteria is to be set out in the CNVMP. Consultation with the owners of specified properties is required before construction work within 200m is commenced.

[633] We are satisfied that the effects from construction have been properly identified and adequately avoided, remedied or mitigated.

## 12.10 AIR QUALITY AND RELATED HEALTH EFFECTS

### Evidence/Submissions

[634] Evidence on this topic was received from a number of witnesses:

- Dr Chapman for RTS;
- Mr Fisher on behalf of NZTA and PCC;
- Mr Kelly for NZTA and PCC;
- Mr Nicholson for NZTA;
- Dr O'Sullivan for RTS;
- Ms Walters for NZHPT.

[635] In addition to the evidence which we heard, at least 15 submissions raised this topic.

### Issues Identified

[636] The issues identified through evidence and submissions can be broadly classified into four areas;

- Air quality;
- Construction dust effects;
- Concrete Batching Plant;
- Air quality health effects;

**Air Quality**

[637] Mr Fisher's evidence addressed the effects of the proposal on air quality on behalf of NZTA and PCC. He described the existing air quality as being characteristic of a rural environment, with generally low contamination levels. He noted that air quality will improve in the urban areas where traffic would be removed and emissions dispersed in a rural location[201]. Mr Fisher noted that Mana Esplanade and Raumati were areas previously identified as having concentrations close to or exceeding the standards and would benefit from the removal of traffic.

[638] The AEE identified that the effect of TGP on air quality will depend on the existing air quality, predicted traffic volumes, meteorological factors influencing dispersions, the location of sensitive receptors and improvements in the performance of the country's vehicle fleet emission rates. Overall the air quality assessment concluded that on a regional basis, there will be an overall reduction of public exposure to vehicle emissions on completion of TGP and that as there will be no material adverse effects resulting from the Project's construction, no mitigation is necessary.

[639] Mr Fisher testified that the operation of TGP will improve air quality in many parts of the Project area, due to vehicle emissions being largely removed from the congested SH1 route and arterial roads and dispersed in a rural location. He also noted that regional scale impacts will be insignificant due to improvements in traffic flow combined with the continuing improvement in vehicle emissions generally[202].

[640] Mr Fisher also noted that ...*Exposure levels in all areas will comply with the National Air Quality Standards which are designed to protect the health of the most vulnerable individuals in the community*[203]. This was supported by evidence of air quality modelling for various design years (as presented in TR13) in comparison to existing modelled reference data. The results demonstrated that at Linden and Warspite Avenue, the levels of nitrogen dioxide, carbon monoxide and particulates were all below recommended standards in the forecast year 2031.

[641] There was no contradictory evidence to that of Mr Fisher on this topic and the Board is comfortable that emissions from TGP will be within nationally accepted guidelines and therefore not create any adverse effects which are more than minor.

**Construction Dust**

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201 EiC, para 14.

202 EiC, para 18.

203 EiC, para 15.

[642] The AEE stated that ...*construction of the Project (particularly the earthworks and concrete batching) has the potential to generate dust which could have an adverse effect on air quality. This potential effect can be mitigated to an acceptable level through dust management measures*[204]. It also considered dust generated from earthworks (including dust from stockpiles and road dust from construction vehicles) and rock crushing, emissions from construction vehicles, odour generated during construction and discharges to air from concrete batching.

[643] Mr Fisher acknowledged that there will be dust generated by TGP, largely as a result of earthworks but also because of other activities including operation of the concrete batching plant. He said that implementation of a Construction Air Quality Management Plan (CAQMP) is intended to manage any potential effects arising from earthworks and associated dust discharges[205] and would include many standard measures for reducing dust nuisance[206].

[644] A draft CAQMP accompanied the application documents. The suppression of dust at its source[207] was the primary management approach proposed. Table 7.1 of the draft CAQMP sets out the potential dust sources and appropriate control methods. The CAQMP also contains a monitoring programme.

[645] Mr Kyle stated that specification of trigger levels in both the management plan and conditions would provide greater certainty for those potentially affected by dust discharges and for those called upon to administer the conditions.

[646] Mr Fisher recommended that slightly more stringent trigger levels than those recommended by the Ministry for the Environment should be adopted in the CAQMP to provide greater certainty to dust sensitive neighbours[208]. He also outlined proposed locations for dust monitoring equipment relative to sensitive receptors and suggested that mobile monitoring equipment could be utilised[209].

[647] In questioning by Counsel, Mr Fisher explained that NZTA has agreed to include further detail around the number and location of dust monitors and the dust trigger levels (as above) in the conditions. NZTA did not agree that how, why and when mitigation for dust nuisance effect should occur should be detailed in the conditions as the effects from detailed operations are not known yet, are somewhat weather dependent and are already managed in the construction management plan[210]. Mr Fisher considered that the guidelines in the CAQMP are appropriate.

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204 Executive Summary pg (vi).

205 EiC,pPara 42.

206 EiC, para 50.

207 We note that dampening of the site is a proposed mechanism – a water take has not yet been sought for the project. This is not unusual in a project of this scale and seems appropriate in our view to seek more specific construction related consents at a later date. The effects of any take can be assessed at that time.

208 Rebuttal Evidence, para 11.

209 NoE, pg 287.

210 NoE, pg 288.

[648] Issues raised through submissions generally reflected the issues raised by Mr Kyle in respect of the ability to set and monitor trigger levels for dust and then expeditiously deal with these effects[211].

[649] Mr Fisher provided overall objectives for the CAQMP[212] and concluded that implementation of measures to meet these objectives would suitably manage construction related dust effects.

[650] The Board accepts Mr Fisher's evidence that dust effects are notoriously difficult to manage, given the possible sudden change of effects from wind conditions and the often short term nature of the effects. We conclude that any CAQMP must provide for dust suppression at source, adequate monitoring, identification of significant incidents and remedies to affected parties.

**Concrete Batching Plant**

[651] A Concrete Batching Management Plan (CBMP) was proposed to address specific issues relating to the concrete batching plant. Mr Fisher confirmed that the proposed conditions relating to air quality will implement suitable measures for the management of dust during TGP's construction period[213].

[652] Mr Fisher provided overall objectives for CBMP in Paragraph 58 of his Evidence in Chief and concluded that implementation of measures to meet these objectives would suitably manage dust effects from the concrete batching plant.

[653] Mr Kyle considered that there is currently a lack of adequate certainty within the conditions, particularly if an event is short lived, that any mitigation will be undertaken if a complaint is made as a result of a discharge from the concrete batching plant. He[214] suggested that there was not sufficient transparency in the conditions to determine when action will be taken to implement identified contingency measures.

[654] Mr Fisher disagreed with Mr Kyle[215] and considered that the conditions proposed with regards to the concrete batching plant are standard, and that *in the opinion* of an enforcement officer is a reasonable and robust measure to assess dust nuisance[216]. In his rebuttal evidence and during cross-examination Mr Fisher explained his view that it is neither practical nor realistic to attempt to tie in any mitigation responses to any particular trigger event. This is because the event can be short lived, or quite sensitive to wind direction, and the effects can be very localised. Mr Kyle maintained the view that trigger levels either within the conditions and/or management plan may serve to assist enforcement officers and affected parties to determine what might constitute an adverse effect.

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211 Mitchell Partnerships, s42A Report, Part 2, pg 35.

212 EiC, para 57.

213 EiC, para 59.

214 Mitchell Partnerships Section 42A Report, Part 2, pg 35.

215 Which recommended that limitations on air discharges arising from the concrete batching plant be included in conditions and/or a draft Concrete Batching Management Plan.

216 Rebuttal Evidence, para 17.

[655] Two submissions raised specific issues relating to the concrete batching plant – St Joseph's Church (through NZHPT) and Mr Edge.

[656] Discussions between NZHPT and the Applicants identified conditions which would mitigate any effects on the glacier windows at St Joseph's Church. These are reflected in proposed conditions NZTA.16-19 – Archaeology and Heritage

[657] The issues raised by Mr Edge were addressed outside of the inquiry process and a confirmation letter attached to Mr Nicholson's rebuttal evidence of 20 January 2012. This letter from NZTA to Mr Edge outlined processes to apply if Mr Edge did not want to remain in the property during construction. Mr Edge confirmed by an acknowledgement signature that his concerns had now been adequately addressed.

[658] However, the various planners agreed that a management plan for dealing with the concrete batching plant is not necessary as appropriately drafted conditions can deal with this matter.

[659] The Board accepts the the planners agreement that conditions are an appropriate mechanism to address specific issues associated with the batching plant.

**Air Quality Health Effects**

[660] The health effects of vehicle emissions were raised by several submitters and also through the evidence of Dr O'Sullivan for RTS.

[661] Dr O'Sullivan outlined the changes in transport modes and reflected on the road transport focus of transport planning as well as the increasing dependency on car usage. Her evidence highlighted that poor urban design can lead to poor health outcomes, but this was related more to obesity and mental health problems than air quality related issues. The only comments in terms of health effects related to air quality were generic comments identifying the vulnerability of poorer communities to health related air quality issues.

[662] The evidence presented did not highlight any specific health related air quality issues. Generalities in terms of air quality and health effects did not relate specifically to TGP and there appears to be no determination required by the Board in this respect. As noted in the evidence of Mr Nicholson[217] the economic analysis highlights a small overall reduction in carbon dioxide emissions.

[663] The Board considers that while the relocation of vehicles and associated emissions will result in different effects on specific communities, the resultant detrimental health effects asserted in submissions have not been supported through evidence presented and the overall effects are likely to be relatively neutral.

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[217] Rebuttal Evidence, paras 67-68.

**Main findings on air quality and dust effects**

[664] With respect to air quality, the Board accepts that the level of emissions will be within nationally accepted guidelines and will therefore not create any significant effects in this situation.

[665] The Board accepts that dust effects are difficult to manage, given the sudden change of effects from wind conditions and concludes that any CAQMP must provide for dust suppression at source, adequate monitoring and identification of significant issues and remedies to affected parties. The conditions presented by NZTA and PCC in this respect (NZTA.39-41) outline the requirements of the CAQMP.

[666] The concrete batching plant was initially the subject of some debate. Overall, the Board concludes that a CBMP is an appropriate mechanism to address specific issues associated with the batching plant.

[667] Submissions from NZHPT and Mr Edge raised site specific issues in relation to the concrete batching plant. Their concerns were addressed by NZTA and agreed positions presented to the Board. The Board has no objections to or concerns about the agreements provided that agreed conditions are confirmed.

[668] Health effects in relation to air quality were also considered and found that while the relocation of vehicles and associated emissions will result in different effects on specific communities, the resultant detrimental health effects raised by submissions have not been supported through evidence presented and the overall effects are likely to be relatively neutral.

[669] Ultimately we found that all of the issues which we have addressed under this head have been dealt with by the Applicants in a manner which avoids, remedies or adequately mitigates adverse effects.

## 12.11 CONTAMINATED LAND

**Evidence/Submissions**

[670] Ms Maize was the only expert witness to present evidence on contaminated land issues. No submissions on TGP raised the issue of contaminated land.

**Issues Identified**

[671] No specific issues were identified through either evidence or representations in terms of specific contaminated land issues. The rebuttal statement from Ms Maize addressed issues raised in Mr Kyle's first s42A Report (Part 1, November 2011). There was also comment on contaminated land in the second s42A Report (Part 2, February 2012), which is discussed in the findings below.

**Main findings on contaminated land**

[672] The AEE presented the results of investigations relating to contaminated land in TR16 (Contaminated Land Assessment).

[673] The AEE stated that the majority of areas on the TGP route identified as currently contaminated do not present a significant risk to human health or ecology. The highest risk areas are:

- An area at MacKays Crossing where potential for unexploded ordinances has been identified;
- Soil contamination at the Porirua Gun Club and a former nursery;
- The potential presence of asbestos in building materials**.**

[674] Ms Maize identified the mitigation or remediation that is required in relation to each site and confirmed that the removal and/or remediation of any sites will be in accordance with requirements of the National Environmental Standard for Soil (Soil NES) which came into effect on 1 January 2012. Ms Maize[218] also confirmed that specific contamination issues identified at the Porirua Gun Club would need to be addressed as part of a future consenting process.

[675] The application[219] contemplated that an Asbestos Management Plan will be prepared as well as a Contaminated Land Management Plan (CLMP). The S42A Report (Part one) highlighted an inconsistency between the application and the proposed conditions at that time, which only referred to a CLMP. The proposed CLMP condition did however include actions relating to asbestos identification and management.

[676] Ms Maize noted in her rebuttal evidence that the application omitted a reference to a CLMP for the PCC designations and that this should be included as a condition. We have done so (PCC.46).

[677] In response to questions from the Board, Ms Maize[220] explained that the CLMP requires that contaminated soil is tracked to its final deposition because of the need for care about human exposure and risks to ecological values.

[678] The Board accepted Ms Maize's evidence and concluded that the proposed CLMP (to be required through Condition G.20 and PCC.46) includes suitable measures for the identification and treatment of contaminated land in unexpected situations and addresses unexploded ordinance and asbestos related issues. Implementation of the CLMP provides a method to avoid, remedy or mitigate any contaminated land issues associated with TGP. Specific issues identified at the Porirua Gun Club (contamination above human health and ecological guideline levels) will need to be addressed as part of a future consenting process.

## 12.12 TANGATA WHENUA

[679] TGP lies within the rohe[221] of Ngati Toa Rangatira (Ngati Toa), the manawhenua iwi. We heard evidence about the migration of Ngati Toa from their traditional rohe in Kawhia and the subsequent conquest and settlement

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218 EiC, para 23.
219 Page 469.
250 NoE, pg 249.
221 Area.

of the Wellington region. These historical factors were covered in TR18 (Cultural Impact Report) and provide context for Ngati Toa's relationship with the Transmission Gully area, and for Ngati Toa concerns in relation to the Project.

[680] In the modern context, Ngati Toa interests are represented by Te Runanga o Toa Rangatira Incorporated (the Runanga). Ms Pomare was engaged by the Runanga to give evidence to the Inquiry. Ms Pomare's evidence covered (inter alia); Ngati Toa's relationship with the Proposal area; the effects of the Proposal on matters of cultural importance; mitigation measures and conditions proposed; assessment of the Proposal against the relevant Part 2 RMA matters (i.e. sections 6(e), 7(a) and 8); and conclusions[222].

[681] In line with Ngati Toa kaitiaki responsibilities, TR18 was prefaced with the following whakatauki[223].

Toitu te Marae o Tane

Toitu to Marae o Tangaroa

Toitu to Iwi

If the domain of Tane survives to give sustenance,

And the domain of Tangaroa likewise remains,

So too will the people.

**Issues**

[682] Ms Pomare expanded on Ngati Toa's relationship with the Transmission Gully area and told us of Ngati Toa's specific concerns about TGP. They were sediment discharge to both freshwater and marine environments; the management of stormwater; stream ecology and the associated underlying cultural values; the proposed stream works; impacts on native fish; native vegetation; waahi tapu; and areas of cultural significance.

[683] In terms of cultural effects regarding sediment discharge, Ngati Toa were particularly concerned about:

- The high risk of sediment contamination during construction when silt and soils from areas of open ground can be carried into waterways during rain events;
- The potential for further contamination once the road is operational, as stormwater discharges can transfer contaminants (including sediments) from the road surface to the catchments, thus potentially affecting downstream water quality; and
- The extensive earthworks required within streams where culverts, bridges and realignments are proposed, which will potentially generate significant

222 EiC, para 11.
223 Proverb.

adverse effects on stream environments and cause downstream effects on the Pauatahanui Inlet and Porirua Harbour[224].

[684] Ms Pomare told us that the development of an erosion and sediment control plan by NZTA and PCC (which will be required to be approved by the Regional Council)[225] will be necessary to identify specific measures to be imposed and how the effectiveness of those measures will be monitored on an ongoing basis. Ms Pomare also said that Ngati Toa consider that effective monitoring will be just as important as the measures themselves in achieving successful sediment control[226].

[685] Ngati Toa believed their concerns regarding site construction management in regards to sediment can be addressed by the proposed erosion and sediment control plan. The complete list of mitigation measures (including site specific mitigation) for construction effects is included in TR11.

[686] Ngati Toa acknowledged that even though an erosion and sediment control plan would be in place, a risk still remains that in a large rainfall event, where sediment deposition occurs at a depth and duration that is likely to cause adverse effects, the options for remedial action are very limited. Inability to remedy these adverse effects once they have occurred was of concern to Ngati Toa.

[687] However, Ngati Toa believed the above effects are largely mitigated by the low risk of such an event occurring and the positive effects of other mitigation intended to reduce erosion and sediment discharge over the medium to long term.

**Stream Ecology and Enhancement**

[688] Ms Pomare told us that the mitigation proposed for habitat loss (outlined in TR11) includes significant stream restoration and enhancement proposals. More than twice the length of stream adversely affected by TGP will end up being restored as a result. The upper Horokiri and Te Puka catchments are the main focus areas for mitigation, as substantial land retirement and stream enhancement is possible in these locations[227].

[689] Ngati Toa supported these mitigation proposals and the rationale for selecting these particular sites, as they have the highest ecological value and the greatest potential for quick recovery and long term benefit. Ngati Toa was also supportive of the approach taken in selecting key ecological areas for mitigation as opposed to creating small isolated sites along the route within each affected catchment. This is consistent with a more holistic approach to environmental management which underpins the ethic of Kaitiakitanga[228].

[690] Ngati Toa also considered the riparian areas already planted by NZTA will have positive effects and should be considered as an existing benefit for the loss of habitat and riparian vegetation elsewhere within the TGP area.

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224 EiC ,paras 40, 40.1, 40.2 and 40.3.
225 Conditions E.11 and PCC E.19.
226 EiC, para 82.
227 EiC, para 90.
228 EiC, para 91.

[691] Ngati Toa considered the proposed works in streams might compromise the well-being and passage of native fish. The mitigation package proposed to address these concerns includes culvert design that will allow fish passage and stream diversions that are designed and constructed to be consistent with the morphology of the streams.

[692] NZTA also propose to repair or replace malfunctioning culverts which are currently limiting, if not stopping, fish movements within this catchment. This mitigation is outlined in the draft EMMP which also gives details of perched culverts that are to be replaced or retrofitted in Duck Creek. It was expected that this mitigation will reopen 8.5km of stream where fish are affected[229] (before allowing for the reopening of Wainui Stream as now proposed).

[693] Ngati Toa believed that fish passage should be maintained at all times and considered the conditions[230] proposed address this concern. NZTA has also addressed the question of freshwater fish translocations in the draft EMMP[231] and in the Indicative SSEMP for the Te Puka Stream and Upper Horokiri Stream.

**Stormwater**

[694] Ngati Toa supported the *treatment train* approach of using wetlands and proprietary devices to mitigate stormwater discharge. However, as wetlands have important ecological values, Ngati Toa would support the use of wetlands as the first option whenever possible.

[695] Ngati Toa also considered that operational stormwater discharged from the TGP highway should be treated to minimise the effect of contaminants on the water quality of freshwater and coastal environments. As there is no resource consent required for operational stormwater discharges, mitigation measures to manage stormwater discharges are not embodied in the designation or resource consent conditions. That notwithstanding, based on the comprehensive mitigation proposed to manage the effects of stormwater, Ngati Toa considered that contaminant discharge can be managed to produce the highest quality discharge possible resulting in very low effects to the receiving environment[232].

**Cultural Issues**

[696] We were told the loss of *mauri*[233] as a result of stream diversions and reclamation will need to be mitigated through appropriate cultural ritual/protocol to be conducted by Ngati Toa. As part of that mitigation package, Ngati Toa and NZTA have entered into a Memorandum of Understanding (MoU). The purpose of the MoU is to establish an effective relationship through open and frank dialogue in relation to the design, construction and completion of the Wellington Northern Corridor projects. The

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229 Draft Ecological Management and Monitoring Plan, Section B9.26.
230 A number of resource conditions address these matters. See, for example G.21.
231 Draft EMMP at Section B10.
232 EiC, para 101.
233 Life force of the natural environment.

opportunity is also provided for Ngati Toa to undertake any cultural ceremony at the site of the construction activity should this be deemed necessary.

**Native Flora**

[697] Ngati Toa considered that all efforts should be made by NZTA for the road alignment to avoid areas of native forest/vegetation. Ngati Toa also considered that further investigation needs to be made into avoiding those areas currently within the road alignment.

[698] For Ngati Toa, the loss of mauri, where native forest has been removed, will be mitigated by the appropriate use of karakia and tikanga. This protocol is specifically provided for in the MoU between Ngati Toa and NZTA.

[699] We were told that Ngati Toa are supportive of revegetation proposals as part of the mitigation for terrestrial habitat loss, and the selection of sites intended to maximise ecological benefits. In addition, the retirement of 450ha of land was initially proposed to offset the loss of 120ha of native vegetation. This is considerably more than the 250ha estimated to mitigate the loss of native vegetation which Ngati Toa considered will result in positive ecological effects over the long term[234].

**Waahi Tapu**

[700] Ngati Toa are not aware of any waahi tapu within the proposed designation boundaries, however, this does not rule out the possibility of unearthing a site or cultural material during construction. Measures have been put in place to ensure correct protocol is followed in the event of an accidental discovery of culturally significant material. Procedures for an Accidental Discovery Protocol[235] are clearly outlined in the conditions and the MoU.

**Sites of Cultural Significance**

[701] We heard evidence that Transmission Gully was not favoured as a place for occupation for Ngati Toa, although important Ngati Toa settlements were located at either end of the proposed alignment; at Whareroa in the north and Porirua in the south. The focus of Ngati Toa settlement was in coastal locations such as Wainui (Paekaakaariki), Pukerua, Taupo (Plimmerton), Paremata and Porirua. The environs of the Pauatahanui Inlet and Porirua Harbour also provided attractive locations for settlements and facilitated access to the coast for fishing and the gathering of kaimoana.

[702] The TGP area was used significantly by Ngati Toa for subsistence purposes. Although the kaimoana and kaiawa in modern times is not as plentiful, the area is still used for customary gathering and still retains cultural significance for Ngati Toa.

[703] Ngati Toa considered that for these places of cultural significance the mitigation of the effects of TGP will be achieved through the design and implementation of effective erosion and sediment controls, and robust stormwater treatment.

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234 EiC, para 104.

235 Conditions G.8 and PCC.14.

**Main findings as to effects on Tangata Whenua**

[704] Ms Pomare told us that Ngati Toa considered that the proposal is consistent with ss6(e), 7(a) and 8 of the RMA, and therefore satisfies the statutory requirements in matters relating to Maori resource management.

[705] We also heard that Ngati Toa supports TGP as a way to ease congestion along SH1, thereby protecting the coastal environment from further roading impacts. Ngati Toa believed that without TGP, major upgrades will be required through Mana and Centennial Highway to cope with projected increases in traffic levels. This would require further reclamation of the coastal environment and the destruction of numerous sites of cultural significance along the coastal route. As a result, there would be significant adverse cultural effects which could not be appropriately mitigated[236].

[706] Ngati Toa recognised that there will still be significant impacts of the Project on some areas of native vegetation and significant lengths of steam which will be unavoidable. Therefore, a comprehensive range of mitigation will be required to address these losses and the loss of mauri.

[707] We heard that Ngati Toa is satisfied that the adverse cultural effects identified in TR18, which include those concerns outlined above, can be appropriately mitigated. Further to this, over time Ngati Toa believe that the proposed mitigation will reduce the scale of the above effects to the point where there will be a range of positive effects on the environment.

[708] We accept the views expressed by Ngati Toa on these issues.

## 12.13 ARCHAEOLOGY AND BUILT HERITAGE

**Archaeology**

[709] We heard evidence from the following witnesses, relating to assessments of archaeological sites and features that could be affected by construction of the proposed Project.

- Ms O'Keeffe for NZTA;
- Ms Pomare for Ngati Toa;
- Ms Walters for NZHPT.

[710] Ms Pomare told us that the TGP alignment passes near several areas of significant cultural and historical value. However it does not directly impact on any known waahi tapu (scared sites) or sites of cultural significance[237].

[711] Ms O'Keeffe carried out an archaeological assessment and co-authored a report on the TGP area[238]. The Project study area can be divided into three broad themes: Maori occupation and subsistence; military history; and

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236 TR18, Conclusion Para 1.
237 EiC, para 63.
238 TR20.

European farming. Aspects of these three themes are contiguous in time and place.

[712] The archaeological sites recorded within the vicinity of TGP are in three main locations: on the coast at Paekakariki, at Battle Hill, and at the Pauatahanui Inlet[239].

[713] Archaeological sites at Paekakariki include pre-European Maori middens, pits, pa and terraces. In addition, there is a military theme at Paekakariki with sites including the locations of the three World War Two (WWII) military camps (Camps Russell, McKay and Paekakariki), which housed United States (US) Marines during WWII.

[714] Archaeological sites at Battle Hill, adjacent to the Paekakariki Hill Road, include sites associated with the military engagement in August 1846 between the European militia and Maori forces under Te Rangihaeata. There is also an historic quarry, an historic woolshed and a gold mining site in the vicinity.

[715] The archaeological sites around the Pauatahanui Inlet are of both Maori and European origin. There are numerous midden sites located around the edge of the Inlet, reflecting the richness of the sea-based resources available to the Maori occupants. There are also European houses and churches, reflecting the strategic importance of this location as a new settlement. In addition, St. Albans Church is built on the remains of Matai-Taua, a defended pa built by Te Rangihaeata.

[716] As a result of this assessment, Ms O'Keeffe concluded that there are no known archaeological sites within the proposed designation footprints or in close vicinity to TGP that will be directly adversely affected during the Project's construction. Neither will there be adverse effects on sites in the close vicinity during operation of TGP[240]. We agree with this conclusion.

[717] However, Ms O'Keeffe recommended that NZTA take a precautionary approach and apply for an authority under s12 Historic Places Act 1993 to modify, damage or destroy archaeological sites[241]. This matter is outside our jurisdiction, however we understand NZTA have agreed to the recommendation.

[718] Further, Ms O'Keeffe considered that there is a low probability of further, unknown archaeological sites being discovered during the construction period. This is because:

- Previous archaeological surveying and documentary research suggests a strong preference for coastal locations for pre-European Maori and early European settlers, based on the richness of coastal resources for subsistence, and ease of access along the coast;
- The vast majority of recorded archaeological sites within the wider Wellington/Kapiti Coast region are located on or very near to the coast;

239 EiC, para 20.
240 EiC, para 32.
241 EiC, para 38.

- The majority of the proposed TGP area is well inland;
- Where the route is near the coast or harbour edge, additional site visits have been made to check for the possibility of additional unrecorded sites being present[242].

[719] Ms Walters told us that she and a colleague had undertaken a detailed assessment and consideration of TGP and its effects. The Project had also been assessed by NZHPT's archaeologists and Maori heritage advisors.

[720] As a result of these assessments, Ms Walters told us that no known archaeological sites will be affected by TGP. We accept that evidence.

**Built Heritage**

[721] We heard evidence about two significant sites of built heritage in close proximity to TGP that might potentially be affected by the Project's construction and operation. These sites are St Joseph's Church and a WWII Petrol Storage Tank. St Joseph's Church was built in 1878 and thus is an archaeological site in terms of the definition in the Historic Places Act 1993[243]. The petrol storage tank is not *archaeological* in the sense of this definition as it postdates 1900AD. However, this feature does have high historical values, through its relative rarity and historical associations[244].

[722] The following people gave evidence on sites of built heritage:

- Mr Bowman for NZTA;
- Mr Lister for NZTA;
- Ms O'Keeffe for NZTA;
- Ms Thomson for KCDC;
- Ms Walters for NZHPT.

[723] Mr Bowman was the author of TR19 (Built Heritage). He told us that St Joseph's is the oldest Catholic Church still in use in the Wellington Region and has a rare form of glazing known as *glacier windows* or *poor man's stained glass*. Mr Bowman said the glacier windows are not in particularly good condition at the moment but he did not know the cause of the damage to them[245]. Associated with the church is a cemetery where a number of early settlers in the area were buried.

[724] The church is located approximately 170m from the Main Alignment and 300m from the Project's main construction yard and is elevated above the SH58 interchange. However, TGP will raise the level of the SH58 interchange approximately 9.5m from existing ground level and this will result in the interchange being approximately the same level as the church.

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242 EiC, paras 33, 33.1, 33.2, 33.3 and 33.4.

243 Built heritage structures that pre-date 1900AD meet the definition of *archaeological site* contained in the Historic Places Act 1993

244 EiC, para 22.

245 NoE, pg 254.

[725] The Main Alignment will be visible to the west and north of the church grounds. The historical visual connection with the Inlet and wider village setting will be hindered by the Project[246]. Mr Bowman recommended planting on the Main Alignment to mitigate these effects on the church, and during cross-examination clarified that amenity planting around the church grounds is not a good idea because it may obscure the view and alter the rural setting[247].

[726] There are potential noise, vibration and dust effects on the church. These effects are to be managed through a CNVMP[248] and conditions proposed by NZTA[249]. Mr Bowman said there may be scope to manage these effects in a proposed Heritage Management Plan.

**Petrol Storage Tank**

[727] The WWII petrol storage tank is one of few surviving structures in the area associated with the US Defence Force in WWII. The petrol storage tank is listed as a historic building in the KCDC District Plan[250] (The structure is not actually the tank itself but rather its protective brick outer skin).

[728] War historian Peter Cooke has written that the petrol storage tank and splinter proof wall at Paekakariki was the last to be constructed and, because it was used for US motor spirits (rather than aviation fuel) it is unique among the depots constructed[251]. He considered that the tank is the best preserved of those still in existence[252]. The petrol storage tank is one of few surviving structures, of the many built throughout the Wellington region, associated with the US Defence Force in WWII[253].

[729] The route of the Main Alignment was refined to avoid the petrol storage tank[254] and is now proposed to pass approximately 20m east of the structure. TGP will affect the setting of the tank to a considerable degree, with a six metre high embankment separating the structure from the alignment.

[730] Mr Bowman concurred[255] with Mr Lister's recommendation for mitigation planting between the fuel tank and the Main Alignment and the removal of vegetation growing out of the fuel tank structure[256]. That notwithstanding, Mr Bowman concluded that the effect on the overall heritage significance of the structure will be minor[257]. We agree with this conclusion.

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246 EiC, para 25.
247 NoE, pg 252.
248 NZTA.35 and PCC.23.
249 NZTA.16.
250 EiC, para 15.2.
251 Defending New Zealand: Ramparts on the Sea 1840-1950s**,** Defence of New Zealand Study Group, 2000.
252 Personal communication Peter Cooke to Ian Bowman 8 November, 2010.
253 EiC, para 36.
254 EiC, para 87.
255 EiC, para 52.
256 NoE, pg 254.
257 EiC, para 39.

[731] We were told that there could be vibration effects on the tank caused by the construction of TGP. These effects are to be managed via the CNVMP[258] and conditions proposed by NZTA[259].

[732] Ms Walters supported Mr Bowman's recommendation[260] suggesting a conservation plan be put in place for the petrol storage tank[261] and the upgrading of the conservation plan for St Joseph's church[262].

[733] Initially, Ms Thomson believed public access to the brick fuel tank structure would be appropriate. During cross-examination Mr Bowman agreed with Mr Kyle that it was a good idea to provide a public access track to the tank.[263] Further to this, a Conservation Plan is to be prepared for the tank.

[734] However, in her supplementary evidence Ms Thomson said she now appreciates how well hidden the storage tank site is. The vegetation and landform around the site disguised it completely when one is standing adjacent to the proposed road corridor. Ms Thomson understood that the proposed road will be several metres below the existing ground level when adjacent to the tank so it will be even less visible in the future. Accordingly, Ms Thomson now considered that providing public access to the structure is neither necessary nor particularly desirable due to the risk of vandalism[264].

[735] NZHPT, KCDC and NZTA have proposed that a Heritage Management Plan. be written to manage the effects of TGP on St Joseph's Church, the petrol storage tank and other archaeological sites and features within 500m of the designation boundary[265]. We concur with that. We also find that issues of access to the petrol storage tank are best resolved through either that plan or a specific Conservation Plan and make no directions in that regard.

**Main findings as to effects of TGP on archaeology and built heritage**

[736] We find that potential adverse effects of TGP on archaeology and built heritage will be avoided, remedied or adequately mitigated by application of the conditions and management plans proposed by the Applicants.

## 12.14 SOCIAL

[737] We heard evidence on the potential social effects of TGP from:

- Ms Lawler for PCC;
- Dr O'Sullivan for RTS;
- Mr Rae for NZTA.

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258 NZTA.35 and NZTA.36.
259 NZTA.16.
260 TR19, Section 7.1.
261 NZTA.18.
262 NZTA.17.
263 NoE, pg 251.
264 Supplementary evidence dated 9 February 2012, Para 2.6.
265 NZTA.16.

[738] Mr Rae told us that his evidence was an overview of the social effects of TGP at a regional and local scale, and in terms of construction and operational effects. His evidence drew on effects identified by technical experts in the air quality, traffic, noise, urban design and landscape disciplines[266]. Mr Rae co-authored the Social Impact Assessment (TR17) which formed part of the AEE in support of the Project.

[739] We heard that TR17 took account of the principles embodied in the International Association for Impact Assessments. Broadly these are to seek improvement of social well-being of the wider community affected by planned interventions, whilst being aware of the differential distribution of impacts among different groups, including vulnerable groups in the community[267].

[740] Mr Rae told us that TR17 established a local study area for the purposes of profiling the existing environment and for assessing local social impacts associated with TGP. TR17 identified six main community areas within the Project area[268].

- Community Area 1 – Paekakariki;
- Community Area 2 – Rural communities;
- Community Area 3 – Pauatahanui and Whitby;
- Community Area 4 – Eastern Porirua;
- Community Area 5 – Linden and Tawa;
- Community Area 6 – Coastal communities.

[741] Mr Rae advised that consultation had been carried out to inform his assessment and in summary, this has involved:

- Reviewing the outcomes of previous consultation and public submissions on the existing designations;
- Participating in the wider consultation carried out by the Project team, including attending TGP open days;
- Separate consultation with Regional Public Health, and with NZ Police;
- Separate meetings with PCC's staff and consultants to discuss planning and policy documents, and to discuss the outcomes from PCC's consultation on the proposed Porirua Link Roads, as discussed in Mr Bailey's statement of evidence.

[742] Mr Rae said that the wider consultation results[269] showed that the consultation undertaken to date established a good level of community support for TGP, acknowledging that some residents of the community in close proximity to the route (e.g. at Paekakariki Hill Road and at Flightys Road) are not supportive of

266 EiC, para 15.
267 EiC, para 35.
268 AEE, Chapter27, Section 27.2.
269 TR22.

the Project and are affected in ways that require specific mitigation. Of relevance to assessing social impacts, the consultation undertaken also showed that:

- There is an on-going commitment to engagement between NZTA and Ngati Toa, recorded in their MoU. Ngati Toa had also prepared a Cultural Impact Assessment Report (TR18);
- No concerns were raised by the providers of emergency services (Fire Service, Police, Ambulance services);
- Housing New Zealand Corporation, which owns almost 48% of all housing stock in eastern Porirua had expressed no concerns with TGP;
- The Tawa Community Board consulted widely with Tawa residents but had raised no specific concerns;
- The only Residents Associations within the Project area to express any particular interest were the Pauatahanui Residents Association (whose members had widely differing views about the merits of TGP but with no specific concerns about the design) and the Waitangirua Providers Forum (which initially requested a meeting but did not respond to subsequent invitations);
- Other than Tawa College, and Linden School (which is directly affected), none of the 34 schools in the Project area expressed any interest in or concerns with TGP;
- Business groups throughout the Project area were invited to attend the open days, and no concerns emerged from that process[270].

[743] Further to this, we heard the TR17 assessment team conducted its own consultation which resulted in feedback obtained from the open days, and from meetings with Regional Public Health and NZ Police. From all of this consultation the following conclusions on social effects were able to be drawn:

- The route is recognised as being of strategic importance and transport benefits will arise from the new linkages;
- Economic benefits, in terms of employment opportunities and increased spend in the local communities, are expected to arise from TGP;
- There are potential impacts for access through regional reserves and forest parks;
- Traffic is a significant source of noise and air pollution, and poses a risk of road traffic injury;
- Transport infrastructure can cause a barrier to physical activity, and can cause community severance and affect social cohesion – and these effects are most pronounced in socio-economically deprived neighbourhoods (e.g. Waitangirua);

[270] EiC, paras 44, 44.1 - 44.7.

- There are potential health-promoting impacts including improved access to employment, shops and services and from promoting economic development;
- The incidence of crime may be reduced, especially in Waitangirua where the link road will provide increased traffic movements, passive surveillance and lighting;
- There is a need to maintain and provide local roads, walkways and cycle-ways as important community linkages;
- There will be adverse effects during construction, including noise and visual effects.

[744] Mr Rae told us that, at a regional level, having regard to evidence from other expert witnesses on traffic effects, economics, air quality and noise he considered that the main overall social and economic effects of TGP will be:

- Improved security of the regional transportation network by establishing an alternative major transportation corridor;
- Overall improved accessibility, traffic safety, and reduced travel times arising from the implementation of a major new corridor, with strategically located interchanges and link roads;
- Improved overall connectivity between communities and opportunities for reduced community severance of communities along the existing coastal route, which is affected by high traffic volumes;
- Economic benefits from construction activities generating local employment and spending and from increased levels of economic activity in the region as a consequence of TGP (such as reduced unemployment and underemployment of resources) as described in Mr Copeland's evidence;
- Economic growth and indirect economic benefits arising from land use development and fulfilment of strategies in several district and regional planning documents which show TGP as an integral component.

[745] We also heard that the health and sustainability of communities will be enhanced through:

- Overall improvements in accessibility to places of employment, shops, social support, health services, parks and reserves;
- Maintenance of vital community linkages and walkways and cycle ways;
- Traffic safety improvements, including an overall reduction in traffic along the existing SH1 through coastal communities;
- Improved overall air quality and exposure to traffic noise, through reductions in traffic on some routes (in particular, the existing SH1 between Linden and MacKays Crossing, and on SH58 west of the junction

of the main alignment with SH58 and on Grays Road) and freer flowing traffic on other routes.

**Construction Effects**

[746] We heard evidence that the main potential impacts arising from construction activities are considered to relate to:

- Construction noise and vibration;
- Air quality effects;
- Traffic and access issues;
- Effects on recreational activity;
- Landscape and visual impacts.

[747] Mr Rae told us that key to minimising any anxiety in the community is the use of good communication to inform affected communities and to respond to any difficulties that may arise for them. This will be done principally through the operation of a CEMP, which contains provisions for consultation, monitoring and response in the affected community areas[271].

[748] We heard that the CEMP has subsidiary plans, each with provisions for addressing noise, air quality and traffic effects in the local communities. SSEMPs will be prepared within the framework of the CEMP (and its subsidiary plans) which will provide a construction methodology that addresses relevant environmental issues and explains how potential effects can be managed[272].

[749] Day time construction noise will generally not affect residents beyond some nuisance/disturbance during particularly noisy works, although people who stay at home during the day (including people who work from home, are sick, or who work night shifts) could be disproportionally affected by long periods of noisy works. A CNVMP[273] identifies methods to control construction noise, including noise barriers in sensitive locations, and these were explained in the evidence of Dr Chiles.

[750] Dust can affect human health and also impact on people's enjoyment of outdoor areas and cause perceived or actual health impacts. These effects will be avoided or minimised through dust suppression at its source, and by meeting appropriate separation distances for dust generating activities. A CAQMP[274] sets out methods to manage effects on air quality. The effects were assessed in TR13 and in Mr Fisher's evidence.

[751] Potential effects from construction traffic may include noise and loss of amenity for residents along the roads to be used for construction related traffic; and temporary disruption of access and accessibility through the

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271 NZTA.13.
272 EiC, para 54.
273 NZTA.35, PCC.23.
274 NZTA.40.

communities. These effects were addressed in TR4 and in Mr Kelly's evidence.

[752] Horse riding on Paekakariki Hill Road was identified as a popular recreational activity within regional parks, on private land and on local roads. To mitigate these adverse effects a CTMP[275] is to be prepared recognising that horse riders are present on local roads such as Paekakariki Hill Road.

[753] Mr Rae said overall access to Belmont and Battle Hill Forest Farm regional parks (and pedestrian and cycle linkages through the Parks) will be maintained in the long term (post-construction), but there will be some minor changes to the access to Parks during construction in order to manage phasing of construction activities. Whilst the route necessarily removes parts of these parks, pedestrian and cycle linkages will be maintained across the Project[276]. To mitigate access issues, a new track will be constructed for recreational users, linking Battle Hill Forest Farm Park through to Queen Elizabeth Park. Access issues are further discussed in the Traffic and Transport Effects section of this report.

[754] There will be visual effects during construction arising from removal of vegetation, construction yards, partially completed roading elements and concentrations of vehicles and machinery at construction sites. These will cause some change to the *look and feel* of neighbourhoods for the duration of those activities. Mitigation measures such as rehabilitation planting and the screen planting of construction yards have been identified. These effects are discussed further in the Landscape and Visual Assessment[277] and in Mr Lister's evidence

**Operational Effects**

[755] Mr Rae also assessed the operational or on-going effects of TGP on local communities. The operational effects include the potential adverse effects arising from noise and vibration and on air quality, character and visual amenity, safety, community severance and access to community facilities. There are also a number of positive or beneficial effects such as improvements in route security, accessibility and movement and safety.

[756] Noise and vibration from road traffic were addressed in TR12. Noise mitigation is proposed in a number of areas, mainly where TGP is in proximity to urban areas. Noise options and mitigation were discussed by Dr Chiles in his evidence. Mr Rae considered that operational road noise will be able to be mitigated to an acceptable level in accordance with NZS 6806:2010[278].

[757] Where traffic is expected to increase (e.g. at Kenepuru Drive, SH58 east of the Main Alignment, and in areas adjacent to the proposed link roads) vehicle emissions will still be within the guidelines for air quality[279]. There will be benefits in terms of improved air quality in some areas, particularly for the

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275 NZTA.22, PCC.17.
276 AEE, Chapter 27, Section 27.4.8.
277 TR5.
278 EiC, para 63.
279 TR13.

coastal communities which will experience less traffic and consequently lower levels of vehicle emissions. This was explained in Mr Fisher's evidence.

[758] The introduction of substantial new roading elements will have an effect on the character of local communities, to varying degrees. In some instances the changes in character will be cumulative on the existing SH1 (such as at Linden and MacKays Crossing) and in other instances the changes will introduce new types of infrastructure (such as the backdrop to the eastern suburbs of Porirua). The remote and quiet character of some rural areas will also change, especially in the regional parks (e.g. Belmont Regional Park, Battle Hill Forest Farm Park)[280].

[759] Mr Lister addressed effects on landscape and urban character. His evidence described planting and other mitigation measures to provide screening and framing of views, where appropriate. The Urban and Landscape Design Framework[281] (the Design Framework) focussed special attention on the design and landscaping measures that can be implemented in the most affected communities, so as to maintain (and where possible enhance) the character of these areas. Conditions of consent are proposed that require preparation of a Landscape and Urban Design Management Plan (LUDMP), which will be prepared in accordance with the Design Framework[282].

[760] Traffic safety (in particular for pedestrians and cyclists) was a key focus particularly where the proposed link roads will introduce more traffic into certain areas (e.g. at Whitby, Waitangirua, and Kenepuru). Recommendations for signalised intersections, and provisions for pedestrians and cyclists and other design measures to address potential traffic safety issues in those communities were outlined in TRs 4 and 23 and discussed in the evidence of Mr Kelly and Ms Hancock. They are addressed further in the Transport Section of this decision.

[761] There are some areas of land identified in TR16 (e.g. at the Porirua Gun Club) as having levels of soil contamination which could pose a human health risk. A Contaminated Soil Management Plan[283] (CSMP) is proposed which includes practices and procedures to minimise environmental effects, and effects on human health and safety.

[762] Mr Rae told us that once TGP is operational there is the potential for community severance effects. In addition, the vulnerability of socio-economically deprived neighbourhoods to disruptions in existing linkages caused by major new roads was noted from consultation with Regional Public Health. Effects of this nature are most pertinent in Waitangirua where additional traffic movements will be introduced in the heart of the shopping area and community hub, and also at the SH58 Interchange where vital community walkways and cycle ways need to be maintained.

[763] We heard evidence that such effects were recognised in the very early stages of TGP and were key considerations at a series of urban design workshops.

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280 EiC, para 65.
281 TR23.
282 NZTA.43 and PCC.29.
283 G.20 and PCC.46.

These workshops allowed for specialist expertise to be provided in aspects of design, engineering and community development.

[764] The Design Framework was developed following those workshops and it contains a range of measures for each section of the route. These include safe crossing options (e.g. underpasses) to maintain the vital linkages across the road corridor so that communities may continue to function in a healthy and safe way. In addition, a condition recommended for the designations requires a LUDMP to be developed in consultation with local groups to address design issues in this community[284].

[765] There will be beneficial effects for communities once TGP is operational. These include overall improvements in route security, connectivity and movement. This will result in positive social impacts for people's day to day living, in terms of access to places of employment, shops, and community facilities. The increased route security, and reduced travel times, will also benefit emergency service providers and freight carriers. These benefits will extend to the coastal communities, which will experience an overall reduction in traffic and congestion on existing SH1.

[766] We heard evidence that significant traffic safety benefits can be expected to arise from the improvements to the regional transportation network, brought about by new roads and intersections designed to the latest design and safety standards, and generally more free-flowing traffic. This is expected to be particularly apparent in relation to communities alongside the existing SH1 which will experience in some areas considerably less traffic and an overall safer environment.

[767] We heard evidence from Mr Rae on the assessments of the potential effects of the construction and operation of TGP, and from the conclusions drawn from consultation carried out by NZTA and its advisors. We find that there is a good level of overall support in the community for TGP on social and economic grounds and this has been borne out in the consultation and submission processes. We accept that there is some opposition as well.

**Porirua City Council**

[768] Ms Lawler gave evidence on behalf of PCC. She told us that the Council is supportive of TGP as a whole and has long advocated for its construction. This support is reflected in PCC's statutory and non-statutory documentation. In particular, TGP's construction has been assumed in the Council's identification of future urban areas in the Porirua Development Framework 2009 and in the District Plan[285]. Ms Lawler told us that the eventual construction of TGP is a key assumption in PCC core planning documents.

[769] We heard evidence that during the construction of the Project the *look and feel* of some communities may change. However, Ms Lawler said, one of the premises of the Framework is that no area would be developed to the extent that the local character of a community would fundamentally change, rather

284 PCC.29.
285 EiC, para 10.

there would be pockets of development that strengthen the existing infrastructure. We accept that evidence.

[770] Ms Lawler said transport is a key element in the Porirua Development Framework. It is an essential element as the travel network links and binds different spaces and places together helping the City work as a whole. 45% of workers commute to Wellington City for work and 37% of workers in Porirua come from outside the City.

[771] Ms Lawler told us, by way of background, that in November 2005 the PCC submission on the Proposed Western Corridor Plan strongly endorsed a route through Transmission Gully over a coastal route upgrade. This was on the basis that the Transmission Gully route provides ...*a superior solution to the coastal route in every significant respect; transport network, economic, environmental, and social and resilience to emergencies*[286].

[772] We heard evidence that the PCC Village Planning Programme provides an important mechanism for communities to articulate their social, economic and environmental aspirations for the future development of their areas, as well as setting forth expectations of PCC's role in helping communities achieve their vision. Further to this, Ms Lawler considered that TGP will be beneficial to the wellbeing of coastal communities in a number of ways.

[773] TGP enhances the overall goals within village plans to foster a sense of community pride and identity;

- It will strengthen community cohesion by reducing severance and enhancing access to residences, businesses and community facilities;
- It provides opportunities to increase recreational use such as those outlined in village plans. Examples include improved opportunities for walking and cycling and improvements in landscaping to make coastal areas attractive to visit;
- It helps to meet communities' aspirations for improved safety and mobility;
- It complements village planning initiatives to protect/enhance unique characteristics of local natural environments.

[774] Ms Lawler said she believed the Village Planning Programme in Pukerua Bay, Plimmerton and Paremata will be enhanced by the construction of TGP because it will ease congestion on SH1, thereby reducing local concerns regarding safety and severance issues[287].

[775] We heard evidence that the community of Waitangirua faces a number of socio-economic challenges. It is an area with a high density of state housing (69%), the average income in Waitangirua is $18,000, less than two thirds of the regional average, single parents make up 40% of the families (more than twice the regional average) and the unemployment rate is significantly higher

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286 EiC, para 67.
287 EiC, paras 77–90.

at 14% (regional average 5.2%). Youth unemployment is particularly high reflecting the youthful demographics of the area[288].

[776] Ms Lawler said she believed that TGP offers positive opportunities for economic development in Waitangirua during its construction and operational phases due to the close proximity of the roads to underutilised commercial space. There is potential for revitalisation of Waitangirua to result from a combination of economic benefits from TGP and on-going community development activity efforts between Council and the local residents. Ms Lawler supported Mr Rae's evidence in this regard. Based on their evidence, we accept that TGP offers positive opportunities for economic development in Waitangirua.

[777] Submissions received from Ballinger Industries Ltd, Kapiti Coast Airport Ltd and the Automobile Association strongly supported TGP for the economic and social benefits it will bring to the region. Regional benefits were also identified and discussed in Mr Copeland's economic evidence.

[778] Submissions received from Public Transport Voice and RTS opposed TGP on the grounds that it promotes the use of private cars and there would be greater health benefits from making provision for public transport and alternative transport modes instead, although we were given no hard evidence on the ability of these modes of transport to accommodate the volume of traffic served by SH1. We heard evidence from Mr Rae that overall there will be an improvement in the access to community facilities and parks and reserves for recreation, and important linkages for cyclists and pedestrian will be maintained and in some cases enhanced[289]. Based on Mr Rae's evidence, we believe the submitters' concerns have been addressed.

[779] The Living Streets Wellington submission expressed concern that the roading changes will not in themselves remove the severance issues experienced by coastal communities along the existing SH1. Mr Rae supported Ms Lawler's response that while TGP will not remove community severance completely, significant traffic reductions (including heavy vehicle reductions) along the existing SH1 will enhance community access to local businesses, residences and facilities. We accept this evidence.

[780] Several submissions were received regarding severance in the coastal communities. The Pukerua Bay Residents Association submitted on the current problem of severance in the Pukerua Bay community. Also, Mr Phillips' submission talked of how the Paremata/Mana coastal highway *splits the community in two*.

[781] The Public Transport Voice submission was in opposition to TGP however, it acknowledged that there will be some benefits arising for coastal communities from reduced severance. We agree with this view.

[782] The Cannons Creek Residents and Ratepayers Association submission raised concerns regarding the potential impacts of the link road in Waitangirua on the Cannons Creek community. During the hearing we heard from expert

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288 2006 Census.

289 EiC, para 78.

witnesses on noise, exhaust fumes, pedestrian safety and environmental effects. Ms Lawler confirmed that PCC will continue to engage with residents' associations regarding local concerns through the village planning programme. We consider that the concerns raised in the submission have been adequately addressed.

[783] The Waitangirua Community Park Design Team submission expressed concern regarding pedestrian crossing safety on Warspite Avenue between Maraeroa Marae and Waitangirua Community Park, and safety concerns for Waitangirua Community Park users from the misuse of broken branches from TGP tree plantings. Mr Bailey addressed the safety concerns of the pedestrian crossing on Warspite Avenue which we discuss in the transport section of this decision.

[784] Ms Lawler told us that PCC has worked closely with residents from Waitangirua on the design, construction and maintenance of Waitangirua Park. PCC has had and will continue to have dialogue with the community regarding TGP landscaping in the area. Discussion to that effect has been had with Maraeroa Marae Executive and with representatives of the Tokelauan Church. It has been recommended that the Waitangirua Community Park Design Team be added to the list of stakeholders to be consulted in the detailed design phase of TGP in this area[290]. We consider that the Waitangirua Community Park Design Team concerns have been adequately addressed.

[785] Mr MacLean, on behalf of the Pukerua Bay Residents Association submission, outlined existing severance, safety and environmental issues with the coastal route. His representation spoke of Pukerua Bay being ...*blighted by the ongoing fear and frustration caused by it being bisected by an overloaded state highway*. Although we understood that the Association supported TGP in principle it had concerns about potential problems during construction and subsequent operation of TGP. Mr MacLean detailed a number of alleged broken commitments made by NZTA in the past and expressed scepticism that commitments now being made would be honoured.

[786] We heard evidence from Dr O'Sullivan that poor urban design contributes to mental health problems with major roads known to disrupt social networks and reduce neighbourhood connectivity[291]. Dr O'Sullivan said that the health impacts of major roading projects differentially affect poorer communities. That is, they are more vulnerable to the effects of air pollution, noise, community severance and social isolation[292].

[787] Mr Rae told us that it is acknowledged that the more socio-economically deprived sectors of the community may be more vulnerable to such effects as described by Dr O'Sullivan. However, these effects will be addressed through a range of mitigation measures, as described in the specialist technical reports, including retention of important walkways and cycle ways, linkages

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290 PCC.29.
291 EiC, para 16.
292 EiC, para 21.

and access to regional parks, and through localised landscape and urban design plans to be developed for affected neighbourhood areas[293].

[788] In his rebuttal evidence Mr Rae considered that Dr O'Sullivan's (and Dr Chapman's) statements of evidence do not take account of the evidence given by experts regarding the factors which are relevant to health effects and which are specific to TGP. Mr Rae referred to evidence touching on issues of concern to Dr O'Sullivan from various NZTA expert witnesses:

- Public transport evidence given by Mr McCombs;
- Accessibility and traffic safety evidence by Mr Kelly;
- Urban design and connectivity by Ms Hancock; and
- Air quality effects evidence by Mr Fisher.

We agree with Mr Rae that the evidence of these witnesses comprehensively addressed the issues raised by Dr O'Sullivan.

**Main findings as to the social effects of TGP**

[789] None of the evidence which we heard established any credible threat to the social wellbeing of communities from TGP. The evidence rather established the advantages which would flow from an efficiently operating regional transport system.

[790] We have some reservations about the extent to which the opportunities for economic benefits (which we have accepted TGP may create) will translate into actual benefits. Time will tell if that happens. However, the evidence which we heard satisfied us that there were no adverse effects on communities which could not be avoided, remedied or mitigated.

## 12.15 LANDSCAPE AND VISUAL EFFECTS

[791] It is inevitable that a project of TGP's size will have significant landscape and visual effects. Argument regarding those matters was, however, surprisingly limited in these proceedings. That is because much of the route runs through (largely) uninhabited pastoral land. The exception to that is at the northern end of TGP where it traverses the Te Puka Valley and at the southern end where it traverses urban areas.

[792] We heard expert landscape evidence on these matters from two witnesses[294]:

- Mr Lister for the Applicants;
- Ms Peake for KCDC.

[793] The landscape and visual effects of TGP were assessed in TR5 which identified them (in summary) in these terms:

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293 EiC, para 12.7.

294 Evidence of some planning and lay witnesses touched on landscape issues but the primary evidence was that of Mr Lister and Ms Peake

- Substantial earthworks must inevitably have adverse effects on landforms, streams and natural vegetation. The most significant effects in landscape terms would be in Te Puka Stream and in an area known as Lanes Flat. TGP has been *fine tuned* to reduce such effects as far as possible;

- TGP will introduce significant change to existing landscape character particularly at Te Puka Stream, Horokiri Stream and Duck Creek. However, when TGP is completed and operational, these parts of the route will have the highest amenity value for the users of the road;

- TGP will reduce landscape amenity in parts of Battle Hill Farm Forest Park and Belmont Hills Regional Park but the route will not intrude upon the most significant parts of these parks. Adverse effects would be mitigated by retaining physical connections to existing trails in both parks and by restoration planting where trails approach the Main Alignment;

- There will be adverse effects ranging between *moderate* and *very high* on some properties adjacent to TGP at Linden and at the middle sections of the route. Such adverse effects are much less than might be expected normally for a project of this size primarily because urban areas make up a relatively small proportion of the route and there has been an attempt to maintain reasonable separation distances where possible. More recently developed properties in the vicinity of TGP will have been aware of the existing designation and have tended to plan accordingly;

[794] TR5 concluded that the visual experience for road users would be largely positive as they traverse a ...*bold topography, a sequence of enclosure and openness, and a contrasting sequence of landscapes from urban to natural*[295].

[795] In addition to the above assessment TR5 noted that:

- There would be natural character effects on the streams which we have previously discussed. We take that matter no further and refer back to our section on freshwater ecology;

- The only outstanding natural feature (ONF) or outstanding natural landscape (ONL) identified in any relevant district plan which might be affected by TGP is the *foothills of the Tararua Ranges*[296]. The KCDC District Plan describes these as an *outstanding landscape* which we take to mean the same as an outstanding natural landscape. Any effects on the Ranges would be modest given the small proportion of the ONL affected by TGP, the low elevation at which TGP traverses this feature and the extent of existing modification in the vicinity.

[796] The Applicants' proposals for management of the landscape effects of TGP were based on an *Urban Design and Landscape Framework* (The Framework). The Framework was contained in TR23. The purpose of this document was to demonstrate how the design of TGP satisfied NZTA's Urban Design Policy Requirements.

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295 TR5, para 1.1.8.

296 KCDC District Plan - Policy 4, C.10 : Landscape.

[797] The Framework incorporated a comprehensive analysis of the route and identified a series of principles which would inform the landscape design of TGP. The principles were (in summary):

- Project wide design principles which identified wider design issues such as creating an *open sky* highway emphasising the linear character of the highway as a landscape fault line and existing landscape patterns (Principle 4.1);
- Landscape design which included both highway and landscape design principles (Principle 4.2);
- Earthworks design principles which sought to minimise the effect of earthworks (Principle 4.3);
- Structures design principles which addressed the construction of bridges, underpasses, culverts and retaining walls (Principle 4.4);
- Planting design principles which set out planting requirements (Principle 4.5);
- Noise barrier principles which sought to minimise the effects of potentially intrusive noise control structures (Principle 4.6);
- Pedestrian and cycle links design principles which sought to provide for pedestrian, tramping, horse riding and cycle links where TGP crosses or joins local networks (Principle 4.7);
- Stormwater devices design principles which sought to minimise the environmental impacts of any failure of stormwater treatment systems (Principle 4.8);
- Highway furniture principles which addressed the design and positioning of structures such as barriers, lighting columns and the like (Principle 4.9).

[798] The Framework was to provide the foundations for a more comprehensive Landscape and Urban Design Management Plan (LUDMP) which would in some places be supplemented by Site Specific Management Plans.

[799] Volume 4 of the application documents was a comprehensive set of landscape plans (LAO1-LA21). These landscape plans illustrate mitigation measures planned by the Applicants to mitigate landscape and amenity effects of TGP works. Mr Lister recommended that reference to these plans be included in conditions as they are also to inform the Management Plans to which we have referred. We note that this recommendation has been adopted by NZTA and these plans form part of Condition NZTA.1. That condition requires that the Project shall be undertaken in general accordance with the information provided by the requiring authority in the NoRs dated August 2011 and supporting documents being the AEE report, dated 8 August 2011 plus various plan sets. Clause (vi) specifically lists Plans LA01-21 which are the landscape plans referred to by Mr Lister.

[800] TR5 identified the measures proposed by the Applicants to mitigate landscape and amenity effects. It described them in these terms[297]:

> *9.1.8 In total approximately 570ha* (now 625ha) *mitigation/restoration is planned, spread between both ecological and landscape work streams and including a range of restoration methods:*
>
> *i. Retiring land from grazing to enable it to regenerate naturally;*
>
> *ii. Restoring riparian vegetation along the full length of significant tributary streams (particularly in Te Puka Stream, Upper Horikiri Stream, and Duck Creek catchments) and restoring riparian vegetation over shorter distances for more minor streams where they intersect the Project;*
>
> *iii. Enrichment planting of retirement areas;*
>
> *iv Large scale re-vegetation (using planting and hydroseeding techniques) of highway batters and slopes within the designation. In particular including major re-vegetation of Kanuka Forest within the designation between the Pauatahanui Stream and Duck Creek catchments, and a revegetation corridor between Porirua Park Reserve and Cannons Creek;*
>
> *v. Establishment of wetland areas to treat stormwater run-off, with a margin and riparian plantings;*
>
> *vi. Restoration of Lanes Flat as a major wetland, with restored riparian vegetation along Pauatahanui Stream and revegetation of adjacent valley edges;*
>
> *vii. Amenity planting with faster growing exotic trees and adjacent to the road corridor to soften the overall appearance of the road and mitigate visual effects from adjacent properties.*

[801] We do not propose to traverse the evidence of Ms Peake and Mr Lister on this topic in any detail. It is apparent from their witness conferencing statement that the witnesses agreed on many aspects of landscape issues. In particular they agreed that:

- TGP would have only limited effects on the values of the Tararua hills which are an ONL;
- The most significant adverse effect to be addressed was very high adverse effects of TGP on the natural character of Te Puka Stream. The witnesses agreed that such effects are unavoidable in order to construct TGP.

[802] We mean no disrespect to Ms Peake and Mr Lister in not providing more detailed summary of their evidence, quite the contrary. Their briefs were comprehensive and focused on relevant issues. The witnesses had clearly proceeded with their discussions in an objective fashion as required by the

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297 TR5, para 9.1.8.

Board's instruction to expert witnesses. They were largely in agreement as to the mitigation measures proposed by the Applicants. There was however, debate between the witnesses as to various matters of detail such as treatment of batters and the form of conditions.

[803] An issue of particular concern to Ms Peake was that, although the mitigation measures proposed by NZTA were appropriate in principle, the conditions of consent proposed as part of the application gave insufficient certainty in guiding final design of the process and managing adverse effects. It was agreed that certainty could be achieved by suitable amendments to the Framework which would drive subsequent detailed landscape management plans and in the LUDMP which was to be drawn up.

[804] We understand that these concerns are reflected in condition NZTA.46 and that they generally satisfy Ms Peake's concerns.

[805] Some submitters raised site specific issues regarding effects of TGP on their properties and we will address those elsewhere in this report.

**Main findings as to landscape and amenity issues**

[806] We appreciate that this is a comparatively brief commentary on landscape and amenity issues which commonly figure very prominently in the consideration of projects such as TGP. In this case, the landscape impacts of TGP are influenced and minimised by the fact that most of the route runs through highly modified farm and rural land with limited numbers of affected neighbours. However, we acknowledge that TGP will become a significant landscape feature across the route and will influence the outlook and views of those who presently enjoy a primarily rural environment.

[807] In the Te Puka Valley/Stream at the northern end of TGP where there is probably the most significant adverse effect on landscape and natural values, the expert witnesses have agreed that the mitigation measures proposed by NZTA are appropriate. We acknowledge that adverse effects at Te Puka cannot be avoided. That acknowledgement must be tempered by the fact that this portion of the route is currently privately owned farm land to which the public do not have access and which can be cleared for farming purposes (indeed much of it has been). The change of route from the eastern to the western side of Te Puka Valley enables TGP to avoid the very important Akatarawa Forest which is presently subject to the existing TGP designation and where adverse effects would be much more significant.

[808] Also relevant to our considerations regarding Te Puka Valley are the terrestrial and freshwater ecology mitigation measures which we have discussed elsewhere and which include enhancement of the Wainui Stream (situated just north of Te Puka Valley). That is not a case of double counting, but rather recognising that the overall mitigation package proposed by the Applicants has sedimentation, hydrological, ecological, landscape and amenity benefits.

[809] Mr Lister and Ms Peake agreed that NZTA and PCC have taken appropriate measures to mitigate adverse effects on neighbouring properties at the Linden end of TGP and these steps are reflected in several conditions particularly the suite of conditions relating to the production of a LUDMP which is to be firstly,

appropriately informed by the Framework that has already been drafted; and secondly, submitted to the relevant territorial authorities for assessment as part of the Outline Plan process.

[810] Having regard to all of the above matters, we find that the Applicants have planned TGP in a manner which provides a comprehensive design for mitigation of adverse landscape and amenity effects. Notwithstanding that finding, we acknowledge that there will be significant adverse landscape effects on the Te Puka Valley but consider that those effects must be assessed in light of the tempering factors set out above.

## 12.16 DIRECT PROPERTY EFFECTS

[811] This section of the decision considers issues raised by submitters claiming to be subject to direct effects from TGP. We identify those submitters and briefly summarise the issues raised by them. The AEE identified that TGP is likely to have effects on land either required for or in close proximity to TGP but stated that properties potentially adversely affected have been identified and appropriate mitigation has been devised.

**Mr & Mrs Senadeera**

[812] Mr & Mrs Senadeera, expressed serious noise and visual concerns about the road. One of the TGP works compounds will be just north of the submitters' property and they will be subject to heavy construction traffic daily for three years. Their property is at 55 Collins Avenue which already sits below and in close proximity to the existing SH1.

[813] Mr Edwards submitted detailed plans[298] showing the tie-in point between the existing motorway and TGP near the Senadeera property and an alternative layout moving that point 30m to the northwest[299]. The effect of this change is to move the proposed motorway a further 3.2m from the Senadeeras' south western boundary corner (6.5m to 9.7m) and 3.4m further west from the north western boundary corner (4.7m to 8.1m).

[814] Ms Grinlinton-Hancock provided planning evidence for Mr and Mrs Senadeera and was involved in consultation to identify possible solutions to noise, visual and construction effects of the proposal. Ms Grinlinton-Hancock considered that conditions proposed by NZTA were a practicable means to achieve the outcomes sought by the Senadeeras' submission although Mrs Senadeera had concerns that this would not be the case.

[815] Mr Nicholson informed the Board that an agreement had been reached with Mrs Senadeera for minor amendments to be made to the road alignment to increase separation distance from her property. Although this combined with conditions seemed to adequately address Mrs Senadeera's concerns, she advised that this was a *backstop* position and her preferred solution was for NZTA to buy a vacant lot on their property as a reserve to improve amenity for the residents of Little Collins Avenue.

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298 Exhibits 7 (Property Access Plan SK24 - Application layout) and Exhibit 8 (Property Access Plan SK25 – Altered Tie-in point).

299 NoE, pg 369.

[816] NZTA contended that moving the merge area to the north by 30m would reduce the effects on the Senadeeras' property which, when combined with noise mitigation measures also proposed, would appropriately mitigate the effects of moving traffic closer to the property. Ms Grinlinton-Hancock accepted that was the case although Mrs Senadeera appeared to have a different view.

[817] We concur with the position of NZTA and Ms Grinlinton-Hancock. The reality is that the Senadeera property is already affected by presence of the dominating SH1 in its existing position. The design change and noise mitigation measures proposed by NZTA will mitigate effects of the new alignment to the greatest extent possible and ensure that the effects of the new road are little (if any) more adverse than the existing road.

**Green and Whitby Coastal Estates Ltd**

[818] Mr C A Green is the owner of 53A Cleat St. Part of the proposed Waitangirua Link Road alignment will extend onto the southern end of the submitters property. The Applicants have provided a plan showing a possible earthworks design solution which would ensure that physical access can be achieved between the new road and the submitter's property

[819] Whitby Coastal Estates Ltd (WCEL) noted that the proposed Whitby Link Road bisects the submitters land.

[820] An expert conferencing joint report[300] was drafted between Mr Edwards (NZTA) and Mr R O'Callaghan (NZ Area Manager, Cardno, representing both WCEL and Mr Green) and sought to address issues raised by Mr Green and WCEL. It was agreed that:

- *An access from the Waitangirua Link Road onto the Green property is feasible and will be incorporated into the final design if required by the land owner at time of detailed design;*
- *The indicative access point as shown on Cardno drawing WO8274-CP02 Rev 1 is a suitable location as the general basis for the final design;*
- *Flexibility is achievable for the Whitby Link Road;*
- *The final design can accommodate the future residential use adjacent to the Whitby Link Road without any significant restrictions;*
- *As part of the development of the final construction management plans, it is expected that construction access will be achievable between Navigation Drive and the main project works site.*

[821] We understood that the conference statement addressed the concerns of Mr Green. Mr Bailey confirmed that PCC would continue to discuss remaining issues with Mr D Bradford (the managing director of WCEL), but that it was unrealistic that any agreement will be reached before conclusion of the

[300] Dated 30 November 2011

hearing[301]. At the hearing however, Mr Bradford changed his position on the notices of requirement from *support in part* to *oppose in part.*

[822] The PCC proposed Waitangirua-Whitby link road cuts through the WCEL land at Whitby. The land is zoned for residential development. Mr Bradford accepted that development of the WCEL land can be coordinated with development of the link road. Surprisingly, Mr Bradford's objection to the designation was that he wanted more of the WCEL land to be contained within it.

[823] Mr Bradford asked the Board to consider extending the designation to include areas of existing bush on the WCEL land referred to as Ecosite 33, although he did not suggest that the land in question was required for the road. Mr Bradford's hypothesis was that Ecosite 33 had been identified in designation plans provided by PCC as an area of conservation significance and ought be protected in order to provide a very attractive entrance to Porirua City.

[824] Ecosite 33 was not included in the areas for riparian or replenishment planting proposed by NZTA. It is not needed by PCC as part of the link road. Mr Bradford appeared to be advocating its acquisition for conservation purposes which go beyond any roading purpose. We do not propose to comment on the conservation value of Ecosite 33 other than to observe that no weight regarding that matter should be attached to its identification as an area of conservation significance on the designation plans. The designation plans are provided to identify the extent of the designation and cannot have wider purposes such as identifying areas of conservation value under the PCC District Plan. Mr Bradford acknowledged that the land on Ecosite 33 is zoned for residential development and that he is entitled to clear the existing bush if he wishes.

[825] The Board is satisfied that the designation has identified sufficient land in this vicinity to enable road construction and mitigate its effects. Extending the designation as suggested by Mr Bradford is not required for roading purposes.

**Battle Hill Farm Forest Park Permanent Access**

[826] Submissions were received from the Regional Council and Battlehill Eventing Incorporated (BHEI) regarding access across the proposed motorway. Mr Kennedy[302] advised that the Regional Council, as owner of Battle Hill Farm Forest Park, requires two accesses across the TGP route to provide for logging and recreational access across the Park.

[827] BHEI was concerned about potential restriction of access to Battle Hill Farm Park for BHEI events and loss of trails for equestrian riders. The submitter was also concerned about potential risk to riders and horses from construction traffic, noise and vibration.

[828] We understand that there has been a site access agreement for Battle Hill Farm Forest Park negotiated between NZTA and the Regional Council.

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301 NoE, pg 143-144

302 EiC, paras 9-10.

Mr Kennedy confirmed during the hearing[303] that the conditions that the Regional Council had originally sought were no longer necessary. The access arrangements agreed also seem to deal with the issues raised by BHEI.

**Rangatira Road**

[829] A series of related submissions were received from C J and A D Sheridan, G L and M O Owens, Jianfei Li, J E Gray, D C and J Barnes and S B Hill and J S Grace. The submitters all live at Rangatira Road, Tawa and were represented by Mr B Wood, an acoustics expert.

[830] The submitters had concerns regarding construction noise, dust and other amenity effects. The submitters also raised specific matters about the location and use of a proposed site compound at 11 Rangatira Road. The submitters contended that the change of site use from rural residential to industrial will change the rural environment and were concerned about additional traffic and associated safety and security concerns. Sections of Collins Avenue are used by school children from Linden School. The submissions raised general concerns about increased noise levels and visual effects.

[831] The Applicants proposed conditions requiring consultation with identified property owners along this road to occur and appropriate mitigation strategies to be implemented.

[832] Mr Lister testified that the submissions were similar and related to six rural-residential properties on a private driveway off Rangatira Road. These properties overlook the proposed Kenepuru Interchange and Link Road from the eastern side of SH1. The submissions sought conditions limiting vegetation removal and earthworks, retention of trees for visual and dust screening purposes, planting of further trees as soon as practical and returning a site compound area to a rural character following construction.

[833] Mr Lister said that while vegetation clearance and earthworks will be needed to accommodate the site compound and construction access, a proportion of a pine stand on the southern boundary of the construction site and the plantation on the northern side of the site near the Kenepuru Interchange, should be able to be retained. The semi-rural character of the area could also be restored through tree planting and following construction. Mr Lister considered that planting plans prepared through the LUDMP process would form the basis of consultation with the residents and would lead to a suitable outcome.

[834] Noise issues were also a concern for the residents. The submitters engaged Mr Wood to provide acoustic advice to them and discuss noise issues with Dr Chiles. Mr Wood conducted a detailed review of Dr Chiles acoustics assessment and was satisfied that the noise effects at Rangatira Road would be acceptable.

[835] The Board is satisfied that the concerns of these submitters will be appropriately resolved through the LUDMP process and that noise effects on their properties will be acceptable.

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303 NoE, pg 855.

**Deuss / Poppe/Christensen**

[836] Three submissions were lodged separately by adjoining landowners in relation to similar visual and noise related issues.

[837] The Poppe Family Trust is the owner of 504 Paekakariki Road. The Main Alignment removes a large portion of the rear of the submitter's property. The submitter sought realignment as did nearby submitters, Deuss and Christensen.

[838] Mr E Deuss observed that the Main Alignment cuts his property in half. He was concerned about visual and noise impact on his property. He proposed that the road be shifted about 100m to the east at the northern end of his property. Staff from NZTA had visited the property. Mr Deuss said that there appeared to be no major impediments to relocation.

[839] D Christensen (a neighbour to the Poppe and Deuss properties) expressed concerns that the new designation brings the road significantly closer than the earlier designation to his property and about motorway noise increase and construction noise impacts.

[840] All three submitters sought the designation alignment be shifted 100m eastward towards the original designation.

[841] NZTA responded to these requests through the evidence of Messrs Lister, Edwards and Nicholson[304]. They explained that moving the alignment as suggested by the submitters would either shift the road some 30m up the hillside thereby increasing its prominence or would significantly increase cut heights to maintain the current gradients. Mr Nicholson noted that the design curves as proposed by NZTA in this vicinity avoid large cuts into Gasline Ridge that could require relocation of two gas mains that run through the area.

[842] In closing submissions for NZTA, counsel noted inaccuracies with the relative distances from dwellings and boundaries contained in the respective submissions and provided amended figures based on the plans submitted as part of the application.

[843] Dr Chiles commented on noise issues raised by the submitters and concluded that the operational noise levels would be below Category A as defined in NZS 6806 and were therefore reasonable. He also expected construction noise to comply with the construction noise standard, NZS 6803:1999 and to be significantly below the guidelines for the majority of the constriction period.

[844] Notwithstanding those comments, NZTA proposed a condition which would attempt to keep the Main Alignment of TGP as far away from these properties as possible, while staying within the designation as currently proposed.

[845] The Board considers that the condition proposed by NZTA is a practical way to mitigate the effects on the submitters' properties, in addition to the extensive landscaping already proposed by NZTA through conditions.

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[304] EiC, paras 125-129, 107-111, and 131-132.

**Powerco**

[846] Powerco is the network operator of a gas pipeline in the vicinity of TGP. Its Counsel (Mr Anderson) addressed the issues of maintenance of the existing gas lines in the Transmission Gully area and possible future expansion of gas infrastructure across the road.

[847] Powerco was largely in agreement with NZTA conditions as proposed by Ms Rickard[305] insofar as existing operations were concerned. Some minor amendments were suggested by Ms McPherson in her supplementary evidence and provided these were accepted, Powerco considers that the operation and maintenance of its gas line assets will not be affected.

[848] Mr Anderson submitted that TGP would create a significant restriction on Powerco's ability to install additional gas lines in the area for future development and that there should be provision for as many utility crossings across the road as possible.

[849] NZTA responded[306] that it was willing to accommodate future utility requirements in the design and construction of TGP. Powerco was satisfied that a letter of intent from NZTA and separate Memorandum of Understanding to follow would address its concerns for future proofing. The Board proposes to leave the matter there.

**Transpower**

[850] Transpower raised dust and vehicle access issues regarding its Pauatahanui and Takapu substations due to the location of an NZTA construction compound. Its concerns were satisfied by conditions proposed by NZTA. NZTA Conditions 65 - 70 specifically deal with reverse sensitivity issues as they relate to Transpower operations.

**KiwiRail**

[851] KiwiRail has interests as an affected land owner as part of the area proposed for the Kenepuru Link Road is owned by the Crown for railway purposes and is administered by KiwiRail. The land is designated for railway purposes. KiwiRail supports TGP as long as it is designed and implemented so as not to interfere with KiwiRail operations. NZTA is continuing to consult with KiwiRail to ensure operations are not affected. The Board proposes to leave the matter there.

**Regional Water Infrastructure**

[852] Mr A McCarthy from the Regional Council outlined the effect of TGP on the region's bulk water supply. The Regional Council supplies water to the cities of Upper Hutt, Porirua, the Hutt Valley and Wellington. Approximately 50% of the water supplied to those cities is sourced from the Hutt River at Kaitoke and is treated at the Te Marua water treatment plant. It is piped along Ferguson Dr and SH58 and then south, initially following Belmont Road and then Duck Creek to emerge at the northern end of Takapu Road. The pipeline follows

305 Rebuttal Evidence, paras 78-79.
306 Rebuttal Evidence, paras 90-92.

Takapu Road to the Wellington - Johnsonville Motorway which it follows south as far as Ngauranga Gorge.

[853] Mr McCarthy noted that water supply is a critical infrastructure service, but that it is possible to shut down the bulk water pipelines for short periods up to about eight hours. In terms of possible effects, the TGP route crosses the bulk water main network at four locations:

- At point 19,100m, a 180mm diameter branch pipeline to Bradey reservoir.
- At point 19,500m, twin branch pipes to Porirua City.
- At point 20,800m a 900mm diameter trunk main.
- Distance 23,200m a 900mm diameter trunk main in a tunnel.

[854] The Bradey reservoir branch main will have to be reconstructed at a lower level to avoid the TGP formation. This will involve a special construction methodology of enclosing the pipe in a sleeve so that it can be removed for future maintenance work or replacement if required without digging up the road.

[855] The Porirua branch mains cross TGP at a point where the new road formation is approximately 18m below existing ground level. It will be necessary to relocate these pipes temporarily to enable first stage earthworks and construction of a services duct to be undertaken. The pipes would then be moved to their permanent location and the earthworks completed.

[856] The trunk main crossing at 20,800m will have to be reconstructed at a lower level prior to commencement of the earthworks for TGP. It will have to be contained in a concrete box culvert or similar structure of sufficient size to enable pedestrian maintenance access. Vehicle access through the culvert is not necessary, provided vehicle access to both ends of the crossing is readily available.

[857] At point 23,200m the trunk water main is located in a tunnel. Preliminary investigations suggest that the tunnel will be unaffected by construction of TGP.

[858] Mr McCarthy suggested a number of changes to conditions to ensure adequate time was available for the Regional Council to plan, coordinate and execute the required works to ensure unimpeded water supplies around the Wellington region.

[859] Mr Nicholson confirmed that NZTA intends to work with the Regional Council to appropriately protect the security of the bulk water mains. NZTA supports the general intent of the Regional Council's proposed changes to conditions, with some amendments to provide as much advance notice of construction as possible to all of the affected network utility owners. Mr Nicholson also proposed that some of the amendments identified by the Regional Council would be best handled by way of a signed agreement between NZTA and the Council.

[860] We understood that matters of concern to the Regional Council regarding these matters have been resolved by the relevant conditions proposed by the Applicants.

**Cannons Creek Residents and Ratepayers Association**

[861] Cannons Creek Residents Association was concerned about noise from the large increase in traffic coming through the Waitangirua area into Cannons Creek as well as exhaust fumes and pedestrian safety along Warspite Avenue and the Waitangirua Mall.

[862] The assessment undertaken by NZTA in TR13 showed only minor effects from noise and fumes in the Cannons Creek area. There was no substantive challenge to those assessments which we accept.

[863] In respect of pedestrian safety, there was no detailed discussion of Warspite Avenue, but it seems apparent that if existing pedestrian facilities are safely providing for pedestrians now (as we understand they are), they will continue to do so in the future.

[864] NZTA noted that traffic signals will be established at the intersection of the Waitangirua Link Road near the Waitangirua Mall. This design feature should appropriately provide for safe pedestrian use of the intersection.

**23 Tremewan Street**

[865] Mr C S W and Mrs S E Edmonds are the owners of 23 Tremewan Street. They were concerned that the removal of houses on the opposite side of Tremewan Street will have a severe effect on visual amenity of their property. Mr and Mrs Edmonds submitted that the new road would also have severe impacts on their property during both construction and operation of TGP as the result of noise, dust, lighting and vibration. They noted that technical reports identified that the highest impacts on residential properties will be in the Linden and/or Tremewan Street areas. They complained about lack of consultation by NZTA.

[866] Mr Nicholson advised that the property owners on the opposite side of Tremewan Street from the designation had not been specifically consulted by NZTA, but were part of the wider public engagement process (which we take as an acknowledgement that the Edmonds were not directly consulted). The part of Tremewan Street where Mr and Mrs Edmonds reside is already next to the road and is subject to existing operational effects. TR12 (Acoustic Assessment) concluded that changes to those existing effects would be minor and could be managed by sound mitigation including bunds or walls. Construction effects will be addressed by the management plans proposed by NZTA, which will include procedures to consider and address residents' concerns.

[867] The Board considers that the management approach proposed by NZTA in this respect is appropriate and acknowledges the assessment contained in TR12.

**Flightys Road**

[868] Submissions were received from four submitters on Flightys Road. These were Mr S H and Mrs C D Redit, Mr B Dowie and Ms T Maguire, Mr G Tombs and Mr D J Harris.

[869] Mr Harris owns a property adjacent to the road. The submitter supported the proposal subject to the imposition of conditions that an earth sound barrier and a track allowing access to a paddock be constructed.

[870] Mr Tombs submitted that TGP will have adverse visual and noise effects on his property during construction and once complete.

[871] Ms Maguire and Mr Dowie raised the issue of effects on their rural views and tranquillity.

[872] Mr and Mrs Redit were concerned that the road runs through the back of their property and they asked to have earthworks constructed to block views of the road and noise.

[873] The overall thrust of these submissions pertained to maintaining rural character in the area, particularly as it relates to visibility of the road and noise issues. The edge of the designation runs along the western boundary of the properties of two of the submitters and west of the remaining properties. The alignment of the road itself would be some distance to the west and located below an intervening ridgeline.

[874] NZTA will consult with residents along the route during the design period through the LUDMP. We consider that this will provide an opportunity to agree and implement an appropriate planting or screening regime for these particular properties which have been identified in an NZTA proposed condition in this respect (NZTA.47 - we note that reference to 247C Flightys Road was not included in the proposed condition and we have done so).

**Mr Edge**

[875] Mr C Edge owns a property at 51 Paremata Haywards Road (SH58). The submitter's property is included in the designation as there are works directly opposite, within 20m of his residence. There would be noise, dust, vibration and visual concerns during construction and the property may depreciate in value.

[876] Mr Edge's property was included within the designation as NZTA considered that effects on his property could not be adequately mitigated so that ultimately the Crown would acquire the property. Mr Nicholson[307] acknowledged that Mr Edge was not consulted until fairly late in the process. Subsequently, Mr Edge had a number of meetings with NZTA[308] which resulted in his concerns being addressed. This acknowledgement was presented in

[307] EiC, para 161.
[308] EiC, paras 161-164.

Mr Nicholson's rebuttal evidence. The Board proposes to leave the matter there.

**Paremata Residents Association**

[877] The Paremata Residents Association Inc represented by Mr Morrison supported the application subject to conditions. The Association sought that NZTA undertook all steps necessary to allow demolition of the Paremata Bridge with six months of TGP completion, avoided the use of tolls or maintained the ability to remove tolls at any time and sought additional sediment and contaminant mitigation measures.

[878] As confirmed by NZTA and discussed elsewhere in this decision, tolling is not proposed and is not considered material to this decision.

[879] The issue of removal of the existing SH1 bridge has been addressed in the Legal Issues section of this decision.

**Main findings as to direct property effects**

[880] A number of submitters discussed effects on specific properties and mitigation of possible effects of TGP. We consider that all the issues raised, except those by WCEL and the Paremata Resident's Association, are addressed by conditions and the management plans proposed by NZTA. The management plans outline how NZTA will continue to consult with affected parties to resolve remaining design issues. Given the site specific nature of many individuals' concerns and the preliminary status of the current road design, this is an appropriate way to provide suitable outcomes.

[881] In respect of the submission by WCEL, the Board does not believe that extension of the designation sought by Mr Bradford is required to address the effects of the proposed road.

[882] The Paremata Residents Association concerns relate to conditions of the existing Mana designation which may no longer apply if TGP proceeds and NZTA relinquishes the earlier designations. We understand the Association's concern in that regard although we did not hear sufficient evidence to decide whether or not removal of the second bridge as sought by the Association is an appropriate outcome. That may not be finally determined until TGP has been operating for some time. We have endeavored to draft a condition which ensures that the Association is consulted at that time as the existing condition requires.

# 13. THE TRANSPOWER APPLICATION

## 13.1 OVERVIEW AND PRELIMINARY MATTERS

[883] In this section we consider the Transpower application in total. This is an application made pursuant to the NESETA, as a restricted discretionary activity. The applications relate to the relocation of 24 transmission towers. All issues raised by submitters, the s42A reporters and the responses of Transpower counsel and witnesses are considered, evaluated and our findings presented. In doing so, we initially record that there were only minor issues arising from this particular application by Transpower. On that basis we have adopted an approach whereby we have provided a brief synopsis and analysis of the main issues emanating from the application.

[884] We also note the following preliminary matters:

- Under the heading of *Additional Consents* in the legal issues section of this decision we have already commented on a single legal issue arising from consideration of the Transpower application; namely the fact that Transpower has not applied for earthwork consents required as part of the access tracks, culverts and site works associated with tower relocations. We do not revisit that issue in this section other than to record our finding that Transpower's *failure* to have applied for those additional resource consents is understandable in the circumstances and is not fatal to these current applications.

- Furthermore, that does not preclude us from considering the effects arising from the application for the tower relocations themselves. In this respect we do have a satisfactory basis to consider the wider effects arising from the tower relocations and the immediate earthworks associated with that. We accept that the consideration of the wider earthworks associated with access tracks, culverts etc is for another day.

- A number of the particular issues associated with the Transpower application have been touched upon in other sections of this decision alongside the TGP proposal and its effects. For example, we note that NZTA made an allowance for earthworks likely to be necessary as part of the Transpower proposal and these combined effects were considered in turn by the archaeologist and ecologist who were shared witnesses between Transpower and NZTA.

[885] We return to the issue of witnesses presently. In the meantime we turn to the submissions received.

## 13.2 SUBMISSIONS

[886] Transpower's application was the subject of only four direct submissions. Counsel for Transpower opined that is perhaps an endorsement of the careful route selection process that Transpower has undertaken, and a pragmatic

recognition that transmission lines have been a feature of the Gully for some 80 years and are not being relocated far from their existing locations.

[887] Our brief commentary on those submissions follows.

**Director General Of Conservation**

[888] The concerns of the Director General were centred on whether the absence of earthworks applications prevented the Board from having the information it requires to determine this matter, or will prevent sedimentation issues from being properly assessed when later applications are made.

[889] For the record, we note that despite questioning Mr Nicholson[309] and Ms Hopkins[310] on the issue, Counsel for the Director General did not pursue the matter in submissions. We also record that none of the other submitters provided submissions challenging Transpower's approach on subsequent earthworks consents.

[890] We note that Mr Nicholson expressed a view that Transpower appeared to endorse, namely that if for some reason Transpower is unable to secure the requisite earthworks consents, then it will be unable to proceed with the line relocation works as they are presently conceived and, by extension, NZTA may be unable to proceed with the Project as presently conceived. This is a given which we accept.

**Kapiti Coast District Council**

[891] Prior to the commencement of the hearing there appeared to be some concerns held by KCDC with respect of the landscape and visual amenity effects of proposed Tower 2A which is to be situated at the northern end of TGP, near its point of exit from Te Puka Valley.

[892] We note that the position advanced at the hearing was that those issues have been resolved, in that Ms Peake for KCDC and Mr Lister for Transpower have agreed that there is no better option available for the design of the line relocation works in the vicinity of proposed Tower 2A.

[893] Further, we record that Ms Thomson confirmed that (with the exception of the landscape monitoring period upon which we comment) she agreed with all of Ms Hopkins' rebuttal evidence addressing Ms Thomson's original concerns in respect of conditions. We record that this agreement has been captured in the amended conditions which were appended to Ms Hopkins' rebuttal and which have been adopted by us (see conditions heading later in this section).

**Poppe Family Trust/Mr Duess**

[894] The Poppe Family Trust and Mr Deuss put forward an alternative alignment for the highway, and suggested that it may alter the need or scope of Transpower's line relocation works.

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309 NoE, pg 68, line 23 onwards.
310 NoE, pgs 304-305.

[895] We discuss this particular set of submissions later in this section. Of all the submissions in relation to the Transpower application, it was the only set that was either still relevant or unresolved by the close of the hearing.

## 13.3 WITNESSES

[896] Transpower and NZTA had shared witnesses on a number of topics. The full list of shared witnesses between the two Applicants were:

- Mr Bowman - built heritage;
- Mr Fuller - ecology;
- Mr Lister - landscape and visual;
- Ms Maize - contaminated land;
- Ms O'Keeffe - archaeology;
- Ms Pomare - cultural effects;
- Mr Rae - social effects

[897] We also heard evidence from the following three Transpower specific witnesses:

- Ms Hopkins – planning;
- Mr Mason -transmission line construction;
- Ms Yorke - transmission line engineering.

[898] In addition we heard from two KCDC witnesses; namely:

- Ms Peake – landscape architect;
- Ms Thomson – planner

## 13.4 ISSUES ARISING

[899] The key aspects of the application and the issues arising are considered under the following headings:

- Visual and landscape effects;
- Earthworks and contamination;
- Ecological effects;
- Effects on historic heritage;
- Effects on sensitive land uses;
- Clearance of trees and vegetation;
- Restoration of land / effects and timing of construction works.

## 13.5 VISUAL AND LANDSCAPE EFFECTS

[900] Mr Lister advised that the visual and landscape effects of the line relocation works were assessed in TR5A. In his evidence to us, he divided the visual and landscape effects into two key considerations - landscape character and effects on individual properties.

**Landscape Character**

[901] Mr Lister's evidence was that for the most part only relatively minor modifications are being made to the existing line, resulting in minor landscape effects relative to the existing environment. He advised that in his opinion the most significant area of change is the western deviation around Wainui Saddle (towers 8A to 12A) which will result in three towers on spurs above and to the west of the Saddle. We noted that the deviation is within an area classified as ONL and therefore we gave additional consideration as to whether the deviation is *appropriate* in terms of Section 6(b).

[902] In this respect, we note that Mr Lister give evidence that the deviation is appropriate, taking into account:

- That the existing line already traverses the ONL;
- That the proposed route is the best of the available options (given that other constraints apply both through the Saddle, and on the eastern flank of the Saddle);
- That the deviation will have little effect on the main values of the ONL as a natural backdrop to the coastal plains.

[903] We agree with and adopt that assessment as our main finding on this topic.

**Effects on individual properties**

[904] In terms of general effects on properties within proximity to the relocated transmission tower route, s42A writer Mr Kyle initially advised us that the visual and landscape effects assessment had identified that there will be moderate effects on seven residences arising from proposed towers 32A, 33A and 40A. We were also told by Transpower that those towers are at the same distance or further away from the relevant dwellings than the towers they replace.

[905] Mr Lister proposed that those effects can be partially mitigated by reducing the tower movement tolerances for those tower sites, and through localised planting. We generally accept Mr Lister's recommendations and have agreed that they be included as conditions on the consents.

[906] Further, we note that maintenance and upgrading of the line permitted under the NESETA could result in similar visual effects.

[907] Ms Hopkins gave evidence that she is satisfied that significant landscape effects have been generally avoided through careful route selection processes. In reliance on Mr Lister's assessment, she concluded that she is

satisfied that, with the proposed mitigation measures in place, the minor residual landscape effects are acceptable. We concur.

[908] In terms of specific effects on properties, we were told that one of the towers identified by Mr Kyle (33A) plus one other (31A) were the subject of a submission by the Poppe Family Trust and Mr Deuss. Those submitters, who are immediate neighbours, filed separate submissions and attended the hearing giving representations in support of their submissions. They were joined by another neighbour Mr Christensen, although he had not submitted on the transmission towers themselves.

[909] Of relevance to Transpower, the Poppe and Deuss submitters suggested there should be a realignment of TGP in the vicinity of their properties, which they submitted would result in no need for the movement of transmission towers 31 or 33.

[910] We agree with Counsel for Transpower that the highway alignment is not a matter for Transpower. We also note that at the hearing the transmission lines concern canvassed by those submitters was secondary to their principal thesis that the highway corridor should be moved to the east. However, like Transpower, we have given consideration to the consequences of the re-alignment of the highway on the line relocation works to the extent that that is possible.

[911] To this extent, we relied on Ms Yorke's rebuttal evidence that in turn drew on the unchallenged evidence of Mr Lister.

[912] Ms Yorke addressed the concerns of the submitters on the following basis:

- That even if the highway were to be realigned as suggested by these submitters, it is likely that tower 32 would have to move and may also have to increase in height, and
- That tower 31 may need to be upgraded, given the new roles that those towers would play on either side of a road crossing, and the relative clearances required between the conductors and the road as a result of that change.

[913] In short, she was clear in her appraisal that the desire of these submitters to minimise changes to the towers in the vicinity of their properties will not be achieved through the highway realignment that they propose. We agree.

[914] In addition we record that, as outlined in Section 12.16, NZTA has offered a condition for its designations requiring the detailed design of the Main Alignment to maximise the distance between the road carriageway and the Poppe, Deuss and Christensen properties within the designation corridor. If that is taken up (presumably through the subsequent outline plan process under s176A of the Act), then there may need to be an alternative design consented for the relevant tower sites (31 – 33).

[915] For the present, we accept that Transpower cannot assess what significance the adjustment to the Main Alignment might have for the tower relocation sites;

and for that reason we acknowledge Transpower's position that it seeks that consents be granted for the sites as presently designed.

[916] In terms of the above assessment of landscape effects and in reliance on the conditions discussed the end of this section, we agree with the Transpower position and that is our main finding in that regard.

## 13.6 EARTHWORKS AND CONTAMINATION

[917] Transpower earthworks will be the subject of future consent applications. However, as earthworks are a matter for which discretion is restricted (regulation 16(4)(b) NESETA), we note that Transpower was required to identify the likely scale of earthworks that the project is expected to involve. Transpower told us that this may assist the Board in understanding in a broad sense the comparative scale of the line relocation works. We acknowledge this and note the disclaimer from Transpower that the information about the likely earthworks components was put forward primarily for contextual purposes.

[918] When consent applications are made for the earthworks associated with line relocation, it will be possible to comprehensively assess the full effects of those earthworks (including any cumulative effect they may have when added to the earthworks elements of the highway construction). We were advised by Transpower, that for a line relocation project it is common for tower sites to be consented first, followed by micro-siting of towers, followed by earthworks consents once the detailed earthworks design has developed.

[919] The only witness who expressed a contrary view to Transpower's approach was Mr McLean, who in his s42A report raised an objection *in principle* to the separation of the earthworks consents from the other consents required.

[920] In questioning Mr McLean acknowledged that Ms Malcolm's evidence for NZTA took into account sediment yield from Transpower's likely earthworks. Nevertheless he raised a concern that ...*the actual methods for any given part of the Transpower works have not been detailed and therefore the adequacy of any proposed measures cannot be fully assessed*[311].

[921] In answers to questions from the Board on this issue[312] Mr McLean expressed the view that this was more of a missed opportunity than a significant flaw. We tend to agree. We have already acknowledged the principle that ideally all requisite consents should be sought concurrently. However, we also accept that this is not always possible, particularly with larger-scale projects.

[922] We also accept the argument from the Regional Council[313] that the current approach from Transpower will enable an appropriately cumulative assessment of effects (including the adequacy of any proposed mitigation) at a future date.

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311 Peer Review of Sedimentation Mitigation Controls, January 2012, pg 23.
312 NoE, pg 1629.
313 Memorandum of Counsel for the Regional Council, 5 March 2012, paras 1 – 10.

[923] With respect to contamination, Transpower said that the risk of encountering land which has contaminants present at a level above background or risk-based levels has been assessed based on the proposed tower sites. They referred to a report by Ms Maize which was included in support of Transpower's application (*Addendum to Technical Report 16A: Land Contamination Assessment and Investigation Report*).

[924] Ms Maize said that, with two exceptions, there are no identifiable contamination risks with any of the proposed tower sites. We were told that the two exceptions are:

- That tower 1 is located in an area with minor to medium contamination risk from past land uses, but as the tower is to be strengthened without significant disturbance of the soils, the risks are assessed as low;
- That the site of tower 25A is associated with past DDT usage, but with appropriate measures in place to manage any potentially contaminated material found during that disturbance, any adverse effects are expected to be no more than minor, and have been appropriately avoided, remedied or mitigated.

[925] We note that when earthworks consents are sought, a related assessment will also be undertaken of any potential effects related to contamination. Accordingly we do not need to take this matter any further.

## 13.7 ECOLOGICAL EFFECTS

[926] Mr Fuller had produced TR11A assessing the ecological effects of line relocation. He gave evidence that was:

- All but four of the proposed tower relocations lie within the extended works for the highway.
- The remainder, being towers 9A, 10A, 11A and 32A, all lie on improved pasture and are accessible by existing farm or forestry access tracks, such that no vegetation removal or clearance will be required.
- No regenerating native bush or native forest will be affected by the Line Relocation Works and no vegetation trimming for line clearance during operation is likely to be necessary, for the foreseeable future.
- No sites of ecological value identified in the Kapiti Coast District Plan or Porirua City District Plan are expected to be affected by the line relocation works.

[927] To ensure these outcomes Mr Fuller recommended that the full extent of all ecological sites of value are confirmed prior to earthworks commencing, and appropriate protections be put in place. Those recommendations were incorporated into the conditions proposed by Transpower and are accepted by us.

[928] We accept that the key mitigating factor in the avoidance, remedy and mitigation of ecological effects is that most tower locations and potential access tracks are expected to lie on flat to rolling terraces and downland. In

this respect, we agree with Mr Fuller's assessment that there are unlikely to be any issues around the prevention of erosion or management of sediment discharge.

[929] We also accept that when earthworks consents are sought in due course, those issues will be fully open to evaluation, and appropriate management.

[930] Overall, our main finding is that the line relocations can be undertaken without adverse effect on ecological values or indigenous biodiversity.

## 13.8 EFFECTS ON HISTORIC HERITAGE

[931] The effects of the line relocation works on historic heritage were assessed in two reports that formed part of the Transpower application (TRs 19A and 20A). Evidence for Transpower was given by Mr Bowman and Ms O'Keeffe, who undertook the assessments described in those reports.

[932] Mr Bowman gave evidence that the line relocation works will not detract from the heritage values of the sole built heritage site within the vicinity of the works, being the WWII brick fuel storage tank closest to proposed towers 2A and 3A.

[933] Similarly, Ms O'Keeffe gave evidence that none of the archaeological or heritage sites from Maori occupation or past military presence in the area are to be physically affected by the works.

[934] In light of Mr Bowman and Ms O'Keeffe's assessments, no specific mitigation was considered to be necessary, but a condition of consent is proposed setting out procedures for accidental discovery of potential archaeological material (an ADP) and it is anticipated that any future earthworks consents would include similar conditions.

[935] Furthermore, we note that Transpower proposes to adopt the same ADP that NZTA developed with NZHPT and Ngati Toa Rangatira for inclusion within the Line Relocation Works CEMP. Evidence about that protocol was given for Transpower by Ms Pomare.

[936] We make the main finding on this issue that the effects of line relocation on archaeology and heritage have been adequately addressed by Transpower.

## 13.9 EFFECTS ON SENSITIVE LAND USES

[937] The effects of the line relocation works on sensitive land uses were assessed in TR17A. The author of that report, Mr Rae, gave evidence for Transpower.

[938] Before commenting on that evidence we note that *sensitive land use* is defined in regulation 3 of the NESETA. It ...*includes the use of land for a childcare facility, school, residential building, or hospital*.

[939] Mr Rae gave evidence that the works will have no effects on any schools or childcare facilities nor on any hospitals as there are no schools or childcare facilities within the line relocation route. The closest school is the Pauatahanui Primary School, which is 1.2km from the nearest relocated tower, being tower 43A. There are no hospitals within the vicinity of the line relocation.

[940] Mr Rae identified that there are a few residential buildings in the vicinity of the relocation as follows:

- The nearest being 120m from tower 33A. That tower is to shift approximately 10m to the north from the existing tower site, but will not be located any closer than the existing tower to the residential building.
- The next closest tower to a residential building is tower 3A at a distance of 140m. Again, after relocation, the tower will not be located any closer to the nearest residential building.
- The next closest tower is tower 32A, located 220m from the nearest residential building.
- All other distances between residential buildings and towers are considerably greater, and in several locations will increase as a result of the line relocation works.

[941] Mr Rae said that the visual effects of the tower relocations on these residential buildings have been assessed as part of the landscape and visual effects assessment undertaken by Mr Lister (and Ms Peake for KCDC). With mitigation measures for those towers in place, the adverse effects have been assessed as no more than minor.

Our main finding on this topic is that with proposed mitigation in place, the effects of the entire tower relocation works on sensitive land uses will be negligible.

## 13.10 CLEARANCE OF TREES AND VEGETATION

[942] Ms Yorke advised us that the route selected for the relocations has resulted in towers that are sited to avoid areas of significant indigenous vegetation. Transpower is additionally offering measures by way of its own proposed CEMP that will further ensure any adverse effects of vegetation clearance are appropriately avoided, remedied or mitigated.

[943] We note the point made by Counsel for Transpower that this approach regarding the CEMP is precautionary given that:

- No clearance of significant vegetation is required for the line relocation works;
- Any vegetation clearance will be predominantly of gorse-dominated scrub and some plantation pine, the effects of which have been assessed as part of the ecological effects assessment, and found to be negligible.

[944] We accept that submission. We conclude that clearance of trees and vegetation will be re-examined as part of the later consenting of earthworks and that in the interim the CEMP will contain the appropriate safeguards.

## 13.11 RESTORATION OF LAND/EFFECTS AND TIMING OF CONSTRUCTION WORKS

[945] Evidence about land restoration and construction timing was given by Mr Mason, a construction manager with Transpower.

[946] His evidence on the effects and timing of construction works was not challenged and it is adopted by us. We also note that his evidence on this topic was relied upon by Transpower's planning consultant, Ms Hopkins, who concluded that the effects of construction will be minor and of short-term duration, and are well able to be managed through the proposed provisions of the CEMP. We agree.

[947] Mr Mason's evidence on land restoration was that:

- Following construction, all equipment and materials will be removed from the area, and all areas not required for following works for the highway will be reinstated by means of topsoiling and grass-seeding, or planting of native bush.
- Any access tracks not required for maintenance will be reinstated. The remaining tracks will be established to a permanent standard for continuing maintenance access.
- Mr Mason also described the restoration process that will occur at the decommissioned tower sites.

His evidence is accordingly adopted by us.

## 13.12 OVERVIEW OF EFFECTS ASSESSMENT

[948] Transpower submitted that the effects that are relevant under the restricted discretionary status of the Line Relocation Works have been assessed independently and to a level of detail commensurate with their environmental significance. We concur.

[949] We make the main finding that any adverse effects of line relocation which can be presently assessed are able to be avoided, remedied or mitigated to an appropriate degree on the following basis:

- Areas or sites potentially sensitive to the proposed line relocation have generally been avoided through the route selection process.
- Some of the potential effects may be disregarded as effects that could arise from permitted line relocation works under the NESETA.
- The remaining effects are limited to construction and landscape effects, all of which can be appropriately mitigated through conditions of consent.

[950] We now conclude with a brief comment on the relevant conditions.

## 13.13 CONDITIONS

[951] Importantly, we note that, like the application itself, the proposed Transpower conditions were (with one exception as discussed below) conceived and drafted so as to operate on a stand-alone basis, (i.e. distinct from the conditions that may attach to NZTA's and PCC's consents and designations). We endorse that approach as it recognises the relative scale of these project components.

[952] The other benefit of this approach is, as counsel for Transpower noted, that if we were of a mind to introduce any changes to NZTA or PCC conditions (which we have) it is unlikely that any corresponding change will be required to the Transpower conditions.

[953] That preliminary matter aside, the key Conditions of the Transpower application relate to the following three matters

**Landscaping – Monitoring period**

[954] The single exception to the stand alone approach of conditions on the Transpower application is in relation to the landscape monitoring periods where the Transpower condition is linked to the NZTA conditions. In this respect, we note that Transpower has proposed a monitoring period of three years, based on Mr Fuller's evidence. Mr Fuller's view was that a range of alternatives could be specified, but three years is appropriate. A different view was expressed by Ms Peake for KCDC, who said she would support a five year period on the basis that *longer is better.*

[955] Ultimately the Board prefers Mr Fuller's opinion and imposes a three year monitoring period. This does not raise any inconsistency between the Transpower conditions and the NZTA/PCC conditions.

**Landscaping – off-site Mitigation**

[956] One landscaping matter that the Board raised during the hearing is the question of possible off-site planting on submitters' properties to provide greater screening of relocated towers: specifically in relation to the properties of the Poppe Family Trust and Mr Deuss.

[957] Mr Lister's evidence on this point was that this type of off-site planting was considered, and he advised the Board that such planting is a possibility, but he said that he did not recommend it, because he did not think there was a need.

[958] It was Transpower's submission that no need has been established in the representations from the submitters themselves as follows:

- Mr Deuss and Mr Poppe (supported by their neighbour Mr Christensen) have focussed primarily on getting the road re-aligned, which they anticipate will mean that towers 31, 32 and 33 may not require relocation.

- They have not requested mitigation planting on their sites, and even when questioned about what possible mitigation they might desire if the alignment remains as proposed, none of them identified that they would wish to have mitigation planting for possible screening of towers.

[959] Therefore, we agree with Transpower's submission there is no basis for off-site mitigation planting to be required as a condition of consent.

**Other Amendments**

[960] A number of minor corrections were proposed in respect of the Transpower conditions, these included:

- An additional advice note that clarifies the applicability of the conditions across the Porirua City and Kapiti Coast districts;
- An additional provision describing the obligation to appoint a Project Archaeologist, which was previously absent despite a reference to the *Project Archaeologist*; and
- Several self-explanatory grammatical corrections.

[961] We have adopted those changes and the final set of conditions is included in the TL series of conditions.

## 13.14 MAIN FINDINGS ON TRANSPOWER APPLICATIONS

[962] Transpower seeks consents to relocate parts of its long-standing PKR-TKR A transmission line, to enable NZTA and PCC to develop TGP.

[963] Transpower's applications are made pursuant to the NESETA, as a discretionary restricted activity. All of the matters to which the Board's discretion has been restricted have been addressed in the evidence of Transpower's witnesses; and Transpower's application faced limited opposition.

[964] On the above basis, we have concluded in reliance on the largely unchallenged evidence called for Transpower, that:

- Areas or sites potentially sensitive to the proposed line relocation have generally been avoided through Transpower's route selection processes, and
- Some of the potential effects of the activity may be disregarded as effects that could arise from permitted line relocation works under the NESETA.
- Transpower's evidence is that the remainder are limited to effects of construction and landscape effects, all of which are to be appropriately mitigated through proposed conditions of consent.

[965] We also conclude, in reliance on Transpower's evidence, that the line relocation works will promote the sustainable management of natural and physical resources, and in particular will:

- Enable a route for TGP, which is in turn part of the Wellington Northern Corridor RoNS;
- Provide for the on-going operation and maintenance of a nationally significant physical resource – the National Grid – which provides for the sustainable, secure and efficient transmission of electricity.

# 14. MANAGEMENT PLANS

## 14.1 CONTEXT

[966] In our section on Legal Issues we recorded that it was apparent to the Board that the outcome of these applications and NoRs would largely depend on an assessment of their effects and how they are managed. The degree to which those potential effects will be avoided, remedied or mitigated was a significant focus of the hearing and one which directs attention squarely on the topics of adaptive management, conditions and the various management plans.

[967] At the heart of the NZTA/PCC and Transpower applications is a system of avoiding, remedying and mitigating adverse effects of TGP through the use of adaptive management techniques. The focus of those techniques is the use of management plans.

[968] Many of these management plans have been referred to in other sections of this report dealing with specific effects of the proposal. Such references generally provide that the effects under consideration will be dealt with through a management plan which will be required by a condition and which will be prepared and submitted to either the Regional Council or the relevant territorial authority.

[969] For example, in Section 12.3 on sedimentation effects, it is proposed that an Erosion and Sediment Control Plan (ESCP), Erosion and Sediment Control Monitoring Plan (ESCMP) and Site Specific Environmental Management Plans (SSEMP) (dealing with a range of topics including sediment control), would all be required to be prepared by the Applicants and submitted to the Regional Council for certification. Similar examples are cited in other sections of this report dealing with specific effects.

[970] In this section we give some consideration as to how the management plan process will work in practice to ensure that the consideration and reliance on the management plan process is well founded and appropriate.

[971] Accordingly, we briefly identify the various management plans that are embodied in the conditions including:

- The nature of each management plan;
- The inter-relationship between management plans in terms of relevant statutory provisions and content;
- The process of preparation, authorisation and implementation of such plans.

[972] To assist in this exercise, the Board has included reference to Appendix 1 to this report which is a diagrammatic depiction of the management plan arrangement proposed by the Applicants. Appendix 1 provides the following information:

- A list of the various management plans;
- Identification of which conditions are relevant to the management plans;
- Whether the management plan is to be submitted to a territorial authority or the Regional Council, or both;
- The functional relationship between the various management plans.

The commentary that follows should be read in conjunction with Appendix 1.

## 14.2 THE MANAGMENT PLANS: NATURE AND CONTENT

[973] There are over 20 management and monitoring plans covered by the suite of conditions under both the NoRs and the resource consents. As discussed under the adaptive management heading in the legal issues section, the starting point for consideration of these management plans is the two *overarching* management plans which between them define the overall management plan process. Those are:

- An Outline Plan prepared by NZTA/PCC pursuant to 176A RMA for the TGP;
- A Construction Environmental Management Plan (CEMP) to be prepared by both NZTA/PCC and Transpower for their respective projects.

[974] The salient features of both categories of management plan along with a summary of our findings on them are outlined below using the above Outline Plan and CEMP division for organising our considerations.

## 14.3 MANAGEMENT PLANS CONSIDERED UNDER THE OUTLINE PLAN UMBRELLA

[975] The Outline Plan process is provided by the RMA to ensure territorial authority input into detailed design. We note that Section 176A RMA sets out the process whereby the requiring authority submits an Outline Plan to the Territorial Authority.

[976] In terms of the Project's management plans, the following specific plans will each form a chapter of the Outline Plan[314:]

- Landscape and Urban Design Management Plan – LUDMP (NZTA.42, PCC.26)
- Heritage Management Plan - HMP (NZTA.16)
- Construction Traffic Management Plan - CTMP, (NZTA.22, PCC.17)
- Construction Noise and Vibration Management Plan - CNVMP, (NZTA.35, PCC.23)
- Construction Air Quality (Dust) Management Plan - CAQDMP, (NZTA.39, PCC.24).

[314] Rickard, 20 February 2012, para 13.

[977] The above plans cover, with the exception of one plan (the LUDMP), matters that are solely within the ambit of the functions of territorial authorities. The LUDMP is the exception because there are (as we discuss later) elements of that plan which cross over into Regional Council functions.

[978] For completeness, we note that the CAQMP would normally be a matter for the Regional Council, given that such a plan potentially covers the regional function of the discharge of contaminants to air (such as fugitive dust from construction works). In this instance, however, TGP does not trigger the need for any discharge consent under the Regional Air Plan. Instead the discharge of dust is considered solely by the territorial authority under the NoR as an amenity effect. Accordingly, although there is functional jurisdiction for input into the CAQMP by the Regional Council there is no regional consent application for the CAQMP to attach to. We note also that application has been made for air discharge consent for the concrete batching plant. Whilst a concrete batching plant management plan is not required, the discharges are managed by consent conditions.

[979] The above exceptions aside, the key features of the plans under the Outline Plan umbrella are set out below.

**Landscape and Urban Design Management Plan (NZTA.42, PCC.26)**

[980] The purpose of this plan is to provide for the integration of TGP's permanent works into the surrounding landscape. This involves input into matters such as:

- Earthworks contouring;
- Appearance of structures (including bridges, noise barriers etc);
- Provision of guidelines for highway furniture (e.g. signposts, lighting standards etc.);
- Identification of required landscape and visual mitigation planting;
- Coordination between landscape works and ecology works.

[981] The LUDMP must be prepared by suitably qualified landscape architects and urban designers and is required to implement a number of relevant and informing documents such as the 21 landscape plans submitted with the applications. Other key documents that the LUDMP must be informed by or give effect to include:

- The Transmission Gully Urban Landscape Design Framework (the Design Framework) and associated design principles;
- Various Transit NZ/NZTA guidelines on highway landscaping and urban design.

[982] In addition, this plan is required to include landscape and urban design details for specific parts of the project on such matters as diverse as intersection design, riparian planting, landscape treatment for pedestrian and cycle

facilities and principles relating to Crime Prevention Through Environmental Design (CPTED).

[983] The plan requires NZTA/PCC to consult with a variety of stakeholders including iwi, the Regional Council, cycle and pedestrian groups and the owners and occupiers of nominated properties including Little Collins Street and 55 Collins Avenue.

[984] The conditions volunteered by the Applicants acknowledge the need for consistency between the LUDMP and the EMMP (a plan is to be submitted to the Regional Council for certification under the CEMP umbrella as discussed later in this section) and propose that the EMMP be submitted to the relevant territorial authority for information at the same time that it is submitted to the Regional Council for certification. We return to this matter later.

**Heritage Management Plan (NZTA.16)**

[985] This plan, in addition to identifying and managing the effects of the Project on St Joseph's Church and the brick fuel tank containment structure, is required to identify a methodology for dealing with heritage and archaeological matters during the construction period. The plan recognises that an authority under Historic Places Act 1993 may be required for earthworks and also relates to a requirement for a conservation management plan for the brick fuel structure and an updated conservation management plan for the church.

[986] In preparing the HMP, consultation with iwi and the NZ Historic Places Trust is required and an agreed accidental discovery programme must be produced. No works are permitted to commence until the HMP has been completed and finalised as part of the Outline Plan process.

**Construction Traffic Management Plan, (NZTA.22, PCC.17)**

[987] The purpose of the CTMP is to manage the various traffic safety and efficiency effects associated with construction of TGP. It is required to address matters including the staging of works, construction yard access, methodology for detour routes and a process for the submission of site specific traffic management plans.

[988] This plan must be prepared in consultation with the roading asset managers of the territorial authorities. Specific requirements for inclusion in the CTMP are:

- Consultation with the owners and occupiers of nominated Rangatira Road properties;
- Methods to manage construction traffic effects of the harvesting of plantation forestry along/adjacent to the TGP route.

[989] The CTMP is required to be consistent with the NZTA Code of Practice for Temporary Traffic Management (COPTTM).

[990] A key feature of the CTMP is the requirement for Site Specific Traffic Management Plans (SSTMPs) (NZTA.28, PCC.19) to be prepared for specific parts of the Project. SSTMPs are required to describe the measures that will be taken to manage the effects associated with construction on parts of the

route prior to works being undertaken. It is likely that there will be several SSTMPs for the Main Alignment and link roads which are likely to relate to the staging of the project. Other key features of the SSTMPs are:

- They are to be certified by the relevant territorial authority;
- The principal purpose of the certification process is to ensure that the traffic management principles contained in each SSTMP are consistent with the CTMP that will have already been submitted as part of the Outline Plan process.

[991] The Board notes that the Applicant proposed that the CTMP is processed as part of the Outline Plan process, whereas the SSTMPs are to be *certified* by the territorial authorities.

[992] Specific aspects which the SSTMPs will deal with include:

- Temporary traffic management measures;
- Individual management plans for intersections;
- Access to private properties;
- Safety measures;
- Signage;
- Detours.

[993] In addition to preparing the SSTMPs (and the CTMP for that matter) both NZTA and PCC must demonstrate to the territorial authority that these traffic management plans are consistent with the NZTA Code of Practice for Temporary Traffic Management (COPTTM). That will be a consideration for the territorial authority when assessing the CTMP and SSTMPs as part of the Outline Plan process and certification process respectively.

**Construction Noise and Vibration Management Plan (NZTA.35, PCC.23)**

[994] The conditions on the NoRs include reference to noise standards from NZS 6803:1999 Construction Noise. That Standard specifies a range of noise limits depending on the day of the week and the time of the day. The purpose of the CNVMP is to include specific details relating to methods for the control of noise associated with all project construction works to demonstrate (as far as practicable) compliance with NZS 6803:1999.

[995] The preparation of this plan is required to be undertaken by a qualified acoustics specialist and must be prepared in consultation with the relevant territorial authority. It must demonstrate that appropriate consultation has been undertaken with a range of nominated parties including the owners and occupiers of selected Rangatira Road properties and 55 Collins Ave.

[996] A draft CNVMP was submitted with the application (dated July 2011) and the final CNVMP must be generally consistent with that draft plan.

**Construction Air Quality (Dust) Management Plan (NZTA.39, PCC.24)**

[997] The CAQMP is required to provide a methodology for managing the effects of dust from construction activities occurring along the route. It is required to include as a minimum:

- The identification and implementation of dust suppression measures appropriate to the sensitivity of nearby sensors;
- Identification of contingency measures (e.g. cleaning of water tanks, cleaning of houses etc).

[998] The plan requires a process of advice to and consultation with the owners and occupiers of any residential property where construction activities that have the potential to generate dust will be undertaken within 100m of a dwelling. The plan must be consistent with the draft CAQMP submitted with the application dated March 2011.

[999] We note that in addition to the above management plans directly covered by the Outline Plan process, there are other groupings of plans relating to both the NoR and other non-statutory requirements. These plans, along with the relevant conditions numbers, are as follows:

- Conservation Management Plans – St Joseph's church (NZTA.17); Brick Tank (NZTA.18);
- Network Utilities Management Plan (NZTA.57, PCC.33)
- Communications Plan (NZTA.13, PCC.12)
- Accidental Discovery Protocol (G.8, PCC.14)

**Conservation Management Plans (NZTA.17 and 18)**

[1000] There are two conservation management plans required as follows:

- The first relates to St Joseph's Church. This is an existing CMP that must be updated before construction works commences. It applies in the PCC district.
- The second CMP relates to the brick fuel tank containment structure. This is a new CMP and the condition relates only to the NoR served on KCDC.

[1001] No approval or certification process is required for either management plan.

**Network Utilities Management Plan (NZTA.57, PCC.12)**

[1002] This plan is required to be produced to ensure that the enabling works, design and construction of TGP take account of and include measures to address the safety, integrity, protection and (where necessary) the relocation of existing network utilities.

[1003] This relates to existing utilities such as gas pipelines and water pipes. It also potentially covers the existing Transpower alignment although there are a series of conditions (NZTA.65-70) proposed which specifically cover that

matter and are based on a separate agreement between NZTA and Transpower.

**Communications Plan (NZTA.13, PCC.12)**

[1004] This plan must be prepared and implemented by NZTA/PCC prior to the commencement of the construction and enabling works.

[1005] The plan must contain a suite of provisions on matters such as construction management contact details, details of construction period and deal with concerns and incidents. Details of communication methods such as newsletters and consultation are also required.

[1006] This plan must be prepared in consultation with the owners and occupiers of certain properties such as the Rangatira Road properties and 55 Collins Avenue.

[1007] No certification of the Communications Plan is required in the conditions.

**Accidental Discovery Protocol (G.8, PCC.14)**

[1008] As with the HMP, the consent holder is required to consult with iwi and the NZ Historic Places Trust to prepare an Accidental Discovery Protocol (ADP) for all relevant aspects of the construction at TGP.

[1009] A copy of the ADP must be provided to the relevant territorial authority at the same time as the CEMP is submitted for certification.

## 14.4 MANAGEMENT PLANS CONSIDERED UNDER THE CEMP

[1010] Whereas the management plans associated with the Outline Plan process relate to the process for designations under s176A RMA, the management plans associated with the CEMP are proposed as part of conditions on regional resource consents required by NZTA/PCC. Accordingly, these management plans fall within the ambit of s108 RMA.

[1011] The CEMP is the umbrella management plan under which all of the plans associated with regional consents will be produced and considered. The purpose of the CEMP is to confirm that the final Project details, staging of works, and detailed engineering design remains within the limits and standards approved under the NoR. It is the key management plan associated with the construction process to ensure that such construction and operational activities avoid, remedy or mitigate adverse effects on the environment.

[1012] The CEMP is required to provide details of:

- The responsibilities, reporting frameworks, co-ordination and management required for project quality assurance;
- Final detailed design;
- Construction methodologies;
- Timeframes and monitoring processes and procedures.

[1013] The Applicants proposed that the CEMP be certified by the Regional Council only but that it be supplied to the relevant territorial authority for an initial consultation process with the final document to be supplied for information and display in a site office. We return to this matter later in this report.

[1014] A draft CEMP was submitted with the applications (dated July 2011) and provides the basis for the preparation of the final CEMP. That draft gave the Board an understanding of the level of detail required in the final CEMP and the other management plans falling under its umbrella.

[1015] The following specific plans fall under the CEMP:

- Erosion and Sediment Control Plan (E.11, PCCE.19)
- Erosion and Sediment Control Monitoring Plan (G.39, PCCE.41)
- Chemical Treatment (Flocculation) Plan (E.25, PCCE.33)
- Ecological Management and Monitoring Plan (G.21, PCCE.36)
- Forestry Harvesting Management Plan (E.27)
- Contaminated Land Management Plan (G.20, PCC.46)

We describe those plans below.

**Erosion and Sediment Control Plan (E.11, PCCE.19)**

[1016] This is an overarching management plan that includes the ESC philosophy, procedures, responsibilities, general methodologies and typical details.

[1017] As a minimum the ESCP is required to demonstrate how the requirements in Conditions E.7 and E.8 containing objectives relating to capture and treatment of sediment laden discharges from the site shall be met.

[1018] In addition, the ESCP must demonstrate compliance with a number of other requirements including:

- Ensuring appropriate control measures are installed prior to and during all construction works;
- Identification of personnel appropriately qualified and experienced in this field;
- Identification of detailed management actions required to deal with extreme weather events and exceedences of trigger levels and non-compliances;
- Provision for maintenance and monitoring review of all control devices and measures;
- Provision for decommissioning of control devices/measures.

**Erosion and Sediment Control Monitoring Plan (G.39, PCCE.41)**

[1019] The ESCMP is to include methods to undertake a range of monitoring as follows:

- Regular inspections of erosion control measures;
- Physical monitoring of sediment control measures including frequency, locations, performance measures (including treatment efficiency, management actions and reporting);
- Physical monitoring of catchment control points.

[1020] The purpose of the ESCMP is to ensure that the consent holder is actively and appropriately conducting monitoring indicated as above but also in relation to the following:

- Baseline sediment monitoring at the pre construction stage;
- Erosion and sediment control monitoring during construction;
- How discharge quality breaches of trigger levels are being managed and how any failures of erosion and sediment control devices are being managed.

[1021] The ESCMP must be updated and reviewed by a Sediment Management Peer Review Panel before being submitted to the Regional Council for certification.

[1022] This plan is required to be consistent with the draft ESCMP lodged with the application.

**Chemical Treatment (Flocculation) Plan (E.24, PCCE.33)**

[1023] Condition E 24 requires that all compliant sediment retention devices shall be chemically treated in accordance with a Chemical Treatment (Flocculation) Plan.

[1024] The CTP outlining the use dosage monitoring maintenance spill contingency and performance matters must be prepared and submitted to the Regional Council for certification prior to the commissioning of any chemical treatments for sediment management purposes.

**Ecological Management and Monitoring Plan (G.21, PCCE.36)**

[1025] The key objectives of the EMMP are to demonstrate how the consent holder will monitor, manage and mitigate the adverse effects of construction activities on terrestrial, freshwater and marine ecological values and their associated biodiversity values.

[1026] The EMMP must set out the methodology and process that will be used to achieve these objectives and includes but is not limited to:

- Ecological management;

- Habitat restoration;
- Ecological monitoring and adaptive management.

[1027] In preparing the plan the consent holder is required to consult with iwi, Department of Conservation and the relevant territorial authorities.

[1028] Certification of the EMMP must address the following matters:

- Whether the plan has been prepared in general accordance with the draft EMMP submitted with the application dated July 2011;
- The inclusion of performance measures, actions, methods, trigger levels and monitoring programmes to achieve the stated objectives;
- Whether consultation has been undertaken with the relevant parties.

[1029] The consent holder is also required to prepare site Specific Environmental Management Plans (SSEMPs). The purpose of such plans is to integrate design elements with environmental management and monitoring methods, into a set of plans for each stage or location, in order to demonstrate how the Project will be practically implemented on the site.

[1030] Each SSEMP is required to include a variety of information not just in relation to erosion and sediment control but also in respect to:

- Construction methodology for all works;
- Vegetation clearance and rehabilitation activities;
- Stream alignment and culverting;
- Areas and features to be avoided during construction.

[1031] SSEMPs will be critical components in implementing the specific objectives of the plans that sit under the CEMP. This is particularly so with the EMMP.

**Forestry Harvesting Management Plan (E.27)**

[1032] This plan requires the consent holder to prepare a plan prior to the commencement of removal of plantation pine forestry for the purposes of construction activities (including enabling works).

[1033] The FHMP is required to include a range of details on forestry issues including timing and staging, location of access tracks, details of stream crossings, erosion and sediment control methods etc.

[1034] The plan is required to be certified by the Regional Council.

**Contaminated Land Management Plan (G.20, PCC.46)**

[1035] This plan is a subset of the CEMP and must be certified by the Regional Council. It requires the consent holder to provide information on the measures to be undertaken in the handling, storage and disposal of all contaminated material excavated during construction works.

[1036] The measures are required to be developed in consultation with the NZ Police and NZ Defence Force and are directed towards:

- Protecting the health and safety of workers and the public;
- Controlling stormwater run-on and run-off;
- Removing and managing contaminated soil.

## 14.5 MANAGEMENT PLANS CONSIDERED UNDER THE TRANSPOWER APPLICATION

[1037] In addition to and separate from the Outline Plan process and the CEMP process, there are management plans associated with the Transpower resource consents lodged with KCDC and PCC under the NESETA. They are as follows:

- Transpower Construction Environmental Management Plan (TL 16);
- Transpower Accidental Discovery Protocol (TL.14);
- Transpower Landscape Mitigation Plan (TL.10).

**Transpower Construction Environmental Management Plan**

[1038] The purpose of the CEMP is to identify the environmental management procedures to be implemented during construction of the line works relocation project to manage compliance with consent conditions and minimise adverse effects.

[1039] The plan is to be certified by the relevant territorial authority and must include a variety of details similar to the CEMP required for TGP.

**Transpower Accidental Discovery Protocol (TL.14)**

[1040] As with TGP, there is a requirement for Transpower to liaise with local iwi and prepare a protocol for dealing with the accidental discovery of artefacts or material of cultural significances during construction:

- A qualified archaeologist is required to oversee the ADP processes;
- Consultation with iwi and the New Zealand Historic Places Trust.

(No certification of this plan is required)

**Transpower Landscape Mitigation Plan (TL.10)**

[1041] This plan is required to detail the visual mitigation measures agreed to by Transpower. The plan is required to include information on the following:

- The location and pattern of all stream and amenity planting;
- Plant species and planting densities;
- Pest animal and plant management programme.

(The plan is to be submitted to the relevant territorial authority for certification)

# 15. CONDITIONS

## 15.1 CONTEXT

[1042] We emphasised earlier in this decision the importance of conditions of consent if adaptive management regimes are to operate properly. We noted that conditions need to:

- Be clear, certain and enforceable;
- Contain identifiable standards and performance criteria against which proposed management plans can be assessed and the subsequent operation of the management plans measured.

[1043] The Board has concluded that the conditions proposed by all three Applicants at the conclusion of the hearing generally achieved those objectives. Based on the above, in this section we undertake a brief overview of the following matters:

- Commentary of the Outline Plan and CEMP conditions;
- Commentary on request by submitters for new conditions to be added by the Board;
- Commentary on conditions added by the Board as a result of s42A advice.

[1044] This section should be read in conjunction with the following two documents which are contained in Volume 2 of this report:

- The schedule of consents applied for by the three Applicants and granted by the Board.
- The final schedule of conditions produced by the Board.

## 15.2 COMMENTARY ON OUTLINE PLAN AND CEMP CONDITIONS

[1045] The Board has generally accepted the approach of the Applicants as to processing certain management plans associated with territorial authority functions through the Outline Plan process. In the remainder of this Section we set out our understanding of how this will work and explain where we slightly depart from the Applicant on one matter.

**Outline Plan Conditions and Territorial Authorities**

[1046] The management plan approach allows for information on detailed design to be collected effectively into a single place[315]. Mr Milne advised in his legal opinion that there is nothing unlawful in leaving management plans which are

[315] Rickard, 20 February 2012, para 13.

not linked to Regional Council consents, to be addressed under the Outline Plan process.[316]

[1047] Once the Outline Plan(s) has/have been submitted to the relevant territorial authority, that council has the ability to request changes to the Outline Plan and those changes will be considered by the requiring authority[317]. An Environment Court appeal process could follow if the requiring authority declines to make the changes sought. However, the evidence of Ms Rickard[318] was that this process works well in practice and this opinion was not challenged to any significant degree. As Ms Rickard explained to us, the prospect of an Environment Court appeal is a *good incentive to work things out*.[319] We agree.

[1048] Counsel for NZTA/PCC summited that a key benefit of the designation process is the ability to successfully manage linear projects that traverse multiple territorial authority boundaries.[320] In support of this the Applicants submitted that:

- The Main Alignment crosses four territorial boundaries.
- It is important that, in terms of management plans (particularly the landscape and urban design plan [LUDMP] and associated measures), a consistent or holistic approach across the entire Project route is adopted.
- This holistic approach could be jeopardised if the individual councils sought to impose differing requirements through an individual certification process[321]. By comparison, an Outline Plan process would enable the Applicants to successfully manage any changes requested by the various territorial authorities to the five management plans under that umbrella.

[1049] We understood that the Applicants view the Outline Plan process as appropriate as it will allow for an integrated design response across the entire roading alignment, which successfully merges all of the detailed design, landscape and urban design aspects. We generally agree.

[1050] We also note that the Applicants did not seek to rely soley on the Outline Plan process. The conditions suggested by the Applicants propose a consultation process for all management plans whereby:

- There will be consultation with the applicable territorial authority prior to the formal submission of any management plan which forms part of an Outline Plan[322];

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316 Legal Advice to the Board, 6 March 2012.
317 Section 176A(4).
318 Rickard, 20 February 2012, para 21.
319 Rickard, 20 February 2012, para 21.
320 Rickard, 20 February 2012, para 15.
321 Rickard, 20 February 2012, para 15; Transcript, pg 669, lines 23-30 (Rickard). See conditions NZTA.16 (NZTA.9), NZTA.23 (NZTA.33), NZTA.35, NZTA.39, and NZTA.42.

- Management plans which are to be certified by the Regional Council (e.g. the CEMP and EMMP) will be submitted to the territorial authorities for information and in some instances for comment;[323]

- NZTA will provide a programme for the submission of the Outline Plan (or Plans) to the territorial authorities for the purpose of assisting them with resourcing[324].

[1051] In addition to the above, the conditions promoted by the Applicant provide that the timeframes for requesting any changes to the Outline Plans within section 176A could be extended, if required[325]. We understand that this was offered in recognition of concerns from KCDC about the substantial quantity of information that could be submitted with an Outline Plan.

[1052] In our view, the above proposals advanced by the Applicants and included in the conditions relating to the Outline Plan process are generally sound and represent best practice. The finer details on this process are found in the following conditions:

- The NZTA series conditions on Outline Plans in which apply to the NZTA NoR for the main alignment (particularly conditions NZTA.16, 22, 35, 39 and 42);

- The PCC series of conditions on Outline Plans in which apply to the PCC NoR for the link roads (Particularly conditions PCC.17, 23, 24 and 26[326]).

[1053] This arrangement is illustrated diagrammatically in Appendix 1.

[1054] The only matter in which we depart from the Applicant's position on the arrangements for those management plans being handled solely through the Outline Plan process relates to our previous determination in the legal issues section whereby we found that where management plans, impinge on <u>both</u> regional and territorial functions then they must be certified by both authorities.

[1055] In this respect, we conclude that, of the suite of management plans being handled by the Outline Plan process, the Landscape and Urban Design Management Plan (LUDMP) will have content which relates to the Regional Council's functions under s30(1) RMA in riparian areas. Accordingly, the relevant parts of it must also be submitted to the Regional Council for certification. We would expect that in considering the LUDMP, the Regional Council will also have regard to linkages with the Ecological Management and Monitoring Plan (EMMP) which it must certify also (under Condition G.21).

**CEMP Conditions and the Regional Council**

[1056] The suite of management plans associated with the CEMP and attaching to the regional consents will be authorised under s108 RMA. The Applicants

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323 G.22, G.19A, NZTA.20, PCC.E.18A, PCC.15.

324 NZTA.8.

325 NZTA.8.

326 NB. There is no Heritage Management Plan required for the PCC conditions. This reflects the absence of heritage items on the link road corridor as compared to the main NZTA alignments which contains items such as the heritage fuel tank.

propose that all plans will be certified by the Regional Council. The Board acknowledges that and accepts this as being appropriate subject to our earlier comments about the need for certification by territorial authorities where necessary.

[1057] However, as with the LUDMP, the same situation will happen in reverse in respect to some of the management plans being certified by the Regional Council which also contain content relating to territorial authority functions. Those plans are:

- Construction Environnent Management Plan (CEMP);
- Ecological Management and Monitoring Plan (EMMP);
- Site Specific Environmental Management Plans (SSEMPs).

[1058] In terms of the CEMP, we acknowledge that where matters in the CEMP were not already addressed by the plans being assessed as part of the Outline Plan process by the territorial authorities (i.e. the CTMP, CNVMP or CAQMP), the Applicants have removed them from the CEMP and created new conditions relating to light spill and dirt on roads (i.e. Conditions NZTA.33A and NZTA.41A). Notwithstanding this, to the extent that the CEMP contains these (and probably other matters) that impinge on the jurisdiction of the territorial authorities these must be certified by them as well as by the Regional Council.

[1059] In terms of the EMMP there will be a similar overlap between regional and territorial authorities. In particular, whilst we accept that the bulk of this plan will contain content of sole functional relevance to the Regional Council there will, nevertheless, be some terrestrial ecology matters (both fauna and fauna) that will be relevant to the territorial authorities. Accordingly, we require certification of that plan by the relevant territorial authority also.

[1060] The above minor departures to the Applicant's position have been reflected in the final set of conditions relating to the management plans contained in Volume 2 of this report.

## 15.3 COMMENTARY ON REQUEST BY SUBMITTERS FOR NEW CONDITIONS TO BE ADDED BY THE BOARD

[1061] In addition to the suite of conditions volunteered and agreed by witness conferencing during the course of the hearing, the Board received several requests from submitters in respect to a range of topics. The principal requests fell into the following three groupings:

- Conditions regarding the treatment of the existing SH 1 following the operation of TGP;
- Conditions regarding cycling walking and recreation linkages;
- Previous conditions relating to Mana Expressway.

**Conditions regarding the treatment of the existing SH1 following the operation of TGP**

[1062] This issue was canvased in some detail in the legal issues section of this report. KCDC had requested the imposition of a designation condition relating to the treatment of the bypassed sections of SH1[327]. NZTA (and PCC) did not support such a condition[328]. In the legal issues section we detailed our reasons for declining to do so and take that particular aspect of the KCDC request no further.

[1063] There is however a further aspect of the issue raised by KCDC which must be addressed. The Council's initial concerns were raised in the context of revocation of state highway status for parts of the coastal route. KCDC also raised the issue of safety and management of the coastal route in the period after opening of TGP but prior to any revocation of state highway status.

[1064] KCDC contended that there could be an immediate effect brought about by a reduction in vehicle numbers on the coastal route. As we understood the Council's concern, it was that congestion at busy times has a constraining effect on vehicle speeds which has safety benefits. Removal of congestion may lead to a corresponding increase in speed with resultant potential safety issues. We consider that is something which needs to be assessed.

[1065] We accept that safe management of the state highway remains the statutory function of NZTA during this interim period (or if the state highway status is not revoked at all). We do not propose to interfere with that function. We do however consider that it is necessary for there to be an assessment made on the effects which TGP has on use of the coastal route to ascertain whether or not TGP has had any effect on that route of the sort suggested by KCDC. That assessment is important both for NZTA as the roading authority and the local authorities who may have to take over management of the road if state highway status is revoked.

[1066] We consider that the NZTA designation conditions must address this issue and a condition should be imposed requiring a safety audit on the coastal route after commencement of operation of TGP. In requiring this condition we acknowledge claims by some submitters that there is a long history of slow responses by NZTA and its predecessor to issues along the coastal route. Accordingly, we have included the following condition in the NoR conditions:

> *No earlier than 6 months after the commencement of operation of TGP, and no later than 12 months from that date, NZTA shall complete a traffic safety audit (in accordance with the NZ Transport Agency Guidelines 'Road Safety Audit Procedures for Projects' November 2004) to ascertain the effects of reduced traffic and potentially higher environmental speeds on the coastal route resulting from the operation of TGP. The audit shall outline what measures are necessary to remedy those effects. A copy of the audit and its findings shall be sent to the relevant territorial authorities.*

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327 KCDC Opening Submissions, para 4.10; KCDC Closing Submissions, paras 2.14-2.15.
328 Nicholson, 20 January 2012, para 32.

**Conditions regarding cycling walking and recreation linkages**

[1067] On the matter of the pedestrian, cycling and recreational issues, RTS requested that the Board include a wide range of conditions on the NoR. In doing so RTS drew on the evidence and representations of the following:

- Mr Morgan, Project Manager at Cycling Advocates Network (who claimed expertise ...*in the analysis of levels of service provided to cyclists, and determining cycling needs*[329]*);*
- Ms Thomas, of Living Streets Aotearoa as to pedestrian issues;
- Mr Gywnn for Mana Cycle Group as to effects on mountain biking;
- Mr Horne as to effects on recreational walking particularly in relation to Battle Hill Farm Forest Park.

In his closing submissions Mr Bennion put great emphasis on the status of the above as *expert witnesses* on their various subjects. We thought that a more correct expression would be *advocates* for their particular interests but nothing turns on that. We have given due consideration to their views.

[1068] In response to observations from the Board, NZTA opposed those conditions on several grounds including:

- The PCC and NZTA witnesses had assessed effects on recreational users of reserves, such as walking, cycling or horse-riding and concluded that any actual or potential effect would be adequately addressed in the proposed NZTA conditions;
- In several respects, the additional conditions pursued by RTS are either ultra vires or seek to use the RMA to intrude into the statutory responsibilities of NZTA for the operation and control of the state highway network:
- The set of conditions which RTS sought for cycling and walking facilities in relation to SH1 substantially pursue environmental compensation or benefit. They are contrary to *Newbury* principles.

[1069] NZTA submitted that the RTS conditions should be rejected. We agree (although not necessarily on all points). We consider that a number of the conditions requested by RTS are better handled through conditions relating to the Landscape and Urban Design Framework and the LUDMP. In this respect, we note the following salient points about the Design Framework and its relationship with LUDMP:

- The purpose of the Design Framework was to demonstrate how the design of TGP satisfied NZTA's Urban Design Policy Requirements. The Design Framework was included in the AEE as TR23;

329 EiC, para 2.

- The Design Framework incorporated a comprehensive analysis of the route and identified a series of principles which will inform the design of TGP.

- Principle 4.7 of the Design Framework relates to pedestrian and cycle links and includes design principles which seek to provide for pedestrian, tramping, horse riding and cycle links where TGP crosses or joins local networks

- The Design Framework is to be implemented through the LUDMP[330].

- The LUDMP must demonstrate how the design principles in the Design Framework have been adhered to in the development of the design concepts. [331]

- A future LUDMP which did not contain appropriate walking and cycle linkages would be unlikely to be *implementing* the Design Framework.

[1070] A further safeguard is that the LUDMP is to be prepared in consultation with a number or organisations, including the Mana Cycle Group[332]. This will give that Group and other listed interest groups, an opportunity to voice any concerns about the adequacy of the walking and cycle paths proposed. The Applicants are obliged to report on this consultation process and explain in the LUDMP where any comments arising in consultation have not been incorporated and the reasons why[333].

[1071] We consider that those safeguards are sufficient to address concerns with regard to walking, cycle and recreational linkages. Notwithstanding the above, we note that NZTA did present some modifications to their earlier proposed conditions in light of the RTS submissions and observations by the Board. Those modifications related to the following matters:

- SH 58 joint pedestrian and cycle path;

- References to guides and standards in conditions;

- Addressing disruption to recreational activities.

[1072] We acknowledge those modifications by NZTA and confirm that they have been captured in our decision by Condition numbers NZTA.42, 43 and 47A and PCC.29.

**Existing condition regarding Mana Expressway**

[1073] As discussed in our legal issues section, the Paremata Residents Association lodged a wide ranging submission which (inter alia) sought that the Board imposed a condition requiring removal of part of the Paremata Bridge.

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330 NZTA.43(b) (NZTA.46).
331 NZTA.46(a) (NZTA.48).
332 NZTA.42.
333 NZTA.42.

[1074] For the reasons discussed previously, we have imposed a condition similar to that imposed by the Environment Court in 2000 when approving Transit New Zealand's notice of requirement for an upgrade of the Urban Section of SH1 from Plimmerton to Paremata[334]. That will be reflected in these conditions.

## 15.4 COMMENTARY ON CONDITIONS ADDED BY THE BOARD AS A RESULT OF S42A ADVICE

[1075] As part of the s42A process the Board received reports from experts in the fields of planning, sedimentation (generation and control) and acoustic noise. As a result of that advice, the Board has determined that additional conditions are required over and above those proposed by the Applicants.

[1076] The additional conditions relate to the following matters:

- Conditions regarding acoustic operational traffic noise;
- Conditions regarding the capture and treatment of sediment laden contaminants.

[1077] Again, we note that these issues have been canvassed extensively in previous sections of this report. This section focuses on the appropriate alterations to the relevant conditions.

**Additional conditions regarding acoustic noise**

[1078] Towards the end of the hearing and following the presentation of acoustic evidence by Dr Chiles and Mr Lloyd, the Board requested further conferencing between those two witnesses in relation to issues about conditions on road traffic noise and in particular a condition requiring a level of 40dBA $L_{Aeq(24h)}$ to be achieved inside protected premises and facilities.

[1079] The two witnesses produced a joint statement outlining the agreement that had been reached in response to operational traffic noise issues raised by the Board. They drafted a condition which, in addition to the provisions for Category C buildings, requires all Category B premises and facilities located by new roads to be assessed to achieve an internal noise level of 40dB $L_{Aeq(24h)}$ in habitable spaces. There were a number of consequential changes to other conditions also identified. Those included the addition of a condition requiring validation of the noise assessment post construction. We note that this will be undertaken via a Noise Mitigation Plan which provides for a monitoring and validation report.

[1080] We have adopted those changes to operational noise conditions in full and they appear in the final set of conditions in Volume 2 to this report.

[1081] We record that it was the position of Dr Chiles that such a condition was unnecessary but that if the Board was minded to impose such a condition then this was its appropriate form.

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334 *Porirua City Council v Transit New Zealand* Decision W52/2001.

**Additional conditions regarding Sedimentation**

[1082] The Board issued a Minute to the parties expressing its initial views about control and discharge of sediment from TGP, on 15 February 2012. The Minute alerted the parties to the fact that the Board was considering the inclusion of conditions (should the applications be granted) relating to the capture of runoff from earthworks until stabilisation. The Board indicated that such conditions could require all runoff to be captured.

[1083] During the course of the hearing it became obvious to us that physical and practical reasons might prevent runoff from some small areas not being fully captured so an allowance of up to 5% should be made. That was reflected in a requirement that sediment laden runoff from all, or up to 95%, of the project earthworks area ought to be captured for treatment in a compliant sediment retention device.

[1084] Ultimately the Applicants proposed some amendments to conditions that gave partial recognition to our suggestion, but the explicit requirement we suggested was missing. Under a heading *Erosion and Sediment Control objectives, standards and design criteria* a condition attached to the earthworks and discharge consents numbered E.7(f) required the consent holder to ...*Treat all sediment laden discharges from the site arising from the works using erosion and sediment control measures implemented in general accordance with the ESCP and any relevant SSEMP.*

[1085] As outlined in Section 12.3 of this report, we considered this condition to be close to meeting our concerns but required more precision. In that section we identified two changes to the condition proffered by the applicant as follows.

[1086] Firstly, we require all sediment laden runoff from the site arising from the works to be treated in a compliant sediment retention device. Condition E.7(f) should therefore read ...*Treat all sediment laden runoff from the site arising from the works using a compliant sediment retention device together with any other erosion and sediment control measures implemented in general occordance with the ESCP and any relevant SSEMP.*

[1087] Secondly, we appreciate that in some locations it may be impractical to use a compliant sediment retention device. In these locations we accept that other methods of sediment retention may be used but only with specific acceptance by the Regional Council and only to the extent of in total 5% of the Project earthworked area. Accordingly, we have added the following condition *E.7(g).*

> *Notwithstanding the provisions of Condition E.7(f) above, other sediment retention devices may be used where it is impractical to use a compliant sediment retention device, provided the GW accepts each proposal and the total area from which sediment laden runoff emanates does not exceed 5% of the total project earthworks area."*

These alterations are embodied in the conditions in Volume 2 to this decision.

# 16. NATIONAL AND REGIONAL/DISTRICT POLICY ASSESSMENT

## 16.1 RELEVANT STATUTORY DOCUMENTS

[1088] The Applicants, submitters and the section 42A authors identified a range of statutory documents relevant to the Board's consideration. We identify the following:

- National Environmental Standards for Air Quality;
- National Environmental Standard for Sources of Human Drinking Water;
- National Environmental Standards for Electricity Transmission Activities;
- National Environmental Standard for Assessing and Managing Contaminants in Soil;
- New Zealand Coastal Policy Statement 2010;
- NPS Freshwater Management 2011;
- NPS on Electricity Transmission 2008;
- Wellington RPS (operative and proposed);
- Regional Freshwater Plan for the Wellington Region;
- Regional Air Quality Management Plan for the Wellington Region;
- Regional Coastal Plan for the Wellington Region;
- Regional Soil Plan for the Wellington Region;
- Regional Plan for Discharges to Land for the Wellington Region;
- Operative Kapiti Coast District Plan;
- Operative Porirua City District Plan;
- Operative Upper Hutt City District Plan;
- Operative Wellington City District Plan.

## 16.2 NATIONAL ENVIRONMENTAL STANDARDS

[1089] National Environmental Standards (NES) comprise regulations issued under section 43 and 44 RMA. The following standards are in force as regulations:

- NES for Air Quality;
- NES for Sources of Human Drinking Water;

- NES for Telecommunication Facilities;
- NES for Electricity Transmission Activities (NESETA).

[1090] We have considered each of these and determined that the NES for Air Quality and the NES for Human Drinking Water are relevant to the subject applications. Additionally, the NESETA is directly relevant to the application submitted by Transpower and will be considered in that context.

**NES for Air Quality (NES AQ)**

[1091] The NES AQ sets the boundaries of Regional air-sheds and requirements for management of air quality within those air sheds. TR13 provides an assessment of TGP against the relevant standards and thresholds.

[1092] The Regional Council has classified eight air-sheds within the Wellington region where PM10 standards are regularly breached, or are considered to have potential to breach the NES AQ. Parts of the TGP will affect the Porirua air-shed, which is one of the air-sheds that has been identified by the Council. Any additive effects arising from TGP are however not considered to be significant on this air-shed, as there is little difference to the overall regional air quality when the *with TGP* and *without TGP* scenarios are assessed on a comparative basis. This is noted in the evidence of Mr Fisher[335], where he concludes that TGP is not predicted to impact on the Regional Council's ability to issue future resource consents within the air shed as there remains space to allow further emissions without compromising the thresholds set out in the NES AQ[336].

**National Environmental Standard – Sources of Human Drinking Water (NES DW)**

[1093] This Standard is intended to reduce the risk of contaminating drinking water sources such as rivers and groundwater. It does this by requiring regional councils to consider the effects of activities on drinking water sources in their decision making. TGP is located on the periphery and downstream of the Regional Council's drinking water collection areas.

[1094] The only known extraction point affected by TGP is at Paekakariki and this water source (a KCDC supply) will be relocated by NZTA as part of Project implementation. The evidence of Mr Wood for KCDC confirmed that subject to appropriate conditions being imposed, and subject to concluding discussions with NZTA about protecting the water supply infrastructure, he was satisfied that the KCDC's concerns about the TGP impact on the Paekakariki water supply can be resolved[337].

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335 EiC, para 29.

336 EiC, para 37.

337 EiC, para 3.2.

**National Environmental Standards for Electricity Transmission Activities (NESETA)**

[1095] The evidence of Ms Hopkins confirmed that these applications have been prepared in accordance with this Standard.

**National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health**

[1096] This Standard came into effect on 1 January 2012. NZTA has advised that additional consents which may be required as a result will be applied for separately.

## 16.3 NEW ZEALAND COASTAL POLICY STATEMENT 2010 (NZCPS)

[1097] The purpose of the NZCPS is to state policies achieving the purpose of RMA in the coastal environment. The issues, objectives and policies of the NZCPS apply to both the coastal marine area (below MHWS) and the wider coastal environment (we will simply refer to the coastal environment for the balance of this discussion). Although TGP itself does not traverse the coastal environment, some elements of TGP could influence that environment, particularly at Porirua Harbour. Accordingly NZCPS is relevant to our consideration of resource consents for TGP.

[1098] The objectives and policies of NZCPS relevant to TGP were detailed in Section 32.4 of the NZTA and PCC application, and in Section 2.3 of TR21. We agree that Objectives 1, 2, 3 and 6 are particularly relevant. Policies 1, 2, 4, 6, 13, 14, 21 – 23 were also identified as being relevant to this proposal. In its Key Issues Report, the Regional Council identified Policies 3, 5, 11, 15 and 18 as also being of relevance. Effects on the coastal environment were also considered in the evidence presented by both the Applicants and submitters. The key effect of TGP on the coastal environmental stems from sediments generated by construction related activities which might enter Porirua Harbour.

[1099] Objective 1 of the NZCPS seeks:

> *To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystem, including marine and intertidal areas, estuaries, dunes and land.*

[1100] Policy 22 is directly relevant as it seeks (inter alia) that use and development does not result in significant increase in sedimentation, and aims to reduce sediment loadings in runoff and stormwater systems through controls on land use activities.

[1101] In addition Objective 6 and Policy 6 NZCPS seek to recognise that the provision of infrastructure is important to the social, economic and cultural wellbeing of people and communities, and that there should be consideration of how built development and associated public infrastructure should be enabled, without compromising the other values of the coastal environment.

[1102] Sedimentation effects were a significant issue for a number of submitters, including the Director General. We refer to our findings in the marine ecology, hydrology and sediment sections of this Report all of which must be considered in this context.

## 16.4 NATIONAL POLICY STATEMENTS

### National Policy Statement for Freshwater Management 2011 (NPS FM)

[1103] Objectives A1 and B1 of the NPS FM seek to safeguard the life supporting capacity of freshwater ecosystems. Objective C1 seeks to improve the integrated management of freshwater and the use and development of land in whole catchments.

[1104] It was recognised by the Applicants from the outset that there will be adverse effects on streams and freshwater ecosystems arising from habitat disturbance or removal, construction of structures, discharges, diversions, reclamations and stream realignment as a result of TGP. Mitigation measures were designed to reduce the severity of these effects. Direct effects arising from sediment discharges are to be managed by erosion and sediment control mechanisms which are to be enhanced, culverts which presently interfere with fish passage are to be improved and some 27km of streams will be restored and protected. We refer to our earlier findings in the freshwater ecology section of this report, which is again relevant to our findings under this head.

[1105] Part D of the NPS FM relates to tangata whenua roles and interests. Ngati Toa supported TGP and considered that over time the mitigation (offsetting) proposed will result in positive effects.

### National Policy Statement on Electricity Transmission 2008 (NPS ET)

[1106] The NPS ET is directly relevant to TGP. The objective of the NPS is:

> *To recognise the national significance of the electricity transmission network by facilitating the operation, maintenance and upgrade of the existing transmission network and the establishment of new transmission resources to meet the needs of present and future generations, while:*
>
> - *managing the adverse environmental effects of the network; and*
> - *managing the adverse effects of other activities on the network*

[1107] The policies that support this objective seek to:

- Recognise the benefits of electricity transmission[338];
- Manage the environmental effects of electricity transmission[339];
- Manage the adverse effects of third parties on the electricity transmission network[340];

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338 Policy 1.

339 Policy 2–9.

340 Policy 10-12.

- Set out policies for long-term strategic planning for electricity transmission assets[341].

[1108] NZTA has been working closely with Transpower about the effect of TGP on its transmission assets and agreed solutions have been achieved. Transpower supports TGP and has made applications to relocate part of its infrastructure so that TGP may proceed.

## 16.5 WELLINGTON REGIONAL POLICY STATEMENT

[1109] There is both an operative and a proposed regional policy statement (RPS) for the Wellington Region. Both are relevant to the consideration of this proposal. The RPS for the Wellington Region was made operative in May 1995. The proposed RPS was notified in March 2009 with a revised decisions version being released in May 2010. A total of eight appeals on the proposed RPS have been lodged with the Environment Court.

**Operative RPS**

[1110] The provisions of the operative RPS which are of most relevance to TGP are:

- Iwi Environmental Management System (Chapter 4);
- Freshwater (Chapter 5);
- Soils and Minerals (Chapter 6);
- Coastal Environment (Chapter 7);
- Air (Chapter 8);
- Ecosystems (Chapter 9);
- Landscape (Chapter 10);
- Natural Hazards (Chapter 11); and
- Built Environment and Transportation (Chapter 14).

[1111] These objectives and policies were summarised in TR21 and also identified in the Key Issues report prepared by the Regional Council.

**Proposed RPS**

[1112] The objectives and policies of the proposed RPS which are relevant to TGP are:

- Air quality (Section 3.1);
- The coastal environment (Section 3.2);
- Energy, infrastructure and waste (Section 3.3);

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[341] Policy 13 and 14.

- Fresh water (including public access) (Section 3.4);
- Historic heritage (Section 3.5);
- Indigenous ecosystems (Section 3.6);
- Landscape (Section 3.7);
- Natural hazards (Section 3.8);
- Regional form, design and function (Section 3.9);
- Resource management with tangata whenua (Section 3.10); and
- Soils and minerals (Section 3.11).

[1113] These objectives and policies were summarised in TR21. In addition the Regional Council's Key Issues report contended that the following policies and/or recent amendments to policies are also relevant:

- Policy 5A – recognises the regional significance of the Porirua Harbour (including Pauatahanui Inlet and Onepoto Arm);
- Policy 6 – which has been amended to recognise the benefits from regionally significant infrastructure;
- Policy 34 – regarding the preservation of natural character and safeguarding the life supporting capacity of coastal ecosystems, is also considered relevant due to the potential impact TGP may have on the Inlet;
- Policy 46 – managing effects on indigenous ecosystems and habitats with significant indigenous biodiversity values.

[1114] The Regional Council noted that the proposed RPS also specifically refers to the importance of the Pauatahanui Inlet.

## 16.6 REGIONAL FRESHWATER PLAN FOR THE WELLINGTON REGION

[1115] The Regional Freshwater Plan came into effect on 17 December 1999. Since that time there have been four plan changes, all of which have been adopted. One of those plan changes, seeking to ensure that resource consent applications for TGP would be determined on their merits and not potentially precluded by the operation of s104D RMA to the TGP was the subject of discussion elsewhere in this Report.

## 16.7 REGIONAL AIR QUALITY MANAGEMENT PLAN FOR THE WELLINGTON REGION

[1116] The Air Quality Management Plan came into operation on 8 May 2000. NZTA requires a consent for an air discharge consent associated with a concrete batching plant, and this Plan is therefore relevant. The objectives and policies relevant to this proposal are identified in TR21.

[1117] The most notable effects on air quality from TGP will occur during construction activities. For a number of sensitive receptors (i.e. residential activities, child care facilities), which are within 100m of the construction works, these effects could be adverse.

[1118] The relevant objectives and policies of the Air Quality Management Plan seek to maintain and enhance existing air quality of the region[342], and to avoid, remedy or mitigate adverse effects on amenity values[343]. Policy 4.2.5 seeks to avoid or minimise adverse effects by managing any discharge at its source.

[1119] Mr Fisher addressed the proposed methods for managing effects on air quality. Mr Kyle noted[344] that measures are proposed to manage adverse effects at source by dampening and rapid rehabilitation of exposed areas. Management plans are proposed to manage both dust effects and discharges arising from the concrete batching plant. In his s42A report, Mr Kyle considered that the mitigation measures promoted by Mr Fisher are appropriate but that where it was possible to do so, greater specificity should be inserted into proposed conditions (i.e. monitoring locations, triggers, how and when contingency measures will be applied). This would ensure that consistency with the general thrust of the objectives and policies, which envisages that mitigation measures will be necessary. Specific conditions were also preferred by a number of planners instead of an additional management plan relating to the concrete batching plant.

[1120] Turning to the effects of vehicle emissions on air quality, relevant policies seek to avoid, remedy or mitigate the adverse effects of discharges to air from mobile transport sources, and to promote improved air quality by encouraging public transportation efficiencies, alternative transportation methods and an aim to reduce vehicle congestion in urban areas[345].

[1121] Mr Fisher said that the operation of TGP will improve air quality in many parts of the Project area, due to vehicle emissions being taken off the existing congested SH1 coastal route, and arterial routes, and being dispersed in a rural location[346]. He acknowledged that in some locations there will be increased vehicle emissions but stated that these increases would be comparatively small and would comply with the NES AQ so that any adverse effects of vehicle emissions would not be significant.

## 16.8 REGIONAL COASTAL PLAN FOR THE WELLINGTON REGION

[1122] TGP does not require any resource consents under the Regional Coastal Plan. However, because TGP has the potential to influence the coastal marine area through discharges, the Regional Coastal Plan is of relevance to

342 Objective 4.1.1.

343 Policy 4.2.7.

344 Mitchell Partnerships s42A Report, Part 2, pg 63.

345 Policies 4.2.22 and 4.2.23.

346 EiC, para 13.

our considerations. Section 32.10 of the AEE identifies the Objectives and Policies that are relevant to TGP.

[1123] The most relevant provisions are contained in the General Objectives and Policies in Chapter 4 of the Plan, and the Water Quality Objectives and Policies in Chapter 10. Relevant objectives seek to protect important ecosystems and other natural and physical resources in and adjacent to the coastal marine area, from inappropriate use and development[347]. Objective 4.1.23 seeks that conditions are placed on consents to avoid, remedy or mitigate adverse effects on the coastal marine area.

[1124] Policy 4.2.10 requires that the values of areas identified by the Plan as either Areas of Significant Conservation Value or Areas of Important Conservation Value shall be protected from the adverse effects of use and development. The Pauatahanui Inlet is identified as an area of Significant Conservation Value, having natural, conservation, geological, and scientific values[348].

[1125] Relevant water quality provisions, in particular Policy 10.2.2, seek to manage the Pauatahanui Inlet and Porirua Harbour for contact recreation purposes.

[1126] Again we note that sedimentation and the effects of TGP on Porirua Harbour in particular were a key concern for a number of submitters and refer to the earlier sections of this report which have dealt with that and related issues.

## 16.9 REGIONAL SOIL PLAN FOR THE WELLINGTON REGION

[1127] Provisions of this Plan are particularly relevant to consideration of bulk earthwork activities. The most relevant policies relate to the involvement of tangata whenua, the management of erosion and sedimentation, water quality, monitoring, cultural effects and effects on ecology.

[1128] In particular, Objective 4.1.8 seeks that the adverse effects of accelerated erosion are avoided, remedied or mitigated. Objective 4.1.11 seeks that land management practices are adopted for the effective control of sediment runoff to water bodies. Similarly, Policy 4.2.16 seeks to ensure that recognised erosion control and land rehabilitation techniques are adopted to avoid, remedy or mitigate any adverse effects resulting from soil disturbance activities.

[1129] Once again we refer to earlier sections of this report dealing with sediment and hydrology. We accept that the mitigation and management measures agreed to by the expert witnesses will ensure consistency with the relevant objectives and policies of the Regional Soil Plan.

## 16.10 REGIONAL PLAN FOR DISCHARGES TO LAND

[1130] This Plan is particularly relevant for the resource consent necessary for earthworks and vegetation removal, the discharge of stormwater to land, and the use of contaminated land. Again these issues have been adequately dealt with in preceding sections of this report.

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347 Objective 4.1.6.

348 Appendix 2 of the Regional Coastal Plan.

## 16.11 OPERATIVE KAPITI COAST DISTRICT PLAN

[1131] The Kapiti Coast District Plan (KCDP) became operative on 30 July 1999. It covers the northern most section of TGP. The application documents noted that in addition to an underlying Rural Zoning over this land, there are a number of other KCDP notations on or close to the land required for the designation including:

- Water Collection Area;
- Faultline;
- Ecological Sites K111, K139, and E17;
- Outstanding Natural Landscape; and
- Noise Contour.

[1132] The application noted that there is an existing designation in place relating to the previously proposed TGP alignment and identified objectives and policies that are relevant to the consideration of TGP. The Key Issues Report prepared by KCDC confirmed that the most relevant objectives and policies were appropriately identified in the application. These are:

- Rural Zone C2.1;
- Tangata Whenua C6.1;
- Earthworks C7.3.1;
- Heritage C8.1;
- Landscape C10.1;
- Ecology C11.1;
- Noise C14.1;
- Natural Hazards C15.1;
- Network Utilities C16.1;
- Transport C18.1.

[1133] In summary, the key issues emerging from the relevant policy matters were:

- The importance of rural landscapes and the requirement to avoid, remedy or mitigate adverse effects;
- The involvement of tangata whenua in the resource management process;
- The need to minimise effects of earthworks on outstanding landscapes;
- Management of heritage,
- Seeking to maintain the integrity of ecosystems;

- Avoid, remedy or mitigate effects on amenity values (i.e. noise);
- A need to minimise hazards that may affect a development (e.g. earthquakes);
- Management of effects on utilities.

[1134] The AEE identified numerous potential effects of TGP within the KCDC district. KCDC sought the avoidance or mitigation of potential effects from earthworks, measures to minimise potential effects on viewshafts and adequate management of noise.

## 16.12 OPERATIVE PORIRUA CITY DISTRICT PLAN

[1135] The Porirua City District Plan (PCDP) became operative on 1 November 1999. TGP traverses a number of zones contained in the PCDP. PCC stated in its Key Issue Report that these zones contain zone specific objectives and policies which are relevant to TGP. The zones affected by TGP include:

- Rural;
- Public Open Space;
- Suburban;
- Judgeford Hills;
- Recreation;
- Industrial.

[1136] The Whitby Landscape Protection Area overlay applies to the PCC link roads.

[1137] At Paragraph 4.33 of the PCC Key Issues Report it is noted that there is a plan change which affects land within TGP. Plan Change 12 seeks to rezone land located south of Cannons Creek from Rural to Open Space. The report notes that NZTA was a submitter to this plan change. At the time of writing this report the PCC had yet to hear and decide on submissions to this plan change.

[1138] There are four existing designations affected by this application. NZTA is the Requiring Authority for two of these existing designations.

[1139] The application identified that the objectives and policies most relevant to TGP are found in Chapter C of the PCDP incorporating:

- C1-4 Zoning Provisions;
- C5 Treaty;
- C7 Transport;
- C8 Heritage;

- C9 Landscape and Ecology;
- C11 Noise;
- C12 Natural Hazards;
- C14 Network Utilities; and
- C15 Hazardous Substances.

[1140] PCC has identified the following as key issues arising from the PCDP with respect to TGP[349]:

- Silt and sediment effects of earthworks
- Potential ecological effects stemming from the loss of indigenous vegetation, especially sites of ecological significance
- Ensuring landscape character is retained
- Residential amenity – both during construction and operation (noise & dust)
- Visual effects (especially concreting batching plant)
- Transportation provisions
- Tangata whenua
- Heritage
- Flooding & earthquake risks

[1141] Of note, the Judgeford Hills Section of this Plan has provisions which specifically refer to TGP albeit in a somewhat neutral fashion[350]. The Transport Section of the PCDP[351] explains that PCC supports the Wellington Regional Land Transport Strategy (which in turn supports the Western Corridor Plan and TGP).

## 16.13 OPERATIVE UPPER HUTT CITY DISTRICT PLAN

[1142] The Upper Hutt City District Plan (UHCDP) became operative on 1 September 2004. TGP transects less than 1ha of land within the territory of the Upper Hutt City. The underlying zoning of that land is Rural and it is subject to the existing designation providing for the previous TGP alignment.

[1143] Relevant objectives and policies were identified in both the application documents and the Key Issues Report prepared by Upper Hutt City.

[1144] Of particular relevance, UHCDP policies seek to avoid, remedy or mitigate the impact of earthworks and place a high value on the protection of rural amenity. These sit among a range of policies which set the direction for

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349 Porirua City Council Key Issues Report.
350 Policy C4A.3.5.2 and Policy C4A.3.6.3.
351 Objective C7.1.

amenity, ecology, hydrology, air quality and noise effects and utilities within the Upper Hutt District.

## 16.14 OPERATIVE WELLINGTON CITY DISTRICT PLAN

[1145] The Wellington City District Plan (WCDP) became operative on 27 July 2000. TGP affects land that is zoned Outer Residential and Rural. Both the application and Wellington City Council Key Issues Report note that there are plan changes that could potentially affect the TGP. Those identified include Plan Change 70 (now operative) and Plan Change 72 relating to earthworks and the residential chapter respectively.

[1146] There is an existing NZTA designation allowing the previous road alignment. The application and Key Issues Report identify the relevant objectives and policies relating to the proposal. The Key Issues Report identified the following key issues within the WCC territory:

- Noise;
- Rural character;
- Visual;
- Appropriate conditions; and
- Use of management plans.

We address all of those elsewhere.

## 16.15 RELEVANT NON-STATUTORY DOCUMENTS – OTHER MATTERS

[1147] Section 4.9 of the application identified the following as being relevant other matters to consider.

- The Government Policy Statement on Land Transport Funding 2009/10 – 2018/19;
- The National Infrastructure Plan 2011;
- The New Zealand Transport Strategy 2008;
- The Wellington Regional Land Transport Strategy 2010 – 2040 (WRLTS);
- The Western Corridor Plan 2006;
- The Wellington Regional Strategy 2007;
- The Porirua Development Framework 2009;
- The Porirua City Community Outcomes Action Plan 2009 – 2015;
- The draft Porirua Transportation Strategy;
- The Kapiti Coast Sustainable Transport Strategy;

- The Wellington Conservation Management Strategy 1996;
- The Greater Wellington Parks Network Plan 2011;
- The Pauatahanui Inlet Action Plan 2000;
- Iwi management plans – Me Huri Whakamuri Ka Titiro Whakamua 1996

[1148] The PCC's Key Issues Report also identified the Draft Porirua Harbour Catchment Strategy and Action Plan (PHCSAP) as a relevant consideration.

[1149] During expert conferencing it was agreed that TGP is an integral component of the WRLTS as approved by the Regional Transport Committee (RTC) and that such approval does not necessarily require an individual project to deliver on all of the eight outcomes of that Strategy[352]. TGP certainly meets some of the identified outcomes.

[1150] In some instances the documents are wholly supportive of the proposed TGP[353]. In other cases, they are not supportive or neutral with respect to the proposal[354]. Consistency of TGP with such documents is largely dependent on the management of adverse effects and appropriately targeted conditions. As agreed during the expert conferencing, Mr Kelly provided an assessment of the Project against Key Outcomes 1.1, 2.1 and 3.1 of the WRLTS.

[1151] The TGP objectives were set in 2007, prior to the Government Policy Statement (which describes the RoNS project) which was prepared in 2009. The TGP objectives were not reframed following the preparation of the Government Policy Statement[355].

[1152] During cross-examination, Mr Nicholson explained that the PHCSAP did not exist at the time the project was developed, however NZTA was aware that the document was in the process of being created and took into account where that document was heading[356]. In response to the propositions regarding sedimentation in the PHCSAP, NZTA believes that the project will lead to less sediment into the harbour in the long term[357] and we have found that to be the case.

[1153] Ms Lawler stated that the PHCSAP is a relevant matter in terms of community interest[358]. Ms Lawler said that it was It is important that the sedimentation risk to the harbour was recognised and steps are taken to mitigate it[359]. Based on Dr De Luca's evidence, Ms Lawler was of the opinion

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352 Witness Conferencing Joint Report to the BOI – Traffic & Transport – 9 December 2011.

353 For example the Wellington Regional Land Transport Strategy (RLTS) 2010-2040

354 For example the Wellington Conservation Management Strategy 1996 and the Pauatahanui Inlet Action Plan 2000

355 NoE, pg 55.

356 NoE, pg 65.

357 NoE, pg 67.

358 NoE, pg 217.

359 NoE, pg 220.

that the risks are manageable and that over the long term the harbour can survive those risks and will survive those risks if they are mitigated properly[360].

[1154] The planners' witness statement agreed that all of the relevant statutory documents had been identified in Mr Kyle's s42A report and in Ms Rickard's planning evidence. With the initial exception of Dr Solly we understood that all of the planning witnesses agreed that TGP was not precluded from obtaining the resource consents which the Applicants sought by virtue of being contrary the objectives and policies of any of the identified documents. We understood Dr Solly to also come to that position ultimately with resolution of the RTS High Court appeal against the Board's plan change decision.

[360] NoE, pg 221.

# 17. APPRAISAL

[1155] In this section of the report we consider whether we ought to confirm the NoRs sought by NZTA and PCC and grant consent to the applications made by NZTA, PCC and Transpower. In doing so we will:

- Identify various factual findings as to the effects of TGP which are relevant to our determination;
- Consider the provisions of s171(1) RMA (except for Part 2 matters);
- Consider the provisions of s104D in respect of the non-complying activity resource consents;
- Consider the provisions of s104 RMA (except for Part 2 matters) in respect of the NZTA and PCC non-complying activity applications;
- Consider the provisions of ss104 and 104C RMA as they apply to the application for restricted discretionary activities consents by Transpower;
- Consider the provisions of s105 RMA in respect of any discharge permit applications;
- Undertake a Part 2 assessment on an *overall* basis;
- Determine the various requests and applications.

## 17.1 FACTUAL FINDINGS

[1156] We make the following factual findings which will inform our other determinations:

- The existing coastal route of SH1 provides an inadequate level of service due to issues of congestion, poor accessibility, use of inappropriate routes, safety, severance of coastal communities, vulnerability of pedestrians and cyclists and risk of closure in the event of earthquake or tsunami (refer Section 2 above);
- TGP will rectify those inadequacies by providing a new four lane route which will avoid congestion, reduce travel times and achieve consistency in travel times. The new route will be safer than the coastal route. A reduction in travel volumes on the coastal route will create the potential for the roading authorities to reduce community severance and improve walking and cycling facilities on that route. TGP will not be vulnerable to tsunami and in the event of earthquake will be repairable much more speedily than the coastal route (refer Section 12.2 above);
- A likely consequence of undertaking TGP will be an increase in sediment discharges to Porirua Harbour over the period of construction. Although there is some uncertainty surrounding the accuracy of predictive modelling, the additional sedimentation is likely to be in the order of

4 - 5% of the baseline sediment discharge without TGP. Upon completion of TGP, there will be an ongoing and permanent reduction in sediment discharge to the Harbour as a result of planting and improved management practices associated with TGP (refer Sections 12.3 and 12.7 above);

- TGP will cause adverse effects on terrestrial ecology which are more than minor. Areas of indigenous growth will be destroyed. A number of threatened species are known to be present on or near the site although the effect of TGP on such species is uncertain. There are likely to be unidentified smaller organisms of unknown significance which could be destroyed by TGP works. A comprehensive mitigation package proposed by NZTA will protect the wider habitat and will adequately mitigate these adverse effects (refer Section 12.5 above);

- TGP works will cause adverse effects which are more than minor on approximately 10km of streams on the route by destruction, modification and diversion. These effects will be mitigated by riparian improvements which will restore and protect approximately 27km of streams. Additionally, replacement of a perched culvert of the Wainui Stream will open up an additional 11km of stream from which downstream native fish are presently excluded. It is likely that the mitigation package will achieve a net gain in freshwater ecological terms (refer Section 12.6 above);

- Any adverse effects on the marine ecology of Porirua Harbour caused by additional sedimentation will be temporary and more than mitigated by the long term reduction in sediment discharge to the Harbour to which we have previously referred (refer to Section 12.7 above);

- Noise effects of TGP will be *acceptable* provided the operation of TGP is subject to a condition limiting internal noise levels at affected properties (refer Section 12.9 above);

- Potential air quality and health effects arising through construction of TGP have been adequately avoided, remedied or mitigated by the operation of conditions and management plans. No such effects will be more than minor (refer Section 12.10 above);

- There will be no adverse cultural effects on tangata whenua as a result of construction and operation of TGP (refer Section 12.12 above);

- Potential adverse effects of TGP on archaeological sites and built heritage have been adequately avoided, remedied or mitigated by the operation of conditions and management plans. No such effects will be more than minor (refer Section 12.13 above);

- Potential adverse social effects on communities arising from construction and operation of TGP have been adequately avoided, remedied or mitigated by the operation of conditions and management plans. No such effects will be more than minor (refer Section 12.14 above);

- TGP will have significant adverse landscape and visual effects in the Te Puka Valley. Those effects cannot be avoided. They have been

mitigated to the greatest extent possible. Adverse effects on other parts of the route (particularly at Linden) have been adequately avoided, remedied or mitigated by the operation of conditions and management plans (refer Section 12.15 above);

- A number of properties in the vicinity of the TGP route will be adversely affected by construction and operation of TGP to a greater or lesser degree. With two limited exceptions (which we have addressed) adverse effects have been adequately avoided, remedied or mitigated by the operation of conditions and management plans (refer Section 12.16 above);

- Potential adverse effects of Transpower's proposed line relocation have largely been avoided through the route selection process and to the extent they have not been such effects have been adequately remedied or mitigated (refer Section 13.17 above).

The above factual findings will inform our following discussion of relevant provisions of RMA.

## 17.2 SECTION 171(1) RMA

[1157] Section 149P RMA requires that in considering the NZTA and PCC notices of requirement the Board must have regard to the matters set out in s171(1) RMA which relevantly provides:

*(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to -*

*(a) any relevant provisions of -*

*(i) a national policy statement;*

*(ii) a New Zealand coastal policy statement;*

*(iii) a regional policy statement or proposed regional policy statement;*

*(iv) a plan or proposed plan; and*

*(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if -*

*(i) the requiring authority does not have an interest in the land sufficient for undertaking work; or*

*(ii) it is likely that the work will have a significant adverse effect on the environment; and*

*(c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and*

*(d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.*

(In this case references to the territorial authority are references to the Board)

[1158] Insofar as the statutory instruments referred to in s171(1)(a) are concerned, we refer to Section 16 of this decision in which we have identified and discussed a range of national, regional and district planning instruments. We refer to our extensive discussion as to the potential effects of TGP on Porirua Harbour in light of the provisions of NZCPS and our conclusion that in the long term TGP will have a positive effect on the Harbour by reducing the overall input of sediment into it although there will potentially be an increase in sediment over the term of construction.

[1159] Overall, we conclude that TGP is not in conflict with or opposed to the outcomes sought by the instruments to which we are required to have particular regard to such an extent as to preclude confirmation of the notices of requirement. TGP is consistent with many of the instruments in question.

[1160] NZTA and PCC considered alternative sites, routes or methods of undertaking the work associated with TGP. It was agreed by all participants in the proceedings who addressed this issue that the route now proposed for TGP was the best available route within Transmission Gully itself. We have accepted NZTA's contention that TGP is preferable to upgrade and extension of the existing coastal route. Even assuming that notices of requirement could be confirmed and resource consents obtained to allow such upgrading (which is highly uncertain), upgrade of the coastal route would fail to address issues of community severance and the route would continue to be vulnerable to sea level rise, earthquake and tsunami.

[1161] Accordingly, we find that adequate consideration has been given to alternative sites.

[1162] We find that the work and designation are reasonably necessary to achieve the objectives of NZTA and PCC. We refer to the findings which we made in the Legal Issues section of this report in that regard. We also accept the contents of paragraphs 244-245 of the Applicants' opening submissions.

[1163] We have identified a range of non statutory documents which might be considered under the head of *any other matter*. We consider that TGP is broadly consistent with those documents to the extent that they are relevant to our considerations.

## 17.3 SECTION 104D RMA

[1164] NZTA and PCC have applied for a number of resource consents from the Regional Council. These resource consents relate to water diversions, the discharge of water to land and water and undertaking of works such as culverts in the beds of rivers. These activities are governed by the provisions of the Freshwater Plan and are non-complying activities in terms of that plan. The grant of non-complying activity consents is subject to particular restrictions contained in s104D RMA which relevantly provides:

*(1) Despite any decision made for the purpose of section 95A(2)(a) in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either -*

*(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or*

*(b) the application is for an activity that will not be contrary to the objectives and policies of -*

*(i) the relevant plan if there is a plan but no proposed plan in respect of the activity; or*

*(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or*

*(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.*

[1165] The above provisions contain what is referred to as the *gateway test* which requires that consent to a non-complying activity application may be granted only if it passes through one of the following gateways:

- Either the adverse effects of the activity on the environment are minor;
- Or, the activity is not contrary to the objectives and policies of a relevant plan or proposed plan.

[1166] In this case the Applicants have conceded from the outset that adverse effects of the activities for which resource consents were sought would be more than minor. The TGP applications accordingly fail to pass through the first gateway of s104D. In order to grant consent to the applications, the Board must be satisfied that the applications pass through the second gateway, namely that they are not contrary to the objectives and policies of the Freshwater Plan.

[1167] Somewhat unusually for an issue of such significance in these proceedings, that issue can be determined relatively succinctly.

[1168] We have concluded that the activities for which non-complying activity consent is sought are not contrary to the objectives and policies of the Freshwater Plan. That was the ultimate conclusion of the expert planning witnesses (including Dr Solly who initially considered otherwise).

[1169] The issue of whether or not TGP was contrary to the objectives and policies of the Freshwater Plan was the subject of detailed consideration in the Board of Inquiry Report into changes to the Freshwater Plan. The Board concluded that arguably TGP was contrary to the objectives and policies contained in the Freshwater Plan at the time of that inquiry[361]. The Board further concluded that TGP was of such significance that it was appropriate that any resource

[361] Paras 162 - 166 Report of Board of Inquiry into NZTA Transmission Gully Plan Change Request.

consent applications to enable it ought be subject to a full appraisal having regards to its beneficial as well as adverse effects and not be precluded from consideration by virtue of the operation of s104D. That Board accordingly approved a number of policy changes to Policies 4.2.10, 7.2.1 and 7.2.2 of the Freshwater Plan to provide that adverse effects on waterways affected by TGP were to be considered in accordance with a new Policy 4.2.33A.

[1170] Policy 4.2.33A contains the following provisons relating to management of adverse effects of TGP under the Freshwater Plan:

> *4.2.33A To manage adverse effects of the development of the Transmission Gully Project, in accordance with the following management regime:*
>
> *(1) Adverse effects are avoided to the extent practicable;*
>
> *(2) Adverse effects which cannot be avoided are remedied or mitigated.*
>
> ***Explanation:*** *This policy recognises that the Transmission Gully Project is identified in various statutory and policy documents as having both national and regional significance. In achieving the sustainable management objectives of the Act, resource managers and decision makers have the option of applying avoidance, remediation and mitigation in managing adverse effects. Accordingly, the adverse effects of aspects of the Project may be acceptable, even though they cannot be completely avoided, remedied, or mitigated.*
>
> *Remedying or mitigating can include the concept of offsetting. "Offsetting" means the provision of a positive effect in one location to offset adverse effects of the same or similar type caused by the Transmission Gully Project at another location with the result that the overall adverse effects on the values of the waterbodies are remedied or mitigated.*
>
> *Where offsetting is to be applied, there should be a clear connection with the effect and the offsetting measure. The offsetting measure should preferably be applied as close as possible to the site incurring the effects. Hence, there should be a focus on offsetting occurring within the affected catchments along the Transmission Gully route and to specifically address the effects at issue.*
>
> *Offsetting should, as far as can be achieved maintain and enhance the particular natural values affected by the Project when assessed overall.*
>
> *The adequacy of a proposed offsetting measure should be transparent in that it is assessed against a recognised methodology.*
>
> *In this policy "to the extent practicable" requires consideration of the nature of the activity, the sensitivity of the receiving environment to adverse effects, the financial implications and adverse effects of the measure considered compared with other alternative measures, the current state of technical knowledge and the likelihood that effects can be successfully avoided, remedied or mitigated.*

[1171] Determination of whether or not a proposal is contrary to objectives and policies of a plan requires consideration of plan objectives and policies as a whole, rather than individual policies in isolation. However, where particular objectives or policies are directed to a specific end it may sometimes be the case that those objectives or policies are particularly significant in determining whether or not a proposal is contrary to objectives and policies. Policy 4.2.33A is such a policy.

[1172] In our view, the TGP proposal is in accordance with Policy 4.2.33A and cannot be said to be contrary to the objectives and policies of the Freshwater Plan. A key thrust of the evidence which we considered when considering the effects of TGP was the attempt made by the Applicants to avoid adverse effects of TGP in their route selection, specifically the choice of the western alignment along Te Puka Valley. To the extent that adverse effects could not be avoided the Applicants have sought to remedy or mitigate them by a comprehensive package of mitigation proposals. With limited exceptions, the adequacy of those mitigation proposals was accepted by all relevant witnesses and the Board considers that package to be comprehensive and appropriate.

[1173] Accordingly we are satisfied to the extent TGP requires consents under the Freshwater Plan, it is not contrary to the objectives and policies of that Plan and is not precluded from obtaining such consents by the provisions of s104D RMA. Insofar as any other relevant regional plans are concerned, we accept the evidence and conclusions of Ms Rickard contained in paragraphs 14-24 of her statement of evidence dated 16 November 2011.

## 17.4 SECTIONS 104 & 105 RMA

[1174] Having determined that the NZTA and PCC resource consent applications have passed through one of the gateways of s104D, they must be considered in accordance with the provisions of ss104 and 105 RMA. Section 104 relevantly provides:

> *(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to –*
>
> *(a) any actual and potential effects on the environment of allowing the activity; and*
>
> *(b) any relevant provisions of –*
>
> *(i) A national environmental standard;*
>
> *(ii) other regulations,*
>
> *(iii) a national policy statement;*
>
> *(iv) a New Zealand coastal policy statement;*
>
> *(v) a regional policy statement or proposed regional policy statement;*

*(vi) a plan or proposed plan; and*

*(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.*

[1175] Insofar as the issue of actual and potential effects on the environment is concerned we refer to the summary of factual findings which we previously made and which are set out in Section 17.1 above. We consider that those findings accurately identify the actual and potential effects of TGP which will be determinative in our considerations.

[1176] The relevant provisions of the various instruments specified in s104(1)(b)(i-vi) have been identified in Section 16 of this report. Highly pertinent considerations under those instruments arise out of the NZCPS insofar as effects of TGP on Porirua Harbour are concerned and the relevant provisions of the Freshwater Plan which we have previously discussed. The fact that any temporary increase in sedimentation caused by TGP works will be counter balanced in the long term by an ongoing reduction in sediment discharged to the Harbour from TGP catchments, is a significant consideration under NZCPS. The comprehensive package of avoidance, remedy and mitigation of adverse effects is similarly a significant consideration under the Freshwater Plan.

[1177] We consider a number of the instruments identified in Section 16.13 of this report under the head *any other matter.* The WRLTS and the Western Corridor Plan 2006 both of which are highly supportive of TGP are relevant in that regard. We have also given consideration to the draft PHCSAP in this context. As with all of our considerations in respect of Porirua Harbour, the fact that TGP associated land rehabilitation works will ultimately bring about a reduction in volume of sediment being discharged to the harbour is a significant factor in our considerations.

[1178] In addition to the consideration of s104 (above), applications for discharge permits are subject to the provisions of s105 RMA which relevantly provides:

*(1) If an application is for a discharge permit or coastal permit to do something that would contravene section 15 or section 15B, the consent authority must, in addition to the matters in section 104(1), have regard to—*

*(a) the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*

*(b) the applicant's reasons for the proposed choice; and*

*(c) any possible alternative methods of discharge, including discharge into any other receiving environment.*

*(2) If an application is for a resource consent for a reclamation, the consent authority must, in addition to the matters in section 104(1), consider whether an esplanade reserve or esplanade strip is appropriate and, if so, impose a condition under section 108(2)(g) on the resource consent.*

[1179] Insofar as the matters set out in s105 are concerned, we refer to our comprehensive discussion on those matters in Sections 12.3, 12.4, 12.6, 12.7 and 12.10 of this report and adopt the various findings made in those Sections having regard to the evidence of the witnesses on those matters.

## 17.5 PART 2 RMA

[1180] Our considerations pursuant to ss171(1) (NoRs) and 104(resource consents) RMA are in each case subject to Part 2 RMA. Part 2 identifies the purpose and principles of the Act. In deciding these requests and applications it is necessary for us to determine whether or not confirming the requirements and granting the resource consents achieves the purpose of the Act.

[1181] Section 5 RMA defines its purpose in these terms:

> ***5 Purpose***
>
> *(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.*
>
> *(2) In this Act,* ***sustainable management*** *means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –*
>
> *(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
>
> *(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
>
> *(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

[1182] In order to inform our considerations under s5, we are obliged to consider the provisions of ss6, 7 and 8 RMA. We consider those provisions sequentially.

[1183] Section 6 RMA provides:

> ***6 Matters of national importance***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
>
> *(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers*

*and their margins, and the protection of them from inappropriate subdivision, use, and development:*

*(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:*

*(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:*

*(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:*

*(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.*

*(f) the protection of historic heritage from inappropriate subdivision, use, and development.*

*(g) the protection of protected customary rights.*

[1184] We are required to consider the matters identified in section 6(a)-(g) as matters of *national importance*. A number of them are relevant in this case:

- The preservation of the natural character of Porirua Harbour appeared to us to be the most significant single issue arising out of the TGP proposal. We have found that there will be a temporary increase in sedimentation as a result of TGP works. We have accepted that the increase might be somewhere in the order of 4 - 5% per annum above present levels for the six year life of the Project. Once construction works have been completed, there will be a permanent reduction in the volume of sediment entering Porirua Harbour from the TGP catchments in the order of 3 - 4% per annum on an ongoing basis. That is a beneficial effect of TGP and clearly contributes towards the preservation of the Harbour's natural character;

- We accept that TGP will have adverse effects on the natural character of the streams (rivers) in its course. Those effects have been avoided to the extent possible. The comprehensive mitigation package proposed for sedimentation control and ecological purposes adequately addresses those effects.

- TGP might conceivably have some minor adverse effects on the Tararua foothills which are identified as an ONL in the KCDP. Any such effects are so limited in scope that they do not render TGP an inappropriate development;

- Although Te Puka Valley was described as an *ecological hotspot* in the ecological witness' caucusing statement it did not appear to us to constitute an area of significant indigenous vegetation or significant habitat of indigenous fauna. In terms of vegetation, TGP will bring about the destruction of scattered remnants of forest on the western side of the Te Puka Valley. In our view those remnants cannot be regarded as

significant when compared with the Akatarawa Forest on the eastern slopes. No significant habitats of indigenous fauna were identified to us;

- None of the evidence which we heard indicated that TGP would unduly affect public access to the coastal marine area or the streams which we have discussed. TGP includes comprehensive access proposals by the provision of walking, cycling and horseriding paths as part of landscape development.

- TGP will not interfere with the relationship of Maori with their ancestral lands, water, sites, Waahi Tapu and other Taonga. Ngati Toa supports the proposal. Its representative indicated in very clear terms that Ngati Toa would strongly oppose the alternative suggested possibility of extension of the coastal route;

- Historic heritage will be protected by NZTA's proposals in respect of St Joseph's Church and the WWII fuel storage site.

[1185] We do not consider that the TGP proposal runs counter to any of the provisions of s6 RMA. The reduction in sediment discharge into Porirua Harbour in the long term promotes preservation of the harbour and accords with the provisions of s6(a).

[1186] Section 7 RMA provides:

> ***7 Other matters***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –*
>
> *(a) Kaitiakitanga:*
>
> *(aa) The ethic of stewardship:*
>
> *(b) The efficient use and development of natural and physical resources:*
>
> *(ba) The efficiency of the end use of energy:*
>
> *(c) The maintenance and enhancement of amenity values:*
>
> *(d) Intrinsic values of ecosystems:*
>
> *(e) Repealed:*
>
> *(f) Maintenance and enhancement of the quality of the environment:*
>
> *(g) Any finite characteristics of natural and physical resources:*
>
> *(h) The protection of the habitat of trout and salmon:*
>
> *(i) The effects of climate change:*
>
> *(j) The benefits to be derived from the use and development of renewable energy.*

[1187] We are required to consider the matters identified in section 7(a)-(j) as matters to which we must have particular regard. A number of them are relevant to our considerations in this case:

- Ngati Toa has determined to exercise Kaitiakitanga in this case by supporting TGP;

- Stewardship by community groups other than Ngati Toa has been addressed through the consultation process and in some cases by conditions requiring consultation with specific groups as TGP proceeds.

- TGP promotes the efficient use and development of natural resources by rectifying inadequacies in the existing coastal route. Those inadequacies include congestion, accessibility issues, use of inappropriate routes, safety concerns, severance of coastal communities, danger to pedestrians and vulnerability to closure in the event of earthquake or tsunami. Although there was considerable issue taken by some parties as to how that efficiency was measured in terms of BCR applying NZTA guidelines, we have some reservations about their relevance to our considerations;

- TGP will have adverse effects on the amenity values of a number of persons living near the route. For persons living in what are presently quiet rural areas, the TGP expressway will become a very prominent feature of their environment. NZTA has sought to mitigate adverse effects as much as possible through the route selection process and will seek to make further improvements as design proceeds. Except for the request to move the route further uphill and to the east as requested by submitters Poppe Family Trust, Deuss and Christensen we heard of no other tangible mitigation suggestions. Ultimately, we accept that there will be adverse amenity effects on some people if TGP proceeds;

- There will be adverse effects that are more than minor on intrinsic values of ecosystems, particularly in the Te Puka Valley and Stream and in the other streams which we have identified. Those adverse effects will be adequately remedied or mitigated by the Applicants' mitigation proposals;

- Some aspects of the environment will not be maintained or enhanced by TGP. Those aspects largely relate to the Te Puka Valley and the various streams which we have identified. We consider that the Applicants have offset those adverse effects through their extensive suite of mitigation measures. The long-term reduction of sediment discharge into Porirua Harbour constitutes an enhancement of the quality of the environment.

- It appeared to us that the most significant effect of climate change which we should consider related to possible impacts of sea level rise, tsunami and storm events on the viability of the coastal route, although we heard little evidence on those matters. The other relevant aspect of climate change related to the hydrological estimates where the evidence which we heard was that the construction timeframe would be within the inherent variability of the existing climate.

We consider that TGP is substantially in accord with the provisions of s7 RMA, although not in all respects.

[1188] Section 8 RMA addresses Treaty of Waitangi issues. It provides:

> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)*.

[1189] We were not advised of any Treaty issues that arose in this context. We note Ms Pomare's evidence that the Applicants had responded appropriately to s8 issues and that the principles of the Treaty of Waitangi had been taken into account by the MoU between NZTA and Ngati Toa.

## 17.6 CONCLUSION ON PART 2 CONSIDERATIONS

[1190] Our overall conclusion in respect of Part 2 matters is that approval of the notices of requirement and resource consents to enable TGP to proceed will promote the sustainable management of natural and physical resources. Providing a safe, alternative inland route to the existing coastal route for SH1 will enable people and communities to provide for their social and economic wellbeing and for their health and safety. Although there are a number of adverse effects we do not consider that the scale of those effects outweighs the benefits which we have identified. TGP has avoided adverse effects on the environment to the greatest extent possible and where avoidance is not possible proposes remedial or mitigatory measures which in some instances constitute environmental gains.

**Outcome**

[1191] When regard has been had to all of the matters above, including Part 2 considerations, we determine that it is appropriate that the notices of requirement sought by NZTA and PCC be confirmed and that the resource consents applied for be granted subject to the imposition of appropriate conditions.

## 17.7 SECTION 104C RMA

[1192] The Transpower resource consent applications must be determined in accordance with the provisions of s104C RMA which provides as follows:

> *(1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which –*
>
> *(a) a discretion is restricted in national environment standards or other regulations;*
>
> *(b) it has restricted the exercise of its discretion in its plan or proposed plan.*
>
> *(2)* The consent authority may grant or refuse the application.

*(3) However, if it grants the application, the consent authority may impose conditions under section 108 only for those matters over which –*

*(a) a discretion is restricted in national environmental standards or other Regulations;*

*(b) it has restricted the exercise of its discretion in its plan or proposed plan.*

[1193] Transpower's applications were made pursuant to the NESETA. All of the matters to which the Board's discretion has been restricted were addressed in the evidence of Transpower's witnesses and the Transpower application faced limited opposition.

[1194] We have concluded, relying on the evidence called for Transpower that:

- Areas or sites potentially sensitive to the proposed line relocation have generally been avoided through Transpower's route selection process;
- Some potential effects of the relocation may be disregarded as effects which could arise from permitted line relocation works under the NESETA;
- Transpower's evidence was that remaining effects are limited to the effects of construction and landscape effects all of which may be appropriately mitigated through proposed conditions of consent.

[1195] We also conclude, relying on Transpower's evidence, that the line relocation works will promote the sustainable management of natural and physical resources, and in particular will:

- Enable development of TGP which we have found will promote a sustainable management of natural and physical resources;
- Provide for the ongoing operation and maintenance of the National Electricity Grid which is a nationally significant physical resource providing the sustainable, secure and efficient transmission of electricity.

**Outcome**

[1196] For these reasons we conclude it is appropriate to grant the resource consents sought by Transpower, again subject to the imposition of appropriate conditions.

# 18. DECISION

[1197] For all of the reasons set out in the foregoing sections of this report, our decision is that:

- We confirm the Notices of Requirement given by NZTA;
- We confirm the Notices of Requirement given by PCC;
- We grant the resource consents applied for by NZTA;
- We grant the resource consents applied for by PCC;
- We grant the resource consents applied for by Transpower.

[1198] In each case, the respective confirmations and grants are to be subject to the relevant conditions contained in Volume 2 to this report.

[1199] This is the final decision and report issued by the Board in accordance with the provisions of s149(R)(1) RMA. The Board issued a draft report and decision on these matters on 30 April 2012. That document was the subject of comment from various persons pursuant to the provisions of ss149Q(4) and (5) RMA (although a number of the comments went substantially beyond the ambit of those provisions). The Board has considered those comments in producing this final report and making these decisions. A summary of the comments and the Board's consideration of them is available on the EPA website.

[1200] Contemporaneously with this report and decision we will execute Notices of Requirement and resource consents giving effect to the decisions which we have made. We record that draft Notices of Requirement and consent documents were submitted to EPA by the Applicants and circulated to other parties for comment. No comments were received on the form of those documents.

Dated this 12th day of June 2012

Environment Judge Brian Dwyer

Environment Commissioner Russell Howie

David McMahon

David Mitchell

Glenice Paine

# APPENDIX 1

**Construction Environmental Management Plan**

(Outline Plan and Resource Consents NZTA.20, PCC.15, PCCE.18)

Territorial Councils

Regional Council

**Outline Plans to include:**

- Heritage Management Plan (NZTA.16)
- Construction Traffic Management Plan (NZTA.22, PCC.17)
- Landscape Urban Design Management Plan (NZTA.42, PCC.26)
- Construction Noise & Vibration Management Plan (NZTA.35, PCC.23)
- Construction Air Quality Management Plan (NZTA.39, PCC.24)

**Regional Resource Consents**

- Contaminated Land Management Plan (G.20, PCC.E.45)
- Erosion and Sediment Control Plan (E.11, PCCE.19)
  - Chemical Treatment Plan (E.24, PCCE.33)
  - Erosion and Sediment Control Monitoring Plan (G.39, PCCE.41)
- Ecological Management and Monitoring Plan (G.21, PCCE.36)
- Forestry Harvesting Plan (E.27)

**Site Specific Plans – Notices of Requirement**

- Site Specific Traffic Management Plans (NZTA. 28, PCC.19)
- Conservation Plan – Brick Tank (NZTA .18)

**Site Specific Plans – Resource Consents**

Site Specific Environmental Management Plans (G .26, PCCE.39)

- Site Specific Environmental Monitoring Plans
- Marine Ecology Quality Monitoring Methodology & Adaptive Management Plan (G.21)
- Revegetation and enrichment plan (G.24)
- Stream Restoration Plan (G.24)
- Bat Monitoring Plan (G.38)

Duck Creek Management Plan (Duck.1)

**Other Plans**

- Network Utilities Management Plan (NZTA.57, PCC.33)
- Communications Plan (NZTA.13, PCC.12)
- Accidental Discovery Protocol (G.8, PCC.14)

**Local Authority Resource Consents (KCDC & PCC only)**

- Transpower Construction Environmental Management Plan (TL.16)
- Transpower Accidental Discovery Protocol (TL.14)
- Transpower Landscape Mitigation Plan (TL.10)

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA440/2008**
**[2009] NZCA 621**

| | |
|---|---|
| BETWEEN | MICHAEL SHANE MCELROY & OTHERS<br>Appellants |
| AND | AUCKLAND INTERNATIONAL AIRPORT LIMITED<br>Respondent |

Hearing: 22 and 23 September 2009

Court: Chambers, Robertson and Ellen France JJ

Counsel: C R Carruthers QC, B H Dickey and T M Molloy for Appellants
A R Galbraith QC, S J Katz and L A Macfarlane for Respondent

Judgment: 23 December 2009 at 11.30 a.m.

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B The cross-appeal is dismissed, save that the declarations contained in order A of the High Court judgment are varied as follows:**

**(a) A declaration is made that the land formerly owned by the appellants is held for a public work in terms of the Public Works Act 1981;**

**(b) A declaration is made that that land is still required for a public work, namely the Auckland International Airport.**

**C The appellants must pay the respondent costs for a complex appeal on a band B basis, plus usual disbursements. We certify for:**

**(a) a uplift of 50 per cent in terms of r 53C(1)(b) of the Court of Appeal (Civil) Rules 2005; and**

**(b) second counsel.**

**D We make no order for costs on the cross-appeal.**

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## REASONS OF THE COURT

(Given by Robertson J)

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### Introduction

[1] The respondent ("AIAL") owns approximately 1,100 hectares of land at Mangere. The appellants, who are trustees of the Craigie Trust, formerly owned 36.626 hectares of that land. It was lawfully acquired by the Crown in 1975.

[2] In a proceeding heard in 2008 by Hugh Williams J at the High Court in Auckland, the Craigie Trust sought a declaration that AIAL was under an obligation pursuant to s 40 of the Public Works Act 1981 ("PWA 1981") to offer the trust land, at its assessed value, back to the Craigie Trust on 1 February 1982 (or within a

reasonable time thereafter), because it was no longer required for the public work purpose of an "aerodrome" for which it was taken and held. In the alternative, if the land had been disposed of in circumstances that it could not be offered back, the Craigie Trust sought damages from AIAL for breach of statutory duty in disposing of the land without complying with s 40 of the PWA 1981.

[3] Hugh Williams J dismissed Craigie Trust's claim: HC AK CIV 2006-404-5980 27 June 2008 (reported in part at [2008] 3 NZLR 262). His formal judgment read as follows:

> A (1) all the plaintiffs' claims against the defendant fail
>
> (2) though Auckland International Airport Ltd is subject to the obligations in s 40 of the Public Works Act 1981
>
> (3) but the land formerly owned by the plaintiffs and held for the public work of an "aerodrome" is and will continue to be required for that public work or that, it no longer being required for that public work, it remains held for the public work of an "airport".
>
> B Had it been necessary so to do, the Court would have concluded that it would not have been impracticable but it would have been unreasonable or unfair to require Auckland International Airport Limited to offer the land back to the plaintiffs and that there had been a significant change in the character of the land for the purposes of or connected with the public work for which the land is held.
>
> C Costs are to be dealt with as in para [231] of this judgment.
>
> [For convenience, we have broken order A into 3 parts.]

[4] The Craigie Trust appeals against orders A(1), A(3) and B. AIAL cross-appeals against order A(2). AIAL also seeks to uphold the judgment on other grounds. In particular, AIAL argues that, even if the appellants establish that the trust land was held for a public work but was no longer required for that public work, offering the land back to the Craigie Trust is not only unreasonable and unfair, but also impracticable.

[5] Five issues arise on appeal:

(a) When the PWA 1981 came into force on 1 February 1982, did s 40 of that Act apply to the trust land, such that the trust land was held in accordance with that section and subject to its offer-back requirements?

(b) If not, did the trust land nonetheless become subject to s 40 at a later date?

(c) If the trust land is held for a public work within s 40 of the PWA 1981, what is the scope of the relevant public work?

(d) If s 40 does apply to the trust land, is the land no longer required for the public work for which it was held?

(e) If the land is no longer required, would it be impracticable, unreasonable or unfair to require AIAL to offer the land back to the Craigie Trust?

**Background**

*The beginnings of an international airport*

[6] Shortly after the Second World War, the Government began investigating a new major international airport for Auckland. Following advice, it considered a model of a "joint venture" airport.

[7] In 1955 the Government determined that the airport should be situated at the present day Mangere site and by 1959 the Crown had acquired most of the land it needed.

[8] In September 1960, the Crown and the Auckland City Council entered into an agreement to develop Auckland Airport as a joint venture. There was an initial deed, dated 24 September 1960, which applied s 31 of the Finance Act (No. 3) 1944 ("Finance Act") to the "purchase or acquisition of the land required for development of the International Airport and carrying out of present and future works". The 1960

deed was superseded by a second deed, ("the principal deed") signed on 25 November 1963 but deemed operative from 24 September 1960. The principal deed stated that the construction of the airport was to be "a work of both national and local importance" in terms of s 31 of the Finance Act, and that its development was to be funded jointly by the Crown and the Auckland City Council/Auckland Regional Authority.

[9] The principal deed was amended on 13 April 1966. The amendment ("the supplementary deed") provided that land for the airport was to be acquired by the Crown and then vested in the Auckland Regional Authority under s 19 of the Reserves and Domains Act 1953. (The Auckland Regional Authority Act 1963 had come into force on 25 October 1963 and had provided for the Auckland Regional Authority to assume liability for those functions, assets and liabilities of the Auckland City Council connected with the airport.)

[10] The appellants' land was first officially considered by a Gazette Notice of 30 January 1975 which read as follows:

> Pursuant to section 32 of the Public Works Act 1928, the Minister of Works and Development hereby declares that that a sufficient settlement to that effect having been entered into, the land described in the Schedule hereto is hereby taken for an aerodrome from and after the 30th day of January 1975.

[11] At the time, it was contemplated that a second runway would cross the land. There is not, therefore, any challenge to the lawfulness of the initial acquisition.

*Land is acquired from the Craigie Trust*

[12] By Gazette notice of 1 December 1977 it was declared:

> Pursuant to section 35 of the Public Works Act 1928, the Minister of Works and Development hereby declares the land described in the Schedule hereto to be Crown Land subject to the Land Act 1948, as from the 1st day of December 1977.

[13] Then, by Gazette notice of 12 October 1978 it was declared:

> Pursuant to the Land Act 1948, the Minister of Lands hereby sets apart the land, described in the Schedule hereto, as reserves for local purpose (aerodrome), and further, pursuant to the Reserves Act 1977, vests the said

> reserves in the Auckland Regional Authority, in trust for that purpose subject to the deed between the Crown and the Auckland City Council, dated 25 November 1963 and the deed between the Crown and the Auckland Regional Authority, dated 14 April 1966.

## The legislative framework

[14] The Public Works Act 1928 ("PWA 1928") was in force at the time the Craigie trust land was acquired. When the PWA 1928 was enacted, it made no express reference to civil aviation, or to aerodromes, although s 2(1) of the Public Works Amendment Act 1935 empowered the Governor-General or a local authority "to take or otherwise acquire under the provisions of the principal Act any area of land required for the purposes of an aerodrome". "Aerodrome" was not defined until 1956, when the PWA 1928 was amended a second time. Section 7(1) of the Public Works Amendment Act 1956 provided that:

> For the purposes of the principal Act the term "aerodrome" means an aerodrome or proposed aerodrome that is owned or controlled by the Crown or a local authority.

[15] Section 35 of the PWA 1928 provided, relevantly, as follows:

> **35 Land taken for public work and not wanted may be sold, etc.—**
>
> (1) If it is found that any land held, taken, purchased, or acquired at any time under this or any other Act or Provincial Ordinance, or otherwise howsoever, for any public work is not required for that public work, the Governor-General may, by an Order in Council publicly notified and gazetted, cause the land to be sold under the following conditions:
>
> (a) A recommendation or memorial, as the case may be, as provided by section 23 of this Act shall be laid before the Governor-General by the Minister or local authority at whose instance the land was taken describing so much of the said land as is not required for the public work...:
>
> (b) The Minister of the local authority, as the case may be, shall cause the land to be sold either by private contract to the owner of any adjacent lands, at a price fixed by a competent valuer, or by public auction or by public tender...:
>
> ...
>
> Provided also that in the case of any land so held, taken, purchased, or acquired for a Government work, if the land is not required for that purpose, or if for any other reason the Minister considers it expedient to do so, he may at any time without complying with any other requirements of this section,

> by notice in the *Gazette*, declare the land to be or to have been Crown land subject to the Land Act 1948 as from a date to be specified in the notice which date may be the date of the notice or any date before or after the date of the notice; and as from the date so specified the land shall be or be deemed to have been Crown land subject to the Land Act 1948:
>
> Provided further that in the case of any land so held, taken, purchased or acquired for a local work, if the land is not required by the local authority for that purpose or if for any other reason the Minister and the local authority agree that it is expedient to do so, the Governor-General may, on the recommendation of the Minister and without complying with any other requirements of this section, by Proclamation declare the land to be Crown Land subject to the Land Act 1948, and thereupon the land shall vest in the Crown as Crown land subject to that Act and may be administered and disposed of under that Act accordingly.
>
> ...

[16] The effect of the two provisos in s 35 was to permit, upon agreement between the Minister and the relevant local authority, land previously taken under the PWA 1928 to be vested in the Crown and thereafter subject to the Land Act 1948 ("Land Act"). By this mechanism land not required for the purpose for which it was taken became Crown land in terms of the Land Act.

[17] From 1 December 1977 the trust land became subject to the Land Act and from 12 October 1978 the trust land was set apart as a reserve under s 167(1) of the Land Act and, pursuant to the Reserves Act 1977 ("Reserves Act"), vested in the Auckland Regional Authority in trust for the local purpose of an "aerodrome".

[18] In relevant part, s 167 of the Land Act provides:

> **167 Land may be set apart as reserves**
>
> (1) The Minister of Conservation may from time to time, with the prior consent in writing of the Minister of Lands, by notice in the *Gazette*, set apart as a reserve any Crown Land for any purpose in which in his or her opinion is desirable in the public interest. Every such notice shall take effect from the date thereof or from such later date as is specified in the notice.
>
> ...
>
> (2) Upon the notice aforesaid being published in the *Gazette*, the land described therein shall be and be deemed to be dedicated to the purpose for which it was reserved, and may at any time thereafter be granted for that purpose in fee simple, subject to the condition that it shall be held in trust for that purpose unless and until that purpose is lawfully changed.

...

> (4) Where any Crown land is set apart as a reserve under this section for any public purpose which is a "Government work" within the meaning of the Public Works Act 1928, the land so set apart shall be deemed to be subject to that Act, save that section 35 of that Act, other than the second and third provisos to that section, shall have no application thereto.

[19] The effect of s 167(4) was to make the sell-back provisions of s 35 of the PWA 1928 inapplicable to the trust land.

[20] Having declared the trust land set apart as a reserve under the Land Act, the Gazette notice of 12 October 1978 then invoked the Reserves Act, pursuant to which the trust land was vested in the Auckland Regional Authority ("ARA"). The ARA was to hold the land in trust, for the declared local purpose of an aerodrome, subject to the establishing deeds.

[21] In relevant part, s 26 of the Reserves Act provides:

> **26 Vesting of reserves**
>
> (1) For the better carrying out of the purposes of any reserve (not being a Government purpose reserve) vested in the Crown, the Minister may, by notice in the *Gazette*, vest the reserve in any local authority or in any trustees empowered by or under any Act or any other lawful authority, as the case may be, to hold and administer the land and expend money thereon for the particular purpose for which the reserve is classified.
>
> (2) All land so vested shall be held in trust for such purposes as aforesaid and subject to such special conditions and restrictions as may be specified in the said notice.

[22] In *Dunbar v Hurunui District Council* HC CHCH CIV 2004-409-000171 5 August 2004, Panckhurst J stated that land held (under the predecessor of s 26 of the Reserves Act) as a "public reserve" was not subject to the PWA 1981. The discussion in that case is not, however, germane to the present case because the trust land was held for a public work (aerodrome), whereas in *Dunbar* the reserve was not a public work.

[23] Finally, by Gazette notice of 30 October 1980, the trust land was reclassified as a reserve under the Reserves Act, in the following terms:

> Pursuant to the Reserves Act 1977, and to a delegation from the Minister of Lands, the Assistant Commissioner of Crown Lands hereby declares the reserve, described in the Schedule hereto, to be classified as a reserve for local purpose (site for aerodrome), subject to the provisions of the said Act.

[24] From 12 October 1978, the trust land was vested in the ARA and held on trust for the local purpose of an aerodrome, and subject to the establishing deeds.

*The Public Works Act 1981*

[25] The PWA 1981 came into force on 1 February 1982. Part 3 of the Act, of which s 40 was a part, was entitled "Dealing with land held for public works". Section 40, in its current form, provides as follows:

> **40 Disposal to former owner of land not required for public work**
>
> (1) Where any land held under this or any other Act or in any other manner for any public work—
>
> (a) Is no longer required for that public work; and
>
> (b) Is not required for any essential work;
>
> (c) Is not required for any exchange under section 105 of this Act—
>
> the Commissioner of Works or local authority, as the case may be, shall endeavour to sell the land in accordance with subsection (2) of this section, if that subsection is applicable to that land.
>
> (2) Except as provided in subsection (4) of this section, the Commissioner or local authority shall, unless he or it considers that it would be impractical, unreasonable, or unfair to do so, offer to sell the land by private contract to the person from whom the land was acquired or to the successor of that person, at a price fixed by a registered valuer, or, if the parties so agree, at a price to be determined by the Land Valuation Tribunal.
>
> (3) Subsection (2) of this section shall only apply in respect of land that was acquired or taken—
>
> (a) Before the commencement of this Part of this Act; or
>
> (b) For an essential work after the commencement of this Part of this Act.
>
> (4) Where the Commissioner or local authority believes on reasonable grounds that, because of the size, shape, or situation of the land he or it could not expect to sell the land to any person who did not own land adjacent to land to be sold, the land may be sold to an owner of adjacent land at a price negotiated between the parties.

> (5) For the purposes of this section, the term "successor", in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person.

[26] Mr Carruthers submitted, and Hugh Williams J accepted, that the trust land became subject to s 40 on 1 February 1982. Mr Carruthers submitted that, as by that date the trust land was no longer required for the public work for which it had been acquired, namely an aerodrome, the value of the land should be fixed as at 1 February 1982. We are satisfied that, regardless of whether the trust land was "no longer required for [the] public work" at that time, AIAL could not be required now to offer the land back at its 1982 valuation. There are possibly two reasons why that is so.

[27] First, the public work fell within s 224 of the PWA 1981. The relevant parts of the section provided:

> **224 Government and local authority may combine in works of both national and local importance**
>
> (1) Notwithstanding anything to the contrary in any Act or rule of law, where in the opinion of the Minister of Finance and the Minister of Works and Development any undertaking, whether a public work within the meaning of this Act or not, is of both national and local importance, the Minister of Works and Development and any local authority or local authorities may enter into and carry out such agreement for the acquisition, execution, control and management of the undertaking as may to them seem most suited to the circumstances.
>
> ...
>
> (19) Notwithstanding anything to the contrary in this Act, any land taken, acquired or used for any undertaking in respect of which an agreement has been made under this section may be transferred or leased to any party to the agreement, or sold or otherwise disposed of, and the proceeds thereof shared or distributed, in accordance with the provisions of the agreement.

[28] Section 224 was, in the PWA 1981, the corresponding provision to s 31 of the Finance Act. By virtue of s 20A of the Acts Interpretation Act 1924, the joint venture deeds, which had been entered into pursuant to s 31 of the Finance Act, were now to be treated as if they had been made under s 224.

[29] The probable effect of s 224(19) was that the joint venture deeds, in so far as they provided for the matters specified in subs (19), trumped s 40.

[30] Secondly, AIAL was not in existence in 1982. Even if the joint venture had become potentially subject to s 40, its liability to the Craigie Trust would not pass to AIAL unless such was subsequently agreed by AIAL. As we shall show, this was never agreed. Mr Carruthers never clearly articulated how any potential obligation on the Crown or the joint venture could have become an obligation of AIAL.

[31] Neither of these reasons appears not to have been advanced and certainly not emphasised before Hugh Williams J. Had they been, we suspect he would have come to the same conclusion we have.

*The 1980s: Auckland Airport is privatised*

[32] In 1987 the Auckland Airport Act 1987 ("Auckland Airport Act") was enacted. Its long title stated that it was:

> An Act to provide for the incorporation of a company to own and operate Auckland International Airport, for the transfer of airport assets and liabilities of the Crown, the Auckland Regional Authority, and certain local authorities to that company, for the payment to the Crown and those local authorities of the existing reserves of the airport...

[33] Section 7 provided as follows:

> **7 Additional provisions relating to vesting of airport assets and airport liabilities in company:**
>
> ...
>
> (4) The provisions of this Act vesting any assets or liabilities in the company shall have effect notwithstanding any enactment, rule of law or agreement, and, in particular, but without limitation, the provisions of this Act vesting any land in the company shall have effect notwithstanding any provision contained in the Land Act 1948, the Reserves Act 1977, or the Public Works Act 1981 or in any other Act relating to land.

[34] Pursuant to the Auckland Airport Act, the Auckland Airport (Vesting) Order 1988 was made. Section 3 of the Order vested airport assets and liabilities in the newly incorporated AIAL on 1 April 1988.

[35] Section 9 of the Auckland Airport Act dissolved the joint venture deeds and by s 4(6) AIAL was deemed to be an airport company within the meaning and for the purposes of the Airport Authorities Act 1966 ("Airport Authorities Act"). AIAL was, by s 3D of the Airport Authorities Act, deemed to be a "Government work" for the purposes of the PWA 1981. A new definition of "public work" was introduced to the PWA 1981 by s 2(5) of the Public Works Amendment Act (No 2) 1987 which came into force on 31 March 1987. The new definition provided that "Government works" are "public works". This, as Hugh Williams J noted (at [103]), confirmed that the airport, now incorporated as AIAL, was a public work.

[36] The effect of these statutory changes was that, from 1 April 1988, AIAL could be subject to the s 40 regime if the requirements of that section were triggered.

[37] The other reason for the trust land's previous exemption from the s 40 regime disappeared: see [28] above. The land was no longer held by a joint venture, with the consequence that s 224(19) was not available to AIAL.

[38] We are satisfied that from 1 April 1988 AIAL was subject to the s 40 regime. It did not take on, however, any potential Crown liability under s 40. In that respect, we differ from the conclusion reached by Hugh Williams J.

[39] The joint venture was not subject to the s 40 regime while it remained in existence. There was no potential liability to be passed on in any event.

[40] Moreover, we consider that s 7(4) of the Auckland Airport Act vested the assets in AIAL free from any potential liability under the PWA 1981.

[41] Further, s 7(1)(c) of the Auckland Airport Act provided further protection to the Crown. It provided that nothing effected or authorised by the Act should be regarded as placing the Crown, the ARA, any constituent authority or any other person in breach of any enactment, which would include the PWA 1981.

[42] Finally, the Auckland Airport Act provided for all the assets and liabilities of the joint venture to be listed, with values attributed to each asset and liability: see s 6. Those assets and liabilities were then specified in an Order in Council (s 6(3)) and

then transferred to AIAL. The obvious intent of this statutory provision was that AIAL should acquire a clean balance sheet, with all its assets and liabilities correctly valued and approved by Order in Council. No potential liabilities under s 40 with respect to the trust land or any other airport land were mentioned in the statutory list.

[43] The Auckland Airport Act was further amended by the Civil Aviation Amendment Act 1992. Section 39 of that Act added new subs (4A) to s 7. The new subs (4A) provided that, where land had been transferred under the Auckland Airport Act, ss 40 and 41 of the PWA 1981 applied to the land "as if the company were the Crown and the land had not been transferred under this Act".

[44] This interpretation explains why the enactment of subs (4A) attracted little attention in the debates and submissions on the Civil Aviation Amendment Bill. Subsection (4A) was not applying ss 40 and 41 to AIAL for the first time, because those sections had been in effect from 1 April 1988. It clarified to whom an offer back would be made if airport land became surplus.

[45] Our conclusion is consistent with the observations of this Court in *Port Gisborne Ltd v Smiler* [1999] 2 NZLR 695. That case involved consideration of the Port Companies Act 1988, s 26 of which provided that when land was transferred to port companies, s 40 of the PWA 1981 did not apply to the transfer, but that after the transfer s 40 applied as if a port company were a Harbour Board and the land had not been transferred. The Court in *Smiler* held that the purpose of s 26 was twofold: first, to avoid argument that transferring land to a port company triggered s 40, and secondly, to make plain that the transfer did not deprive a person having the right given by s 40 in respect of Harbour Board land of that right.

[46] The answer to the second question on appeal must, therefore, be yes. When the airport was vested in AIAL, the joint venture deeds were dissolved and the exemption from the s 40 offer-back regime conferred by s 224(19) of the PWA 1981 ceased to apply to AIAL. The critical date was 1 April 1988. It was on that date that AIAL became subject to s 40 of the PWA 1981, and the mechanics of that position were clarified by s 7(4A) of the Civil Aviation Amendment Act 1992.

**Scope of the public work**

[47] As cases under s 40 of the PWA 1981 go, the present one is unusual in that it does not involve land having been acquired for some future activity which has not come to fruition or where, over the course of time, there has been a diminution of the activity and land at the periphery is no longer necessary. Indeed, under s 40 the original purpose for which land was acquired is only one part of the issue. Section 40 is directed to land "held for a public work". The focus must be on why it is held rather than simply on the purpose for which it was acquired.

[48] We accept AIAL's submission that the inquiry as to why the land is now held is not limited to the specific words which were used in the documents that effected the initial acquisition. Rather, there must be an overall assessment of what was contemplated in terms of the land's development and use, and what continues to be contemplated in those respects.

[49] The historical development of Auckland Airport leaves no room for debate that the entire area of over 1,000 hectares was acquired so that the grand vision of New Zealand's primary international airport could be implemented. From the project's outset, it was the intention of government (and subsequently of local authorities) to create a major gateway airport that would include not merely an airstrip and adjoining terminal, but both air-side and land-side functions, ancillary commercial activity and land available for expansion and development. All the contemporary evidence, and particularly the establishment deeds, reflect a commitment to a major national activity which inevitably would involve ongoing development and in respect of which flexibility and adaptability to advances in aviation technology and requirements had to be hallmarks.

[50] In light of this practical reality, it is unduly semantic to read down this complex inquiry by technical dissection of the word "aerodrome" which appeared in the first Gazette Notice.

[51] The PWA 1981 defined "aerodrome" in the following way:

> Aerodrome means any defined area of land or water intended or designated to be used either wholly or partly for the landing, departure, movement, and servicing of aircraft; and includes any buildings, installations, roads, and equipment on or adjacent to any such area used in connection with the aerodrome or its administration; and also includes any defined air space required for the safe operation of aircraft using the aerodrome; and also includes a military airfield.

[52] The more modern word, "airport", is defined in the Airport Authorities Act 1966 in a manner which resonates with the earlier provision:

> Airport means any defined area of land or water intended or designated to be used either wholly or partly for the landing, departure, movement, or servicing of aircraft; and includes any other area declared by the Minister to be part of the airport; and also includes any buildings, installations, and equipment on or adjacent to any such area used in connection with the airport or its administration.

[53] As Mr Carruthers realistically accepted in his submissions:

> What is said to be "used in connection with the aerodrome" will always be a matter of fact and degree in the context of the 1981 Act, however under the statutory definition it will always have to be connected to the core aerodrome activities. How "connected" any given use is with the aerodrome, will exist on a spectrum.

[54] Two reports preceded the development of Auckland Airport, both of which support AIAL's submission that airport development and planning is a dynamic and long-term exercise. The first of those reports was the Tymms Report, which was commissioned by the Crown in 1948 and prepared under Sir Frederick Tymms (leader of the United Kingdom Civil Aviation Mission) on the organisation, administration and control of civil aviation in New Zealand. The second was the Fisher Report, which was commissioned by the Crown and Auckland mayors and prepared by airport planning company Leigh, Fisher and Associates, on probable future airport developments. Those two reports, and, even more expressly, the principal and supplementary deeds, make abundantly clear that the development of Auckland Airport was not a short-term endeavour. Nothing which occurred in the subsequent privatisation of AIAL altered that.

[55] In his extensive judgment, Hugh Williams J (from [115] to [206]) undertook a painstaking analysis of the evidence which had been given by the opposing aviation experts: Mr Morris Garfinkle (who was an attorney, former part-owner of

an airline and experienced aviation consultant of 20 years), called by the Craigie Trust, and Mr Peter Smith (an engineer specialising in airport planning and development for more than 35 years), called by AIAL.

[56] The Judge also analysed evidence from other witnesses including Mr Donald Huse (who had been the airport's Chief Executive Officer), Mr Wayne McDonald (an engineer with the airport for eight years) and Mr Anthony Gollin (who had initially worked for the Ministry of Transport and subsequently in various roles for AIAL). He also heard evidence from Mr Gregory Fordham. Mr Fordham was the Managing Director of Airbiz Aviation Strategies Pty Ltd, a company which had been involved in airport planning for 28 years. He was also directly involved in preparing the Auckland Airport 1988 and 1990 development plans, the 2005 master plan and the 2007 draft freight master plan.

[57] The issue before Hugh Williams J, in light of the competing expert and historical material, was whether, for the purposes of determining whether land was held for a public work in terms of s 40, a cohesive approach to characterising the land was required or whether there could be a patchwork assessment of specific parcels of land within the total area which was loosely called "the airport".

[58] He undertook an analysis of the use of the word "aerodrome". He was bound to do so, since the word had featured so heavily in much of the evidence and submissions. However we consider that focus on that word is misplaced and unhelpful.

[59] This Court recently has considered the ambulatory interpretation to be accorded to words which have fallen out of common usage: see *Big River Paradise v Congreve* [2008] 2 NZLR 402. Like Hugh Williams J, we are satisfied that an ambulatory approach to the word "aerodrome" and what is encompassed if such a concept has changed significantly over time, should be adopted in this case.

[60] We endorse Hugh Williams J's conclusion that:

> [200] An ambulatory interpretation of the word "aerodrome" can therefore properly be held to encompass the facilities commonly found at airports –

> Auckland International in particular – and changing over time to what was and is now available.

[61] There can be no question that, on 1 January 1988, the entire 1,000 hectares were held for a public work, namely, the provision, expansion and development of a modern airport, with all its connected and associated operational, administrative and commercial activities.

[62] An important element of the appellants' argument before us was that some of the trust land was used for activities which could be viewed as purely commercial, rather than strictly necessary for the functioning of the airport. Mr Carruthers drew our attention to a number of commercial facilities developed on the land. These included:

- NZ Post (operating since 1979);
- Service stations (operating since 1993);
- Flyways (operating since 1995);
- Retail banking services (operating since 1997);
- Car rental facility (operating since 1997);
- Office space – leased to companies unrelated to the operation of Auckland Airport and marketed accordingly (operating since 2000);
- Koru Club Car Care – providing parking and valet service for elite customers (operating since 2000);
- Toyota car dealership (operating since 2000);
- Fast food restaurants – including McDonalds, Dunkin Donuts, Subway and St Pierre's Sushi (operating since 2001);

- Warehouse Stationery – providing low-priced office and stationery products (operating since 2001);

- Foodtown – a large-scale supermarket (operating since 2001);

- Fedex (operating since 2001);

- Priority Fresh (operating since 2002);

- Butterfly Creek – offering a playground with a train circulating the wetlands with a new crocodile attraction, a petting zoo, a bar and cafe and wedding facilities marketed across the city (operating since 2003); and

- Treasure Island Adventure Golf – offering children's attractions such as mini golf and a large pirate ship (operating since 2003).

It was also noted that the much of the land acquired from the appellants remained undeveloped.

[63] The appellants also stressed that, in the 30 years since the land was acquired, there have been only three occasions on which strictly "airport" facilities have been even proposed for the land. None of these proposals came to fruition.

[64] The appellants argue that the High Court Judge adopted a fallacious approach by assuming that because it was desirable or convenient to have land available for activities adjacent to the public work, the criteria for retention were met.

[65] Mr Carruthers strenuously argued that the appellants' land would never have met the test for compulsory acquisition on the basis of the purposes for which it is now being used. He realistically accepted that the public work for which the land was held included more than simply the runway (and land for future runway development) and associated terminals. But he submitted that the purely commercial arm of AIAL's activities could never fulfil the necessary requirements for retention.

He acknowledged that there were grey areas in respect of cargo sheds, customs facilities, and the like, which were harder to classify.

[66] Whatever argument may be sustainable about land at the perimeter of the total airport complex, we are unable to see how Mr Carruthers's submission can succeed in respect of a parcel of land which lies at the very core of the airport precinct. Some of the trust land has been used for major arteries into the existing terminals. Such land was clearly held for a public work. That conclusion is reinforced when regard is had to the fact that a second runway near to the other side of the land under consideration is already in contemplation.

[67] The appellants' entitlement to compensation was not finally settled for a substantial period of time after the land was acquired. An initial payment was made, and then, mostly at the request of the appellants, there was a delay before matters were finally disposed of.

[68] After a lengthy hearing before the Land Valuation Tribunal, an additional award of compensation of $258,000 was made as against a claim for $434,000.

[69] This award was made after the PWA 1981 came into force. At no time while the compensation claim was in train was it suggested that the land was not being held or used for aerodrome or airport purposes. The compensation claim was predicated on the current and likely ancillary commercial uses, which the Craigie Trust acknowledged were occurring.

[70] That apart, on the land acquired from the Craigie Trust, there has been developed:

- Air New Zealand flight catering kitchens;
- the realignment of George Bolt Drive;
- the construction of Tom Pearce Drive;

- the AFFCA Building which provided facilities for freight forwarders operating from Auckland Airport;

- provision for various utility activities; and

- the construction of the Aviation Turbine Fuel Pipeline ("AVTUR pipeline").

[71] Since AIAL's incorporation, there has been an increase in commercial activity on land which has otherwise not been utilised. All of this has been done on the basis of short-term development. AIAL has always been able to ensure that, in the medium to long-term, any direct aviation functions would not be compromised by other activity.

[72] It is instructive to note that, at one point, a second runway would have included the trust land and other taxiways and land-side aviation support, as well as an access road. In a further development plan, there was a possibility of the land being used as part of a passenger terminal and commercial support services. None of these projects are in and of themselves decisive of the issue before us, but they demonstrate the flexibility which is essential in a public work such as a modern airport. Assessing the nature of the airport as a whole, regard must be had to the needs for parking, shopping, and ancillary service requirements. Such services are necessary when there is not only an ever-increasing number of tourists using the airport, but an ever-increasing number of staff permanently supporting its operation, and who work in a somewhat isolated area where there is a need for everyday commerce.

[73] Mr Carruthers relied heavily on publications issued by AIAL which show a distinction between aeronautical and non-aeronautical activities. Particular emphasis was placed on Board papers and development plans throughout the last decade, which demonstrated that there was concentrated attention to the commercial property portfolio and the possibility of exploiting more effectively the value of the land by undertaking commercial activities, which were not necessarily an adjunct to the core activity of running an international airport.

[74] We are satisfied that the entire area of land described in the Auckland Airport Act continues to be held by AIAL for airport purposes.

[75] The evidence does not demonstrate that there are, on a realistically discrete basis, segments of land within that whole which are no longer held for that airport purpose. We accept that some segments may be being used for other purposes in the meantime and some areas have not been developed. However, that is the very nature of a modern international airport precinct. To hold that those segments ought to be cleaved off from the whole and offered back, would be quite unworkable.

[76] The contention that the appellants' land could be carved out so that one was left with a patchwork of land held by the respondent interspersed with, and splintered by, land belonging to private owners, is unrealistic. If the appellants' former land could be treated in this fractured way just because parts of it are not currently in use, the same standard would have to apply to the land of other former owners. Such an outcome would wholly frustrate the flexibility that is necessary for planning, co-ordination, development and responding to changing demands for a modern international airport.

[77] The particular circumstances which may be shown to exist in a particular segment of land in the AIAL precinct are not the issue. We are satisfied that Hugh Williams J was correct to conclude that the land acquired from the appellants is integral to the operation and activities of the respondent, and continues to be held and used for the purposes for which it was acquired.

[78] Although we are satisfied that, as at 1 April 1988, AIAL became subject to s 40 of the PWA 1981, the use to which AIAL has put and is putting the relevant land is within the scope of the public work for which the land is held, and for which it is still required.

**"Impracticable, unreasonable or unfair" and the "character" of the land**

[79] We agree with Hugh Williams J that the onus would be on AIAL, if the land was no longer required for a public work, to demonstrate either that it would be

"impracticable, unreasonable or unfair" to require it to be offered back to the appellants, or that the character of the land had changed such that AIAL was exempted, by s 40(2)(b), from offering it back. The issue does not arise, but for completeness we refer briefly to the point.

[80] Hugh Williams J said that had it been necessary to so decide, he would have concluded that it would not have been impracticable to require the whole of the Craigie Trust land to be offered back, but Mr Carruthers had a fall-back position in the High Court which attracted the Judge.

[81] At our request, counsel offered a preliminary view as to the sort of order the Court should consider if the issue of buy-back arose.

> 1 Pursuant to s 40(2) of the 1981 Act the respondent shall offer to sell the land (allotment 508) Parish of Manurewa, and comprised in certificate of title 78D/195, North Auckland Land Registry), excluding all formed roads which includes George Bolt Memorial Drive and Tom Pearce Drive and the flight kitchen on Tom Pearce Drive, to the appellants at the current market value of the land as at 1 April 1988 or some later date.
>
> 2 On conditions that the appellants grant in favour of the respondent the following matters in relation to Areas A, B, C and D of the Land, as identified on the plan attached to this judgment.
>
> **Area A**
>
> (a) Easements as necessary to protect the Avtur Pipeline and any other services; and
>
> (b) A licence or ground lease for the power station at nominal rental, or, a separate title to be granted for the land required for that power station; and
>
> (c) A boundary realignment to exclude the shopping centre at the North Western aspect of the land; and
>
> (d) A ground lease at current market rental and on reasonable terms for those buildings and associated improvements already on the land.
>
> **Area B**
>
> (e) A ground lease at current market rental and on reasonable terms and for those buildings and associated improvements already on the land.

**Area C**

(f) A ground lease at current market rental and on reasonable terms and for those buildings and associated improvements already on the land.

**Area D**

(g) A ground lease at current market rental and on reasonable terms for those buildings and associated improvements already on the land.

3 Any issues as to the practical implementation of these orders are to be determined at a separate remedy hearing before the trial Judge (including but not limited to the current market rent for the ground leases).

[82] Hugh Williams J concluded that, although there would be practical difficulties in requiring the whole of the land to be returned, they would not be insuperable. The Judge envisaged the type of arrangement outlined in Mr Carruthers's suggested order.

[83] Nonetheless, the Judge held that if necessary he would have concluded that it would have been unreasonable or unfair to require AIAL to offer back the land, as the Auckland International Airport was "an infrastructural asset of critical importance to the New Zealand economy" (at [214]).

[84] Having spoken about its important and contemporary role as the major international airport in the country, the Judge said:

> [216] In part, Auckland International's success in fulfilling that role has resulted from its ability to plan, install facilities and react to evolving aviation and users' requirements unconstrained by lack of land or the need to take the interests of other landowners within its present boundary into account. It has, sensibly, dealt with land use by users in a way which maintains maximum flexibility to accommodate future changes.

[85] The Judge also found that, in terms of s 40(2)(b), there had been a significant change in the character of the land formerly owned by the appellants.

[86] We disagree with the Judge that it would not have been impracticable for AIAL to offer back the land to the appellants, but we endorse his view that it would have been unreasonable and unfair, and with his conclusion that there had been a significant change in the character of the land so that AIAL was exempted from offering it back. In light of the passage of time and the radical alteration of the entire

area of the airport precinct, offering back parts of the land could not be appropriate on any basis.

**Conclusion**

[87] As a result, the judgment should be explained. First, by order A, we dismiss the Craigie Trust's appeal. Their claim to have the land transferred back rightly failed.

[88] Secondly, AIAL's cross-appeal is also essentially dismissed. We have changed the wording of the two declarations contained in Hugh Williams J's order A. His order A(2) was a declaration that AIAL was subject to the obligations in s 40 of the PWA 1981. That is not the position. Although the Craigie Trust land is held for a public work in terms of the PWA 1981, AIAL is not subject to the obligations in s 40 as nothing has happened to trigger the obligations set out in that section.

[89] Thirdly, Hugh Williams J's second declaration, in order A(3), is also no longer appropriate in light of our discussion. We see no significance in the particular phraseology of "aerodrome" and "airport". We prefer a simpler declaration to the effect that the Craigie Trust land is "still required for a public work, namely the Auckland International Airport".

[90] Fourthly, we do not consider Hugh Williams J's order B was truly an order. It expressed the Judge's view in the event that he was wrong on what he otherwise held. What would or should have happened in the event of a finding that the land was no longer required for a public work does not arise on our view of the case either. Like Hugh Williams J, we have expressed an opinion on the matter, but, again like his comments, our comments are not decisive. The Judge's order B was not an order at all. For that reason, we have not quashed it – there is nothing to quash – even though our view on this matter is slightly different from the Judge's.

[91] The Craigie Trust must pay AIAL costs on the appeal. This appeal comes within the definition of a "complex appeal". It justified the retention of senior QCs

on both sides, and for that reason we have provided for an uplift of 50 per cent in terms of r 53C(1)(b) of the Court of Appeal (Civil) Rules 2005. The appeal should be treated as having taken the full two days of the hearing.

[92] Although AIAL had some success on its cross-appeal, we hold that the fair result is that costs should lie where they fall with respect to that. This means AIAL should not recover for its preparation costs on the cross-appeal.

Solicitors:
Meredith Connell, Auckland, for Appellants
Russell McVeagh, Auckland, for Respondent

**BEFORE THE ENVIRONMENT COURT**
**I MUA I TE KOOTI TAIAO O AOTEAROA**

**Decision No. [2018] NZEnvC 25**

| | | |
|---|---|---|
| | IN THE MATTER | of the Resource Management Act 1991 |
| | AND | of a direct referral pursuant to s 87G of the Act |
| | BETWEEN | MINISTER OF CORRECTIONS |
| | | (ENV-2017-AKL-92) |
| | | Applicant |
| | AND | OTOROHANGA DISTRICT COUNCIL |
| | | Consent Authority |

Court: Environment Judge J E Borthwick
Environment Commissioner A C E Leijnen
Environment Commissioner R Bartlett
Environment Commissioner G Paine

Hearing: In Chambers at Christchurch

Date of Decision: 1 March 2018

Date of Issue: 1 March 2018

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**FINAL DECISION OF THE ENVIRONMENT COURT**

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A: The notice of requirement is confirmed subject to conditions labelled "A" and the following associated plans:

(i) Figure 16(a): Building Zone with Maximum Building Height R.L.s, Revision 0, dated 17 January 2018;
(ii) Figure 1: Local Context Plan, Revision A, dated 14 August 2017;
(iii) Landscape, Ecological Enhancement and Mitigation Plan, Revision D, dated 7 February 2018;
(iv) Department of Corrections, Waikeria Prison Development Option 1 Figure 27A, dated 11 August 2017;

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

(v) Department of Corrections, Waikeria Prison Development Option 1 Revised (overbridge) (DWG NO: 14029A13B) dated 22 August 2018;

- all of which are attached to and form part of this decision.

B: Costs are reserved.

## REASONS

### Introduction

[1] On 21 December 2017 an Interim Decision was released concerning the Minister of Correction's alteration to an existing designation.[1]

[2] We were unable to make a final decision as the parties had not addressed whether changes to conditions affecting the height of buildings were within the scope of the designation.

[3] That aside, the court sought further submissions on a number of specified conditions including responses to amendments suggested by the court.

### Scope of amendments to notice of requirement

[4] At paragraph [50] of the Interim Decision, the court noted some members had considerable disquiet as to the manner that certain changes were introduced to the proposed conditions. After the hearing adjourned, supplementary evidence proposed altering the reduced ground level and, no party opposing the change, the change was not addressed by counsel in final submissions.

[5] The condition in question will enable the development to exceed the building envelope which was described in evidence as being the "worst" or "most extreme" level of effect on landscape and visual amenity.[2] Where land is filled the new condition will increase the height of buildings and facilities by 1 metre and 3 metres (subject to location). Given the attendant effect on visibility, and therefore visual amenity for residents at 12B and 52 Walker Rd, it was prudent even necessary, for counsel to establish scope for the amendments proposed.

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[1] *Minister of Corrections v Otorohanga District Council* [2017] NZEnvC 213.
[2] Goodwin, EiC at [45]; supplementary evidence dated 6 September 2017 at [7].

[6] In response to the Interim Decision counsel advised that they had amended the condition fixing reduced levels as the court had questions about an earlier version. While that may be so, we did not anticipate the direction of the change as it was not presaged in the evidence.

[7] The Minister and Otorohanga District Council filed broadly similar supplementary submissions in support of scope.[3] We were not referred to any authority from a senior court on the topic of the permissible scope of amendments to a notice of requirement. We accept, however, the approach taken by other divisions of the Environment Court. In particular, Judge Newhook's observations in *Sustainable Matata v Bay of Plenty Regional Council*[4] that:

> In many cases there are other contingencies that may lead to variations in the design. The designation process itself recognises this need for flexibility, and utilises the concept of Outline Plans. Nevertheless, the Act recognises that effects which are identified can be dealt with as part of the designation process, and in general consents require sufficient details for the Court to accurately be able to understand the nature and scale of effects created.
>
> ...
>
> The court has repeatedly noted its concerns that it *must*, in terms of both designations and resource consents, be able to understand both the scale and significance of the various effects. Generalised conditions and an outline Management Plan often do not achieve this outcome.

***Discussion***

[8] We are grateful for the submissions made by counsel for the Minister and Otorohanga District Council as to the scope of inquiry when modifications are proposed to a notice of requirement. The issue in this case turns on its own facts and in the circumstances, we will not propose a definitive test.

[9] The design parameters – or more particularly, the general lack thereof – was the subject matter of extensive discussion between the bench, counsel and the expert witnesses across all subject areas and the parties worked hard to address the environmental effects through successive condition sets presented during the hearing.

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[3] Dated 26 January 2018.
[4] [2015] NZEnvC 90 at [46] and [47].

[10] Because designations are flexible devices this necessitates careful attention is given to the conditions of the designation and, in particular, to those conditions the purpose of which is to constrain development within the limits/boundaries of effects that are considered acceptable by the expert witnesses and ultimately the court. As noted, few design parameters were proposed in the notice of requirement. Taken by itself, the single building height limit (which was not coupled with a reduced level) was incapable of ensuring the new facilities did not exceed the range of acceptable effects on landscape, rural character and visual amenity. This should have been evident to the parties given that the Minister's own witness has had to assume certain floor levels applied in order to assess effects.[5]

[11] The flexibility of the designation process does not extend to enabling adverse effects on the environment that are different in substance or materially greater than those effects assessed by the decision-maker and considered subject to Part 2. Whether the effects are different in substance or materially greater is a question of scale and degree. A decision to confirm the designation that is enabling in this way is unfair to persons who did not make a submission.

[12] In the NoR, the report writer assessed effects using floor levels based on existing contours. Given the land use consent authorising extensive earthworks within the Building Zone it would make no sense to propose a condition based on those contours. But this is beside the point. The Minister had adopted a building envelope being a "three dimensional envelope within which the construction, operation and maintenance of the future prison facilities will occur".[6]

[13] With the above principles in mind, we have reviewed the evidence of landscape experts, Messrs Goodwin and Mansergh. It is their opinion that the amendments made to certain reduced levels[7] would not result in effects on the residents (located some 700 m distance) that are materially different to those originally identified, indeed the height difference in the buildings will be difficult to discern at most locations. On the other hand, they also advised the adverse effects (which range between medium to high) will be extended by a period of 12-18 months (from 10 to now 12 years) before the Minister's

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[5] NoR, AEE, Report 6: Assessment of Landscape and Visual Effects.
[6] NoR, AEE, Report 6: Assessment of Landscape and Visual Effects, Glossary of Key Terms: Building Envelope.
[7] Reduced levels were introduced after the hearing commenced.

landscape plan ameliorates the same. It is not correct to suggest, therefore, there is no additive effect arising from the amendments proposed.

[14] We accept the change is within scope – although this is by the finest of margins. In reaching this conclusion, an important consideration has been the Minister's agreement to approach the affected residents and offer landscape and visual mitigation for each property. We will return shortly to Part 2, but the extension of effects over a longer period of time is not a sufficient reason to cancel the notice of requirement.

**Conditions**

[15] With some minor exceptions, the amendments proposed by the court to the final condition set were accepted by the parties.

***Mana whenua***

[16] While the parties were of the view that the alteration to the designation should be confirmed, they remained apart on a few conditions. These conditions largely affect the interests of Maniapoto Ki Te Raki, Mr Harold Maniapoto and Raukawa Charitable Trust and their concerns were set out in a reporting memorandum.[8] The court provided feedback[9] suggesting changes to conditions which the parties subsequently confirmed would resolve the outstanding matters in dispute as between them.[10] We will confirm the designation subject to the wording for the Mana Whenua Recognition provision proposed by the Minister and Raukawa. As all parties support the court's alternative wording of condition 145, with Maniapoto Ki Te Raki adding the term "mana whenua", we will make the amendment sought.

***Other conditions***

[17] The parties proposed amendments to other conditions, two of which we will discuss further.[11] The conditions concerned are those pertaining to stormwater management and housing affordability and availability.

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[8] Dated 7 February 2018.
[9] Minute dated 13 February 2018.
[10] Joint memorandum dated 16 February 2018.
[11] Joint memorandum dated 23 February 2018

[18] With that said, we have made some minor changes to further amendments proposed by the parties. These changes are editorial and are not intended to alter the substance of the relevant provision. The changes have been tracked.

*Stormwater management*

[19] In response to concerns raised by the court as to the paucity of evidence on the topic of stormwater discharge, the Minister proposed conditions addressing stormwater management (condition 26). The conditions require, amongst other matters, that any increase in peak flow is to be managed by ensuring compliance with hydrologic neutrality principles (condition 26(c)). "Hydrologic neutrality" was defined as being the pre-development stormwater discharge rate (which was not to be exceeded) and second, as a method for testing the achievement of this rate.[12]

[20] It was the court's view that the provision duplicated condition 26(a). Pointing out evidence led on behalf of the Minister that "hydrologic neutrality" is a methodology and not something that is to be achieved as such[13] we asked in a Minute whether what was intended by the condition was simply the employment of stormwater management systems and guidelines.[14] If we were correct about that, the conditions could be reworded and any references to "hydrologic neutrality" could be deleted.

[21] In the absence of any stormwater design (or in-depth analysis or modelling to validate predictions that stormwater effects were likely to be minor),[15] the court suggested an amendment to condition 8 to require the Outline Plan and Design Report to satisfy the following criteria:

- stormwater management will be designed to address the full hydrological cycle of the catchment and demonstrate that consideration has been given to any actual or potential changes to:
  - this cycle;
  - in-stream baseflows;
  - discharge to ground and change in shallow groundwater levels;

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[12] See joint memorandum dated 8 February 2018. The amendment was proposed by the parties in response to the Interim Decision.
[13] Transcript at 1231.
[14] Minute dated 20 February 2018.
[15] Bird, EiC at [7].

- the coincidence of peak volume and peak flow with a neighbouring catchment;
- frequency and volume of runoff;
- stream erosion; and
- risk to downstream infrastructure.

The report will address the effect on the environment from any of these changes and the measures required to minimise and mitigate the effects.

[22] The variables listed correspond with those mentioned by Mr Bird in evidence. Mr Bird has reviewed the amendment to condition 8 and has confirmed that it is consistent with his understanding of how the design of the stormwater management is to proceed.[16]

[23] The Minister, however, does not support the inclusion of the court's amendment to condition 8, saying that it does not change the outcomes for stormwater management, indeed it duplicates condition 26. We disagree. If it is the Minister's objective to adopt best practice stormwater management practices, condition 26 does not provide for this. Mr Bird's evidence was that Auckland Regional Council Technical Publication 10 was best practice. Under the parties' version of Condition 26(d), this condition restricts the application of this publication to treatment of contaminants.

[24] Second, condition 26(a)[17] adopts a single standard to address all effects (other than those arising in relation to contaminants). It is not our understanding that under Auckland Regional Council Technical Publication 10 best practice is restricted to the application of a single standard based on peak flows, or that this standard applies to address the full range of effects that may arise. Such an approach discourages wider consideration of the effect of the development on the environment.

[25] Alternatively, while the Minister takes no issue with the court's wording of the new provision in condition 8, he proposes instead that the provision be replaced to require stormwater management be consistent with Auckland Regional Council Technical Publication 10. Having reflected on the development of this topic during the proceeding, we conclude the better (surer) course would be to confirm the designation subject to the amendments set out in the Minute dated 20 February 2018.


[16] Joint memorandum dated 23 February 2018 at [8].
[17] Together with condition 26(c) which appears to be a duplicate provision.

*Housing availability and affordability*

[26] The prison expansion will give rise to increased competition for accommodation, housing and rental properties. The communities living in the surrounding towns are ranked well above average on the New Zealand Deprivation Index. The demand for accommodation associated with the prison will impact on housing availability and affordability and this is likely to have an effect, particularly on low income families. While there are other pressures in the housing market and the scale of effect cannot be quantified, "many" within the rental market will be affected.

[27] The Minister proposes to convene a Community Impact Forum of service providers, Council and iwi representatives whose objective it is to provide relevant advice to the requiring authority on measures to lessen and/or respond to changes in housing.

[28] During the hearing the bench discussed with the parties' experts their views on whether the members of the Forum would engage their own resources to research and report on these issues for the benefit of the requiring authority. In response, the Minister proposed that a group of independent technical specialists would report to the Forum on information relevant to their advisory role.

[29] The conditions contemplate that the Forum meet once every three months for a period of five years. In response to the Interim Decision the Minister has proposed an amendment to the conditions that potentially limit the obligation to obtain specialist advice to a single report. The change was not commented on in submissions and so the court sought clarification. The court queried whether the change has the potential to considerably curtail the utility of the Forum. With the exception of MKTR and Mr Maniapoto,[18] the parties, do not address the court's concerns but instead confirm there will be no updating of the report. They point out that the requiring authority and the Forum could seek further technical assistance and submit that this does not need to be provided for in the conditions.

[30] MKTR and Mr Maniapoto oppose the amendment sought by the Minister and the other parties. When agreeing to amend the relevant condition (condition 121) to refer to the obtaining of "a report", it was not their intention to limit the condition to a single report


[18] Memorandum dated 28 February 2018.

as now explained by the Minister. Indeed the conditions anticipate there may be more than one report (including conditions 121(b) and 125) and so they seek a condition enabling the Forum to seek further reports and for the Minister to fund those reports.

[31] Having reflected again on the development of this topic, we conclude the better course would be to confirm the designation subject to a condition acknowledging the Forum may recommend the requiring authority commission further reports from the independent technical specialists that are required to fulfil the Forum's objectives. With this addition, the role of the Forum will not be inadvertently constrained by an omission to make provision for the same in the conditions. The decision-making responsibility resides with the requiring authority if a recommendation is made, but given the importance of access to adequate housing we do not expect the requiring authority will unreasonably refuse the request.

[32] The court queried the effect of other changes made to housing conditions. Where these have not been commented upon by the parties, we have made changes to address the matters raised. The changes are tracked.

**Part 2**

[33] With regard to the role played by Part 2 of the Act, we bear in mind the dicta of Brown J in *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [110]:

> While the provisions in Part 2 are not operative provisions (in the sense of being sections under which particular planning decisions are made), they nevertheless comprise a guide for the performance of the specific legislative functions. As *King Salmon* said with reference to s 5:
>
> (a) [it] states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation;
> (b) [it] is a carefully formulated statement of principle intended to guide those who make decisions under the RMA.
>
> The other three sections supplement the core purpose in s 5 by stating the particular obligations of those administering the RMA in relation to the various matters identified.
>
> [footnotes omitted]

[34] The condition suite endeavours to engage with the whole of the environment. The conditions are not, therefore, to be interpreted as applying to discrete elements of the natural and physical environment.

[35] We are satisfied the alteration to the designation will recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. That it does so is a matter of national importance.[19] Prior to the lodgement of the notice of requirement and throughout the course of this proceeding the Minister has engaged directly with Māori, and in particular the mana whenua parties to this proceeding. The Minister has been willing to offer or accept conditions, the object of which is to recognise and provide for the relationship between mana whenua and the whenua and awa.

[36] The new conditions recognise that the existing prison has had an adverse effect on the relationship between mana whenua and the land and water and that, going forward, any additional effect arising from the intensification and expansion of the prison and degradation of the ecology will be minimised.[20] While the site of the designation is now owned by the Crown, and there are practical constraints to access because it is occupied by a prison, the Minister has, nevertheless, offered to enter into a relationship agreement with Maniapoto, Matakore, and Ngāti Te Kanawa mana whenua hapū and whānau, in order to recognise and provide for the enduring relationship of the hapū and whānau within the whenua, natural resources and assets comprised within the Waikeria Prison site and to provide for ongoing exercise by the hapū and whānau of kaitiakitanga.[21] The expression of kaitiakitanga is significant, as it imports into their relationship tikanga Māori.[22] Consistent with this is the Minister's commitment to consult with a Tangata Whenua Liaison Group in relation to key mitigatory measures, including the development of the Ecological Enhancement and Mitigation Plan.

[37] Other substantive provisions recognise and provide for the relationship with the whenua and awa in a direct way including, amongst other matters, the improvement to water quality by ceasing the direct discharge of treated sewage from the prison to a local stream, developing wetlands, extensive riparian planting, improving tuna habitat and a

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[19] Section 6(e) RMA.
[20] Condition 8(II).
[21] Condition 145.
[22] Section 2 RMA definition "kaitiakitanga".

new direction towards the management of stormwater.

[38] The alteration to the existing designation will bring both benefits and dis-benefits to mana whenua. The intensification of use of land taken from Māori under the Public Works Act is not regarded as a benefit by Maniapoto Ki Te Raki or Mr Harold Maniapoto – although the expansion will, as they acknowledged, increase local employment opportunities. Second, there are existing external pressures on the housing market affecting affordability and availability. The additive pressure on local housing, particularly on Māori, arising from the demands of the prison workforce and visitors will be an adverse effect. The scale of effect is unknown; whether it emerges will be influenced by the actions taken by Minister in response to the Community Impact Forum. While these tensions give rise to an effect on the environment – specifically the people and their communities and the social, economic and cultural conditions[23] – they are not addressed directly under ss 6-8 or for that matter the planning instruments.

[39] There will, however, be an adverse effect on the visual amenity of residents along Walker Rd which will remain unmitigated for 10-12 years and confirmation would be in tension with the outcomes under s 7(c).

[40] On the other hand, for the reasons outlined in the planning evidence, the expansion of the prison facilities at this site to meet the predicted shortfall in capacity and the expansion of this existing site is an efficient use and development of natural and physical resources (s 7(b)). For mana whenua the alteration to the conditions of the existing designations is a significant improvement on the status quo. The conditions of the designation will be to the wider benefit of the environment as the requiring authority now recognises the site's degraded ecosystems have intrinsic value (s 7(d)) and will implement measures to both maintain and enhance the quality of the environment (s 7(e)). Importantly, the requirement recognises and provides for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga as a matter of national importance, namely (s 6(a)) and also kaitiakitanga (s 7(a)).

[41] We give these benefits greater weight than the dis-benefits. This accords with the statutory recognition for the relationship of Māori and their culture and traditions with their ancestral lands and water is a matter of national importance. By providing for this


[23] Section 2 RMA definition "environment".

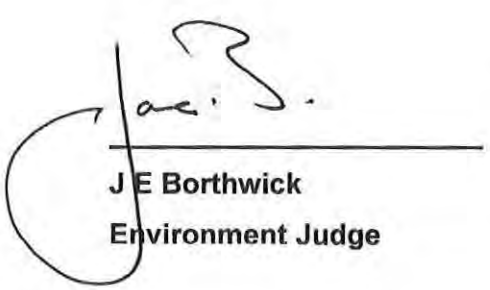
relationship, the designation embraces other values under s 7. That aside, the weighting accords with the policy in the various planning instruments.

**Outcome**

[42] Pursuant to s 149(U) RMA we confirm the requirement to alter an existing designation (listed as Designation D55 of the Otorohanga District Plan) is subject to conditions and plans labelled "A", attached to and forming part of this decision.

[43] Costs are reserved.

For the court:



**J E Borthwick**
**Environment Judge**

"A"

## 1. Amendments to Designation in Otorohanga District Plan

The designation is listed as Designation D55 in Appendix 16 to the Otorohanga District Plan (ODP) – Requiring Authorities, Designations and Heritage Orders.

1. Purpose:

   Construction (excluding the activities described in the resource consent RM170041 issued by Otorohanga District Council on 25 September 2017 for land south of Settlers Road), operation and maintenance of Prison and associated activities to accommodate up to 3,000 prisoners.

2. Legal Description:

   Section 2 SO 60097 and Sections 1 and 3 SO 455234 comprised in Computer Freehold Register 647680 (South Auckland Land Registration District).

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**Definitions**

**AEP** — Annual exceedance probability.

**Active Traffic Management** — is defined in the Code of Practice for Temporary Traffic Management (COPTTM), 4th Edition published 1 November 2012: Part 8 of the Traffic Control Devices manual which includes Manual Traffic Controllers using stop/go paddles, portable traffic signals, and pace vehicles (pilot).

**Associated facilities** — for the purposes of Conditions 10 and 11 include the following:

**Facilities within secure perimeter**

- surveillance equipment and lighting;
- gatehouse;
- prison management, security and operations support;
- prisoner receiving centre;
- specialised units including special treatment, at-risk and drug treatment unit;
- prisoner visits area;
- health centre;
- workshops / industries facilities;
- kitchens/laundries;
- cultural buildings;
- sports hall/gymnasium and sports field; and
- programme facilities such as classrooms, meeting rooms and staff offices.

**Non-Secure Facilities**

- surveillance equipment and lighting;
- prison access control point (boom gate);
- visitors reception centre;
- external deliveries store;
- internal roading;
- staff and visitor car parking;
- administration and staff amenities;
- facilities management and trade parking;

- prisoner Control Point; and
- LPG storage facilities.

**Building Zone** — the area of the Waikeria Prison site shown within the yellow outline on Figure 1.

**CLG** — Community Liaison Group.

**CIF** — Community Impact Forum.

**Construction works** — includes the laying of foundations, installation of infrastructure and all other activities associated with building the facility up to the point of all Code Compliance Certificates under the Building Act being issued by the Otorohanga District Council.

**New prison facilities** — are facilities constructed after [date of confirmation of NOR] within the Building Zone shown on Figure 1 to accommodate prisoners.

**Queue** — the queue length for the purposes of day to day monitoring shall be the maximum observed queue. The queue length for the purposes of monitoring and reporting under conditions 47, 49, 51, 52 and 53 is the 95th percentile back of queue.

**Secure perimeter**: a multi layered perimeter system with the most prominent features being a primary physical barrier.

**Waikeria Prison site** — the 1,276 hectare designation area described as Section 2 SO 60097 and Sections 1 and 3 SO 455234 comprised in Computer Freehold Register 647680 (South Auckland Land Registration District).

**MANA WHENUA RECOGNITION**

In recognition and acknowledgement of the enduring relationship of tangata whenua with Waikeria, and in the spirit of partnership and reconciliation.

A. The requiring authority recognises and acknowledges that:

- the Waikeria Prison site was taken from Maniapoto, Matakore, and Ngāti Te Kanawa hapū and whānau; and
- that the continued dispossession of this whenua, its natural resources and assets has adversely affected their descendants.

When implementing this designation, the requiring authority shall recognise and provide for the enduring relationship of mana whenua with the whenua and resources.

B. The requiring authority recognises and acknowledges that:

- the Waikeria Prison site was taken from the whānau, hapū and iwi of Raukawa of the Wharepuhunga rohe; and
- the continued dispossession from the whenua negatively impacts the whānau, hapū and iwi of Raukawa.

When implementing this designation, the requiring authority will recognise and provide for the enduring relationship of Raukawa with the whenua and resources.

**Conditions**

**PRISON OPERATIONS**

1. All buildings on the site which are designed to hold prisoners overnight shall be contained within secure perimeters.

2. No additional vehicle entrances or road intersections with Waikeria Road or Wharepuhunga Road shall be permitted without Otorohanga District Council's consent (as road controlling authority) for the location, design and construction of the vehicle entrances or road intersections.

3. In the event of an escape from Waikeria Prison, the Prison Manager shall ensure that, as a minimum, the following performance standards are met:

   (a) notification of those persons included on the notification list shall commence within 15 minutes of the control room being notified of an escape;
   (b) 24-hour prison hotline is provided for the community to ask questions during incidents, report concerns and/or provide information to the prison; and
   (c) all persons on the notification list, as defined below, are provided with the number of the prison hotline. The notification list and those persons to be provided with the prison hotline number will be determined by the CLG and updated, as necessary, from time to time.

4. No building or group of buildings larger than 120 $m^2$ floor area and capable of accommodating prisoners overnight shall be located within 200 metres of any residential dwelling beyond the Waikeria Prison site existing as at 26 November 1998, without consent of the dwelling's owner.

5. There shall be no maximum security prisoner accommodation on the Waikeria Prison site and total prisoner numbers shall not exceed 3,000 at any one time.

**OUTLINE PLAN**

6. Prior to undertaking any construction related activities authorised by this designation, the requiring authority shall have submitted an Outline Plan to the Otorohanga District Council, prepared in accordance with section 176A of the Resource Management Act

1991 ("RMA") and finalised in accordance with the process set out in section 176A of the RMA.

**DESIGN REPORT**

7. The Outline Plan required by Condition 6 shall be accompanied by a Design Report, the purpose of which is to demonstrate that the works identified in the Outline Plan will comply with the Conditions 8-49 of this designation.

The Design Report is to be accompanied by a written statement, prepared by appropriately qualified and experienced independent expert(s):

(a) confirming that in their opinion(s) the works identified in the Outline Plan will comply with the conditions of this designation; and
(b) setting out their analysis of how, in their opinion(s), the requirements of Condition 8 have been satisfied.

**OVERARCHING REQUIREMENTS**

8 Notwithstanding any other condition of this designation, the Outline Plan and Design Report required by Conditions 6 and 7 shall satisfy the following criteria:

(a) Integration
  (i) the development authorised by this designation integrates with the existing rural environment and landscape; and
  (ii) Conditions 9-49 are implemented as one complementary suite of conditions that collectively satisfy the criteria of Condition 8.

(b) Sustainability
new prison facilities are designed and constructed in accordance with sustainable design principles;

(c) Building zone, bulk, location and design
  (i) the design of the accommodation and associated facilities has minimised the adverse effects on rural character and rural amenity values when

viewed from dwellings, houses and public places beyond the boundary of the Waikeria Prison site;

(ii) new prison facilities constructed after [date NoR confirmed] are of a size, design and colour so as to not be visually dominant in the context of the surrounding rural environment;

(iii) buildings or clusters of buildings are separated by open areas and are not a large consolidated mass;

(iv) buildings are designed and located so that they appear to be separated into discrete buildings or clusters, when viewed from dwellings, houses and public places beyond the boundary of the Waikeria Prison site, rather than being viewed as a single uninterrupted mass;

(v) there is variation in building size, roof form, building façade and colour at Waikeria Prison; and

(vi) the outcomes for the landscape and natural environment, including wetlands and streams, are demonstrated to have been an integral part of the design of the accommodation and associated facilities.

(d) Finished land contours and land stabilisation

Finished land contours and land stabilisation measures are such that sediment loadings from the site into watercourses running through the site will be no greater than those existing prior to the works being undertaken;

(e) Site servicing

(i) the Waikeria Prison capacity increase advances the Vision and Strategy for the Waipa River and the improvement of water quality in the Puniu River through the removal of a direct discharge of treated sewage through the reticulation of wastewater from Waikeria Prison to the Te Awamutu Wastewater Treatment Plant and the resultant reductions in contaminants discharged;

(ii) stormwater management will be designed to address the full hydrological cycle of the catchment and demonstrate that consideration has been given to any actual or potential changes to:

- this cycle;
- in-stream baseflows;
- discharge to ground and change in shallow groundwater levels;

- the coincidence of peak volume and peak flow with a neighbouring catchment;
- frequency and volume of runoff;
- stream erosion; and
- risk to downstream infrastructure.

The report will address the effect on the environment from any of these changes and the measures required to minimise and mitigate the effects.

(f) Landscape and visual mitigation

(i) site landscaping is sufficient to ensure that the adverse effects of activities authorised by this designation on scenic vistas and the proportion of open space, both as viewed from neighbouring dwellings, will be minimised to the extent necessary to ensure compliance with Conditions 9–49;

(ii) the adverse landscape and visual effects of the prison facility within the designated site are minimised to the extent necessary to ensure that the development of the new prison facilities is integrated with the surrounding environment and maintains rural character;

(iii) the adverse visual effects of the new prison facilities on the residents of 12B Walker Road, 52 Walker Road and 29A Wharepuhunga Road, 44 Wharepuhunga Road and 164 Wharepuhunga Road are minimised; and

(iv) the loss of natural character within the Building Zone is mitigated by planting (including riparian planting) within the Waikeria Prison site.

(g) Ecological mitigation for works undertaken in the Building Zone

The ecological mitigation will be sufficient to ensure the following:

(i) the wetland mitigation provides opportunities to modify artificial drainage channels to reinstate a more natural wetland hydrology, and provide benefits to the Waikeria and Mangatutu Streams and Puniu River receiving environment;

(ii) the wetland development will remediate the services performed by any wetlands removed from the Building Zone including sediment retention and the buffering of surface water flows;

(iii) Tuna (eel) habitat is improved;

(iv) ecological benefits will be derived from the integration of ecological, landscape and visual mitigation, and stormwater management within the Building Zone;

(v) the Landscape, Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited – Revision D, dated 7 February 2018 is implemented;

(vi) 70% canopy closure (or shade) across the stream channel surface is achieved; and

(vii) water quality in the Puniu River catchment is improved by:

- where practicable, avoiding or if not practicable minimising transportation of sediment to the waterbodies;
- developing wetlands within the wetland enhancement area shown on the Landscape, Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited – Revision D, dated 7 February 2018;
- fencing riparian areas, removing stock and managing browsing animals such as possums and goats;
- providing shading of Waikeria Stream to moderate stream water temperature and prevent excessive pest plant growth; and
- staged removal of willows and replacement with native riparian species to improve bank stability and retain sediment.

(viii) the ongoing adverse effects on the relationship of Raukawa and Maniapoto with the awa and whenua through the intensification and expansion of the use of the whenua for a prison and the degradation of the original ecology and the land and the water bodies are minimised.

**SUSTAINABILITY**

9. In the design, construction, and operation of the new prison facility, the requiring authority shall:

(a) ensure efficient and sustainable design principles are incorporated in relation to the use of energy, water, resources, materials, stormwater, wastewater and transportation;

(b) consider whole of life environmental sustainability in the design of prison facilities;

(c) maximise the use of natural light and use energy efficient lighting and control systems; and

(d) operate the facility in a manner that is energy efficient.

**BUILDING ZONE, BULK, LOCATION AND DESIGN**

10. All prisoner accommodation and associated facilities constructed after [date NoR confirmed] shall be located in the Building Zone shown in Figure 1: Local Context Plan – Revision A prepared by Boffa Miskell Limited, dated 14 August 2017.

11. The following development controls shall apply to all prisoner accommodation and associated facilities constructed in the Building Zone after [date NoR is confirmed].

(a) the height of buildings and structures shall not exceed the lesser of the following standards:

Height of buildings and structures above finished ground level

(i) the maximum building height (excluding structures for lighting, light poles, electronic security and communications towers) shall not exceed 12 metres above the finished ground level;

(ii) the maximum height of the secure perimeter shall not exceed 6 metres above the finished ground level;

(iii) the maximum height for structures for lighting, electronic security and communications towers shall not exceed 20 metres above the finished ground level~~; and.~~

Height of buildings and structures relative to a Reduced Level

(iv) the maximum height of any building within the Building Zone on which it is located, shall not exceed those shown on Figure 16a: Building Zone with Maximum Building Height R.Ls – Revision 0, prepared by Boffa Miskell Limited dated 6 November 2017.

Advice Note: the datum to be used in respect of Condition 11(a) is NZGD2000, as shown in Figure 16a.

(b) the buildings and structures within the Building Zone shall be finished with a recessive colour scheme. As a minimum:

(i) the exterior walls of facilities (excluding architraves and trims) shall be restricted to the following hue and greyness values contained in Groups A and B of the BS 5252: 1977 colour chart – 00 neutral, 06 yellow-red, 08 yellow-red, 10 yellow, and 12 yellow green with a maximum (colour) weight value of 29, and the following hue and greyness values contained in Group C of the BS 5252: 1977 colour chart – 08 yellow-red, 10 yellow, and 12 green-yellow with a maximum (colour) weight value of 39. The maximum light reflectivity value (LRV) for greyness groups A or B shall be 60%. The maximum LRV for greyness group C shall be 40%;

(ii) the roofs of facilities shall be constructed with non-reflective materials and have a colour with a reflectivity value of no more than 40% for groups A, B or C; and

(iii) non-reflective glass shall be used in glazing.

(c) natural light is provided to all staff member spaces to ensure connection with the exterior is maintained during the working day, except where required for security purposes;

(d) the design of the vehicle accessways within the secure perimeter shall ensure:

(i) access and turning for all vehicles, including B-Trains, to industries, kitchens and laundry key delivery points, without the need to reverse;

(ii) vehicle access and turning space to the front door of each accommodation unit for pickup and delivery of goods, rubbish, meals and prisoners; and

(iii) emergency vehicles can travel directly via internal roadways to any building in the facility;

(e) there is suitable screening and separation between prisoner accommodation units to ensure that lines of sight between accommodation unit cell windows and from the prisoner accommodation unit to the walkways are blocked;

(f) lighting shall comply with the technical principles of AS 4282 – 1997 (Control of the Obtrusive Effects of Outdoor Lighting) and will include:

(i) only luminaires with full cut-off optics; and

(ii) luminaires that will be aimed to ensure light is directed below the horizontal.

**Gross Floor Area**

12. The Gross Floor Area (GFA) for all new buildings in the Building Zone established after [date the NOR is confirmed] shall not exceed a total of 220,000 $m^2$.

13. For the purposes of this condition, GFA is defined as follows:

> GFA is the sum of the gross area of the several floors of all buildings on a site, measured from the exterior faces of the exterior walls, or from the centre lines of walls separating two buildings or, in the absence of walls, from the exterior edge of the floor.

14. Except as otherwise provided, where floor to floor vertical distance exceeds 6 metres, the GFA of the building or part of the building so affected shall be taken as the volume of that space in cubic metres divided by 3.6. In particular, GFA includes:

(a) basement space except as specifically excluded by this definition;
(b) elevator shafts, stairwells and lobbies at each floor unless specifically excluded by this definition;
(c) interior roof space providing headroom of 2.4m or more where a floor has been laid;
(d) floor spaces in interior balconies and mezzanines;
(e) floor space in terraces (open or roofed), external balconies, breezeways, porches if more than 50% of the perimeter of these spaces is enclosed, except that a parapet not higher than 1.2m or a railing not less than 50% open and not higher than 1.4m shall not constitute an enclosure; and
(f) all other floor space not specifically excluded.

15. The GFA of a building shall not include:

(a) uncovered steps;
(b) interior roof space having less than 2.4m headroom;
(c) interior roof space more than 2.4m headroom where no floor has been laid;
(d) floor space in terraces (open or roofed), external balconies, breezeways or porches if not more than 50% of the perimeter of these spaces is enclosed and provided that a parapet not higher than 1.2m or a railing not less than 50% open and not higher than 1.4m, shall not constitute an enclosure;

(e) pedestrian circulation space;

(f) space for stairs, escalators and elevators servicing a floor or that part of a floor used only for carparking or loading;

(g) required off-street parking and/or loading spaces; and

(h) carparking in basement space (including manoeuvring areas, access aisles and access ramps).

**Site Coverage**

16. Site coverage for all new prison buildings in the Building Zone established after [date the NOR is confirmed] shall be no more than 160,000 $m^2$.

For the purposes of this condition, the area used to calculate 'site coverage' means that area of the Building Zone covered by buildings. Included in the term 'buildings' for the purpose of this definition are accessory buildings, and those parts of the site covered by overhanging buildings, but not fences or walls, eaves, pergolas, slatted open decks, or similar structures of a substantially open nature.

**Impervious Surface Area**

17. The impervious area for all new prison buildings in the Building Zone south of Settlers Road established after [date of the NOR is confirmed] shall not exceed a total of 221,000 $m^2$.

For the purposes of this condition, the impervious area is an area with a surface which prevents or significantly retards the soakage of water into the ground and includes:

- rRoofs;
- paved areas including footpaths, driveways and sealed/compacted metal parking areas,
- sealed and compacted metal roads; and
- layers engineered to be impervious such as compacted clay.

The following surfaces shall not be included:

- grass and bush areas;
- gardens and other vegetated areas;
- porous or permeable paving and living roofs;
- permeable artificial surfaces, fields or lawns;

- slatted decks;
- ponds and dammed water; and
- rain tanks.

**SITE SERVICING**

18. Prison facilities constructed after [date NoR confirmed] shall not be occupied by prisoners unless adequate servicing is in place for:

    (a) wastewater disposal;
    (b) water supply; and
    (c) storm water treatment, diversion and discharge.

19. For the purpose of Condition 18(a), adequate servicing means either:

    (a) the Prison will be connected to the Te Awamutu Municipal Wastewater Treatment Plant; or
    (b) following on-site primary treatment, wastewater will be transported off-site to a reticulated wastewater network that is connected to a consented municipal wastewater treatment plant. Following accommodation of the first prisoner in the new prison facilities there shall be no discharges from the primary treatment facility into water or onto or into land in circumstances which may result in contaminants from wastewater entering water.

20. As soon as possible following [date NoR confirmed] wastewater from Waikeria Prison will be reticulated to the Te Awamutu Wastewater Treatment Plant for treatment and disposal.

**Wastewater management**

21. All wastewater transported off site in accordance with Condition 19(b), shall be managed in accordance with a Wastewater Transportation Management Plan (WTMP) prepared in accordance with Condition 23.

22. All truck movements associated with the offsite transportation of wastewater in accordance with Condition 19(b) shall be via Waikeria Road.

23. The requiring authority shall prepare a WTMP and submit it to Otorohanga District Council for approval in a technical certification capacity. The WTMP shall be submitted no later than 20 working days prior to the commencement of the wastewater transportation activities. The WTMP shall, as a minimum, demonstrate how the required traffic movements will be managed to avoid peak staff movements along Waikeria Road and to mitigate adverse effects on the amenity of residents on Waikeria Road.

24. The WTMP shall:

(a) detail the process for collection and transportation of wastewater from the Waikeria Prison site to the disposal facility including evidence of the approval of the territorial authority that is accepting the wastewater and the facility at which the wastewater would be disposed of;
(b) identify the number, frequency and type of required truck movements;
(c) demonstrate how truck movements will be managed to avoid peak staff movements along Waikeria Road;
(d) identify the duration of the proposed activity;
(e) identify potential effects on other road users and Waikeria Road residents and measures to be implemented to minimise those effects;
(f) provide a communication plan for notifying residents of Waikeria Road and other members of the community that may be potentially affected by the traffic of the nature, timing and duration of that traffic;
(g) provide a complaints procedure for community members to report traffic issues. The complaints procedure will include:
    (i) the process for members of the community to report issues;
    (ii) the process to be followed by the requiring authority to investigate and then take action to address issues identified; and
    (iii) the process used to report to the CLG and the complainant regarding the outcome of the investigation and the actions taken to address the issue identified.

25. The WTMP approved in accordance with Condition 23 shall be implemented prior to the transportation of wastewater off-site occurring and adhered to until wastewater from the Prison is connected to the Te Awamutu Municipal Wastewater Treatment Plant.

**Stormwater management**

26. Stormwater shall be managed so that:

(a) the 10% and 50% AEP peak flows in watercourses outside the Building Zone are no greater than that which existed prior to the development of the site to construct the new prison facility;

(b) stormwater from the Building Zone is retained to the extent practicable in its existing tributary catchments to provide sustenance flows to existing water courses and wetlands; and

(c) stormwater management devices, including for contaminant generating areas of the site, will be designed in accordance with best practice (for example Auckland Regional Council Technical Publication 10) using water sensitive design principles in preference to hard engineering solutions.

**LANDSCAPE AND VISUAL MITIGATION**

27. The landscape and visual mitigation shall be established and maintained in accordance with the Landscape, Ecological Enhancement and Mitigation Plan Revision D prepared by Boffa Miskell dated 7 February 2018.

28. All existing trees as at [date NOR is confirmed] greater than 8 metres in height that are located within:

(a) the Building Zone south of Settlers Road shall be retained, unless they are located within 10m of any new facility, required earthworks, building or road; and

(b) the Building Zone north of Settlers Road and west of Waikeria Road shall be retained for not less than 10 years, provided that any trees removed after that date are identified and addressed in the Landscape and Visual Mitigation and Management Plan ("LVMMP").

29. Any tree posing a security or safety risk shall be exempt from ~~this~~ Condition 28.

30. Where a tree is removed for security or safety purposes, the LVMMP required under Condition 37 shall be reviewed to ensure its objectives are still being met and, if necessary amended.

31. The vegetation blocks identified on the Landscape, Ecological Enhancement and Mitigation Plan Revision D prepared by Boffa Miskell dated 7 February 2018 shall be managed so as to retain their size and function as a screening and integrating element within the prison site. This may include planting of vegetation adjacent to these existing vegetation blocks and/or in alternative locations, provided that the planting performs the same screening and integrating function.

32. The design and construction of landscape features and open space shall ensure that:
    (a) amenity planting around the visitors' car park, visitors' reception centre and administration, staff training and staff amenities is predominantly comprised of native species;
    (b) exercise yards have unobstructed views to an immediately adjoining planted outdoor environment;
    (c) a rugby field is provided; and
    (d) two horticultural areas each of 2,400 $m^2$ are provided.

33. Existing hydrological features within the Building Zone (including Wetland 3 and Stream A2 recorded in the Landscape, Ecological Enhancement and Mitigation Plan Revision D prepared by Boffa Miskell dated 7 February 2018) shall be retained to the extent practicable;

34. Tree and block planting species used to satisfy Condition 35 below, shall be capable of reaching a minimum height of 8 metres within 10 years. Notwithstanding this, indigenous vegetation will be considered and, where practicable, included in tree and block planting, provided it does not prevent the requirements of Condition 35 being achieved.

35. Between 50% and 80% of the new facilities within the Building Zone shall be screened from the dwellings located at 12B Walker Road, 52 Walker Road and 29A Wharepuhunga Road; 44 Wharepuhunga Road; and 164 Wharepuhunga Road within 12 years of [date of NoR confirmed].

36. Finished earthworks shall be blended or shaped so as to integrate into the adjacent existing contours.

37. The requiring authority shall, following input from Maniapoto ki Te Raki, Raukawa Charitable Trust and Te Roopū Kaumātua o Waikeria, prepare the Landscape and Visual Mitigation and Management Plan (LVMMP).

38. The objective of the LVMMP is to ensure the works achieve the relevant overarching requirements of the designation set out in Condition 8.

39. The LVMMP shall be submitted no later than 3 months after [date NOR is confirmed] to the District Council for certification that it achieves the objective specified in Condition 38.

40. The LVMMP shall, as a minimum, include the following:

(a) earthworks and building platform design (including finished ground levels and the location and treatment of batters and retaining walls if any);
(b) building design and location (including site plan and elevations for all buildings);
(c) visual simulations for VP01, VP03, VP06, VP08, VP10, VP13 and VP19. At each viewpoint the following will be shown:
- the existing view;
- a visual simulation depicting the three dimensional model of the actual building design and location in the view; and
- a visual simulation depicting the three dimensional model of the actual building design and location in the view with mitigation planting in place after 12 years.

(d) building materials, reflectivity levels and colour;
(e) carpark design and configuration;
(f) alignment and configuration of all internal roads;
(g) internal and external security fencing/wall design and locations;
(h) light tower design and locations (including height and luminaire configuration);
(i) identification of existing specimen trees within the Building Zone and within the designated site that are to be retained (for mitigation/amenity purposes);
(j) the name (including botanical name), numbers, location, spacing and size of the plant species, details on the timing of planting and details of the existing planting to be retained;
(k) proposed fencing and pest control measures;
(l) proposed site preparation and plant establishment;

(m) ongoing vegetation maintenance and monitoring requirement;

(n) details of how the LVMMP is integrated with the Ecological Enhancement and Mitigation Plan and Enhancement Plan; and

(o) details of how the LVMMP has incorporated the cultural input provided in accordance with Condition 131.

41. The parties listed below shall be given an opportunity to review and comment on the draft LVMMP at least 20 working days prior to its submission to Otorohanga District Council for approval:

- owners of 12B Walker Road
- owners of 52 Walker Road
- owners of 29A Wharepuhunga Road
- owners of 44 Wharepuhunga Road
- owners of 164 Wharepuhunga Road.

The requiring authority shall not be in breach of this condition if one or more of the above parties do not wish to review the LVMMP or provide comment.

Comments provided by the parties and any changes made to the LVMMP as a consequence, shall be documented and provided to the Manager – Environmental Services.

42. The requiring authority shall complete the planting required by the LVMMP within 3 years of [date NOR is confirmed], and shall thereafter maintain all specified works and plantings to the satisfaction of the Manager – Environmental Services.

43. Prior to the production of the LVMMP, the requiring authority shall consult with the residents of 12B and 52 Walker Road and where requested and agreed to by the residents prepare and implement a site specific landscape and visual mitigation plan for each property. The objective of the plan for each site is to reduce the landscape and visual effects of the new prison facilities on the views from the property. The obligation to provide site specific landscaping shall expire three years after [the dated the NoR is confirmed] or one year from the date the first prisoner is accommodated in the new prison facilities, whichever is later.

**ECOLOGICAL MITIGATION**

44. The requiring authority shall, following input from Puniu River Care Incorporated, Maniapoto ki Te Raki, Raukawa Charitable Trust and Te Roopū Kaumātua o Waikeria, prepare an Ecological Enhancement and Mitigation Plan ("EEMP").

45. The purpose of the EEMP is to:

(a) mitigate the loss of wetlands and streams within the Building Zone, and shall, as a minimum, include:

(i) in combination with any other ecological mitigation or restorative works undertaken, planting of 8.6 hectares of enhanced wetland area within the designation site generally in accordance with the Landscape, Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited - Revision D, dated 7 February 2018;

(ii) in combination with any other ecological mitigation or restorative works undertaken, planting of 2,010 metres of riparian stream with the designation site generally in accordance with the Landscape, Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited - Revision D, dated 7 February 2018; and

(iii) include the establishment of a native plant nursery within the designation site. Where practicable, plants for riparian revegetation will be sourced from within the ecological district.

(b) enhance the riparian margins of the streams of the Waikeria Prison site, and shall, as a minimum, include:

(i) identification and revegetation of riparian margins of permanent waterbodies within the designation site. Riparian margins shall be at least 3 metres wide and up to 20 metres wide with an average width of 10 metres on each side of the Waikeria Stream, where the streambank is located within the Waikeria Prison site, generally in accordance with the Landscape, Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited – Revision D, dated 7 February 2018; and

(ii) the ongoing use and operation of a native plant nursery within the designation site. Where practicable, plants for riparian revegetation will be sourced from within the ecological district; and

(iii) measures to control mammalian predators such rats and stoats.

(c) the EEMP shall demonstrate how the mitigation activities are to be carried out, and:

- be integrated with the LVMMP required by Condition 37;
- detail hydrological works for creating, and planting proposals for, wetlands;
- detail planting proposals for the wetland areas to be developed;
- detail proposals for riparian enhancement of streams;
- detail the name (including botanical names), numbers, location, spacing and size of the plant species, details on the timing of planting, and details of existing planting to be retained;
- detail plant and animal pest control measures including fencing of waterbodies to exclude stock and measures to control rats, stoats, possums and goats to be implemented for a minimum of 8 years following the completion of planting;
- detail the maintenance programme for the riparian revegetation;
- promote the use of eco-sourced species; ~~and~~
- provide details of how the EEMP is integrated with the LVMMP and the Ecological Enhancement and Mitigation Plan required by Condition 11 of Waikato Regional Council consent AUTH 138553.01.01 dated 14 September 2017; and
- detail how the EEMP has incorporated the cultural input provided in accordance with condition 74.

46. The EEMP shall be submitted no later than 6 months after [date NOR is confirmed] to the District Council for certification that it achieves the purpose specified in Condition 45.

47. The requiring authority shall complete the planting required by Condition 45(a) within 5 years after [date of confirmation of NoR].

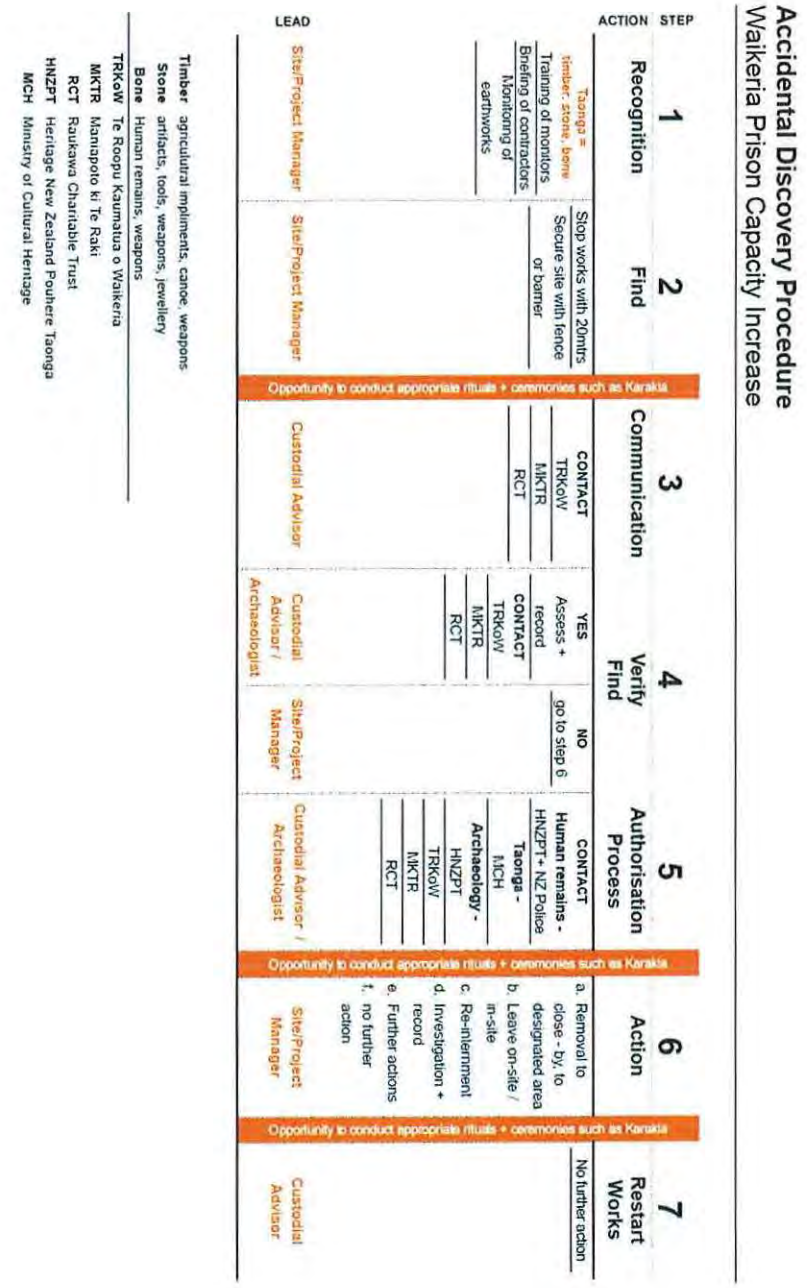
48. The requiring authority shall complete the planting required by Condition 45(b) within 8 years after [date of confirmation of NoR].

49. Where practicable, implementation of the EEMP shall be undertaken by prisoners as part of the prison's rehabilitation and training programmes.

**ACCIDENTAL DISCOVERY PROCEDURE**

50. The requiring authority shall, following consultation with Maniapoto ki Te Raki, Raukawa Charitable Trust and Te Roopū Kaumātua o Waikeria, prepare and implement an accidental discovery procedure (ADP). The ADP will set out the actions and responses to an archaeological find, which shall, as a minimum include, closing down the immediate site of discovery within a 20m radius, communication with the representative groups listed above, opportunities for conducting appropriate rituals and ceremonies, verification and assessment, determination of actions and statutory processes such as Heritage NZ Pouhere Taonga Act and the Protected Objects Act 1975, implementation of any actions, and resuming site works.

    The ADP required by this condition shall be based on, and be in general accordance with, the following:




## EARTHWORKS MANAGEMENT

51. The requiring authority shall provide the Otorohanga District Council with an Earthworks Management Plan ("EMP"), at least 20 working days prior to the proposed commencement of earthworks within the Building Zone.

52. The objectives of the EMP are:

(a) to document earthworks management measures relating to: erosion and sediment control to minimise loss of sediment into water courses from the earthworks site; dust control measures to minimise nuisance on neighbouring properties; and noise and vibration controls to minimise nuisance and adverse effects on amenity on surrounding properties; and

(b) to ensure these measures are implemented for the duration of the earthworks.

53. The EMP shall set out the measures to be undertaken such that:

(a) erosion and sediment control measures are in accordance with the Waikato Regional Council's Erosion and Sediment Control Guidelines for Soil Disturbing Activities: dated January 2009;

(b) earthworks are stabilised against erosion as soon as practicable and in a progressive manner as earthworks stages are completed;

(c) the site is monitored and maintained until vegetation is established or the site grassed to such an extent that it prevents erosion and prevents sediment from entering any watercourse;

(d) all earthworks activities are carried out so that all dust and particulate emissions are kept to a practical minimum to the extent that there are no dust discharges beyond the boundary of the site that cause an objectionable effect; and

(e) vibration levels at neighbouring properties do not damage the buildings or chattels, nor cause unacceptable effects on amenity, as assessed using the NZ Transport Agency State highway construction and maintenance noise and vibration guide (version 1.0, 2013).

Advice Note: the noise controls for earthworks are set out in Condition 56.

54. As a minimum the EMP shall include:

(a) the proposed start date of the earthworks and a schedule of the earthworks program (including the expected timing and duration of works);

(b) the dimensioned cut and fill plans of earthworks and earthworks activities including stockpiling;

(c) the proposed earthworks methodology, including staging;

(d) finalised methods for dealing with any potential adverse environmental effects including but not limited to effects arising in relation to sediment, dust, noise and vibration;

(e) methods to clean up any debris on roads;

(f) monitoring procedures and responsibilities;

(g) methods for dealing with any complaints generated by the activities including reporting of any complaints to Otorohanga District Council; and

(h) the principal contact person for the duration of the earthworks.

55. The EMP shall be submitted no later than 6 months after [date NOR is confirmed] to the District Council for certification that it achieves the objective specified in Condition 54.

The requiring authority shall undertake all earthworks activities associated with the construction of new prison facilities in accordance with the EMP.

**NOISE**

**Objective**

A. Noise shall be managed to ensure noise from the earthworks, construction and operation (including road noise) of the new prison facilities does not cause sleep disturbance and is at levels conducive to the residents' enjoyment of their homes and gardens.

**Earthworks and Construction Noise**

56. Construction noise shall be managed and controlled in accordance with NZS6803:1999 Acoustics – Construction and the following noise limits shall not be exceeded at the façade of any dwelling existing at [date NOR confirmed] throughout the construction of the new facility:

| Time of week | Time period | Noise limit (dBA) | |
|---|---|---|---|
| | | Leq | Lmax |
| Weekday | 630am-730am | 55 | 75 |
| | 730am-6pm | 70 | 85 |
| | 6pm-8pm | 65 | 80 |
| | 8pm-630am | 45 | 75 |

| | | | |
|---|---|---|---|
| Saturdays | 630am-730am | 45 | 75 |
| | 730am-6pm | 70 | 85 |
| | 6pm-8pm | 45 | 75 |
| | 8pm-630am | 45 | 75 |
| Sundays and public holidays | 630am-730am | 45 | 75 |
| | 730am-6pm | 45 | 75 |
| | 6pm-8pm | 45 | 75 |
| | 8pm-630am | 45 | 75 |

Advice Note: these limits have been taken from NZS6803:1999 Acoustics - Construction Table 2: Recommended upper limits for construction noise received in residential zones and dwellings in rural areas, with the long-term duration limits applying due to the proposed length of construction works.

57. The requiring authority shall ensure that construction noise, including both noise from on-site construction activities and noise from construction related traffic along Waikeria Road, shall be managed in accordance with an approved Construction Noise Management Plan ("CNMP") that is consistent with NZS6803:1999 Acoustics – Construction.

58. The requiring authority shall prepare and submit a CNMP to the ~~Otorohanga~~ District Council for ~~approval in a technical~~ certification ~~capacity~~ that it achieves the requirements of this condition. The CNMP shall be submitted no later than 20 working days prior to the commencement of construction activities. The CNMP shall, as a minimum, demonstrate how construction noise will be managed in accordance with NZS6803:1999 Acoustics - Construction and define the measures to be employed for each construction phase or stage of the construction period.

59. The CNMP approved in accordance with Condition 58 shall be implemented prior to the construction period commencing and adhered to for the duration of construction.

**Operational Noise**

60. The following noise limits will apply at the designation boundary for the Waikeria Prison:

| | | |
|---|---|---|
| Monday-Friday | 7am-10pm | 50dB LA10 |
| Saturday | 7am – 7pm | 50dB LA10 |
| Sunday and Public Holidays | 8am – 5pm | 50dB LA10 |
| All other times | 40dB LA10/70 dB LAmax | |

Sound levels shall be measured in accordance with the provisions of NZS 6801:2008 Acoustics – Measurement of Environmental Sound and assessed in accordance with NZS 6802:2008 Acoustics – Environmental Noise.

**Noise Mitigation**

61. For dwellings existing at [date NoR is confirmed] that have direct access to Waikeria Road and within one month of [date NoR is confirmed], the requiring authority shall consult with those resident(s) and, where requested obtain, as soon as is practicable, an acoustic consultant's report undertaken by a suitably qualified acoustic engineer to ascertain any required mitigation measures at that receiving point. Where noise levels inside habitable spaces of an existing dwelling are predicted to exceed 40 dB $L_{Aeq\ (24\ hours)}$ due to Waikeria Prison vehicle movements along Waikeria Road and where agreed to by the affected resident(s) the requiring authority shall implement measures recommended in the report. The requiring authority shall implement such measures as soon as is practicable.

62. The requirements to undertake mitigation under this condition shall remain in force for the period of 2 years from the date the first prisoner being accommodated in the new prison facilities.

63. For the purpose of this condition the required mitigation measures are to be assessed:

    (a) with the windows open during the assessment where they are required for ventilation, unless alternative mechanical ventilation is provided; and
    (b) assuming the prison can accommodate 3,000 prisoners.

64. In addition, if a resident(s) considers that noise external to a dwelling referred to in this condition is required to be mitigated in order to allow the reasonable enjoyment of their garden, the requiring authority shall obtain, as soon as is practicable, an acoustic consultant's report undertaken by a suitably qualified acoustic engineer, to ascertain

the options for mitigating those effects together with the recommendation of a preferred option. The requiring authority shall implement the preferred option as soon as is practicable, provided they are agreed to by the affected resident. In the event the affected resident(s) disagrees with the recommended preferred option contained in the acoustic consultant's report, it shall be peer reviewed by a second suitably qualified acoustic engineer appointed by the Otorohanga District Council. The recommendations of the peer review shall be binding on the requiring authority.

**TRAFFIC**

**Objectives**

A. The safe and efficient construction and operation of the Prison is enabled.

B. The adverse effects of traffic related to the Waikeria Prison capacity increase on the safe and efficient operation of the Waikeria Road-State Highway 3 intersection, Waikeria Road and the surrounding road network are avoided or minimised to the extent needed to ensure compliance with Conditions 65-96.

C. The adverse traffic effects, including construction traffic effects, on the amenity of residents of Waikeria Road are minimised as far as practicable.

**Construction Traffic**

65. The requiring authority shall ensure that construction traffic associated with the construction of the new prison facilities at Waikeria Prison is managed to ensure that the following standards are met, unless Waikeria Road or the State Highway 3 Waikeria Road intersection is being controlled under active traffic management under an approved Temporary Traffic Management Plan:

    (a) the average delay for vehicles turning right out of Waikeria Road shall not exceed 35 seconds; and
    (b) the queue length on Waikeria Road shall not exceed 50 metres.

The requiring authority shall undertake continuous monitoring of the Waikeria Road-State Highway 3 intersection to ensure compliance with this condition.

66. The requiring authority shall ensure all prison related traffic parks within the Waikeria Prison site.

**Construction Traffic Management Plan**

67. Construction traffic associated with the preliminary site earthworks and construction works at the Waikeria Prison site shall be managed in accordance with a Construction Traffic Management Plan ("CTMP") that is submitted to the Otorohanga District Council ~~ODC~~ for approval in a technical certification capacity. The CTMP shall be consistent with the Code of Practice for Temporary Traffic Management ("COPTTM") 4th Edition Published 01 November 2012. The purpose of the CTMP is to:

(a) manage traffic associated with preliminary site earthworks and construction works in accordance with the COPTTM during the construction period of the new prison facilities;
(b) ensure that the compliance with C~~c~~ondition 65 is achieved; and
(c) minimise the effects of construction traffic on amenity for the residents of Waikeria Road during the construction works.

68. The CTMP shall, as a minimum, demonstrate how the construction traffic will be managed by way of approved Temporary Traffic Management Plans in accordance with the COPTTM.

69. The CTMP shall provide details of:

(a) the Traffic Management Co-ordinator for the preliminary site earthworks and construction works;
(b) the proposed construction programme identifying the sequence and timing of construction phases for new prison facilities;
(c) the traffic generating activities and vehicle types expected during the construction programme;
(d) material source locations;
(e) construction transport routes;
(f) daily and peak hour traffic volumes for each construction phase;
(g) driver and tradesperson inductions;
(h) Waikeria Road improvements;
(i) construction site access and parking arrangements;

(j) potential effects on other road users and Waikeria Road residents including information regarding private property access during periods of traffic disruption on Waikeria Road, dust, noise, vibration, safety and convenience;

(k) The Temporary Traffic Management Plans (TTMP) to be employed for each construction phase or stage of construction until construction of the new prison facilities is complete;

(l) The construction travel demand management measures to be employed on site where the construction traffic volume is more than 800 vehicles per day, to ensure the performance standards in Condition 65 are met. This will include, as a minimum, the following measures:

(i) variable work start and end times for contractor staff

(ii) bus services for contractor staff

(iii) carpooling for contractor staff

The requiring authority shall implement mandatory barrier arm control of vehicle departure from the Waikeria Prison site in the event that these measures do not achieve the standards in Condition 65.

(m) methods of continuous monitoring of vehicle departure from the Waikeria Prison site during peak hours and queue length measurement on Waikeria Road at SH3 intersection to ensure standards in Condition 65 are not exceeded;

(n) a communication plan for notifying residents of Waikeria Road and other members of the community who may be potentially affected by construction traffic of the nature, timing and duration of the different construction phases of the construction works, including noise mitigation options and their implementation inside and/or outside the dwelling;

(o) a complaints procedure for community members to report construction traffic issues. The complaints procedure will include:

(i) the process for members of the community to report issues;

(ii) the process to be followed by the requiring authority to investigate and then take action to address issues identified; and

(iii) the process used to report to the CLG and the complainant regarding the outcome of the investigation and the actions taken to address the issue identified.

(p) process for review of CTMP.

70. The requiring authority shall finalise the Construction Traffic Management Plan (CTMP) and submit it, together with evidence of how the requirements of the relevant road controlling authorities have been met, to Otorohanga District Council for approval in a technical certification capacity. The CTMP shall be submitted no later than 20 working days prior to the commencement of preliminary site earthworks and construction works.

71. The CTMP approved in accordance with Condition 67 shall be implemented prior to the preliminary site earthworks and construction works commencing and adhered to for the duration of those works.

**Waikeria Road upgrade**

72. The upgrade of Waikeria Road required by this condition shall be completed by 31 March 2018.

73. Physical works on the part of Waikeria Road that is located in Waipa District shall be designed in accordance with Appendix T4 of the Waipa District Plan.

74. Physical works on the part of Waikeria Road that is located in Otorohanga District shall be designed in accordance with Appendix 4 and Appendix 5 of the Otorohanga District Plan.

75. The design of the proposed works shall be submitted to Otorohanga District Council for approval in a technical certification capacity no later than 20 days prior to undertaking the works, together with evidence demonstrating that the road controlling authority's requirements have been met.

76. The physical works shall include the following as a minimum:

    (a) vehicle entrance visibility improvements at 90, Tanker 35, Tanker 74, 195, 196, 233, 234-1, 234-2, 299, 382, 425 and 463 Waikeria Road to achieve a sight line visibility at each location of 170m where practicable within the public road reserve. Measures such as localised road widening, and warning signs, may be required subject to Otorohanga District Council Road Asset Manager's approval where compliance with the minimum sight distance cannot be achieved;

(b) carriageway widening works to provide a minimum sealed width of 8.0 m with unsealed shoulder widths of at least 0.6m on both sides of Waikeria Road from the intersection of State Highway 3 and Waikeria Road to the northwest abutment of the single lane bridge on Waikeria Road across the Waikeria Stream;

(c) trimming of trees and banks within the road reserve to achieve road corridor sightline improvements along the length of Waikeria Road;

(d) shape correction to the approach to the bridge across Waikeria Stream and contouring to the embankment on the roadside at this location;

(e) painted edge lines to delineate 0.5 m wide shoulders on both sides of the road over the full length of Waikeria Road;

(f) road resealing and new line markings at the intersection of Waikeria Road and Walker Road to confirm that Walker Road traffic gives way to Waikeria Road traffic; and

(g) installation of barriers where roadside hazards exist that have the potential to cause serious injury.

77. Following the upgrade of Waikeria Road required by Conditions 72-76, the requiring authority shall ensure that all traffic associated with the construction of the new prison facilities at Waikeria Prison shall use Waikeria Road to access the site.

**Waikeria Road Bridge Upgrade**

78. The Waikeria Stream bridge on Waikeria Road shall be upgraded to a minimum width of 8.0m. The construction of this upgrade shall commence as soon as practicable but shall be completed no later than 31 March 2019.

79. The bridge upgrade shall be designed in accordance with NZTA Bridge Manual and relevant standards as set out in NZ Transport Agency's Register of Network Standards and Guidelines ISBN 978-0-478-38032 (Online) and the design shall be submitted to Otorohanga District Council for approval in a technical certification capacity no later than 20 days prior to undertaking the works.

**SH3/Waikeria Road intersection upgrade to include a right turn bay from SH3 into Waikeria Road**

80. The intersection of State Highway 3-Waikeria Road shall be upgraded to improve sight distances and accommodate a right turn bay on State Highway 3 in general accordance with the design shown in the plan titled Department of Corrections Waikeria Prison Development SH3/Waikeria Road Intersection – Option 1 Figure 27A, DWG NO:14029A12A, prepared by TDG dated 11 August 2017. The construction of this upgrade shall commence as soon as practicable and shall be completed no later than 31 March 2020.

81. The improvements shall be designed to the relevant standards as set out in NZ Transport Agency's Register of Network Standards and Guidelines ISBN 978-0-478-38032 (Online) and the Waipa District Council Subdivision and Development Manual Version 2.5 May 2015 and submitted to Otorohanga District Council for approval in a technical certification capacity no later than 20 days prior to construction of the right turn bay commencing together with evidence to demonstrate that the requirements of the relevant road controlling authorities have been met.

**SH3/Waikeria Road intersection upgrade to a grade separated junction**

82. The requiring authority shall prepare a preliminary design plan set for the upgrading of the State Highway 3-Waikeria Road intersection to a grade separated junction form of intersection in general accordance with the design shown in Department of Corrections Waikeria Prison Development SH3/Waikeria Road – grade separated junction – Option 1 – Revised (overbridge) (DWG NO: 14029A13B), or an equivalent underpass.

83. The grade separated junction shall be designed to the relevant standards as set out in NZ Transport Agency's Register of Network Standards and Guidelines ISBN 978-0-478-38032 (Online) and the Waipa District Council Subdivision and Development Manual Version 2.5 May 2015 and the design shall be submitted to Otorohanga District Council for approval in a technical certification capacity no later than 3 months following [date NOR confirmed]. The preliminary design shall be sufficient to satisfy a Stage 2 Preliminary Design Road Safety Audit.

84. The upgrade designed in accordance with Ccondition 82 shall be constructed and operational no later than 2 years following the accommodation of the 1st prisoner in the new prison facilities on the Waikeria Prison site.

**Operational Traffic Demand Management**

85. From ~~twenty~~ 20 working days prior to the first prisoner being accommodated in the new prison facilities and until the grade separated junction required by Ccondition 84 is operational, average vehicle delay for vehicles turning right out of Waikeria Road shall not exceed 35 seconds and the queue length on Waikeria Road shall not exceed 50 metres unless Waikeria Road or the SH3/Waikeria Road intersection is being controlled under active traffic management under an approved Temporary Traffic Management Plan.

86. The requiring authority shall implement travel demand management measures as part of the Operational Travel Demand Management Plan ("OTDMP") required by Condition 87 to achieve compliance with Condition 85. Travel demand management measures shall include:

(a) the use of variable staff shift changeover times; and
(b) continuous monitoring of the Waikeria Road -State Highway 3 intersection;
- to ensure compliance with Condition 85 is achieved.

**Operational Travel Demand Management Plan**

87. The requiring authority shall finalise the draft OTDMP for Waikeria Prison and submit it to Otorohanga District Council for approval in a technical certification capacity, at least forty working days prior to the first prisoner being accommodated at the new prison facilities. At that time, the requiring authority shall provide evidence that the requirements of the road controlling authorities have been met.

88. The purpose of the OTDMP is to minimise the risk of Death and Serious Injury Crashes at the SH 3 / Waikeria Road intersection by specifying the measures to be implemented to ensure that the average delay of vehicles turning right out of Waikeria Road onto State Highway 3 does not exceed 35 seconds per vehicle or a queue length of 50 metres on Waikeria Road at the SH3 intersection.

89. To achieve this purpose the OTDMP shall include:

(a) target outcome

(i) no crashes at the SH 3 / Waikeria Road intersection associated with prison related traffic.

(b) site context and current travel patterns

(i) current and expected road traffic volumes, and intersection turning volumes at SH3 / Waikeria Road intersection.

(c) stakeholders, roles and responsibilities

Stakeholders:

(i) prison management
(ii) staff at Access Control Point
(iii) other stakeholders
(iv) Community Liaison Group (CLG)
(v) NZTA
(vi) Waipa DC
(vii) Otorohanga DC

Personnel responsible for:

(i) management of the OTDMP and nominating. ~~Nominate~~ a TDM 'Champion'
(ii) communicating the OTDMP to stakeholders
(iii) implementing the OTDMP
(iv) monitoring the OTDMP
(v) escalation and Resolution of performance issues

(d) travel demand management targets and methods for the Waikeria Prison site which as a minimum, includes consideration of the following measures:

- bus services and carpooling;
- use of a prison visitor booking system; and
- management of prison visiting times.

And must include measures to:

- manage peak departure traffic flow from the Prison using variable staff shift change times or egress control; and
- provide continuous monitoring on Waikeria Road at the SH3 intersection.

(e) day to day monitoring measures which shall include:

- how daily monitoring will occur (access control point flow rate, intersection queue measure);
- by whom;
- frequency i.e. hourly or 5 minute intervals at shift change times;
- recording/reporting; and
- actions if delays or queue limits are exceeded.

(f) Other monitoring measures which shall include:

- monitoring methods and responsibilities to meet condition 52;
- methods of measuring and evaluating the effectiveness of the OTDMP, for example, the effectiveness of (including but not limited to):
  - (i) car park occupancy
  - (ii) bus use
  - (iii) average staff vehicle occupancy (i.e. success of car-pooling/ride sharing)

(g) any traffic control measures to be implemented on State Highway 3 and a description of the co-ordination required with Waipa District Council and NZTA to implement these measures.

90. Application of OTDMP shall be during prison operation. The separate Construction Traffic Management Plan contains the TDM measures to be implemented during the construction phases.

91. The OTDMP referred to in Ceondition 87 shall be implemented twenty working days prior to the first prisoner being accommodated in the new prison facilities and will remain in force until the grade separated junction required by Ceondition 84 is operational.

92. Unless active traffic management is in place, if the average delay per vehicle exceeds 35 seconds or the queue length on Waikeria Road exceeds 50 metres in the period between twenty working days prior to the first prisoner being accommodated in the new prison facilities and the completion of the grade separated junction required by

Condition 84, the requiring authority shall review the OTDMP and amend it to achieve compliance with Condition 85.

93. The revised OTDMP shall be submitted to Otorohanga District Council for approval in a technical certification capacity in accordance with Condition 87 and thereafter shall supersede any earlier OTDMP and be implemented in accordance with Condition 91.

**Traffic Compliance Reporting**

94. The requiring authority shall engage a suitably qualified traffic engineer to prepare monitoring reports analysing the continuous monitoring data collected in accordance with Conditions 65 and 89 to determine whether compliance with the standards in Condition 65 and Condition 85 is achieved. These monitoring reports shall be prepared during construction and from commencement of the new prison operations as follows:

Construction:

(a) one month after construction works commence; and thereafter; and
(b) every three months until the first prisoner is accommodated in the new prison facilities.

Operation:

(a) at least one month prior to the first prisoner being accommodated at the new prison facilities; and
(b) at least monthly for nine months after the first prisoner is accommodated at the new prison facilities and thereafter at least every three months until the grade separated junction required by condition 84 is operational.

95. The requiring authority shall provide the monitoring reports to Otorohanga District Council, Waipa District Council and NZTA within 10 working days of the report being completed. In the event of any non-compliance the report shall advise the actions to be taken to remedy the situation to achieve compliance. Raw data will be made available to Otorohanga District Council, Waipa District Council and NZTA on request.

**Monitoring Surveys**

96. The reporting required by Condition 94 shall occur over a total of six consecutive weekdays (excluding Mondays) collected over a two-week period 1.5 hours either side of afternoon shift change(s) on each monitoring day. Surveys will not be undertaken between 15 December – 10 January and shall include observation and recording of:

(a) total traffic volumes; and
(b) average vehicle delay over the survey period

**LIGHTING**

**Objective**

A. Lighting across the designation site achieves recognised obtrusive lighting amenity standards such that glare and light spillage will not create a nuisance for neighbours and light fall is generally confined to the designation site.

**Construction Lighting**

97. The requiring authority shall prepare a Construction Lighting Management Plan (CLMP), confirming how the Construction Lighting will satisfy the requirements of Condition 102 and will minimise obtrusive light effects beyond the site. At least 20 working days prior to construction commencing, the requiring authority shall submit the CLMP to Otorohanga District Council for approval, in a technical certification capacity.

98. The CLMP approved in accordance with Condition 97 shall be implemented prior to the construction period commencing and adhered to for the duration of the construction period.

**Exterior Lighting**

99. The following Lighting Pre-construction requirements shall apply for operational lighting installations:

(a) as part of the Outline Plan of Works, the requiring authority shall submit to Otorohanga District Council, a detailed lighting design and associated

calculations confirming that the exterior lighting, will satisfy Conditions 100 and 102;~~.~~

(b) calculations shall be computer based using an NZ industry standard software package to confirm compliance with all requirements. Calculations shall be worst case using initial lumen values and an overall design maintenance factor of 1.0, ignoring the screening effects of foliage; and~~.~~

(c) light s~~S~~pill shall be calculated at 5m intervals over the entire designation boundary.

100. Light levels from fixed lighting at the prison site measured at a height of 1.5m above ground level at or beyond the boundary of the designated site shall not exceed 10lux.

101. Except for emergency and security incident lighting, all existing exterior lighting installations outside the Building Zone shall comply with the following obtrusive light limitations.

| Sky Glow | Light Spillage | Glare Source Intensity I | Building Luminance |
|---|---|---|---|
| UWLR (Max %) | Ev (Lux) | (kcd) | L(cd/m2) |
| 5 | 5 | 50 | 5 |

Advice Notes:

(a) UWLR (Upward Waste Light Ratio) = Maximum permitted percentage of luminaire flux that goes directly into the sky.

(b) Ev = Maximum vertical illuminance at the boundary in Lux.

(c) I = Light intensity in Candelas.

(d) L= Luminance in Candelas per square metre.

(e) Source Intensity – This applies to each source in the potentially obtrusive direction, outside of the area lit. The figures given are for general guidance only and for some medium to large sports lighting applications with limited mounting heights, may be difficult to achieve. However, if the aforementioned recommendations are followed then it should be possible to lower these figures to under 10kcd (kilocandela).

(f) Building Luminance – This should be limited to avoid overlighting, relate to the general district brightness.

(g) Exterior lighting within the Building Zone, and all new lighting installed outside the Building Zone following [date NoR is confirmed], is managed in accordance with Ceondition 102 of this designation.

102. Except for emergency and security incident lighting, all exterior lighting located within the Building Zone and all new lighting installed outside the Building Zone after [date NoR is confirmed] shall be designed and constructed to comply with the obtrusive light limitations in the Table below.

| Luminous Intensity | Threshold Increment | Sky Glow | Light Spillage | Building Luminance |
|---|---|---|---|---|
| I (cd) | TI (%) | UWLR (Max %) | Ev (Lux) | L(cd/m2) |
| 500 | 20 | 5 | 5 | 5 |

Advice Notes:

(a) Luminous Intensity (I) limits are proposed based on curfewed hours of 11 pm – 6 am to limit potential impacts to neighbouring residents.
(b) Threshold Increment (TI) is based on adaptation luminance (L) of 0.1cd /m2.
(c) UWLR (Upward Waste Light Ratio) = Maximum permitted percentage of luminaire flux that goes directly into the sky.
(d) Ev = Maximum vertical illuminance at the boundary in Lux
(e) I = Light intensity in Candelas
(f) L= Luminance in Candelas per square metre
(g) Building Luminance – This should be limited to avoid overlighting, relate to the general district brightness.
(h) Exterior lighting outside the Building Zone is managed in accordance with Conditions 100 and 101 of this designation.

**Upgrade of Existing Lighting in the Building Zone**

103. Lighting within the Building Zone existing at [date of confirmation of NOR] shall be upgraded to comply with the standards in the Table in Condition 102.

104. The upgrade required by condition 103 shall be completed no later than the completion of the lighting for the first new prison facilities constructed in the Building Zone.

105. Within 30 working days of the completion of the new prison facilities, the requiring authority shall submit to Otorohanga District Council a report from a lighting engineer confirming that the lighting has been installed in accordance with the approved design and that it complies with the requirements of this condition.

**COMMUNITY CONSULTATION**

**Objective**

A. The objectives of the Community Liaison Group (CLG) are to:

(i) promote a positive relationship between the prison and the surrounding community;
(ii) monitor the effect of the prison on the surrounding community;
(iii) monitor the effectiveness of any measures adopted to mitigate adverse effects on the surrounding community of the prison facility;
(iv) monitor and review the effectiveness of notification procedures during significant security events at the facility;
(v) review any changes to prison management, practices and procedures insofar as they may affect the surrounding community; and
(vi) respond to any concerns raised by the surrounding community or the CLG.

B. During the construction works for the CLG is to be a forum for discussing:

(i) opportunities for training of local residents for the construction / operation of the prison;
(ii) monitoring the effect of construction works for the expansion of the prison on the surrounding community;
(iii) monitoring and reviewing demands of release and reintegration services expected from the expanded prison operations; and
(iv) identifying options, processes or response planning to address issues identified in respect of the above.

106. At a minimum, the following parties shall be invited to be part of the CLG, irrespective of whether or not they are involved with the established CLG as at [date the NoR is confirmed]:

(a) one elected and one senior officer level representative from each of the Otorohanga District Council and Waipa District Council;

(b) local iwi representatives who shall be confirmed through the governance structure of the relevant iwi organisation, and mMana wWhenua representatives, including Maniapoto ki Te Raki;

(c) residents from Walker Road, Ngahepe Road, Wharepuhunga Road and Waikeria Road;

(d) representatives from the local communities of Kihikihi, Otorohanga and Te Awamutu including Korakonui School;

(e) local business owners or business representatives from Kihikihi, Otorohanga and Te Awamutu;

(f) the Prison Manager or his/her designated representative (who shall be the chair unless otherwise agreed by the CLG);

(g) Waikato District Health Board and Community Mental Health and Alcohol and Other Drug services within Otorohanga District, Waipa District and Hamilton City;

(h) representatives of NZ Police; and

(i) representatives of NZ Transport Agency (NZTA).

107. The requiring authority Waipa District Council and Otorohanga District Council shall agree on the selection of those parties identified in Condition 106(d) and (e). Additional members may be appointed with the agreement of the requiring authority and Otorohanga District Council.

108. Meetings of the CLG shall be held at least once every six months. Additional meetings may be held at any other time as agreed between the requiring authority and the Otorohanga District Council.

109. Subject to the CLG objectives set out above, the CLG will be responsible for the formulation of its Terms of Reference, but could include defined roles and responsibilities of its members, procedural matters for the running and recording of meetings, including quorums for meetings.;

110. The Prison Manager or his/her designated representative shall personally attend the meetings with the CLG.

111. The requiring authority shall not be in breach of objectives A and B of these conditions if any one or more of the named groups listed in Condition 106 do not wish to be members of the CLG or to attend any meetings.

112. As soon as practicable following each CLG meeting, the Requiring Authority shall provide copies of the meeting minutes to the Otorohanga District Council and the Waipa District Council.

113. In the event that the Otorohanga District Council or any member of the CLG considers that the group is not operating effectively then this issue may be addressed to the Department's Chief Executive or delegated authority. The requiring authority will act to reinstate the Group in the event that the Department has not met the obligations to run the CLG as set out herein.

**COMMUNITY IMPACT FORUM**

114. The process to establish the Community Impact Forum and the Forum objectives:

A. Prior to construction commencing (including the activities authorised by consent RM170041 issued by Otorohanga District Council on 25 September 2017) the requiring authority shall establish a Community Impact Forum (CIF) in accordance with Condition 115.

B. The overarching objective of the Community Impact Forum is to review and make recommendations to the requiring authority on:

(i) the likelihood and significance of adverse effects of the expansion of the prison on housing stock and housing affordability; and
(ii) the measures to lessen the likelihood of a reduction in the available housing stock or a decrease in housing affordability.

C. During construction and operation of the new prison facilities, the specific objectives of the Community Impact Forum shall be to:

(i) identify opportunities for training of local residents for the construction / operation of the prison; and

(ii) determine the likelihood and significance of adverse effects of the expansion of the prison on housing stock and housing affordability in the local area and make recommendations to the requiring authority on responses to address the same.

115. Within one month of [date NOR is confirmed], the following persons or their representatives will be invited by the requiring authority to join them on the Community Impact Forum:-

(a) one elected and one senior officer-level representative from each of the Otorohanga District Council and Waipa District Council;
(b) local iwi representatives who shall be confirmed through the governance structure of the relevant iwi organisation, and Mana Whenua representatives, including Maniapoto ki Te Raki;
(c) representatives of the early childhood, primary and secondary education sector within the affected communities;
(d) regional representatives of the Ministry of Social Development and local/regional social service providers;
(e) Housing New Zealand, real estate and other social housing services;
(f) representatives of tertiary education and training services;
(g) representatives of NZ Police; and
(h) representatives of the prison construction contractors for the new prison facilities at the Waikeria Prison site.

116. The requiring authority shall not be in breach of Condition 114A or 117 if any one or more of the named persons listed above do not wish to be members of the Community Impact Forum or to attend any meetings.

117. Meetings of the Community Impact Forum shall be held at least once every three months until 5 years after the accommodation of the first prisoner in the new prison facilities, unless otherwise agreed by the majority of the participants.

118. The minutes of Community Impact Forum meetings shall be provided annually to the Otorohanga District Council.

**Housing Information for Waikeria Prison Operations Staff**

119. The requiring authority shall prepare (and keep updated) a housing information package that promotes all local areas to assist staff moving to the area, providing a copy of the information package to prospective employees as part of the recruitment process for the new prison facilities. The objective of the housing information package shall be to promote all local areas as places of residence for prison operations staff to seek to spread the demand for housing and services around the district.

**Housing and Housing Affordability Assessment**

120. Within 3 months of the [date NOR is confirmed] the requiring authority shall engage suitably qualified independent technical specialists to work with the Community Impact Forum to advise on the likelihood and significance of any change in the availability of housing stock or change in housing affordability in the local area during the construction and operation of the new prison facilities.

121. The role of the independent technical specialists will be to prepare a report which:

(a) develops a set of criteria that shall be used to assess the likelihood and significance of any change in the availability of housing stock or housing affordability and to report to the requiring authority on the likelihood and significance of any change;

(b) identifies any potential response(s), including if necessary a management plan with the objective of decreasing the likelihood and minimising the impact of any change on the local population; and

(c) addresses the following matters:

(i) the likely availability and location of workforce supply;

(ii) the available housing stock and predicted housing growth in the Waikato Region and other relevant influences on housing affordability;

(iii) the requiring authority's potential local recruitment scenarios assuming low, medium and high levels of recruitment from the local area; and

(iv) the resulting number of houses required to house the additional workforce required for the construction and operation of new prison facilities at Waikeria Prison and the likely distribution of those houses within the local area.

122. The requiring authority shall provide a copy of the above report to the Community Impact Forum for their consideration.

123. The Community Impact Forum shall review the report of the independent technical specialists and make recommendations to the requiring authority on measures to lessen the risks associated with a reduction in the available housing stock or a decrease in housing affordability and to advise on opportunities for training of local residents in construction and operational work. The Community Impact Forum may recommend the requiring authority commission further reports from the independent technical specialists that are required to fulfil their objectives.

**Housing Stock and Housing Affordability Risk Management**

124. The requiring authority shall, as soon as practicable, take all reasonable steps to ensure that the adverse effects on the local population consequential upon a change in housing stock and housing affordability identified as being attributable to the Waikeria Prison (in whole or in part), and which are within the requiring authority's capacity to influence or responsibility to address (whether in whole or in part), are minimised.

125. If the independent technical specialist or Community Impact Forum recommend that a management plan be prepared and implemented, the requiring authority shall engage a suitably qualified expert(s) to prepare the plan. The measures that will be included in the management plan and implemented by the requiring authority, if required, are:

During the Construction Phase

(a) specific transport initiatives (such as use of buses and car pooling) to get workers to the construction site; and
(b) provision by the requiring authority of temporary construction housing in Kihikihi, Te Awamutu, Otorohanga, or on the Waikeria Prison site.

During the Operational Phase

(a) additional local employment initiatives to encourage more local residents to seek employment with the requiring authority at Waikeria Prison;

(b) facilitation of additional training programmes to provide the required skills for work at the Waikeria Prison; and

(c) working with Otorohanga District Council, Waipa District Council and Government to escalate land release and/or housing development programmes.

126. To the extent that any change to housing stock and housing affordability identified attributable to the Waikeria Prison (in whole or in part) is outside the capacity of the requiring authority to influence or the responsibility to address, the Minister of Corrections will request appropriate Ministers, or any other relevant person, to take such measures as are necessary to avoid or remedy (in the first instance) or mitigate the adverse effects on the local population.

127. Within one month of [date of NoR being confirmed], the requiring authority shall establish a fund of $500,000 to be held by the Waipa District Council and administered jointly by Maniapoto ki Te Raki and Waipa District Council. The purpose of the fund is to provide for or assist in the establishment of housing or accommodation related projects for the benefit of the local hapū communities. The initiatives, and how the contribution is used, shall be at the discretion of Maniapoto ki Te Raki and Waipa District Council and the requiring authority acknowledges that Maniapoto ki Te Raki and Waipa District Council may choose to work with any other iwi and hapū, the Otorohanga District Council and/or established community or affordable housing providers as part of any initiative.

Advice Note: The requiring authority has offered Condition 127 and agrees to be bound by it pursuant to the Augier principle.

**Local Area Recruitment and Training**

128. The requiring authority shall work with the Community Impact Forum and the prison construction contractors to develop and implement a recruitment and training programme. The objective of the recruitment and training programme is to, where practicable, recruit the prison and construction staff required for the new prison facilities from the Waikato Region.

129. When recruiting new employees, the requiring authority shall initially target recruits residing in the Waikato Region. The requiring authority shall hold a minimum of 10 recruitment events in the Waikato Region in advance of undertaking national /

international recruitment drives if suitable candidates are not identified from within the Waikato Region.

130. Where the requiring authority identifies a particular skills shortage within the Waikato Region it will notify the Community Impact Forum of that identified shortage, or if the Forum is no longer operating, notify the Ministry of Social Development as well as the local/regional social service providers and representatives of tertiary education and training services that were previously part of the Forum.

Advice Note: The requiring authority shall not be limited by this condition when determining the suitability of candidates. Nothing in Conditions 129-130 shall derogate from the requiring authority's responsibilities under New Zealand employment legislation.

**TANGATA WHENUA LIAISON GROUP**

**Objective**

A. To promote the relationship between the requiring authority and tangata whenua of Waikeria, and the relationship of tangata whenua with the land, by facilitating cultural input into:
   (i) the development and implementation of mitigation measures; and
   (ii) the development, implementation and monitoring of management plans.

131. The requiring authority shall establish a Tangata Whenua Liaison Group (TWLG) within one month of [date of NoR being confirmed].

The purpose of the TWLG is to recognise and provide for:

- the partnership between the requiring authority and tangata whenua of Waikeria;
- the relationship of tangata whenua with the land within the Waikeria Prison designation; and
- active involvement in the development, implementation and monitoring of the management plans referred to in this condition.

In particular, the TWLG will:

(a) facilitate cultural input into the appropriate commemoration and recognition activities during the construction and operation of new prison facilities. This is to be primarily achieved through the preparation and implementation of a Recognition and Commemoration Implementation Plan in accordance with Conditions 139–144;

(b) facilitate cultural input into the:

  (i) implementation of accidental discovery procedures referred to in Condition 50;

  (ii) development of the Landscape and Visual Mitigation and Monitoring plan referred to in Condition 37; and

  (iii) development of the Ecological Enhancement and Mitigation Plan referred to in Condition 44.

(c) the plans in (b) above will be prepared by the requiring authority to reflect the cultural input provided. Where any aspect of the cultural input cannot be incorporated in the plans referred to in (b) above then reasons will be provided for this. In those circumstances the TWLG may decide to engage an independent expert to further review and advise on those matters;

(d) facilitate the monitoring of the implementation of the plans referred to in 131(b); and

(e) operate for a period of 10 years from the [date of NoR being confirmed].

132. Two representatives from each of the following groups will be invited by the requiring authority to join the TWLG:

(a) Raukawa Charitable Trust;

(b) Maniapoto ki Te Raki; and

(c) Te Roopu Kaumātua o Waikeria.

Two representatives of the Department of Corrections, one of whom will be the Prison Director, shall attend and participate in the meetings of the TWLG but will not be members of the TWLG.

133. The TWLG will prepare their own terms of reference and elect their chairperson within one month of [date of NoR confirmed]. The terms of reference will be reviewed no later than two years after the date the TWLG is first established. The terms of reference will reflect the designation conditions and include as a minimum:

(a) purpose and responsibilities;
(b) the members and composition and record the ability of members to replace its representatives and for the member's representatives to seek input and direction from their constituent group;
(c) frequency of meetings (but not less than at least once every 6 months);
(d) chair and facilitation;
(e) administrative support;
(f) decision-making processes; and
(g) remuneration.

134. If requested by the TWLG, the requiring authority shall assist the TWLG to prepare its terms of reference.

135. The requiring authority shall not be in breach of Conditions 131-134 if any one or more of the parties specified either do not wish to be members of the TWLG or do not attend meetings.

136. The establishment and operation of the TWLG does not replace existing relationships between the requiring authority and whānau, hapū and iwi of the whenua on which Waikeria Prison is situated.

137. The requiring authority shall ensure that all TWLG representatives have sufficient time and resources to prepare for agenda items to be discussed at each TWLG meeting by the:

(a) development of an annual program of activities;
(b) provision of sufficient time and resources to seek input and direction from their constituent group; and
(c) provision of cultural, landscape or ecological expertise necessary to provide input into the plans referred to in Condition 131(a) and (b).

138. The requiring authority shall meet the actual and reasonable costs incurred as a result of the commitments made under Conditions 131-134 ~~AND~~ and 137 above.

**Recognition and commemoration implementation plan**

139. The TWLG will prepare a Recognition and Commemoration Implementation Plan ("RCIP") within 6 months after [date of confirmation of NoR] that, as a minimum, will provide for appropriate cultural recognition or commemoration for:

(a) the turning of the first sod;
(b) the start of earthworks;
(c) commissioning of carvings, monuments and/or commemorative plaques;
(d) unveiling of the name of the new prison facility and any carvings, monuments and/or commemorative plaques;
(e) the use of bilingual signage within the new prison facility;
(f) naming of the new prison facility and significant rooms and spaces within it; and
(g) opening of the new prison facility.

140. The TWLG may identify in the RCIP where matters are unable to be finalised within the 6 month timeframe, and set a new timeframe for completion and approval of these matters.

The processes and timeframes for approval by the requiring authority and the resolution process in the event approval is not given as set out in Conditions 141-143 also apply to these matters.

141. Within 20 working days of receipt of the RCIP from the TWLG, the requiring authority shall provide, in writing, either its approval to the RCIP or the reasons why it does not approve the RCIP. The requiring authority's approval shall not be unreasonably withheld.

142. Where the requiring authority does not approve the RCIP it shall request a meeting with the TWLG at the same time it provides the written response required by Condition 141. The purpose of the meeting is for the parties to try to agree on the contents of the RCIP.

143. In the event the requiring authority and the TWLG are unable to agree on the contents of the RCIP:

(a) the requiring authority shall engage a suitably qualified independent cultural expert, agreed by the TWLG, to consider the draft contents of the RCIP and the views of the parties and make a binding recommendation on the appropriate contents of the RCIP having had regard to the objectives, purpose, and minimum requirements of the RCIP and whether the contents are reasonable and proportionate in that context; and

(b) the independent expert shall consult directly with the TWLG and/or its members and the requiring authority as necessary in order to fulfil his or her functions under these conditions before making a recommendation.

144. For the avoidance of doubt, the requiring authority shall fund the preparation of the draft RCIP and implementation of the approved RCIP.

**RELATIONSHIP AGREEMENT**

145. Prior to the end of the operation of the TWLG under Ccondition 131(e), the requiring authority shall invite the representative(s) of Maniapoto, Matakore, and Ngāti Te Kanawa mana whenua hapū and whānau, presently Maniapoto ki Te Raki (or its successor or assignee), to enter a relationship agreement to recognise and provide for the enduring relationship of the hapū and whānau within the whenua, natural resources and assets comprised within the Waikeria Prison site, including to provide for ongoing exercise by the hapū and whānau of kaitiakitanga. The requiring authority shall not be in breach of this condition if the Maniapoto ki Te Raki (or its successor or assignee) do not wish to enter into a relationship agreement.

**CONDITIONS IMPLEMENTATION OFFICER (CIO)**

146. The Department of Corrections shall appoint an appropriately qualified Conditions Implementation Officer to have oversight of and be responsible for the implementation of the conditions of designation. The CIO shall prepare and submit a compliance report to Otorohanga District Council annually on [date that the NOR is confirmed].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0 100 200 m
1:5,437 @ A3

*Data Sources:* DigitalGlobe Aerials (2016), Waikato Regional Council (1m Contours), Opus, Boffa Miskell

*Projection:* NZGD 2000 New Zealand Transverse Mercator

Legend
- Proposed Building Zone (Amended)
- Proposed Building Zone (NOR)
- WRC Contours 2m Interval

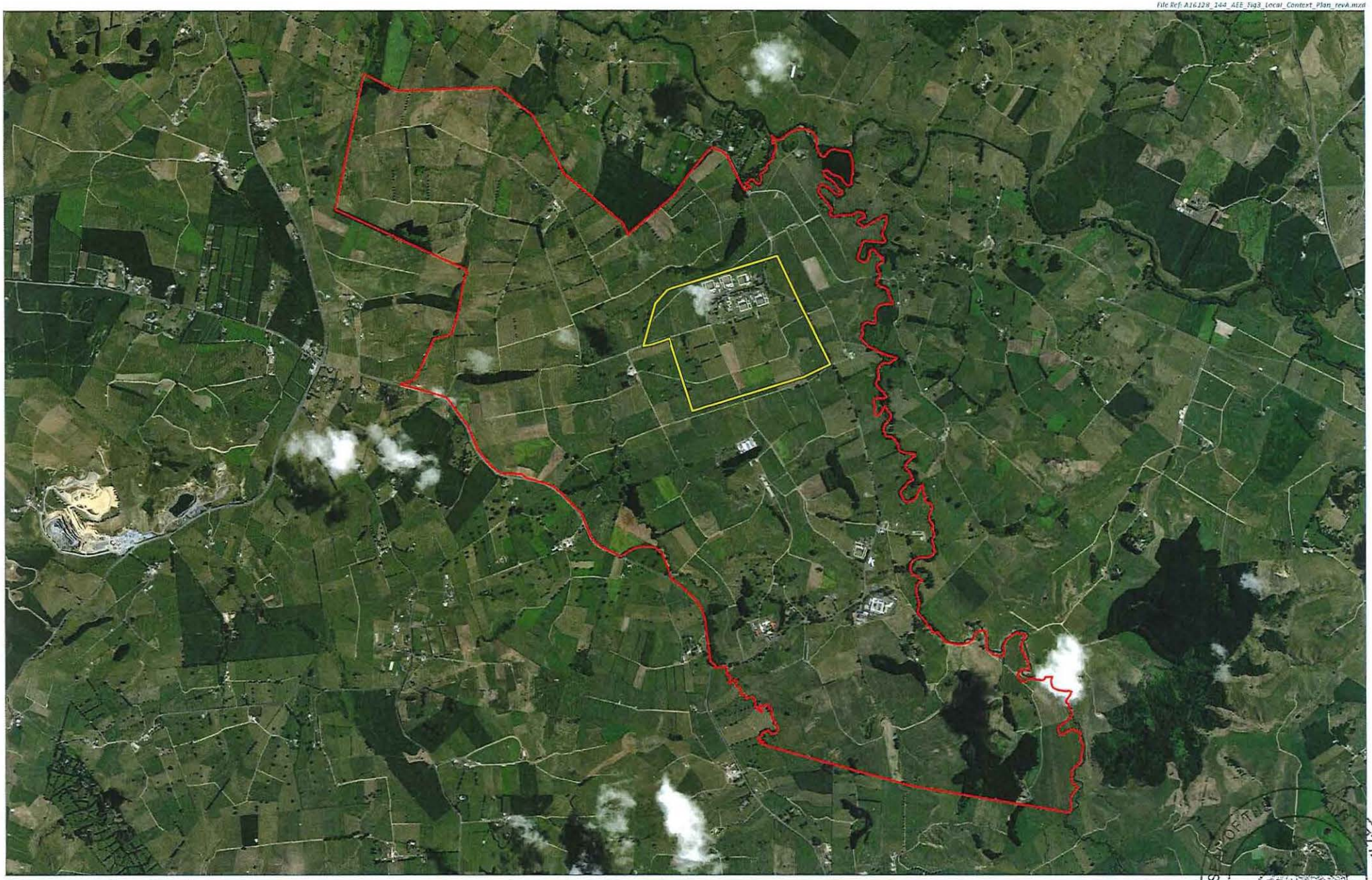
Maximum Building Height R.L's
- 58
- 60
- 62

**A16128 WAIKERIA PRISON CAPACITY EXPANSION**

Figure 16a: Building Zone with Maximum Building Height RL

Date: 6 November 2017 | Revision: 0
Plan prepared by Boffa Miskell Limited
*Project Manager:* Sharon.Dines@boffamiskell.co.nz | *Checked:* JGo

File Ref: A16128_144_AEE_Fig3_Local_Context_Plan_revA.mxd



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0 0.5 1 km
1:25,000 @ A3

*Data Sources:* DigitalGlobe Aerials (2016), Boffa Miskell, Opus

*Projection:* NZGD 2000 New Zealand Transverse Mercator

Legend
- Building Zone
- Waikeria Prison Designation

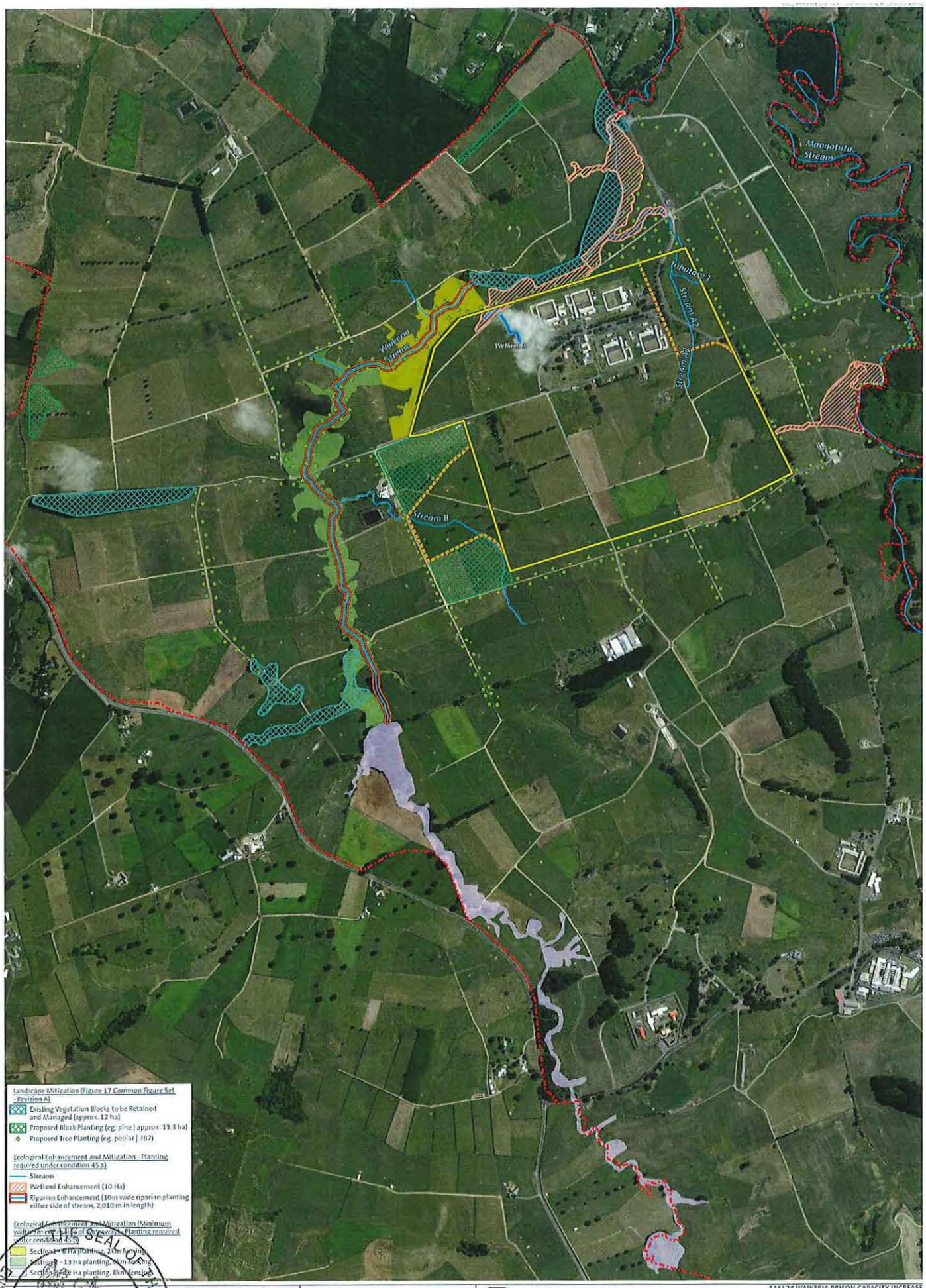
A16128 WAIKERIA PRISON CAPACITY INCREASE

Figure 1: Local Context Plan

Date: 14 August 2017 | Revision: A

Plan prepared by Boffa Miskell Limited

*Project Manager:* Sharon.Dines@boffamiskell.co.nz | Drawn: [illegible] | Checked: FMc




Boffa Miskell

Panlu River Care Inc.

ENVIRONMENT COURT OF NEW ZEALAND

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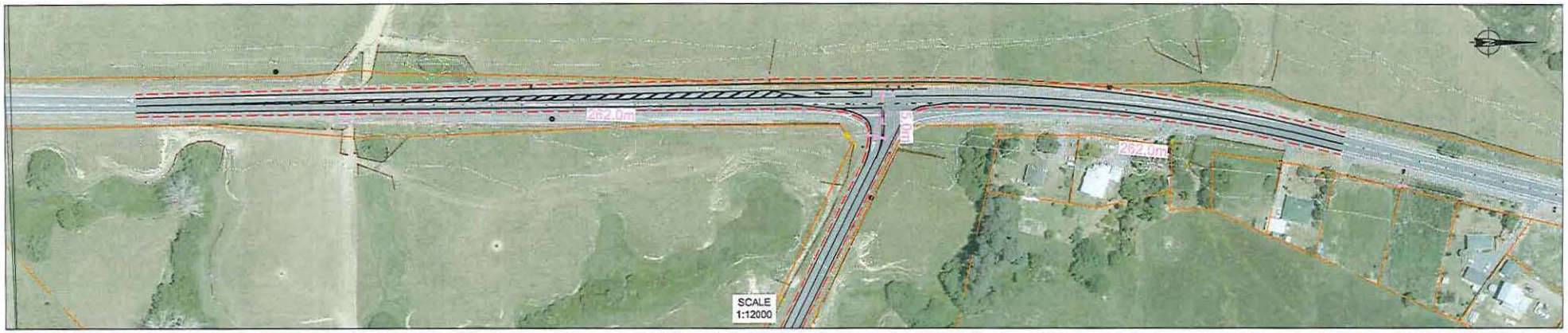
*Data Sources: DigitalGlobe Aerials (2016); Opus, Boffa Miskell, Panlu River Care Inc., Waka Hua limited.*

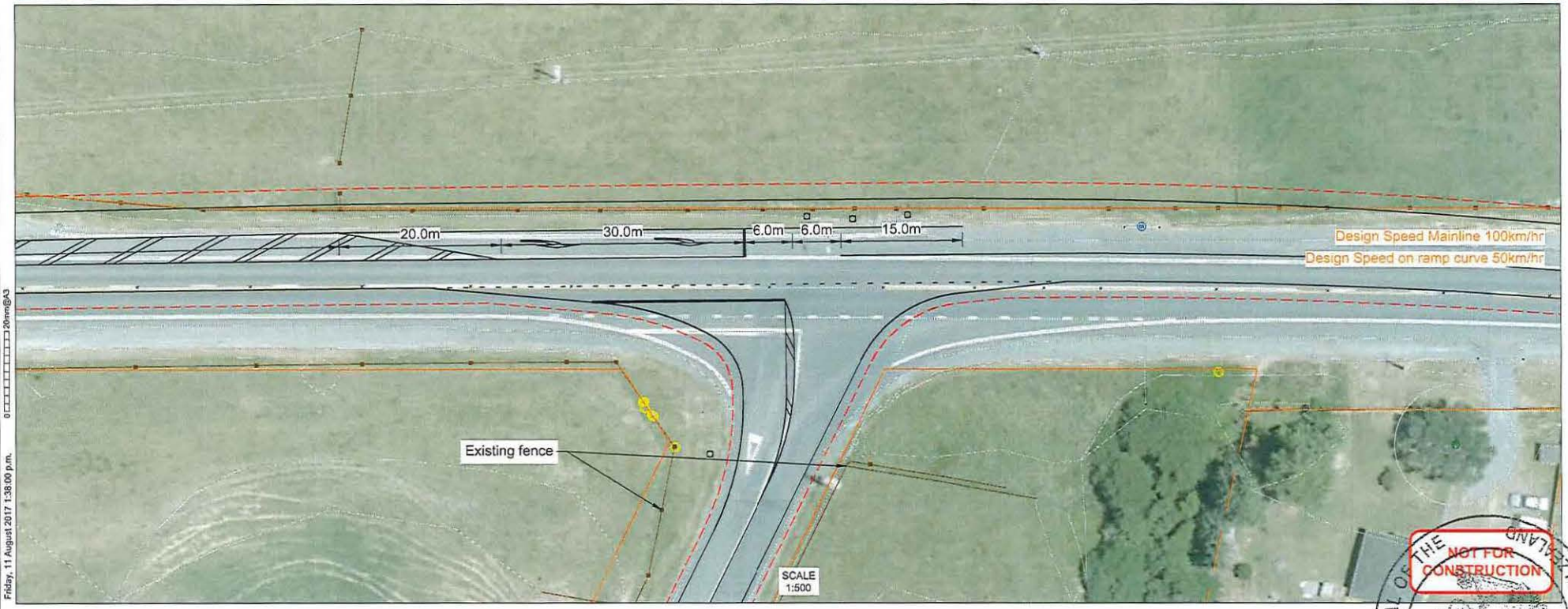
*Projection: NZGD 2000 New Zealand Transverse Mercator*

A16128 WAIKERIA PRISON CAPACITY INCREASE

# Landscape, Ecological Enhancement and Mitigation Plan

Date: 7 February 2018 | Revision: D
Plan Prepared by Boffa Miskell Limited
Project Manager: Sharon.Dines@boffamiskell.co.nz | Drawn: SGa | Checked: SDi




Friday, 11 August 2017 1:38:00 p.m.

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DEPARTMENT OF CORRECTIONS, WAIKERIA PRISON DEVELOPMENT
SH3 / WAIKERIA ROAD INTERSECTION
OPTION 1

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| DRAWN: SP | — | — |
| DATE: 11.08.17 | STATUS: — | |
| SCALE: AS NOTED | | |
| DWG NO:14029A12A | | |

TDG 27A

NOT FOR CONSTRUCTION

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

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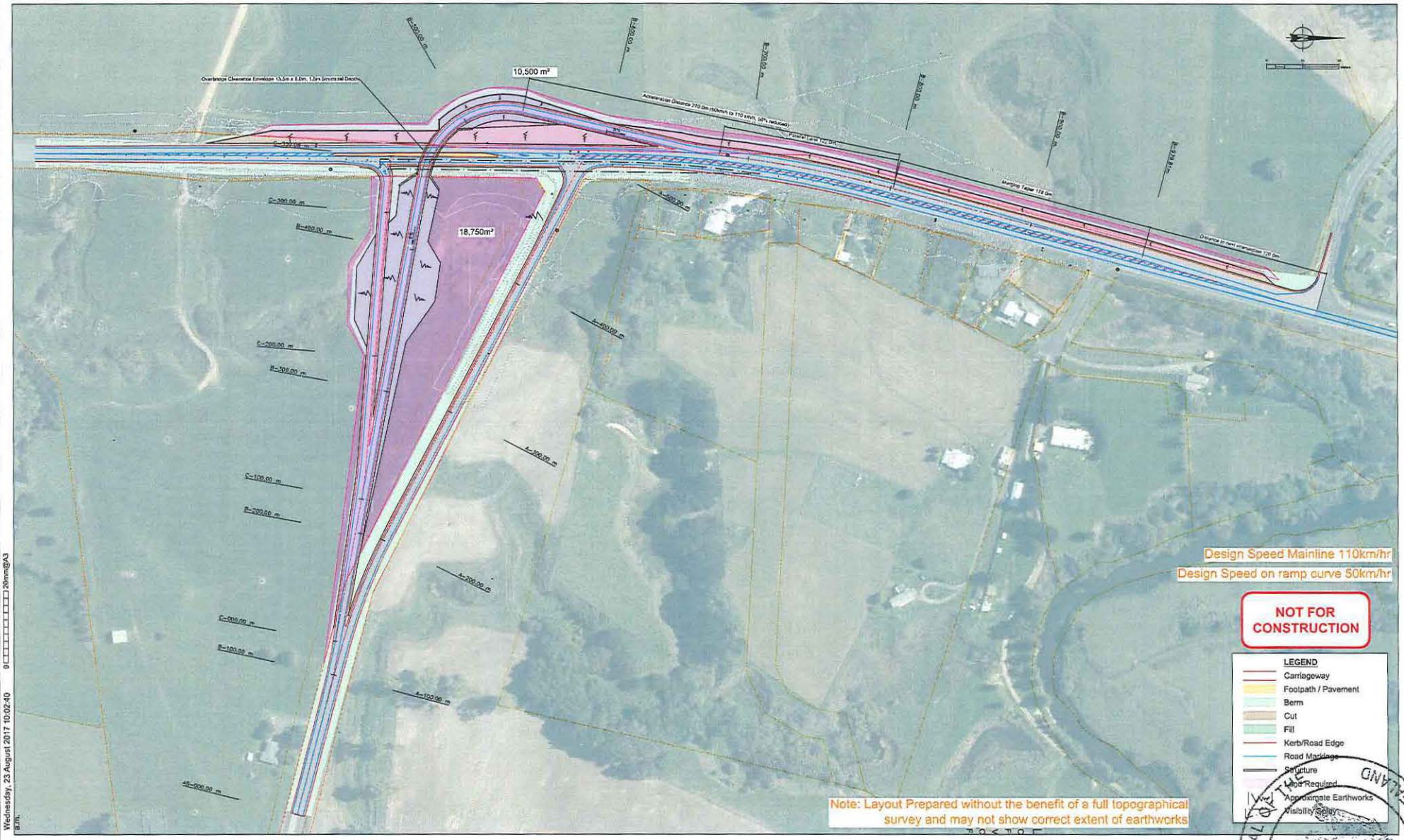


Wednesday, 23 August 2017 10:02:40

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DEPARTMENT OF CORRECTIONS, WAIKERIA PRISON DEVELOPMENT
SH3 / WAIKERIA ROAD - GRADE SEPARATED JUNCTION
OPTION 1 - REVISED (OVERBRIDGE)

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| DRAWN: SP/JF | — — |
| DATE: 22.08.17 | STATUS: — |
| SCALE: 1:2,500@A3 | |
| DWG NO:14029A13B | |

TDG 27B

SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

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**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV 2014-485-11253**
**[2015] NZHC 1991**

| | |
|---|---|
| UNDER | the Resource Management Act 1991 |
| IN THE MATTER | of an appeal under s 149V(1) of the Act against the Report and Decision of the Board of Inquiry into the Basin Bridge Proposal dated 29 August 2014 |
| BETWEEN | NEW ZEALAND TRANSPORT AGENCY<br>Appellant |
| AND | ARCHITECTURAL CENTRE INCORPORATED & ORS<br>Parties to the appeal under s 302(1) of the Act |

Hearing: 20-24, 27-31 July 2015

Counsel: M Casey QC, A F D Cameron, F Wedde and A Cameron for Appellant
K M Anderson and E Manohar for Wellington City Council (Interested Party)
P Milne for Architectural Centre Incorporated (Interested Party)
T Bennion for Mount Victoria Historical Society (Interested Party)
M S R Palmer QC for Save the Basin Campaign (Interested Party) and Mount Victoria Residents Association (Interested Party)

Judgment: 21 August 2015

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**JUDGMENT OF BROWN J**

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**Overview**

[1] On 17 June 2013 the appellant (NZTA) lodged a Notice of Requirement (NoR) and applications for incidental resource consents for what is commonly referred to as the Basin Bridge Project (Project). The Project was to construct, operate and maintain a two lane one-way bridge on the north side of the Basin Reserve in Wellington City as part of State Highway 1 between Paterson Street and Taranaki Street.

[2] The key aspects of the Project were summarised in NZTA's submissions in this way:

> (a) The Basin Reserve is a key transport node within the Wellington network. [NZTA's] assessment is that the Project area is subject to congestion, delay and journey time variability, particularly during peak periods and weekends, and also has a high accident rate. These problems are predicted to get worse in the future as travel demand grows in the area for all transport modes, and changes in land use occur in the immediate vicinity (Adelaide Road) and the wider Wellington area (Wellington airport and the southern/eastern suburbs).
>
> (b) The Project provides essential infrastructure by grade separating the westbound traffic movements at the Basin Reserve. Grade separation would be provided by way of a bridge (the Basin Bridge), located in the north of the Basin Reserve. The Basin Bridge would carry westbound traffic from the Mt Victoria tunnel to Buckle Street/Arras Tunnel. This would remove that traffic from the roads around the Basin Reserve, which frees up capacity on those roads for public transport improvements and north-south local traffic.
>
> (c) The Project also includes a dedicated pedestrian/cycling path and enables improvements for those transportation modes around the Basin Reserve by reducing conflict between those modes and vehicular traffic.

[3] On 7 July 2013 the Minister for the Environment referred the Proposal to a Board of Inquiry appointed under s 149J of the Resource Management Act 1991 (RMA) to hear and determine the merits of the application. The Minister's reasons for directing the Proposal to a Board of Inquiry were as follows:

**National significance**

I consider the matters are a proposal of national significance because:

- The proposal is adjacent to and partially within the Basin Reserve Historic Area and international test cricket ground; in the vicinity of other historic places including the former Home of Compassion Crèche, the former Mount Cook Police Station, Government House and the former National Art Gallery and Dominion Museum; and is adjacent to the National War Memorial Park (Pukeahu). The proposal is likely to affect recreational, memorial, and heritage values associated with this area of national significance (including associated structures, features and places) which contribute to New Zealand's national identity.

- The proposal is likely to result in significant and irreversible changes to the urban environment around the Basin Reserve. In particular, the proposed elevating of westbound traffic on SH1 [State Highway 1] is likely to compete with the open space aspect that exists for the current ground level layout of the Basin Reserve roundabout.

- The proposal has aroused widespread public interest regarding its actual or likely effects on the environment, including on heritage values and experiential values associated with the Basin Reserve. This includes on-going media and public attention on the options for traffic improvement around the Basin Reserve, including local, national and international coverage.

- The proposal is intended to reduce journey time and variability for people and freight, thereby facilitating economic development. The proposal is also likely to provide for public transport, walking and cycling opportunities; reduce congestion and accident rates in the area; and improve emergency access to the Wellington Regional Hospital. If realised, these benefits will assist the Crown in fulfilling its public health, welfare, security, and safety functions.

- The proposal relates to a network utility operation (road) that, although physically contained within the boundaries of Wellington City, as a section of the Wellington Northern Corridor Road of National Significance will affect and extend to more than one district and region in its entirety.

[4] Section 149P(1) provides that the Board of Inquiry must have regard to the Minister's reasons for making a direction to refer the Proposal to the Board for decision.

[5] The scope of the hearing was described by the Board in its Final Report in this way:

> [79] The hearing took place in Wellington. It commenced on 3 February 2014 and finished on 4 June 2014. The hearing took 72 sitting days over four months. The length of the hearing was occasioned by the

> volume of material and the strength and perseverance of the opposition to the Project. No stone was left unturned. We make no apology for the length of the hearing. It was necessary to give the Applicant and the Parties the opportunity to fully present their cases.

[6] Having released a Draft Decision on 22 July 2014 in accordance with s 149Q(1) of the RMA, the Board released its Final Report and Decision on 29 August 2014 (Decision). The essence of the determination of the majority of the Board[1] is captured in the final few paragraphs:

> [1324] In the final outcome, we are required to evaluate the significant adverse effects taken together with the significance of the national and regional need for and benefit of the Project. In carrying out this evaluation, we are conscious of the dicta of the Privy Council in *McGuire* that relevantly Sections 6 and 7 are strong directions to be borne in mind, and if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that.
>
> [1325] This tension between the anticipated benefits and the anticipated adverse effects is the crux of the issues that have been debated before us. It reflects the tensions in Part 2. It reflects the tensions inherent in the statutory documents.
>
> [1326] We are conscious of our findings as to the manner in which the Project would be consistent with the integrated planning instruments and documents relating to transportation. We are also conscious of our findings on adverse effects, which are contrary to the themes in the planning instruments on heritage, landscape, visual amenity, open space and amenity. As the planners agreed, the statutory instruments give no guidance on how this conflict should be resolved.
>
> [1327] While the RMA does not require that an (sic) NoR must set out to achieve the best quality outcome, in our view, there are compelling landscape, amenity and heritage reasons why this Project should not be confirmed. The Basin Bridge would be around for over 100 years. It would thus have enduring, and significant permanent adverse effects on this sensitive urban landscape and the surrounding streets. It would have adverse effects on the important symbol of Government House and the other historical and cultural values of the area.
>
> [1328] Government House, like the Basin Reserve, has the important quality of rarity (there is only one such main residence of the Crown in New Zealand). The sensitivity of the area derives not just from Government House and the Basin Reserve but the overall national significance of the whole area from Taranaki Street to Government House.
>
> [1329] The adverse effects are occasioned by the dominance of the Basin Bridge, resulting from its bulk and scale in relation to the present environment, and the future environment, which does not anticipate such a

[1] Retired Environment Judge G Whiting, D Collins and J Baynes: an alternate view was provided by D J McMahon.

> substantial elevated structure in this significant open space. The carefully crafted design of the Basin Bridge, together with the meticulously crafted landscape and amenity measures, while offering some offset, do not mitigate the bulk and scale of the Basin Bridge, exacerbated by the Northern Gateway Building.
>
> [1330] The ultimate criterion is whether confirming the NoR for the Project would promote the sustainable management purpose of the RMA. On that criterion, we judge that, even with its transportation and economic benefits, confirming the NoR would not promote the sustainable management purpose described in Section 5. It follows that the requirement should be cancelled. The resource consents, being ancillary to the requirement, are declined.

**Scope of appeal**

[7] A right of appeal to the High Court against the Board's decision is provided in s 149V "but only on a question of law".

[8] NZTA filed an appeal on 24 September 2014 and the following parties (the respondents) gave notice under s 301 of the RMA of their wish to appear on the appeal:

(a) the Architectural Centre Inc (TAC);

(b) Mt Victoria Historical Society Inc (MVHS);

(c) Mt Victoria Residents' Association Inc (MVRA);

(d) Save the Basin Campaign Inc (STBC); and

(e) Wellington City Council (WCC).

[9] As noted in a Minute of MacKenzie J dated 12 November 2014, some of the respondents contended that aspects of the appeal were not focused on questions of law but related to factual conclusions or the weight which the Board had placed on certain evidence. Although NZTA did not accept those criticisms, it elected to review its notice of appeal in the light of the matters raised. MacKenzie J directed:

> [9] … The appellant should be given an opportunity to consider the issues raised by the respondents and, if thought appropriate, to amend the notice of appeal. If the parties are then still at odds over whether the issues

> raise (sic) in the appeal do all involve questions of law, a hearing on that question might assist in focusing the issues on appeal, in a way which could potentially save considerable time at the hearing itself.

Timetable directions were made for the filing of an amended notice of appeal and an interlocutory application challenging the scope of the notice of appeal.

[10] On 27 November 2014 NZTA filed an amended notice of appeal together with a memorandum summarising the changes in tabular form. Although the respondents continued to have concerns about the appropriateness of what they described as the "extensive factual related grounds", they advised that they would not be pursuing an interlocutory application because of their limited resources as local community groups.

[11] The scope of the appeal is conveyed in the first paragraph of the amended notice of appeal which divides the appeal into eight issues:

> Issue 1: Misapplication of s 171(1)(b) of the Act (adequacy of consideration given to alternatives);
>
> Issue 2: Inquiring as to the outcome rather than the process of considering alternatives;
>
> Issue 3: Misapplication of s 171(1) of the Act (requirement to have particular regard to matters in paragraphs (a) to (d));
>
> Issue 4: Incorrect approach to the assessment of enabling benefits;
>
> Issue 5: Incorrect approach to the assessment of transportation benefits;
>
> Issue 6: Failure to have particular regard to s 171(1)(a) and (d) matters in assessing heritage and amenity effects;
>
> Issue 7: Incorrect approach to the assessment of the environment; and

> Issue 8: Failure to consider options within the scope of the application to address amenity and heritage related effects of the Northern Gateway Building.

Issue 1 is divided into seven subissues and Issue 5 is divided into three subissues. In total 34 questions of law were specified in the amended notice of appeal. However each specified question of law was preceded by alleged "errors of law" and followed by "grounds of appeal". As a consequence of cross-references to those other parts, the number of questions of law expanded.

**"A question of law"**

[12] As noted above, the right of appeal provided by s 149V is "only on a question of law". Hence this appeal is not a general appeal. It is not the role of the High Court to conduct a rehearing of the application to the Board or to undertake an "on the merits" consideration of whether the Board's conclusion was correct. Nor is it the role of the High Court to determine whether or not the Project would be the best outcome to address the congestion problem at the Basin Reserve.

[13] To adapt the observation of Blanchard J in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* the questions for this Court are the more limited ones of:[2]

> (a) has the Board misinterpreted what was required of it by the RMA and in particular under s 171?
>
> (b) if not, are the Board's conclusions nevertheless so misconceived that they are unlawful conclusions?

[14] The nature of that more limited role was explained by the Supreme Court in *Bryson v Three Foot Six Ltd*:[3]

> [24] Appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion. If the Court were, for example, to misinterpret the requirements of s 6 – to misdirect

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2 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50].

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

itself on the section, which incorporates the legal concept of contract of service – that would certainly be an error of law which could be corrected on appeal, either by the Court of Appeal or by this Court …

[25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.

[26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test …

[27] It must be emphasised that an intending appellant seeking to assert that there was no evidence to support a finding of the Employment Court or that, to use Lord Radcliffe's preferred phrase, "the true and only reasonable conclusion contradicts the determination", faces a very high hurdle. It is important that appellate Judges keep this firmly in mind. Lord Donaldson MR has pointed out in *Piggott Brothers & Co Ltd v Jackson* the danger that an appellate Court can very easily persuade itself that, as it would certainly not have reached the same conclusion, the tribunal which did so was certainly wrong:

> "It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. To answer that question in the negative in the context of employment law, the appeal tribunal will almost always have to be able to identify a finding of fact which was unsupported by *any* evidence or a clear self-misdirection in law by the Industrial Tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option …"

[28] It should also be understood that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on "no evidence". It could nonetheless lead or contribute to an outcome which is insupportable.

[15] In *Vodafone*, after reference to *Bryson*, Blanchard J elaborated on the point with particular reference to the nature of the interpretative problem:[4]

> [54] The nature of the interpretative problem in the present circumstances and the caution which must be exercised before it can be said that an interpretation is in error, or before it can be said that a statutory provision has been misapplied, is well illustrated in the judgment of Lord Mustill, speaking for the House of Lords in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd*. What was in issue was much less complicated than "net cost" in the present case. It was the construction of the words "a substantial part of the United Kingdom" in statutory criteria applying to the investigation of mergers of transport services. Lord Mustill drew attention to the "protean nature" of the word "substantial", ranging from "not trifling" to "nearly complete". He cautioned against taking an inherently imprecise word and "by redefining it thrusting on it a spurious degree of precision". Accordingly, he concluded that the area referred to as "a substantial part" must only be "of such dimensions as to make it worthy of consideration for the purposes of the Act". Applying that test (the criterion) to the facts involved asking, first, whether the Monopolies Commission had misdirected itself, and, second, whether its decision could be overturned on the facts.
>
> [55] His Lordship said that it was quite clear that the Commission had reached an appreciation of "substantial" which was "broadly correct". Speaking generally about how a question of the nature of the second question should be approached, his Lordship said:
>
> > Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v Bairstow* [1956] AC 14.
>
> Lord Mustill said that *South Yorkshire* was such a case:
>
> > Even after eliminating inappropriate senses of "substantial" one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment.

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4 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 2.

> [56] The issue about "net cost" involves an imprecise criterion where "different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case".
>
> [57] Some guidance is also to be obtained from this Court's decision in *Unison Networks Ltd v Commerce Commission*. That case was about a statutory regime for controlling electricity line companies. The Commission's task was to set thresholds for declarations of control. It differs from the present case because it involved the use of a broadly expressed power designed to achieve economic objectives, rather than, as here, the calculation of an amount of net cost. But it was alleged in *Unison* that the Commission had misconstrued the requirements of Part 4A of the Commerce Act 1986 and applied the wrong legal test when exercising its power. As to that, this Court said that the statute contemplated that the Commission, as a specialist body, would exercise judgment in constructing the thresholds. That requirement, the Court said, could have been lawfully tackled in one of two ways. Both approaches were within the terms of the provisions in the relevant subpart of Part 4A. The Commission chose one of them and that was lawful. Importantly, it can be added that if the Commission had chosen the other, it too would have been lawful.
>
> [58] So there are two stages. First, whether the Commission has misinterpreted the language of the statute. This in part turns on its appreciation of the function of the word "unavoidable". And, secondly, whether, if its interpretation was correct, it has nonetheless exercised its judgment about what was "net cost" in a way that contradicts the true and only reasonable conclusion available on the facts and has thereby committed an error of law in terms of *Edwards v Bairstow*.

[16] Several of the questions of law in the amended notice of appeal utilise the formulation whether the Board made findings to which "it could reasonably have come on the evidence".[5]

[17] I recognise that in identifying the circumstances in which it is permissible to interfere with a tribunal's decision a number of High Court judgments have included the formula "a conclusion [the tribunal] could not reasonably have come to".[6] However I consider that there is significant potential for confusion when such a formulation is reframed without the inclusion of a negative with the consequence that the question becomes: is the conclusion one to which a tribunal could reasonably have come on the evidence?

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5 For example, the questions of law listed as 4(b), 7(b)(i)–(iii), 19(a) and (d), 22 and 36(b).

6 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC); *Ayrburn Farms Estate Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [34].

[18] The potential for confusion is compounded when the ground of appeal is expressed as was ground 5(d) in the amended notice of appeal:

> … the finding that sufficiently careful consideration had not been given to alternatives was not a reasonable finding on the evidence.

In similar vein in NZTA's written reply it was contended that:

> A question of law can arise where a decision-maker has reached a finding without any reasonable evidential foundation.

[19] It is useful, I suggest, to recall why Lord Radcliffe preferred his third description in *Edwards v Bairstow*, namely one in which the true and only reasonable conclusion contradicts the determination:[7]

> … Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

[20] In my view paraphrasing the established tests by reference to "not a reasonable finding on the evidence" or "without any reasonable evidential foundation" does not advance the analysis and has the potential to extend the inquiry beyond the proper boundary of what constitutes a question of law.

[21] In the context of an appeal against the exercise of a discretion (which the present appeal is not) it has long been recognised that on the same evidence two different minds might reach widely different decisions without either being appealable.[8] The same point has been made employing the word "reasonably":[9]

> The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any one of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong.

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7 *Edwards v Bairstow* [1956] AC 14 (HL) at 36.
8 *Bellenden v Satterthwaite* [1948] 1 All ER 343 (CA) at 345.
9 *G v G* [1985] 2 All ER 225 (HL) at 228.

[22] However in the third of Lord Radcliffe's descriptions in *Edwards v Bairstow* where "reasonable" appears, it is quite clear that only one possible conclusion was in contemplation as being reasonable:

> one in which the true and only reasonable conclusion contradicts the determination.

[23] Consequently, in the interests of clarity, when addressing those questions of law in NZTA's amended notice of appeal which adopt the "could reasonably have come to on the evidence" formula, I propose to reframe the question to align precisely with Lord Radcliffe's third description.

[24] From time to time there was reference in the course of NZTA's submissions to another formula, namely a conclusion "where there is no reliable, probative evidence to support the determination". Authority for that formula as demonstrating an error of law was said to be found in *Chorus Ltd v Commerce Commission*.[10] Kós J there remarked:

> [177] Thirdly, I find the Commission did not fail to determine what inferences could reliably be drawn from the benchmark data about the likely cost of providing the UBA service in New Zealand. This was very much a tertiary argument to the two primary arguments. Had the Commission had reason to believe that the benchmark evidence was not reliable, probative evidence or that the proposed IPP outcome, based on the benchmark evidence and allowing for consideration of s 18, was irrational and likely to produce an outcome substantially removed from the likely ISLRIC found under the FPP, the Commission would have had a duty to inquire further. But those were not the circumstances here. The benchmark evidence was reliable and probative. The IPP outcome was not evidently irrational, however unpalatable it may have been to Chorus. The mechanism to correct the IPP price lay not in further protracted analysis to produce a more perfect IPP price. It lay in the statutory mechanism, under s 42, to obtain a full pricing review using the FPP.

[25] On appeal the Court of Appeal[11] endorsed the High Court's finding that there was no reason to believe that the benchmark evidence that the Commission obtained through its questionnaire was not reliable, probative evidence.[12] However I do not consider that the Court of Appeal's judgment is to be read as extending the grounds

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10 *Chorus Ltd v Commerce Commission* [2014] NZHC 690 at [154] and [177].
11 *Chorus Ltd v Commerce Commission* [2014] NZCA 440. References omitted.
12 At [121].

upon which a judgment may be challenged as wrong in law. Indeed it is apparent that the Court of Appeal was reiterating the traditional approach.

[26] The introductory paragraphs bear repeating. Having noted that the appeal was not a general appeal against the merits of the Commission's determination and that Chorus did not challenge the Commission's interpretation of any of the relevant statutory provisions, the Court said:

> [109] Instead Chorus challenges the Commission's determination on the basis that the proper application of the law required a different answer. Chorus does this by alleging, in the first five questions of law, that the Commission made factual errors and thereby erred in law.
>
> [110] It is well-established, however, that to succeed on the basis of allegations of this nature Chorus must show that the Commission has exercised its judgment about the application of the IPP:
>
> > … in a way that contradicts the true and only reasonable conclusion available on the facts and has thereby committed an error of law in terms of *Edwards v Bairstow*.
>
> [111] This is a high hurdle for Chorus to surmount. It is well-established that unless the Commission's application of the statutory provisions is factually "unsupportable" it will not have erred in law. It is for the Commission, as a specialist body, to exercise judgment in carrying out the requisite "benchmarking" exercise and in weighing up the relevant facts in that context. It will therefore having erred only if there is no evidence to support the factual findings it made in reaching its determination.
>
> [112] In the absence of a right of general appeal, it is not the role of the Court in an appeal on a question of law to undertake a broad reappraisal of the Commission's factual findings or the exercise of its evaluative judgments. Care should also be taken to avoid a technical and overly semantic analysis of the Commission's determination in an endeavour to create a question of law. In making factual findings it is for the Commission, and not the Court, to decide what weight should be given to the relevant evidence and what inferences, if any, should be drawn from the evidence. An inference must be logically drawn from proven facts and not be mere speculation or guesswork. At the same time, as counsel for the Commission acknowledged, if the Commission has made a factual error that makes its application of the statutory provisions "unsupportable" it will have erred in law.

**Section 171**

[27] The Board was required to consider the NoR under s 149P(4) which provides:

(4) A board of inquiry considering a matter that is a notice of requirement for a designation or to alter a designation—

(a) must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority; and

(b) may—

(i) cancel the requirement; or

(ii) confirm the requirement; or

(iii) confirm the requirement, but modify it or impose conditions on it as the board thinks fit; and

(c) may waive the requirement for an outline plan to be submitted under section 176A.

[28] Consequently the Board was required to make its decision on the NoR by applying s 171(1) which provides:

(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—

(a) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment; and

(c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and

(d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

[29] Issues relating to the interpretation of s 171(1) comprised a significant part of the appeal. In this portion of the judgment I briefly traverse the legislative history of s 171 together with some relevant authorities. In the course of doing so I identify a number of the primary interpretation issues in contest. However it is convenient first to draw attention to s 171(1)(c), relating as it does to the objectives of a requirement.

*Section 171(1)(c)*

[30] NZTA's objectives for the Project were:[13]

> **Objective 1**: To improve the resilience, efficiency and reliability of the State network:
>
> (i) By providing relief from congestion on SH1 between Paterson Street and Tory Street;
>
> (ii) By improving the safety for traffic and persons using this part of the SH1 corridor; and
>
> (iii) By increasing the capacity of the SH1 corridor between Paterson Street and Tory Street.
>
> **Objective 2**: To support regional economic growth and productivity:
>
> (i) By contributing to the enhanced movement of people and freight through Wellington City; and
>
> (ii) By, in particular, improving access to Wellington's CBD employment centres, airport and hospital.
>
> **Objective 3**: To support mobility and modal choices within Wellington City:
>
> (i) By providing opportunities for improved public transport, cycling and walking; and
>
> (ii) By not constraining opportunities for future transport developments.
>
> **Objective 4**: To facilitate improvement to the local road transport network in Wellington City in the vicinity of the Basin Reserve.

[31] The Board found that the works were reasonably necessary to achieve those objectives.[14] The Board also recorded that there was no real dispute that the NoR (i.e. designation) was reasonably necessary for achieving the objectives.[15]

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13 Final Decision, at [1225].
14 At [1230].

*Original form of s 171(1)*

[32] Section 171 as originally enacted in 1991 included Part 2 of the RMA as one of five matters to which a territorial authority was required to have particular regard:

> **171 Recommendation by territorial authority**–
>
> (1) When considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to–
>
> (a) Whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought; and
>
> (b) Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; and
>
> (c) Whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method; and
>
> (d) All relevant provisions of national policy statements, New Zealand coastal policy statements, regional policy statements, regional plans, and district plans; and
>
> (e) Part II.

Section 104 concerning resource consent applications and s 191 concerning requirements for heritage orders had a similar structure.

*1993 Amendment*

[33] The reference to Part 2 was relocated in 1993[16] when the words "Subject to Part II" were placed at the commencement of the subsection. An equivalent amendment was made to both ss 104 and 191.

[34] The 1993 Amendment also introduced s 168A providing for the public notification of requirements. Under s 168A(3) a territorial authority was to have regard to the matters set out in s 171.

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15 At [1218] –[1219].

16 Resource Management Amendment Act 1993, s 87.

[35] The speech of the Minister of the Environment on the second reading of the bill explained the motivation for the amendments. Having noted that the RMA seeks to provide certainty to all parties and that the law must provide a clear framework for the courts and others to work with, the Hon Rob Storey said:[17]

> The Bill, therefore, addresses those sections of the Resource Management Act in which at present there is a lack of clarity. There are some who believe that the Act should be left untouched until case law demonstrates that, because of ambiguous wording, Parliament's intent has not been exactly converted into the law.
>
> If Parliament intends a particular policy direction, I think that direction has to be clearly expressed. To do otherwise would be a dereliction of the trust placed in us as members of Parliament. It is one thing to use language that allows a flexibility of outcomes, when Parliament probably knows what it intends as the result; it is quite another matter to have language that allows a variety of outcomes, when there is meant to be only one.
>
> Sorting out the ambiguities in a legal setting also puts a very large cost on everybody – citizens, local government, central government, and potentially on the environment itself. I think that the House would want to do better than that, and therefore it has to remove the necessary ambiguities and costs.

[36] Specifically in relation to references within the RMA to Part 2, the Minister said:

> As I said, the Bill makes a number of technical amendments and I certainly do not intend to go through all of them. Part II of the Resource Management Act sets out the purpose of the Act. The current references in the Act to Part II have been in danger of being interpreted as downgrading the status of Part II. Amendments in the Bill restore Part II to its proper overarching position.

[37] The significance of the "subject to" drafting method had been the subject of direct consideration some four years earlier in *Environmental Defence Society Inc v Mangonui County Council*.[18] Section 3 of the Town and Country Planning Act 1977, the predecessor of the RMA, related to matters of national importance which were in particular to be recognised and provided for in the implementation and administration of district schemes. Section 36, which related to the contents of district schemes, included the phrase "subject to section 3".

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17 (17 June 1993) 535 NZPD 15920.

18 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 260.

[38] With reference to the significance of the inclusion of that phrase Cooke P said:

> The decision of the Tribunal now in question contains no discussion of the relationship between s 3 and the other sections, but Chilwell J observes in his judgment that the Tribunal has consistently held that the change in wording making certain sections subject to s 3 does no more than make explicit what was previously implicit and that the *Waimea* decision applies to the present Act. The High Court Judge also adopted that view and it may fairly be said, I think, to have been both an express basis of his decision and an underlying assumption of the Tribunal's decision. Read as a whole, their reasoning appears to involve an overall balancing of the various considerations in ss 3 and 4 on the lines approved in the *Waimea* judgment.
>
> With respect, I am unable to agree that this is a correct view. Rather I agree with the view taken by Dr K A Palmer in his *Planning and Development Law in New Zealand* (2nd ed, 1984) vol 1 at p 202 that the 1977 change was significant. **The qualification "Subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict.** This Court had occasion to say so expressly in a reported case the year before the 1977 Act: *Harding v Coburn* [1976] 2 NZLR 577, 582. **There was no need nor reason to insert those words in ss 4 and 36 of the 1977 Act if the legislature had intended that the s 3 matters were no more than matters to which regard was to be had, together with district considerations, in preparing a district scheme.** The explanation of the insertion of the words that leap to the eye, as it seems to me, is that the argument for the Minister of Works rejected in *Waimea* was henceforth to prevail. There is an analogy with the legislative guidelines provided by declaring a special object for the amending Act considered by this Court in *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1988] 1 NZLR 78, 87-88; see also per Bisson J at pp 94–95 and per Chilwell J at pp 97–99.
>
> (emphasis added)

[39] Section 171 in its 1993–amended form was considered in a number of noteworthy judgments. Delivering the advice of the Privy Council in *McGuire v Hastings District Council* Lord Cooke of Thorndon said:[19]

> [22] … By s 171 particular regard is to be had to various matters, including (b) whether adequate consideration has been given to alternative routes and (c) whether it would be unreasonable to expect the authority to use an alternative route. …; but, by s 6(e), which their Lordships have mentioned earlier, [Hastings] is under a general duty to recognise and provide for the relationship of Maori with their ancestral lands. So, too, Hastings must have particular regard to kaitiakitanga (s 7) and it must take into account the principles of the Treaty (s 8). **Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that**

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19 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.

> **the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.**
>
> (emphasis added)

[40] While strictly speaking those observations in relation to the operation of s 171 were obiter dicta, as *Auckland Volcanic Cones Society Inc v Transit New Zealand* recognised, they were "very strong obiter dicta".[20] The High Court there added:

> [59] … The specific considerations in s 171 (alternative methods or routes in particular) are subject to Part II of the RMA. Parties involved in the administration and application of the RMA are very familiar with the requirement to have regard to other considerations subject to Part II. On an application for resource consent, consent authorities and on appeal the Environment Court must have regard to the considerations in s 104 of the RMA. The s 104 considerations are expressed to be subject to Part II. There is a well-established body of case law confirming the primacy of Part II and how that is applied in relation to the s 104 considerations. The drafting technique used in s 171 to provide the considerations in that section are subject to Part II is not unique to s 171.
>
> [60] In the present case the effect of ss 171 and 174 is to require Transit and the Environment Court on appeal to have particular regard to the matters at s 171(1)(a), (b), (c) and (d) but always subject to Part II of the RMA.

*2003 Amendment*

[41] Section 171 was substantially redrafted in the 2003 Amendment.[21] One change was the relocation of the reference to "subject to Part II" from its location at the commencement of the subsection:

> 171 **Recommendation by territorial authority**
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part II, consider the effects on the environment of allowing the requirement, having particular regard to–
>
> …

Although a similar change was made to s 104(1), there was no equivalent amendment to s 191(1) and consequently the phrase "Subject to Part 2" remains at the commencement of that subsection.

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[20] *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 316 (HC).

[21] Resource Management Amendment Act 2003, s 63.

[42] Section 186A(3) was substantially redrafted in terms identical to s 171(1).

[43] One of the contested points of interpretation turns on the fact of that relocation of the phrase within s 171(1). Whereas TAC contended that the phrase continued to render the totality of the consideration of effects as being subject to Part 2, NZTA argued that the relocation had the consequence that the phrase related to the consideration of effects rather than to the (a) to (d) matters.

[44] Most recently s 171 was considered in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council*.[22] Citing *McGuire*, Whata J said:

> [68] It will be seen that the focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. **The import of this is that the purpose, policies and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Indeed, in the event of conflict with the directions in s 171, Part 2 matters override them.** Paramount in this regard is s 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.
>
> [69] Part 2 also requires that in achieving the sustainable management purpose, all persons exercising functions shall recognise and provide for identified matters of national importance; shall have regard to other matters specified in s 7 and shall take into account the principles of the Treaty of Waitangi.
>
> [70] The reference at s 171(1)(d) to "any other matter" is qualified by the words "reasonably necessary". Given the Act's overarching purpose, however, the scope of the matters that may legitimately be considered as part of the effects assessment must be broad and consistent with securing the attainment of that purpose.
>
> (emphasis added)

*Sections 171(1) and 104(1) compared*

[45] It is convenient at this juncture to note the different structure of s 104 following the 2003 Amendment:[23]

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[22] *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 [*Queenstown Airport*]. References omitted.

[23] Section 104(1)(b) was replaced on 1 October 2009 by s 83(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

104 **Consideration of applications**

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part II, have regard to–

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of–

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[46] Two points of difference between ss 104 and 171 material to the statutory interpretation arguments in this case are:

(a) in s 104 the effects on the environment comprises one of the matters to which regard is to be had whereas in s 171 it is the focus of consideration;

(b) s 171 requires that the matters listed are to be the subject of "particular" regard.

[47] Having noted what it described as the "subtly different language" in the two sections, the Board concluded that the difference in wording did not require a substantively different approach to considering effects on the environment arising from NoRs from that for determining consent applications.[24] That conclusion is also in issue in contest on this appeal.[25]

[24] At [194] of the Final Decision.
[25] Question 28A: see [72] below.

*The relevance of King Salmon*

[48] The Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*[26] was released on 17 April 2014 part way through the hearing before the Board.[27] *King Salmon* involved an application for a change to the Marlborough Sounds Resource Management Plan under s 66 of the RMA. It did not concern s 171. The relevance of *King Salmon* to the present appeal arises from the Court's discussion of Part 2[28] and the decision-making process known as the "overall judgment" approach.

[49] NZTA's submissions stated that *King Salmon* has significantly modified the approach to decision-making under the RMA and in particular the meaning of "subject to Part 2". The respondents rejoined that the ratio of *King Salmon* was confined to plan changes and that the decision was of little moment in relation to designations.

**Sequence of consideration of the Issues**

[50] As earlier noted[29] the amended notice of appeal grouped the questions of law under eight broad issues by reference to subject matter.

[51] In its written submissions NZTA stated that it had "further refined" the questions of law comprised in Issues 3 and 6. Although these submissions were presented as filed, the redefinition provoked some debate which led to NZTA filing a memorandum on the fourth day of the hearing formally recording the intended "restatement" of the questions of law relevant to Issues 3 and 6 and summarising the principles relating to the Court's power to amend a notice of appeal.[30]

[52] The Issue 3 questions, being Q 28(a), (b) and (c), were refined as five questions which I will refer to as Q 28A to 28E. The Issue 6 question, being Q 45

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

[27] At [91] of the Final Decision.

[28] A change to a regional plan under s 66 must be "in accordance with [inter alia] the provisions of Part 2": s 66(1)(b).

[29] At [11] above.

[30] Memorandum of counsel for the Appellant in relation to questions of scope and the Court's power to amend (if necessary) dated 23 July 2015.

(albeit with the cross-reference to the errors of law listed in para 44 of the amended notice of appeal), was refined as five questions which I will refer to as Q 45A to 45E.

[53] It is convenient to set out the refined Issue 3 questions of law:

> 28A Does the difference in wording between s 104 and s 171 require a substantively different approach to considering effects on the environment arising from notices of requirement as that for determining consent applications?
>
> 28B Was the Board in error by considering the effects of the environment of allowing the requirement without having particular regard to the matters listed in s 171(1)(a)–(d)?
>
> 28C When considering a requirement under s 171(1) RMA, how are the words 'having particular regard' to be interpreted?
>
> 28D When considering a requirement under s 171(1) RMA, how are the words 'subject to Part 2' to be applied (in particular, following the recent Supreme Court decision in King Salmon)?
>
> 28E As a consequence of those errors, did the Board make findings of fact that it could not otherwise have come to on the evidence?

[54] That "refinement" of the Issue 3 questions of law was particularly significant as it introduced in an explicit way as Q 28C and 28D[31] fundamental questions concerning the interpretation of s 171(1). The answers to, or more accurately the discussion of, those two questions has significance for a number of the other specified questions of law.

[55] Consequently, although the structure of the parties' submissions helpfully tracked the sequence of the Issues in the amended notice of appeal, I propose to first address the key issues of statutory interpretation and the arguments concerning the implications of *King Salmon*. Having done so, the judgment will then traverse the remaining questions of law in the sequence of the identified Issues.

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[31] Q 28(a), (b) and (c) in the amended notice of appeal remained as Q 28A, 28B and 28E.

**The meaning of "having particular regard to" in s 171**

[56] NZTA's intention to call into question the interpretation of the phrase "having particular regard to" was arguably implicit in Q 28(a) and Q 28(b) in Issue 3. However the issue was squarely raised in the restated Q 28C:

> When considering a requirement under s 171(1) RMA, how are the words "having particular regard" to be interpreted?

The 23 July 2015 memorandum[32] explained that it was necessary to address Q 28C when determining the Q 28 questions in the amended notice of appeal.

[57] The phrase is used not only in s 171(1) (and relatedly in s 168A(3)) but it also appears in 191(1) and notably in s 7 in Part 2. By contrast what is usually viewed as the lesser obligation of "have regard to" is employed in s 104(1) and in a variety of other sections.[33]

[58] A curious interface between the two phrases is highlighted in s 149P which concerns the matters to be considered by a board of inquiry. As noted earlier a board is required to "have regard to" the Minister's reasons.[34] In the case of a notice of requirement for a designation or for a heritage order a board is required to "have regard to" the matters set out in s 171(1)[35] and s 191(1)[36] respectively. However both ss 171(1) and 191(1) direct that such matters are to be the subject of "particular regard". I raised with counsel the possibility that, given the terms of s 149P, the obligation on a board might be only to "have regard" to the matters in s 171(1). That would have the consequence of equality of treatment between the s 171(1) matters and the Minister's reasons. However neither side was attracted to that interpretation.

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32 At [51] above.
33 Resource Management Act 1991, ss 131(1), 138A and 142.
34 At [4] above.
35 Section 149P(4)(a).
36 Section 149B(5)(a).

*"have regard to"*

[59] Taking the phrase "have regard to" as the starting point, in *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* Wylie J (sitting with Mr R G Blunt) said:[37]

> We do not think there is any magic in the words "have regard to". They mean no more than they say. The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function[.]

[60] It follows that the phrase "have regard to" does not mean "to give effect to". In *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* Cooke P agreed with and adopted the following analysis of McGechan J at first instance:[38]

> … He is directed by s 107G(7) to 'have regard' to any submissions made. Such submissions are to be given genuine attention and thought. That does not mean that industry submissions after attention and thought necessarily must be accepted. The phrase is 'have regard to' not 'give effect to'. They may in the end be rejected, or accepted only in part. They are not, however, to be rebuffed at outset by a closed mind so as to make the statutory process some idle exercise.
>
> Section 107G(7) in its direction that the Minister 'have regard' to five stated criteria does not direct that any one or more be given greater weight than others. In particular it does not direct that (a) value of ITQ is to have greater or lesser regard paid than (b) net returns and likely net returns. Weight, in the end and provided he observes recognised principles of administrative law, is for the Minister.

[61] Specifically in an RMA context John Hansen J took a similar approach in *Foodstuffs (South Island) Ltd v Christchurch City Council*:[39]

> I do not consider the term "shall have regard to" in s 104 RMA should be given any different meaning from the cases referred to above. In my view, the appellant is seeking to elevate the term from "shall have regard to" to

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37 *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC) at 612.

38 *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551. Similarly see *R v Police Complaints Board, ex parte Madden* [1983] 2 All ER 353 (QBD) at 369–370 where a number of English decisions are discussed.

39 *Foodstuffs (South Island) Ltd v Christchurch City Council* (1999) 5 ELRNZ 308, [1999] NZRMA 481 (HC) at 487.

> "shall give effect to". The requirement for the decision-maker is to give genuine attention and thought to the matters set out in s 104, but they must not necessarily be accepted.

[62] One of the authorities cited by John Hansen J was *R v CD*,[40] a judgment of Somers J who expressed the view in the context of the Costs in Criminal Cases Act 1967 that the expression "shall have regard to" is not synonymous with "shall take into account". However I note that in a number of subsequent decisions in Australia the two phrases have been treated as equivalent.[41]

[63] In my view the expression "to take into account" is susceptible of different shades of meaning. I consider that the two phrases can be viewed as synonymous if the phrase "to take into account" is used in the sense referred to by Lord Hewart CJ in *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Maryleborne* "of paying attention to a matter in the course of an intellectual process".[42] The key point is that the decision-maker is free to attribute such weight as it thinks fit to the specified matter but can ultimately choose to reject the matter.

*"having particular regard to"*

[64] Plainly the phrase "shall have particular regard to" conveys a stronger direction than merely "to have regard to". Section 7 (which includes the phrase) is one of the four sections in Part 2 which *McGuire* described as being "strong directions".[43]

[65] The issue is most recently informed by the discussion of Part 2 in *King Salmon*.[44] Having observed that s 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA, which is given further elaboration by the remaining sections in Part 2 (ss 6, 7 and 8), Arnold J writing for the majority of the Supreme Court said:

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40 *R v CD* [1976] 1 NZLR 436 (SC) at 437.

41 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 25 ALR 497 (HCA); *Queensland Medical Laboratory Ltd v Blewett* (1988) 84 ALR 615 (FCA) at 623; *Minister for Immigration and Ethnic Affairs v Baker* (1997) 45 ALD 136 (FCA) at 142; *Friends of Hinchinbrook Society Inc v Minister for the Environment* (1997) 147 ALR 608 (FCA) at 627.

42 *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Maryleborne* [1923] 1 KB 86 (CA) at 99.

43 At [39] above.

44 *King Salmon*, above n 26.

> [26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. **As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters.** The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. **The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).**
>
> [27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the sense that the principles of the Treaty may have an additional relevance to decision-makers.
>
> (emphasis added)

[66] While NZTA submitted that the (a) to (d) matters in s 171(1) were to be carefully weighed in coming to a conclusion, no submission was advanced in the course of argument on the interpretation issue to the effect that the matters to which particular regard was to be had were required to be the subject of extra weight.[45] On that issue I share the view of Sir Andrew Morritt V-C in *Ashdown v Telegraph Group Ltd*:[46]

> It was submitted that the phrase 'must have particular regard to' indicates that the court should place extra weight on the matters to which the subsection refers. I do not so read it. Rather it points to the need for the court to consider the matters to which the subsection refers specifically and separately from other relevant considerations.

[67] In the event NZTA and the respondents appeared to be on the same page on the interpretation of the phrase. Both sides cited the decision of the Planning

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[45] However NZTA's submissions argued that the Project's enabling effect for future projects was a highly relevant effect that ought to have been considered and "given sufficient weight" by reason of the requirement to have particular regard in s 171(1).

[46] *Ashdown v Telegraph Group Ltd* [2001] 2 All ER 370 (Ch) at [34] where the phrase "must have particular regard to" in s 12 of the Copyright Act 1988 with reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms was considered.

Tribunal in *Marlborough District Council v Southern Ocean Seafoods Ltd* where the following view was expressed:[47]

> The duty to have particular regard to these matters has been described in one case as "a duty to be on inquiry" *Gill v Rotorua District Council* (1993) 2 NZRMA 604, 2 NZPTD Part 5. With respect in our view it goes further than the need to merely be on inquiry. To have particular regard to something in our view is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion.

[68] I agree that that is an appropriate interpretation provided that the reference to "take the matter into account" is understood in the sense explained at [63] above.

*Did the Board adopt the correct approach?*

[69] NZTA's real complaint was that the Board failed to adhere to the identified standard. It placed particular reliance on the Board's comments at [175]:[48]

> [175] What is required (subject to consideration of the *King Salmon* decision, which we address next) is a consideration of the effects on the environment of allowing the requirement having particular regard to the matters set out in sub-sections (a)–(d). This means that the matters in (a)–(d) need to be considered to the extent that our finding on these matters are to be heeded (or borne in mind) when considering our findings on the effects on the environment.

[70] I would agree with NZTA that merely to heed or bear in mind matters would fall below the requisite level of attention which the phrase "have particular regard to" imports. However I do not consider that the comments at [175], which were introductory in character, accurately reflect the Board's approach which is more evident at [181]–[182]:

> [181] By contrast, in considering the NoR we are required to have *particular regard to* the relevant instruments.
>
> [182] The phrase have *particular regard to* has been interpreted as requiring that we specifically turn our mind to each of the listed matters, and give them some greater weight than those to which we are only required to have *regard*. This is a different and lesser test than the requirement to *give effect to*, as was being considered in *King Salmon*. The Supreme Court interpreted *give effect to* as simply meaning *implement*, and considered that this requirement was *intended to constrain decision makers*.

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47 *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 at 228.

48 Attention was also drawn to the use of the verb "informed" in [196].

[71] That such turning of their minds was required separately in respect of each of the listed matters was acknowledged in the Board's subsequent endorsement at [194] of a passage from the Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project (NIGUP).[49]

[72] It is convenient at this point to address Q 28A which states:

> Does the difference in wording between s 104 and s 171 require a substantively different approach to considering effects on the environment arising from notices of requirement as that for determining consent applications?

[73] This ground of appeal was directed to the Board's statements at [193]–[194]:

> [193] … We acknowledge (as [NZTA] noted) that the obligation to assess effects with respect to NoRs under Section 171(1) is expressed in subtly different language from the equivalent obligation arising with respect to resource consents under Section 104(1). Specifically, Section 171(1) requires consideration of the effects on the environment having particular regard to the matters in sub-sections (a)–(d). Whereas under Section 104(1), the activity's actual and potential effects are instead listed as one of the matters to which a decision maker must *have regard*, alongside those in Section 104(1)(b) and (c). Both Sections 104(1) and 171(1) though, are subject to Part 2.
>
> [194] However, we do not consider that difference in wording requires a substantively different approach to considering effects on the environment arising from NoRs as that for determining consent applications, as counsel for [NZTA] claimed. Indeed in our experience, it does not. To the contrary, we adopt the findings of the *Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project*, that Section 171(1) is to be applied as follows:
>
> [a] The language … *consider the effects … having particular regard to …* expresses a duty to do both together, without necessarily giving one primacy over, or making one subordinate to, the other;
>
> [b] The language *having particular regard* expresses a duty for us to turn our mind separately to each of the matters listed, to consider and carefully weigh each one. The words do not carry a meaning that the matters listed in (a)–(d) are necessarily more or less important than the effects on the environment of allowing the requirement; and

[49] At [73] below.

> [c] We must make our own judgment, based on the evidence and in the circumstances of the case, about the effects on the environment, about the matters listed in (a)–(d), and about the relative importance of each in all the circumstances.

[74] NZTA's objection to that analysis was directed both to the equivalence of treatment of the two sections and to the issue of "subject to Part 2". That latter issue is addressed below in the context of my consideration of Part 2.

[75] NZTA's argument was that the Board misapplied s 171(1) by in effect inserting the word "and" into the subsection (presumably before the phrase "having particular regard to") so that it read to the same effect as s 104(1). As its written submissions stated:

> 28.7 … By inserting 'and' into s 171(1), the Majority has given it a different meaning. On the Majority's interpretation of s 171(1) a decision-maker is required to:
>
> a Make its own judgment, through Part 2, concerning the effects on the environment of allowing the requirement; and
>
> b Make a separate judgment concerning the matters listed in paragraphs (a)–(d); and
>
> c Make its own overall judgment, subject to Part 2, regarding the relative importance of each in all the circumstances.
>
> 28.8 This is not what s 171(1) requires. The correct approach to s 171(1) is to consider the effects of the proposed requirement 'having particular regard to' (in the sense of 'through the lens' of) the (a) to (d) matters and then come to a decision on the basis of that assessment of effects. Where there is a conflict in the (a) to (d) matters, the decision-maker will have recourse to Part 2 (we return to the meaning of 'subject to Part 2' in the section below).

[76] I accept the respondents' submission that, while there is a difference in wording between ss 104 and 171, in its analysis of those sections at [193]–[194] the Board has not misinterpreted s 171 in the manner suggested by NZTA. As noted above, in discharging the obligation to have "particular" regard to the specified matters the Board has recognised that each specified matter is to be the subject of separate attention.

[77] The Board transparently stated its intended decision-making process at [199]:

> [199] We therefore propose to structure this part of our decision (appropriately applying the guidance from *King Salmon*, as just identified) as follows:
>
> [a] To identify and set out the relevant provisions of the main RMA statutory instruments that **we must have particular regard to under Section 171(1)(a)**, and the relevant provisions of the main non-RMA statutory instruments and non-statutory documents that **we must have particular regard to under Section 171(1)(d)**;
>
> [b] To consider and evaluate the adverse and beneficial effects on the environment informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents;
>
> [c] **To consider and evaluate the directions given in Section 171(1)(b)** as to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work;
>
> [d] **To consider and evaluate the directions given in Section 171(1)(c)** as to whether the work and designation are reasonably necessary for achieving the objectives for which the designation is sought; and
>
> [e] In making our overall judgment subject to Part 2, to consider and evaluate our findings in (a) to (d) above, and to determine whether the requirement achieves the RMA's purpose of sustainability.

[78] I do not consider that that formulation is susceptible to challenge so far as the appropriate consideration of the 171(1)(a) to (d) matters is concerned.

[79] It is convenient at this point to address the contention at ground of appeal 29(b) that the matters listed in s 171(1)(a) to (d) ought to have been determined prior to the Board's substantive consideration of the Proposal's effects. This complaint is directed to the observation in the Decision at [197]:

> [197] In applying Section 171(1) of the RMA, there is also no explicit obligation that our determination regarding the matters in Section 171(1)(b) must be made in advance of our substantive consideration of effects.

[80] The Board proceeded to note that the Wiri Prison Board[50] had undertaken a substantive effects assessment, and determined that that project would result in some significant effects, before moving on to consider the s 171(1)(b) matters. The Board favoured that approach:

> [198] We adopt the same approach, as we consider it:
>
> [a] Allows us to fully consider all mitigation being offered by [NZTA], and whether there actually will be significant adverse effects remaining once that mitigation is taken into account;
>
> [b] Would be consistent with the High Court's comments in *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* that the greater the impact on private land (or similarly, the more significant the project's adverse effects), the more careful the assessment of alternative sites, routes and methods will need to be. We will have a better understanding of the significance of the Project's adverse effects (and therefore the robustness of the alternatives assessment required), if we undertake our substantive effects assessment before considering the adequacy of the [NZTA's] alternatives assessment; and
>
> [c] Would appropriately reflect the fact that as Section 171(1) is subject to Part 2, some consideration of the relevant matters from that Part is required in terms of forming a view on potential effects. As such, we consider we need to have some understanding of the evidence/effects assessments to reach a view on whether effects are in fact likely to be significant.

[81] Having made the argument at [75] above, on this issue NZTA's submission was:

> 28.21 The Majority was required to assess the effects having particular regard to the (a) to (d) matters as something important to be considered and carefully weighed in coming to a conclusion, rather than simply as matters that needed to be borne in mind. It was therefore necessary (inter alia) to have addressed the (a) to (d) matters before then considering the effects 'having particular regard to' those matters.

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[50] Final Report and Decision of the Board of Inquiry into the Proposed Men's Correctional Facility at Wiri, September 2011.

[82] I do not accept that the sequence of consideration is required to be as NZTA maintains. The Board's reasoning in [198] appears to me to be sound. As Burchett J remarked in *Friends of Hinchinbrook Society Inc v Minister for the Environment*:[51]

> … What is the effect of a requirement that "[i]n determining whether or not to give a consent … the Minister shall have regard only to the protection, conservation and presentation … of the property"? An instant's reflection shows that these words just cannot be applied mechanically. The minister must consider the application made to him and ascertain what it involves before he can have regard to the protection, conversation and presentation of the property in relation to it.

**The effect of the phrase "subject to Part 2" in s 171**

[83] The only question of law in the amended notice of appeal which specifically raised Part 2 was Q 13 [subissue 1D] which states:

> Does s 171(1)(b) require the requiring authority's consideration of alternatives to incorporate Part 2 considerations; including (in particular) the weight given to particular evaluation criteria.

[84] However the fundamental nature of NZTA's Part 2 argument emerged more clearly in the further refinement of the Issue 3 questions, in particular restated Q 28D:

> When considering a requirement under s 171(1) RMA, how are the words 'subject to Part 2' to be applied (in particular, following the recent Supreme Court decision in *King Salmon*)?

The issue of the capacity for the Board to "resort to Part 2" was also implicit in restated Q 45E:

> What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

[85] As noted in the brief discussion of legislative history,[52] two primary arguments were advanced by NZTA concerning the role played by Part 2 in the s 171(1) consideration:

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51 *Friends of Hinchinbrook Society Inc v Minister for the Environment*, above n 41, at 627.

52 At [43] and [49] above.

(a) did the relocation of the phrase within s 171(1) have the consequence contended by NZTA that the phrase related to the consideration of effects rather than to the (a) to (d) matters?

(b) did *King Salmon* change the approach to the application of this phrase in s 171(1)?

*The relocation of the phrase within s 171(1)*

[86] It was not apparent either from NZTA's submissions to the Board or in the Board's Decision whether this line of argument had prominence. However the argument as developed before me is conveniently summarised in NZTA's written reply as follows:

> 11.22 The 2003 amendment separates the (a)–(d) matters from the overriding 'subject to Part 2' direction that was clear in the previous drafting. It is well established that differences in wording between repealed provisions and those enacted is an aid to statutory interpretation and may throw light on the intended meaning. It is submitted that if Parliament intended the whole of the s 171(1) assessment still to be 'subject to Part 2', it would have retained more of the previous wording, such as follows:
>
> > *(1) Subject to Part 2, when considering a requirement and any submissions received, a territorial authority must consider the effects on the environment of allowing the requirement and shall also have particular regard to–*
>
> 11.23 Parliament did not do this. Instead, it moved the position of the 'subject to Part 2' direction to relate to the assessment of effects and used the words 'having particular regard to' to qualify the consideration of effects such that the (a)–(d) matters are not directly made subject to Part 2.

[87] There appears to have been no judicial consideration of the implications of the relocation. Nor do the *travaux preparatoires* throw any express light on the question. If the implications of the movement of the phrase were as significant as NZTA's argument suggests, then one would have expected that there would have been some sign on the legislative trail. One would also expect that the same change as made to ss 104(1), 168A(3) and 171(1) would also have appeared in s 191(1).

[88] The first manifestation of the relocation was in the Resource Management Amendment Bill[53] which was the culmination of a review of the RMA which started in August 1997. The bill had its first reading on 13 July 1999 and was referred to the Local Government and Environment Committee. The bill made changes to ss 104, 168A and 171 but not to s 191 which may account for the fact of the current point of difference.

[89] Because the form of s 171 proposed in 1999 was different from the section in its ultimate form in 2003, I set out its original terms:

> 171(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part II, consider the effects on the environment of allowing the requirement, having regard to–
>
> (a) Any relevant provisions of the plan or proposed plan; and
>
> (b) If the requiring authority does not own the land or it is likely that the designation will have a significant adverse effect on the environment, whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work; and
>
> (c) Whether the designation is reasonably necessary for achieving the objectives of the requiring authority; and
>
> (d) Any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.
>
> (2) A requirement must not conflict with any relevant provisions of a national policy statement or a New Zealand coastal policy statement.

An equivalent amendment was proposed as s 168A(3) and (4).

[90] However the structure of s 104 was substantially different, particularly inasmuch that a distinction was made in relation to the consideration of resource consents for controlled activities, restricted discretionary activities and discretionary activities. Only in relation to discretionary activities was there a reference to "Part II": that reference appeared in the first subparagraph:

> 104(3) When considering an application for a resource consent for a discretionary activity and any submissions received, a consent authority–

[53] Resource Management Amendment Bill 1999 (313–2) (Select Committee Report).

(a) Must, subject to Part II, consider the effects on the environment of allowing the application, having regard to–

(i) Any relevant provision in a plan or proposed plan:

(ii) Any other matter the consent authority considers reasonably necessary to decide the application; and

(b) May grant or refuse the application; and

(c) If it grants the application, may impose conditions.

[91] The fact and the implications of the different activities were usefully explored in the judgment of Randerson J in *Auckland City Council v John Woolley Trust*.[54]

[92] The Committee's report to the House on 8 May 2001[55] did not support the proposal that Part 2 of the Act would not be required to be considered in respect of controlled and restricted discretionary activities. While agreeing that s 104 should be simplified, the Committee said:

> … However, we are not prepared to remove explicit reference to Part II and significant planning documents such as national and regional policy statements and relevant or proposed plans. We recommend that a new, overarching subsection be added to new section 104, requiring consent authorities to consider all applications subject to Part II and to have regard to matters that include the above planning documents.

The amendment proposed as s 104(1A) was identical to s 104(1) in the 2003 Amendment.

[93] With reference to ss 168A and 171 the Committee's report said:

> Section 168A specifies the matters a territorial authority must consider on a notice of requirement for a designation in its own district for a work for which that territorial authority itself has financial responsibility. Section 171 specifies the matters a territorial authority is required to consider when assessing a notice of requirement for designation by another requiring authority. Proposed amendments to these two sections are set out in clauses 56 and 58 respectively. As introduced, the new provisions place greater emphasis on environmental effects when considering a requirement, and the need to consider alternatives is reduced. **These clauses also make sections 168A and 171 more consistent with the proposed new wording for the consideration of resource consents**. Finally, the emphasis is shifted

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54 *Auckland City Council v John Woolley Trust* (2008) 14 ELRNZ 106, [2008] NZRMA 260 (HC) at [24]–[29].

55 Above n 52.

> from considering whether a designation is necessary, to whether or not the work is necessary in achieving the objectives of the requiring authority.
>
> (emphasis added)

[94] No further progress was made on the 1999 bill in the House after the Committee had reported and the report was not debated by the House. The order of the day for consideration of the report was discharged on 24 March 2003. The Resource Management Amendment Bill (No 2) was introduced on 17 March 2003 and referred to the Committee on 20 March 2003. An instruction from the House stated that the Bill was referred to the Committee for the purpose only of the Committee receiving a briefing from officials and the Committee was required to report to the House by 28 April 2003.[56]

[95] With reference to s 171 the report stated:

> [it] requires a territorial authority to consider environmental effects when considering a requirement and to have particular regard to various other matters. Alternative sites, routes, or methods will now only need to be considered if the requiring authority does not have a legal interest in the land or it is likely that the designation will have a significant adverse effect on the environment. The application of the "reasonable necessity" test is clarified. This amendment complements the amendment to section 168A.

[96] A consideration of that history leads me to infer that:

(a) the catalyst for the relocation of the phrase was the proposed s 104(3),[57] the structure of which precluded the phrase being located at the commencement of the subsection;

(b) sections 168A(1) and 171(1) were amended for consistency with s 104;

(c) section 191(1) was left unchanged because it was not addressed in the 2003 Amendment.

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[56] Resource Management Amendment Bill 1999 (No 2) (39–2) (Select Committee Report).

[57] At [90] above.

[97] However there is nothing to suggest that the relocation of the phrase within s 171(1) (and similarly within s 168A) was for the significant purpose contended for by NZTA, namely to change the focus of application of Part 2 within s 171. I also note that such an argument could not logically be mounted in relation to s 104(1) given its structure (with effects on the environment being only one of the matters to which regard is to be had). Yet the phrase was also relocated within that subsection.

[98] For these reasons I do not accept that the relocation within s 171(1) of the phrase "subject to Part 2" had the purpose or effect of making any material change to the application of that section. I reject NZTA's contention at [86] above that the consequence of that amendment was that the phrase "subject to Part 2" related only to the assessment of effects and that the (a) to (d) matters were no longer directly subject to Part 2.

*The implications of King Salmon*

[99] It is fair to say that NZTA's approach to the role of Part 2 with reference to the NoR evolved not only throughout the course of the hearing before the Board but also on the appeal in this Court.

[100] Its opening position was recorded in the Decision in this way:

> [190] In opening, [NZTA] submitted that when considering its NoR, we must (*among other things*):
>
> > [a] Consider the effects on the environment of allowing the NoR; and
> >
> > [b] Have particular regard to the matters in Sections (sic) 171(1) as if we were a territorial authority, namely:
> >
> > > [i] The relevant provisions of planning instruments;
> > >
> > > [ii] Whether adequate consideration has been given to alternative sites, routes and methods of undertaking the work;
> > >
> > > [iii] Whether the work and designation are reasonably necessary for achieving [NZTA's] project objectives, as set out in the NoR;
> > >
> > > [iv] Any other matters we consider reasonably necessary to determine the NoR; and

[v] Above all, consider Part 2 matters.

[101] In closing before the Board NZTA submitted that, notwithstanding *King Salmon*, an "overall judgment" approach remained relevant in the consenting and designation context. It submitted that Part 2 was relevant to the Board primarily because of the presence in s 171 of the phrase "subject to Part 2", drawing attention to that part of *McGuire* highlighted in [39] above. It said:

> 16.12 It is submitted that the position as expressed in *McGuire* above, has not been upset by *King Salmon*. The Supreme Court did not consider sections 104 and 171 of the RMA, or the way in which Part 2 matters are approached in a consenting context.
>
> 16.13 Nonetheless, the Supreme Court's conclusions may in certain respects be taken as impacting on the approach taken to RMA decision-making more broadly. For instance, paragraph 151 of the Court's decision quoted above is noticeably broad in its language (it refers to "*planning decisions*" generally).
>
> …
>
> 16.16 It is submitted that, in the context of … the applications for this Project, and adopting the reasoning of the Supreme Court:
>
> a Sections 104 and 171 are expressly subject to Part 2, and the provisions in Part 2 remain relevant;
>
> b Section 6 elaborates on the guiding principle in section 5. It does not 'trump' it in the way suggested for TAC and NRA;
>
> c Section 5 supports the approval of this Project, but [NZTA] is not relying on this section alone;
>
> d The following discussion of effects will allow the Board to conclude as to each of the elements of Part 2, before undertaking an overall judgment.

[102] In the section of its Decision headed "Overview of the statutory and legal context" the Board recorded its understanding of the established framework for considering s 171(1) before addressing whether that framework had been modified by *King Salmon*. Its analysis commenced in this way:

> [169] We are required to consider the matters set out in Section 171(1) *subject to Part 2*. This has been interpreted as meaning that the directions in Part 2 are therefore paramount, and are overriding in the event of conflict. The relevant Part 2 directions therefore apply to:

[a] Our evaluation of specific effects on the environment; and

[b] Our evaluation in the final analysis.

> [170] The focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. The import of this is that the purpose, policy and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Paramount in this regard is Section 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.

[103] Having set out key passages from *McGuire*, the Decision stated:

> [174] The reference being *subject to Part 2* does not entitle us to ask whether some other project alignment or design better meets the requirements of Part 2, as the Act does not direct a particular use or require the best use of resources. All that is required is a careful assessment of the Project in and of itself to determine whether it achieves the RMA's purpose. A matter that we will consider in detail at the time of our overall judgment.

There then followed [175] previously quoted.[58]

[104] Having recorded its view that, where an evaluation under Part 2 (and in particular s 5) was required or permitted, that should continue to involve an overall broad judgment as held in *NZ Rail Ltd v Marlborough District Council*,[59] the Board stated its understanding of the *King Salmon* decision:

> [177] While the Supreme Court reviewed the previous *overall broad judgment* and *environmental bottom line* jurisprudence around the correct application of Section 5 (where required), it did not go on to substantively consider or evaluate that issue. We accordingly understand that where an evaluation under Part 2 (and in particular Section 5) is required (or permitted), this should continue to involve an *overall broad judgment* as held in *NZ Rail* and outlined above.
>
> [178] The majority of the Supreme Court in *King Salmon* found that the plan change at issue … *did not comply with [Section] 67(3)(b) … in that it did not give effect to the NZCPS.* In doing so, it found that in considering whether the New Zealand Coastal Policy Statement had *been given effect to*, and finally determining the plan change before it, that Board was not entitled by reference to the principles in Part 2, to carry out a balancing of all relevant interests in order to reach a decision. Rather, the plan change should have been dealt with in terms of the New Zealand Coastal Policy Statement, without reference back to Part 2. This was primarily because of what the Court considered to be *strongly worded directives* in two of the New Zealand Coastal Policy Statement policies that were particularly

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58 At [69] above.

59 *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

relevant in that case, which the Board found would not be *given effect to* if the plan change was granted.

[105] The Board then said:

> [179] Again, we consider that properly construed, this aspect of *King Salmon* does not directly affect our determination of [NZTA's] NoR, for the following reasons. *King Salmon* involved consideration of a plan change, and therefore different statutory tests from those applying to [NZTA's] NoR. Importantly, the Supreme Court observed that Section 67(3)(b) provides a *strong directive, creating a firm obligation on the part of those subject to it*, to give effect to the New Zealand Coastal Policy Statement.
>
> [180] Reading the majority decision as a whole, we consider that this specific statutory context was clearly central to the Supreme Court's decision. …
>
> [181] By contrast, in considering the NoR we are required to have *particular regard to* the relevant instruments.

There then followed [182] previously quoted.[60]

[106] NZTA disagreed with the Board's analysis of *King Salmon* and with its reliance on *McGuire*. Its principal written submissions on appeal stated:

> 29.7 *King Salmon* has significantly modified the approach to decision-making under the RMA and in particular, what 'subject to Part 2' means. In other words, when is recourse to be had to Part 2?
>
> …
>
> 29.11 While the decision was in the context of a plan change, the Supreme Court's findings in relation to the planning framework, and the application of Part 2 to decision-making generally, have wider application.
>
> …
>
> 29.13 We submit that the Supreme Court has given a clear direction that it is the planning documents that generally form the basis for decision-making under the RMA. Parliament has provided for a hierarchy of planning documents, relevant to planning decisions under the RMA. These documents are drafted 'in accordance with Part 2' and 'flesh out' the provisions of Part 2 in a manner that is increasingly detailed both as to content and location.

[107] Then, under a heading "Application of *King Salmon* to s 171(1)", NZTA contended:

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[60] At [70] above.

29.16 For the reasons summarised in para 29.13, the planning documents give effect to Part 2. Decisions made in reliance on those documents therefore achieve the sustainable management purpose of the Act, as provided for in Part 2.

29.17 The Supreme Court held that s 5 (the purpose of the Act) is not an operative provision. Nor therefore is Part 2 as a whole given that ss 6, 7 and 8 are a further elaboration of that purpose. Part 2 provisions are particularised (both as to substantive content and locality) by the planning documents, from national policy statements down to district plans.

…

29.22 Section 171(1) directs that when considering a notice of requirement, a decision-maker's assessment of effects on the environment is 'subject to Part 2'. However, on the basis of the principles established by the Supreme Court in *King Salmon*, and consistent with *McGuire*, Part 2 will be relevant if one of the three caveats is established or there is a conflict in the exercise of the statutory duty under s 171(1)(a) to (d). In this case the planning framework did contemplate the Project and therefore there was no conflict so as to bring Part 2 into play.

[108] In response TAC maintained the primacy of Part 2 and criticised NZTA's submission for failing to address how the "subject to Part 2" direction is to be complied with. NZTA's reply submissions were interesting on both those points:

11.15 … We agree with the submissions of TAC to the effect that Part 2 retains primacy.

11.16 The approach by the Appellant to the application of Part 2, assumes primacy, but the question remains as to how that primacy is to be provided for. How it is provided for is cogently summarised at [30] of *King Salmon*. The crucial point is that the Supreme Court has determined that it is the planning documents which give effect to s 5 and Part 2 more generally unless one of the three caveats apply or there is a conflict. Following *King Salmon*, the primacy of Part 2 is maintained and applied through the planning documents; both as to substantive content and the locality to which those documents apply.

11.17 It follows that the phrase 'subject to Part 2' in s 171(1) (or in s 104 for that matter) does not imply the re-litigation of previously settled planning provisions where no caveats or conflict arise. This is why at [151] the Supreme Court determined that s 5 is not intended to be an operative provision in the sense that it is not a section under which particular planning decisions are made. It is the hierarchy (cascade) of planning documents which flesh out the principles in s 5 and the remainder of Part 2, and it is those documents which form the basis of decision-making; in this case being the framework in which effects are to be considered.

[109] It is only proper that I record that, when in the course of his oral reply I explored with Mr Casey QC the issue of the scope of NZTA's argument before the Board on the implications of *King Salmon*, Mr Casey acknowledged that the submission relating to caveats and conflicts had not been developed before the Board to the extent that it had on appeal. In particular para 16.16(a)[61] did not indicate how primacy was to be given whereas NZTA's current stance is that such primacy is via the plan in the absence of any conflict.

[110] While the provisions in Part 2 are not operative provisions (in the sense of being sections under which particular planning decisions are made),[62] they nevertheless comprise a guide for the performance of the specific legislative functions. As *King Salmon* said with reference to s 5:

> (a) [it] states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation;[63]
>
> (b) [it] is a carefully formulated statement of principle intended to guide those who make decisions under the RMA.[64]

The other three sections supplement the core purpose in s 5 by stating the particular obligations of those administering the RMA in relation to the various matters identified.[65]

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61 At [101] above.
62 *King Salmon*, above n 26, at [151]; see also [129].
63 At [24(a)].
64 At [25].
65 At [26].

[111] Consistent with that view, in *John Woolley Trust* Randerson J observed:[66]

> [47] … Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at para [94] of the decision in *Auckland City Council v Auckland Regional Council*, that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. **Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the RMA**.
>
> (emphasis added)

[112] The role of Part 2 is reinforced and reiterated in certain sections (specifically s 104(1), 168A(3), 171(1) and 191(1)) by the presence of the phrase "subject to Part 2". As the Privy Council stated in *McGuire*:[67]

> [22] … Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.

The meaning of the "subject to" drafting method had been previously explained by Cooke P in *Mangonui County Council*.[68]

[113] However the provisions with which *King Salmon* was concerned did not contain that phrase. Furthermore the role of Part 2 in s 66(1) had to be viewed in the light of the direction in s 67(3) which the Supreme Court described as follows:

> [85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) Part 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to Part 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" Part 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

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66 *Auckland City Council v John Woolley Trust*, above n 53, at [47]; the highlighted words were referred to in *Ayrburn Farms Estate Ltd v Queenstown Lakes District Council*, above n 6, at [99] and in *Man O'War Station Ltd v Auckland Regional Council* (2011) 16 ELRNZ 475, [2011] NZRMA 235 (HC) at [20].

67 *McGuire*, above n 19.

68 At [38] above.

[114] In a sense *King Salmon* might be viewed as a case where, to adopt the phrase of Randerson J in *John Woolley Trust*, Part 2 was limited in application by other specific provisions of the RMA although I consider that it would be more accurate to say that its application was provided for in a particular way.

[115] The Board's error in *King Salmon* lay in considering that it was entitled, by reference to the principles in Part 2, to carry out a balancing exercise of all relevant interests in order to reach a decision whereas it was obliged to deal with the plan change application in terms of the NZCPS and failed to do so.[69] The Supreme Court summarised the Board's approach in this way:

> [83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations …

[116] I consider that the Decision in the present case demonstrates that the Board correctly analysed and well understood the ratio of the *King Salmon* decision.[70]

[117] However the Board's task in the present matter was different, as reflected in Mr Palmer QC's submission:

> 8.10 Rather, the Board is required by s 171, "subject to Part 2, to consider the effects on the environment of allowing the requirement", "having particular regard" to various factors including the adequacy of alternatives and the relevant provisions of the planning documents. So consideration of the effects, subject to Part 2, having particular regard to the stated matters is (as the Board said, at [170]) the "focal point of the assessment". Planning documents do not determine the outcome of a s 171 decision, unlike the NZCPS which can determine a plan change decision under s 67.

[118] It is apparent that the Board understood not only the different nature of its task in considering an application under s 171[71] but also the implications of the "subject to Part 2" component:

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69 *King Salmon*, above n 26, at [153]–[154].

70 [179]–[180] of the Final Decision at [105] above.

> [183] Further and perhaps more importantly, as we have already noted, Section 171(1) and the considerations it prescribes are expressed as being *subject to Part 2*. We accordingly have a *specific statutory direction* to appropriately consider and apply that part of the Act in making our determination. The closest corresponding requirement with respect to statutory planning documents is that those must be prepared and changed *in accordance with … the provisions of Part 2*.
>
> [184] For the above reasons, the statutory framework and expectation of Section 171(1) relevant to our current decision can be contrasted with the situation in *King Salmon*. The plan change being considered in that case was required to *give effect to* a higher order planning document which the Supreme Court considered should already *give substance to pt 2's provisions in relation to … [the] coastal environment*. By contrast, here we are required to consider the environmental effects of the NoR, *subject to Part 2* and having *particular regard to* the relevant statutory planning documents.

**Consideration of alternative options – an overview**

[119] The Decision recorded that NZTA acknowledged that both prerequisites in s 171(1)(b) applied with respect to the Project. In any event the Board concluded that the Project would have significant adverse effects, including heritage, amenity and landscape matters.[72]

[120] Consequently the Board was required in considering the effects on the environment under s 171(1) to have particular regard to whether adequate consideration had been given by NZTA to alternative sites, routes or methods of undertaking the work.

[121] As the Board noted in its introduction to the s 171(1)(b) issue,[73] a feature of the hearing process was the strong assertions by some of the parties that there had not been adequate consideration of alternative options. The Board recorded that an enormous amount of information had been put before it about the methodology of the option selection process and how that process took into account the significant effects of the Project.

[122] Opponents of the application presented alternative options to the Board in order to establish that such options were not suppositious and should have been

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71 [181]–[182] at [70] above.
72 At [1084(c)].
73 At [1082]–[1083].

explored as part of the option evaluation process. The Board's conclusion that there had been a failure to adequately assess non-suppositious options is the focus of Issue 1B.

*Chronology*

[123] In what the Board described as a "somewhat complex chronology"[74] the Decision provides a thorough review of the historical background and the chronology of the option process spanning [1097] to [1164] under the following headings:

(a) March 2001: Scheme assessment report by Meritec;

(b) 2006 to 2008: Ngauranga to Wellington Airport strategic study and the Corridor Plan;

(c) 2008 to 2009: Basin Reserve Inquiry-By-Design workshop;

(d) January 2011: Feasible Options Report;

(e) July and August 2011: Public engagement and refinement of the preferred option;

(f) Tunnel options;

(g) BRREO option.

[124] At the Inquiry-By-Design workshop five options were selected for further consideration comprising one at-grade option (with a variation) and four grade-separated bridge options. In order that the discussion below of the several Issue 1 questions may be comprehensible to those who may not read the Decision, I set out certain key passages from the Board's chronology:

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74 At [1165].

[1118] Between 2009 and 2010, the five options were subjected to further detailed analysis, which resulted in one of the at-grade variants being discarded. During this process, one more option was uncovered and added. During 2010, as a result of the government signalling a possibility of contributing financially to a tunnel under the proposed NWM Park, a tunnel option (Option F) was added, making six options in all.

…

[1122] The Feasible Options Report on page 67 sets out the conclusions and recommendations:

> Our team recommended options A and B as preferred options if more weight is given to urban design, social impacts, and long term strategic fit. Of those two options, option A is the better of the two when giving more weight to these criteria. Option A requires the relocation of the [former Home of Compassion] Crèche. We acknowledge that while relocating heritage buildings is not favoured, this may be mitigated to some extent by being able to relocate the Crèche building to provide improved connections to Buckle Street or to relocated the Crèche to a larger historic precinct closer to the War Memorial.

[1123] Following development of the options and before the evaluation of the options, the tunnel option (Option F) was removed and the explanation given was:

> Following development of the options the specialists received a data-pack containing a description of Options A to E together with sufficient information to enable them to undertake peer assessment. It is important to note that the specialists are only comparing the options which permit SH1 to be at-grade in front of the War Memorial: Options A to E. **Once the government makes a decision on whether to fund the War Memorial Tunnel, Option F will be assessed with other options which permit SH1 to be located in a tunnel in front of the War Memorial.**
>
> [*our emphasis*]

…

[1125] This suite of five options was assessed against evaluation criteria as reported in Section 5.3 of Technical Report 19. Using a pair-wise comparison and a weighting process, the workshop participants recommended Option A and Option B – both grade-separated bridge options. Option A eventually evolved into the Project.

…

[1138] In mid-2012, the government was exploring whether it would construct the NWM Park in time for the 100th Gallipoli Remembrance in 2015, including the idea of locating Buckle Street under the park. [NZTA] asked the Project team to reappraise the cost of Option F. This review was carried out with respect to both Options F and X. By letter dated

3 July 2012, Opus set out what it termed an *alternate review*. The letter concluded:

> **Conclusions**
>
> 1. NZTA has previously determined that Option F was unaffordable. A decision by the government to underground Buckle Street will not change this decision.
>
> 2. Option X is likely to be more expensive than Option A while having no more (possibly less) transportation benefits. It is unlikely that Option X would prove to be preferable to Option A.
>
> 3. A decision by the government to underground Buckle Street will not change the outcomes of the option evaluation process used to compare alternatives at the Basin Reserve.
>
> 4. Option A remains the preferred option even if the government decides to underground Buckle Street.

[1139] On 7 August 2012, the government announced that the NWM Park would be completed by April 2015 and that empowering legislation would be enacted and that it would be contributing $50m towards the costs of undergrounding Buckle Street.

…

[1132] On 17 August 2012, [NZTA] confirmed and announced Option A as the preferred option. They also confirmed that a pedestrian and cycling facility would be added to the Basin Bridge to provide a link between Mt Victoria Tunnel and Buckle Street.

…

[1151] In January 2013, Richard Reid and Associates supplied to the City Council conceptual drawings for improving the lane configuration around the Basin Reserve roundabout. Before us, Mr Reid produced an enhanced proposal he called the Basin Reserve Roundabout Enhancement Option (**the BRREO Option**). …

[1152] Essentially, but somewhat simplistically, the BRREO Option proposes an upgrading of the existing roundabout by widening Paterson Street westbound up to the Dufferin Street stop line and widening Dufferin Street to between Paterson Street and Rugby Street, in each case to three lanes. This would provide three continuous lanes westbound around the roundabout from the exit from the Mt Victoria Tunnel to Buckle Street. It also proposes to add a third lane on Paterson Street for westbound traffic in the event of the duplication of the Mt Victoria Tunnel.

*The Board's general approach*

[125] In a section of the Decision spanning [1085] to [1096] the Board directed itself on the proper approach to and the application of s 171(1)(b). After a discussion of aspects of *Queenstown Airport*[75] (which is the focus of the questions in Issues 1A and 1B) and after considering the meaning of adequate consideration, the Board described its task as follows:

> [1090] Subsection 1(b) requires a judgement on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.

[126] The Board's findings on the consideration of alternatives stated:

> [1215] Clearly, the purpose of the statutory direction in Section 171(1)(b) of the RMA is to ensure that the decision to proceed with the preferred option is soundly based and other options (particularly those with reduced adverse environmental effects) have been dismissed for good reason. Adequate consideration becomes even more relevant when the Project, as here, involves significant adverse environmental effects.
>
> [1216] We find the consideration of alternatives has, in the circumstances of this case, been inadequate for the reasons set out above, which include:
>
> [a] A lack of transparency and replicability of the option evaluation; and
>
> [b] A failure to adequately assess non-suppositious options, particularly those with potentially reduced environmental effects.

[127] In Issues 1A to 1G addressed below NZTA challenges various aspects of the Board's approach in coming to the conclusion that NZTA had not given adequate consideration to alternatives to the proposed flyover. The questions of law which NZTA invites the Court to consider include several in the *Edwards v Bairstow* category.

[128] The respondents contend that most of NZTA's points of contention are dressed up in the legal language of "tests" and "thresholds" but are, in effect,

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[75] *Queenstown Airport*, above n 22.

challenges to the Board's view of the facts and hence beyond the proper ambit of this appeal.

**Subissue 1A: Relating the measure of adequacy to the adversity of effects**

[129] The general requirement in the original s 171[76] to have particular regard to whether adequate consideration had been given to alternative sites, routes or methods of achieving the work was confined in 2003 to two scenarios,[77] namely if:

(a) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(b) it is likely that the work will have a significant adverse effect on the environment.

[130] The former scenario was the subject of consideration in *Queenstown Airport.*[78] Queenstown Airport Corporation wished to provide for the expansion of Queenstown Airport and to achieve that objective it issued a notice of requirement seeking in effect to acquire approximately 19 hectares of land owned by Remarkables Park Ltd. The Environment Court rejected that part of the NoR seeking to provide for a precision instrument approach runway and a parallel taxiway and as a consequence the area of land subject to the NoR was reduced to 8.07 hectares.

[131] In the course of considering s 171(1)(b) on appeal Whata J said:

> [121] The section presupposes that where private land will be affected by a designation, adequate consideration of alternative sites not involving private land must be undertaken by the requiring authority. Furthermore, the measure of adequacy will depend on the extent of the land affected by the designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.

[132] In its closing statement to the Board NZTA contended that *Queenstown Airport* was relevant for three purposes, the first of which was:

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76 At [32] above.
77 At [95] above.
78 *Queenstown Airport*, above n 22.

> … it establishes that the concept of adequacy in section 171(1)(b) is a sliding scale, with the measure of adequacy depending on the extent of private land affected by the designation. The extent of land required for the Basin Bridge Project is shown on the preliminary land requirement plans and schedule (sheets 2A.01–03). These show that, of the 46 titles affected by the NOR footprint, only 8 are privately owned. Expressed in land area, 0.3 ha of the 2 ha to which the NOR relates is privately owned. Applying the reasoning in the *Queenstown Airport Corporation Limited* decision, this would suggest that a less careful assessment of alternative sites is required. However, [NZTA] has not sought to undertake a less careful assessment of alternatives. Instead, it considers that the assessment it has undertaken is thorough and robust.

[133] After setting out para [121] of *Queenstown Airport*, the Board said:

> [1087] In this case, the extent of private land subject to the proposed designation is not significant. However, as we have said, [NZTA] acknowledged (and our assessment confirms) that the work would be likely to have a significant adverse effect on the environment. While Justice Whata's comments applied to the impact on private land, the same logic must apply to the extent of the Project's adverse effects. The measure of adequacy of the consideration of alternatives will depend on the impact on the environment of adverse effects.
>
> [1088] Accordingly, we must be satisfied that the assessment of alternative sites was adequate, in light of our findings as to the Project's effects on the environment. The more significant the adverse effects (as we have found them to be), the more careful the assessment of alternatives that is required.

[134] On appeal NZTA seeks to resile from its stance before the Board, proposing to argue that the Board erred in law by adopting the logic of *Queenstown Airport* and extending it to s 171(1)(b)(ii). It seeks to argue first that different considerations apply according to whether the designation will impose restrictions on private land and secondly that there is no "sliding scale" according to the degree of adverse effect. NZTA accordingly invites the Court to consider the following question of law:

> Does s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

[135] NZTA's change in stance was resisted by Mr Palmer who cited an impressive list of authorities deprecating reversals of position in lower courts.[79] While mindful

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[79] *Ihaka Te Rou v Love* (1891) 10 NZLR 529 (CA); *Grobbelaar v News Group Newspaper* [2002] 1 WLR 3024 (HL); *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501 (HC); *Wymondley against the Motorway Action Group Inc v Transit New Zealand* [2004] NZRMA 162

of the reasons that have been advanced over time, I consider in the circumstances of this case where the issue involved is a question of law that it is in the broader interest to consider the argument which NZTA wishes to advance. In doing so I am particularly influenced by the approach of the Privy Council in *Foodstuffs (Auckland) Ltd v Commerce Commission*:[80]

> Their Lordships gave leave to do so on the basis of this lack of material prejudice and also because they considered it important, albeit the issue is now essentially spent, to determine the case on the correct legal footing. Not only does that accord with justice between the parties, but it also seemed appropriate from the point of view of ascertaining the true intention of Parliament when the amending legislation was enacted.

*Q 4(a): Does s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?*

[136] NZTA's argument was structured as follows:

(a) the two scenarios in s 171(1)(b)(i) and (ii) are thresholds for any consideration of alternatives and do not give rise to a need for "closer" scrutiny;

(b) the RMA does not mandate any "hard-look" or "anxious scrutiny" concept such as have been considered in the context of judicial review and applied where fundamental human rights are at stake;

(c) Whata J erred in introducing the concept of a different measure of adequacy according to the level of impact of the designation on private land;

(d) the Board was equally, if not more, wrong to extend that logic to the degree of adverse effects;

(e) if *Queenstown Airport* was correct in importing a sliding scale of adequacy, then such should only apply to the first limb of s 171(1)(b).

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(HC); *New Zealand Meat Board v Paramount Export Ltd (in liq)* [2005] 2 NZLR 447 (PC); *Patcroft Properties Ltd v Ingram* [2010] NZCA 275, [2010] 3 NZLR 681.

80 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2004] 1 NZLR 145 (PC) at [9].

[137] The section requires that where either scenario exists not only must there be consideration of alternative sites but that such consideration should be "adequate". It appeared to be common ground that the meaning of "adequate" was as stated by the Environment Court in *Te Runanga O Ati Awa Ki Whakarongotai Inc v Kapiti District Council*:[81]

> … The word 'adequate' is a perfectly simple word and we have no doubt has been deliberately used in this context. It does not mean 'meticulous'. It does not mean '*exhaustive*'. It means 'sufficient' or 'satisfactory'.

No challenge was made to the Board's analysis of the meaning of adequate at [1089].

[138] It was the respondents' contention that the adequacy (or sufficiency) of consideration in any given case must be circumstances dependent and that that must be so for both scenarios, given that the phrase "adequate consideration" appears in the chapeau to subparagraphs (i) and (ii).

[139] Mr Palmer drew attention to the decision of the Supreme Court in *King Salmon*,[82] in particular to the highlighted part of the following passage:

> [170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that (sic) a particular activity needs to occur in part of the coast environment. If that activity would adversely affect the preservation of natural character in the coast environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, **particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site**. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

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81 *Te Runanga O Ati Awa Ki Whakarongotai Inc v Kapiti District Council* (2002) 8 ELRNZ 265 (EnvC) at [153].

82 *King Salmon*, above n 26.

[140] In my view the analysis in *Queenstown Airport* is correct. I consider that it must logically apply to both the scenarios described in s 171(1)(b). It is simply common sense that what will amount to sufficient consideration of alternative sites will be influenced to some degree by the extent of the consequences of the scenarios in s 171(1)(b)(i) and (ii). That said, I doubt the utility of the expression "sliding scale" as a description of the extent of the consequences because it conveys an unduly mechanical approach to the extent of consideration required.

[141] Accordingly I consider that the Board's approach at [1087] to [1088] is not vulnerable to criticism.

[142] So far as Q 4 is concerned, the word "require" is problematic. A more careful consideration of alternatives may or may not be required: it will be very much circumstances dependent. I would answer in the affirmative either of the following rephrased questions of law:[83]

(a) *May* s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

(b) Does s 171(1)(b) of the Act *permit* a more careful consideration of alternatives when there are more significant adverse effects of allowing the requirement?

[143] In the context of Subissue 1A NZTA poses a second and alternative question of law:

> Q 4(b) In the alternative, was the finding that [NZTA] had not given sufficient careful consideration to alternatives a finding to what the Board could reasonably have come on the evidence?

[144] Mr Casey addressed this question in conjunction with the similarly expressed Q 22 in Subissue 1G. I adopt the same approach.

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[83] Although I have retained the word "careful", because that word is employed in *Queenstown Airport* and hence in the question posed, I suggest that it may be preferable to avoid the notion of degrees of "care". My preference would be a phrase such as "greater scrutiny".

**Subissue 1B: The requirement to consider all non-suppositious options with potentially less adverse effects**

[145] Following paragraph [121] addressed in Subissue 1A above, Whata J further said:

> [122] It is beyond doubt that the extent of private land subject to the proposed designation is significant. As notified 19 ha would be affected. The modified version still encompasses 8 ha. The Court had to be satisfied that the assessment of alternative sites was adequate having regard to this impact. There is authority however that a suppositious or hypothetical alternative need not be considered. But given the statutory requirement to have particular regard to the adequacy of the consideration given to alternatives, it is not sufficient to rely on the absence of a merits assessment of an alternative or on the assertion of the requiring authority. Provided there is some evidence that the alternative is not merely suppositious or hypothetical, then the Court must have particular regard to whether it was adequately considered.

[146] The third respect in which NZTA contended before the Board that *Queenstown Airport* was relevant concerned this issue:

> 11.2(c) Third, should the Board find that any alternative suggested by a submitter (such as BRREO) is not hypothetical or suppositious, then the Board must have particular regard to whether it was adequately considered.

[147] Specifically in the context of the assessment of alternatives NZTA recorded that the parties were in agreement that:

> Speculative, suppositious or hypothetical alternatives need not be considered. However, provided there is some evidence that an alternative is not merely suppositious or hypothetical, then the Board must have particular regard to whether it was adequately considered.

NZTA's case was that all relevant alternatives had been adequately considered.

[148] Under the heading "Non-Suppositious Options, with Potentially Reduced Environmental Effects" the Board said:

> [1182] Because of the Project's significant adverse environmental effects (as we have found them to be) it was necessary for [NZTA] to give adequate consideration to alternatives, particularly those options with reduced environmental effects. As we have said, the measure of that adequacy would depend on how significant the adverse effects would be. In this case, we have found that there would be significant adverse effects.

> [1183] A number of options were referred to in the evidence. The option evaluation team considered some of them at various stages of the process. The Architectural Centre and Richard Reid and Associates, on behalf of the Mt Victoria Residents Association, put options before us. This was not for the purpose of persuading us that their options were better, but to establish that these options were not suppositious, would potentially have reduced environmental effects than the Project before us, and should have been explored as part of the option evaluation process.
>
> [1184] The evaluation teams considered both tunnel and at-grade options. The tunnel options were synthesised down to a tunnel option known as Option F. The Architectural Centre's Option X, proffered during 2011, was another variant of a tunnel option.
>
> …
>
> [1186] The BRREO Option consisted of improving the lane configuration around the Basin Reserve. When introducing his concept, Mr Reid told us:
>
> > 19. The existing network has sustained NZTA's many attempts to engineer a motorway 'solution' over the past 50 years. These 'solutions' have almost always diverted highway traffic northwards from its current route around the Basin Reserve roundabout and involve a flyover or tunnel structure which invariably destroys the amenity of the Basin Reserve and the urban structure of the city.
> >
> > 20. I believe the existing network will continue to have sufficient flexibility, tolerance and resilience to serve the city well into the future. The objectives to the project can be met without the need for the Basin Bridge proposal.
>
> [1187] We heard a considerable amount of evidence on these options. The evidence reached the threshold of requiring our careful consideration. We propose to consider first the tunnel options and secondly the at-grade options.

[149] In concluding its discussion of certain options the Board then said:

> [1213] As we have said, it is not for us to determine which is the best option. The statutory requirement directs us to have particular regard to the adequacy of consideration of alternatives. Mr Justice Whata said in the *Queenstown* case that, where there is evidence that the alternative is not merely suppositious or hypothetical, then the Court (or in this case this Board) must have particular regard to whether it was adequately considered.

The Board concluded that NZTA's consideration of alternatives had been inadequate for reasons which included a failure to adequately assess non-suppositious options, particularly those with potentially reduced environment effects.[84]

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[84] At [126] above.

[150] NZTA acknowledged that before the Board it had accepted the proposition which is reflected in [1213]. However it submitted that on reflection the proposition at [122] of *Queenstown Airport* goes too far or should be limited to the first limb of s 171(1)(b). NZTA again sought on appeal to reverse its stance before the Board and it proposed for consideration the following question of law:

> Q 7(a) Does s 171(1)(b) require the requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environmental effects?

[151] On this issue also I am prepared to consider the question of law, thereby permitting NZTA to reverse its stance below, for the same reasons as stated in the context of Subissue 1A at [135] above.

*Q 7(a): Does s 171(1)(b) require the requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environmental effects?*

[152] As is apparent from ground of appeal 8(b), NZTA's contention is that the Board had required NZTA to demonstrate that it had considered every non-suppositious option with potentially less adverse effects. NZTA's argument was that in so doing the Board had elevated the standard of consideration beyond "adequacy".

[153] Referring to what it described as the classic approach, namely that a requiring authority is not required to eliminate speculative alternatives or suppositious outcomes, NZTA submitted:

> 16.7 In *Queenstown Airport* and the Majority's decision, this test has been inverted to require *every* non-suppositious option to have been considered. Indeed, the Majority's decision takes the test a step further and requires other options with potentially less adverse effects to have been dismissed only for good reason.
>
> 16.8 This takes the test of adequacy too far. In any significant project there are likely to be any number of options and variations of options that could be considered. It is unreasonable to expect a requiring authority to give detailed consideration to every permutation of the non-suppositious. That is, there may be any number of permutations of the (for example) at-grade option; [NZTA] does not have to show that it specifically addressed each and every one.

[154] I do not accept that the Board approached its task in the manner suggested by NZTA. On the contrary (as NZTA acknowledged) the Board said:

> [1090] Subsection 1(b) requires a judgement on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.

[155] Mr Palmer neatly captured the point here when he submitted:

> NZTA appears to wish to elide the point that witnesses identified non-suppositious options with reduced environmental effects with the point that NZTA's consideration of alternatives was not adequate, to create a straw man that the Board required NZTA to examine every possible alternative. It certainly did not.

[156] The answer to Q 7(a) is, therefore, in the negative.

[157] While not accepting that s 171(1)(b) creates a duty to consider all non-suppositious options, in section 17 of its primary submissions NZTA mounted a reasonably extensive argument that it had in fact considered the options identified by the Board as non-suppositious and that its consideration had been adequate.

[158] The respondents attacked this argument as being blatantly a disagreement with the Board's assessment of the facts and not a question of law as required by s 149V(1).

[159] As noted in the discussion of "a question of law"[85] the Board's conclusions on fact can only be challenged on an *Edwards v Bairstow* basis. NZTA recognises that reality by the formulation of the questions comprising Q 7(b)(i), (ii) and (iii). I proceed to address them, albeit reframed to align precisely with Lord Radcliffe's third description for the reasons explained at [16] to [23] above.

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[85] At [12]–[15] above.

*Q 7(b)(i): Is the case one in which the true and only reasonable conclusion contradicts the determination that BRREO was a non-suppositious option?*

[160] With reference to at-grade options (including BRREO) NZTA first submitted that the Board's finding, that such options had not been adequately considered, "was not a finding that it could reasonably have come to on the evidence". That, of course, was not the nature of the *Edwards v Bairstow* question framed in relation to BRREO.

[161] The argument was then developed in this way:

(a) the Majority failed to evaluate the evidence of the independent peer reviewers and to determine whether an at-grade solution, such as BRREO, could meet the Project objectives;

(b) in the absence of a finding from the Majority to the contrary, the Minority's finding that an at-grade option could not meet the Project objectives must stand;

(c) an option that does not meet the Project objectives should be considered to be a suppositious option.

[162] However the issue which I am required to determine is not whether BRREO was or was not a suppositious option but whether the true and only reasonable conclusion contradicts the Board's conclusion. In addressing the reframed question I remind myself of the Supreme Court's direction in *Bryson* that appellate judges must keep firmly in mind that on a challenge of this nature an appellant faces a very high hurdle.[86]

[163] The nature of the Board's consideration of and conclusion on the BRREO option is apparent from the following paragraphs:[87]

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[86] At [14] above.

[87] The issue is also touched on at [1210] and [1214].

> [1162] We do not propose to resolve the apparent conflicts in the evidence relating to BRREO. It is not for us to determine the best option. The question is whether this less-harmful option is hypothetical or suppositious. We bear in mind that BRREO is still at an indicative stage and could be subject to more detailed analysis, such as to geometry and intersection control phasing, by an option evaluation process.
>
> [1163] At its worst, Mr Dunlop acknowledged that general traffic and freight would receive some benefit from the BRREO Option, now and following duplication of the Mt Victoria Tunnel, but he quantifies that the transport benefits (over 40 years) would be approximately 40% less than the benefits the Project can achieve. However, following a detailed assessment, he noted that both the Project and BRREO displayed significant journey time savings over the do-minimum scenario, which includes improvements to the Vivian Street/Pirie Street and Taranaki Street/Buckle Street intersections.
>
> [1164] We are satisfied the BRREO Option, particularly having regard to the adverse effects we have identified with regard to the Project, is not so suppositional that it is not worthy of consideration as an option to be evaluated.

[164] Given the preliminary nature of the Board's appraisal and the material to which it referred I do not consider that it could fairly be said that the Board's finding on the BRREO option was insupportable. The answer to Q 7(b)(i) is No.

*Q 7(b)(ii): Is the case one in which the true and only reasonable conclusion contradicts the determination that Option X was an option with potentially less adverse effects?*

[165] NZTA's submissions on Option X echoed its BRREO submission in combining different points of complaint:

(a) in the absence of an explicit finding by the Majority, the Minority's finding that Option X had been adequately considered must stand;

(b) a finding that Option X had not been adequately considered was not a finding that could reasonably be reached on the evidence;

(c) there was no evidence to support a finding that Option X was an option with potentially less adverse effects.

Only the third of those points of criticism engages with Q 7(b)(ii).

[166] The genesis of Option X was described at [1135]:[88]

> [1135] During the period from 2007–2009, the Architectural Centre developed a concept that later became known as Option X. It provided for westbound State Highway 1 traffic to travel at grade in front of the Basin Reserve northern entrance. All vehicles travelling between Adelaide Road and Kent and Cambridge Terraces would be diverted around the western sides of the Basin Reserve along Sussex Street. Local traffic would pass over a War Memorial Tunnel providing grade separation. The removal of circulatory traffic on the eastern side of the Basin Reserve would enable the Dufferin/Rugby Street corner to be developed into a park area.

[167] In the course of its conclusions the Board at [1319][89] stated that it was satisfied on the evidence that similar transportation benefits as those from the Project could be achieved by a tunnel option or variant similar to Option X and that such should have been included in a robust option evaluation process.

[168] Mr Palmer contended that the Board did not make a finding that Option X was an option with potentially less adverse effects. Neither the amended notice of appeal nor NZTA's submissions indicated where in the Decision such a finding was made.

[169] While I was unable to identify a specific finding to that effect, I inferred that the basis for the allegation was the second of the two overarching themes which the Board at [1171] described as being worthy of careful consideration, namely "the consideration given to non-suppositious options, with potentially reduced environmental effects".[90] As Option X was discussed in the section which followed, then it could fairly be assumed that it met that description.

[170] It was Mr Milne's submission by reference to several items in the transcript that there was evidence from which it could have been found that Option X or a variant of it, if it had been properly considered within the context of the National War Memorial Tunnel, might have less adverse effects. He also made the point that NZTA had found Option X to have sufficient merit to warrant preliminary and later more detailed consideration, as had WCC. He submitted that that of itself was

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88 It is then discussed at several points in the Board's analysis: [1136]–[1138], [1143]–[1146], [1191], [1195]–[1196], [1199]–[1200].

89 At [234] below.

90 At [178] below. Essentially the same statement was made at [1183].

indicative that both entities accepted that an Option X variant could potentially have lesser environmental effects.

[171] On the basis of that material I consider that there was evidence which warranted the Board including Option X within the category of options which had "potentially" reduced environmental effects. NZTA has not demonstrated that a different view was the true and only reasonable conclusion.

*Q 7(b)(iii): Is the case one in which the true and only reasonable conclusion contradicts the determination that a long tunnel option was a non-suppositious option?*

[172] Ground of appeal 8(a)(iii) asserted that the evidence showed that NZTA considered the long tunnel option to be unaffordable, that the Board acknowledged at [1206] that affordability is properly a matter for the requiring authority and that consequently the Board could not reasonably conclude that the long tunnel option was non-suppositious.

[173] While cost can be exclusionary, it was apparent the Board had reservations about the consistency in the assessment of cost among the options and the omission to undertake a reassessment subsequent to the government's decision to underground Buckle Street. Under the heading "Affordability" the Board observed with reference to Option F:[91]

> [1204] As we have said, notwithstanding that Option F provided better overall outcomes than Option A in respect of the simplified evaluation criteria, Option F was dismissed on the basis of being unaffordable. Mr Durdin pointed out in the Abey Peer Review Report that the additional weighting given to economic efficiency, when comparing Option A to Option F, was inconsistent with the approach used to identify Options A and B as being preferred to Options C and D, in the evaluation of the initial options. In that instance, the assessment concluded that a difference in Benefit-Cost Ratio of approximately 0.5 was insignificant for a project of this scale, yet the difference in BCR between Option A and Option F is of a similar magnitude given the additional costs of Option F and the similar level of benefits generated by each option. He concluded:

[91] At [1184] the Board noted that the tunnel options were synthesised down to a tunnel option known as Option F.

> The apparent inconsistency and lack of transparency in the underlying process by which options have been compared in different stages of the project is a significant concern of the reviewers.

[1205] In his concise summary of evidence, Mr Durdin again said:

> My concern is that Technical Report 19 provides its recommendation on preferring Option A over Option F on the basis of affordability. The lack of transparency around this process has led me to question the extent to which this can be considered a substantive assessment of alternatives.

[1206] We agree with Mr Cameron that the question of affordability is a matter for [NZTA]. As pointed out by Mr Cameron, the cost of an option could make the option unrealistic. However, affordability is a relative term. In the context of this case, where we have found that there would be significant adverse effects, there is a greater need to test the cost against the adverse effects in a transparent and comparative evaluation against other options. This should have been done at the Feasible Options Report stage. It was not.

[1207] Option F was removed from that process on the grounds of affordability. At the time it was removed there was a clear statement of intent in the Feasible Options Report to assess Option F once the Government made a decision whether to fund the NWM Park and Buckle Street Underpass. This was not done once that decision was made by the Government. Rather, an ex post facto comparison of Options A, F and X was appended as Appendix B to Technical Report 19. At this stage [NZTA] had indicated a preference for the Basin Bridge (Option A) and were preparing to lodge the application documents.

[174] Although a number of items of evidence were cited by the respondents in their opposition on this issue, in my view those observations of the Board suffice to repel the argument that a different determination on the non-suppositious nature of Option F was the true and only reasonable conclusion.

**Subissue 1C: Interpreting adequacy as requiring transparency and replicability**

*Context*

[175] To comprehend the nature of NZTA's complaint it will assist to refer in a little more detail to aspects of the chronology of events and the Board's discussion.

[176] With reference to the suite of five options referred to in [1125][92] the Board said:

> [1125] This suite of five options was assessed against evaluation criteria as reported in Section 5.3 of Technical Report 19. Using a pair-wise comparison and a weighting process, the workshop participants recommended Option A and Option B – both grade-separated bridge options. Option A eventually evolved into the Project.
>
> [1126] The option evaluation did not identify whether certain evaluation criteria were given more weight than others until the end of the process. This made following the process to arrive at the preferred option difficult to follow.
>
> [1127] Mr Milne's cross-examination of Dr Stewart focused on this apparent lack of transparency at some length. While it became apparent that weighting was applied at different stages of the process, just how those weightings were applied was not explained. A clear expression of the weighting factors would have made it much easier to follow and would have enabled a replication of the selection process.
>
> [1128] Abley Transportation Consultants, instructed by the Board to peer review aspects of the transportation issues including alternatives, attempted to replicate the selection process used to arrive at the preferred options. Several scoring systems were applied to the negative and positive effects ratings presented in Technical Report 19. By assuming equal weighting for each criteria, their analysis concluded that the at-grade Option D should receive the highest ranking. This highlights the sensitivity of the outcome to the relative weightings of the criteria.
>
> [1129] Of note also are the following comments from page 65 of the Feasible Options Report:
>
> 3. If we give more weight to the built heritage then we should select Options C, D or B but not A.
>
> 4. If we give more weight to social impacts and urban design then we should select Options A or B and not C or D.

[177] After discussing the March 2013 option evaluation recorded in Technical Report 19, the Board referred to the Traffic and Transportation Effects Peer Review of 25 November 2013 by Abley Transport Consultants which concluded with the observation:

> The apparent inconsistency and a lack of transparency in the underlying process by which options have been compared at different stages of the project is a significant concern of the reviewers.

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92 At [124] above.

[178] In turning to address the many criticisms levelled at the process and its underlying methodology, the Board reminded itself of the limitation on its function:

> [1167] At this stage, it is important to remind ourselves that Parliament has stopped short of giving this Board the jurisdiction to direct that any other alternative must be selected. It would thus become an exercise in futility if we were required to examine, in detail, and adjudicate upon, in detail, the merits of the various alternatives.
>
> [1168] While there were numerous criticisms made, we propose to identify those that we consider cogent to an overall appraisal of the process …
>
> [1171] From these criticisms, we distil two overarching themes that we consider worthy of our careful consideration:
>
> [a] The transparency and replicability of the option evaluation; and
>
> [b] The consideration given to non-suppositious options, with potentially reduced environmental effects.

*The transparency and replicability of the option evaluation*

[179] While [1172] is the primary focus of NZTA's complaint, NZTA's submissions analysed the Board's observations in several subsequent paragraphs. It is useful to record them:

> [1172] It was accepted that any evaluation process needed to be transparent. Dr Stewart acknowledged the need for this during his cross-examination by Mr Milne. Mr Durdin was also of the same view. This is necessary in order that what occurred during the option evaluation process can be fully understood, particularly if weightings are given to evaluation criteria. Mr Durdin also considered it is important that any process be replicable so that its robustness can be tested. Thus, transparency and replicability go hand in hand.
>
> [1173] It was clear from the questioning of Mr Stewart and other witnesses that each specialist applied weighting at various stages of the process. However, this was not explicit and was not documented. We have already expressed our concern about how the option evaluation, particularly as summarised in Technical Report 19, did not identify whether certain evaluation criteria were given more weight than others. This made it difficult to follow.
>
> [1174] The problem manifested itself by the fact that Mr Durdin was unable to replicate the selection process used to arrive at the preferred options in the Feasible Options Report. The November 2013 Peer Review (Report 1) included a test of the decision-making process using a non-weighted multi-criteria analysis approach. As Mr Durdin pointed out in his evidence-in-chief, the test was completed to check the robustness of identifying Option A as the preferred option. That process showed that

> Option A could have been selected, but equally Options B, C or D could have been selected using that approach.
>
> [1175] Dr Stewart has accepted, both in the Joint Witness Statement – Transportation, February 2014 and in cross-examination that:
>
> > Put simply, if a different process was used, a different recommendation may have resulted.
>
> [1176] All of the experts at that conference agreed.
>
> [1177] As Mr Durdin pointed out, this demonstrated the selection is highly reliant on the assessment technique used. He said:
>
> > Ideally, the preferred option would be identified independent of the assessment technique thereby providing greater confidence in the robustness of selecting one option over another. That is not the case in this instance, as Option A was selected using the pair-wise analysis method, Option D would be selected using the NZTA incremental BCR method and Option A, B, C or D could have been selected using multi-criteria analysis.
>
> [1178] This emphasises, or highlights, the need for transparency in explicitly setting out the weightings that are used, and the reason why they have been used, in any multi-criteria analysis. This would enable a decision-maker, in this case this Board, to adequately carry out its statutory functions under Section 171(1)(b). Parliament has directed decision makers to have particular regard to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work. We take that explicit direction seriously.

*The issue*

[180] NZTA contended that the Board erred in law in finding that, in order to be adequate under s 171(1)(b), the consideration of alternatives must also be "transparent and replicable". It framed the following question of law:

> Q 10 Does the inquiry into adequacy under s 171(1)(b) require that the consideration of alternatives be transparent and replicable; or is it sufficient that the consideration is apparent?

[181] NZTA contended that the paragraphs quoted above demonstrated that the Board descended into a level of enquiry that is neither permitted nor appropriate under s 171(1)(b). It argued that, by requiring "replicability", the Board sought to audit NZTA's consideration of alternatives and in doing so engaged with the outcome as opposed to the process, which is not its role. In its primary submissions NZTA said:

> 18.7 While the consideration of alternatives must be apparent in order for the adequacy of the consideration to be assessed, the Majority erred in law by requiring that the consideration be 'transparent and replicable'. The Majority heard detailed and lengthy evidence regarding the consideration of alternatives, such that the consideration given was readily apparent.
>
> 18.8 The Act does not require that the consideration given to alternatives be replicable, or mandate the Board to conduct an audit of the requiring authority's selection process. It clearly contemplates that the requiring authority will have exercised judgement in selecting the preferred option.
>
> …
>
> 18.11 … the correct approach under s 171(1)(b) … recognises that it is for the requiring authority to exercise judgement and make a policy decision as to which option to pursue. The decision-maker should not seek to ensure that the 'best' option has been selected by auditing the consideration of alternatives, in particular, by seeking to replicate the selection process.

[182] As with some of NZTA's other specified questions of law, I consider that the inclusion of the verb "require" misdirects the inquiry. Certainly the Board did not suggest that in all cases a conclusion on the adequacy of consideration of alternatives will necessitate demonstrating replicability. If the question is viewed as importing such a general requirement the answer would be No.

[183] The issue of replicability has arisen in this case because of the fact that weightings were applied to various evaluation criteria at various stages of the process.[93] The Board's complaint was that the selection process is in effect opaque in the absence of information about the different weightings applied. Given the Board's perception that NZTA's preference for Option A had become entrenched,[94] the Board was not satisfied that the consideration of other non-suppositious options had been adequate. It felt the need to state that it viewed its obligation "seriously".

[184] NZTA's complaint is that the Board took its role too seriously. Both the form of the question and its submissions emphasised that the inquiry is whether the requiring authority's consideration of alternatives is "apparent". Mr Milne's submissions for TAC construed that approach as being:

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93 At [176] above.
94 At [1200].

> trust us … measure adequacy by the volume of paper we produce not the quality of the process.

[185] I do not accept NZTA's submission[95] that the Board was seeking to ensure that the "best" option had been selected by auditing the consideration of alternatives. I consider that the Board had a clear understanding of the confined nature of its role: see [1090][96] and [1167].[97] While I can understand how NZTA might perceive the Board's concern about weightings as approximating to an audit, it is clear in my view that that was not the Board's objective. The Board's concern as expressed at [1181] was that, absent an understanding of the weightings applied, it was not possible to determine that adequate consideration had been given to relevant alternative options.

[186] In my view in some, but by no means in all, cases it may be necessary for the decision-maker to gain access to the weightings in a multi-criteria analysis in order to be satisfied that adequate consideration has been given to alternatives. The cases will inevitably be circumstances dependent. I do not consider that that is an unreasonable approach given the context of s 171(1)(b) where:

(a) as I have held with reference to Issue 1A above, the measure of adequacy of the consideration of alternatives will depend on the impact on the environment of adverse effects; and

(b) the subject of s 171(1)(b) is one of the matters to which particular regard is to be had.

[187] I am unable to discern an error of law in the Board's approach to this question. Indeed I perceive that this is another instance where NZTA is in effect inviting the Court, under the guise of a question of law, to second-guess the Board's conclusions. There is force in Mr Palmer's submission that NZTA's argument at para 18.9 of its primary submissions, that the Board placed "too much weight on the opinion evidence of Mr Durdin", serves to illustrate that NZTA's real complaint amounts to a disagreement about a matter of factual inference and assessment.

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95 At para 18.11 in [181] above.
96 At [125] above.
97 At [178] above.

**Subissue 1D: Requiring the assessment methodology to incorporate Part 2 weightings**

[188] NZTA's challenge on this issue is directed at the Board's concluding observations following those considered in Issue 1C above, in particular the emphasised words:

> [1180] A failure to explain the reasons for any weighting (if any) can create difficulty for us in exercising our statutory function by making it difficult for us to assess any such weightings against Part 2 and the objectives of the Project. **While we accept that each alternative does not need to be assessed against Part 2, nevertheless, Part 2 considerations should be reflected in any weight given to a particular evaluation criteria (sic) over another, as is clear from the North Island Grid Upgrade Project Board of Inquiry decision, quoted earlier.** Furthermore, as was pointed out in the Feasible Options Report, a key focus of the evaluation process was that the preferred option can be considered as that option that best meets the Project objectives with the least overall social, community and environmental impacts.
>
> [1181] The failure for either the evidence or the reports to explicitly explain what weightings were given at each of the option evaluation stages makes it difficult, if not impossible, to determine if adequate consideration was given to alternative options.
>
> (emphasis added)

[189] The amended notice of appeal at paragraph 12 contended that the Board erred in law by finding at [1180] that considerations under Part 2 of the Act should be reflected in the weight given to particular evaluation criteria, and consequently in finding at [1181] that the failure explicitly to explain the weightings given to criteria made it difficult, if not impossible, to determine if adequate consideration was given to alternative options.

[190] NZTA posed the following question of law:

> Q 13 Does s 171(1)(b) require the requiring authority's consideration of alternatives to incorporate Part 2 considerations; including (in particular) the weight given to particular evaluation criteria?

[191] NZTA criticised the highlighted passage on two counts. First it contended that the second sentence contained inconsistent findings. Secondly it said that the NIGUP decision was not authority for the proposition that Part 2 considerations must

be reflected in any weight given to a particular evaluation criterion over another during the consideration of alternatives.

[192] NZTA submitted that each alternative does not have to be tested against Part 2, citing *Volcanic Cones Society*[98] and *Queenstown Airport*.[99] The Board acknowledged that that is so. Indeed the Board had emphasised that point in the quotation from the NIGUP decision at [1094].

[193] NZTA developed the argument in this way:

> 19.3 The only purpose of requiring Part 2 to be reflected in weightings could be to ensure that the alternative met the requirements of Part 2 – in other words, to test the alternative against Part 2. Thus, by finding that Part 2 considerations should be reflected in any weight given to a particular evaluation criteria over another, the Majority effectively required alternatives to be tested against Part 2 (which the Majority was obliged to acknowledge is not the legal test). These findings are inconsistent.

[194] NZTA's argument was that, by recognising a requirement for evaluation criteria weightings to reflect Part 2 considerations, the Board was in effect requiring each individual alternative to be assessed against Part 2 despite the Board disclaiming such an intention.

[195] The issue is a subtle one. The Board's statement needs to be read in context, namely its consideration of the transparency and replicability of the option evaluation. The passage at [1180] follows the discussion at [1173] to [1177][100] of the significance for the outcome of the weighting of the evaluation criteria and the fact that it was not known whether certain evaluation criteria had been given more weight than others.

[196] That discussion had prompted the Board's observation at [1178] about the need for transparency in explicitly setting out the weightings used in any multi-criteria analysis. All of that had been preceded by the chronology which had

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98 *Volcanic Cones Society*, above n 20, at [61].
99 *Queenstown Airport*, above n 22, at [50].
100 At [179] above.

included the significant paragraphs [1128] and [1129][101] where the sensitivity of the outcome to the relative weightings of the criteria had been noted.

[197] I do not consider that the Board's intention was to subvert the established position, which it clearly recognised, that each alternative does not have to be tested against Part 2. My impression is that the Board was saying that, if a range of alternatives are to be the subject of evaluation by criteria which are to be variably weighted, then the selection of the different weightings should "reflect" Part 2 considerations.

[198] In view of the discussion of the role of Part 2 in both *McGuire* and *King Salmon* I do not view that suggestion as controversial. While each alternative does not need to be measured against Part 2, it is not unreasonable that a mechanism which provides the basis for the comparison of alternatives *inter se* should not be subject to the infusion of Part 2. Consequently I do not consider that the second ("nevertheless") part of the highlighted sentence of paragraph [1180] is erroneous in law.

[199] NZTA's second point was that the Board misapplied the NIGUP decision. The answer to this criticism is simpler. As Mr Palmer acknowledged, the sentence structure is a little puzzling. I agree that the NIGUP decision is not authority for the "nevertheless" proposition. However, as the Board had already recognised at [1094], it is clear authority for the first statement that each alternative does not need to be assessed against Part 2. In my view the Board was intending to say no more than that. Although located at the end of the sentence, its reference to the NIGUP decision was not intended as support for the observation about weightings reflecting Part 2 considerations.

[200] Reverting to Q 13, I do not consider that the question as framed is sufficiently precise to permit an answer reflecting my reasons above. An affirmative answer could be construed as departing from the established position that individual alternatives do not have to be separately tested against Part 2. I consider that a more accurate way of encapsulating my view of this aspect of the Board's decision is to

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[101] At [176] above.

say that, in circumstances where the requiring authority's consideration of alternatives involves the application of evaluation criteria which are variably weighted, the decision to allocate the variable weightings should be subject to Part 2.

**Subissue 1E: Conflation of s 171(1)(b) and (c) considerations**

[201] The question of law posed under this heading is:

> Q16 Does the test of adequacy under s 171(1)(b) require a requiring authority to select the option that best meets the transportation objectives while minimising environment effects?

[202] In relation to that question the amended notice of appeal at paragraph 15 states that the Board erred:

> (a) By inferring at [1180] that the assessment of alternatives must result in selecting the alternative ("the preferred option") that best meets the project objectives with the least overall social, community and environmental impacts.
>
> (b) By inferring at [961] that the project objectives ought to have included an environmental objective so that the Proposal could be tested against transportation effects and adverse environmental effects.

[203] Paragraph [961] appears in a discussion of the marked conflict of evidence between NZTA's expert witnesses and the witnesses called by the opposing parties. It states:

> [961] Both at the Feasible Options Report stage and at the hearing before us, there appeared to have been an overemphasis on transport and related benefits (which reflects the Project's objectives) rather than an assessment of the relevant amenity and environmental effects of the Project (which are absent from the objectives), assessed by reference to what is sought to be protected, maintained or enhanced in the statutory instruments.

[204] With reference to that paragraph NZTA submitted:

> 20.2 This comment is provided against the context of the Majority's assessment that the urban design and landscape evidence called by [NZTA] was influenced by the transportation objectives of the Project and the acceptance that grade separation by way of a bridge

> is the only way of achieving those objectives. However, it is submitted that this criticism has also permeated the Majority's assessment of the Appellant's consideration of alternatives.

[205] Then, after referring to [1180][102] and [1198], NZTA submitted that, while NZTA's aim throughout the process of considering alternatives was to select the option that best met the project objectives with the least environmental effects, NZTA did not accept that s 171(1)(b) required that test to be applied or met. NZTA argued that the Board's approach unnecessarily conflated ss 171(1)(b) and (c).

[206] I do not consider that the Board made any error of law as suggested. I agree with Mr Palmer that [961], read in the context of the relevant discussion, is simply designed to explain why there might have been a conflict of evidence between the witnesses on the opposing sides. I also accept his submission that the final sentence of [1180] on what NZTA relies is an attribution to NZTA's own Feasible Options Report. I am unable to discern a conflation error of the nature advanced.

[207] While in those circumstances I consider that Q 16 is inapt, the answer is in the negative.

**Subissue 1F: Finding that adequate consideration was not given to alternatives following the Government's decision to underground Buckle Street**

*Context*

[208] The short chronology in the overview of the consideration of alternative options referred to the letter from Opus to NZTA dated 3 July 2012.[103] The Decision continued in this way:

> [1196] The five-page document was essentially a brief summary or overview of Option F and Option X. It briefly referred to the decision being made that Option A was preferred over Option B. It touched on other options. It was not a careful evaluation of options in light of the decision by the government to underground Buckle Street. It could not be compared to the rigour of the Feasible Options Report stage. At most it could be called nothing but a cursory review of the situation.

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102 At [188] above.
103 In [1138] at [124] above.

[1197] Following its public announcement on 17 August 2012 that Option A was the preferred option, [NZTA] then proceeded to prepare its documentation for lodging its application with the EPA. The application was lodged on 17 June 2013.

[1198] Our concern is that the playing field changed with the likelihood of the Buckle Street Underpass and the bringing forward of Mt Victoria Tunnel duplication options. These should have resulted in re-evaluation of the options, including Option F, against the Project objectives. The Feasible Options Report, as we have said, itself specifically states the need to reconsider the ability of options to work in with a possible underpass. This was not done. There was no proper reconsideration of options once the underpass became a certainty.

[1199] Nothing further was done until the City Council decided on 19 December 2012 to order an assessment of Option RR (the precursor of the BRREO Option), Option X and Option A. An Option X transportation assessment was prepared by Opus for the City Council and was published on 20 February 2013. The overall assessment was completed on 28 March 2013. It concluded:

> **Overall Conclusions**
>
> From an urban design perspective, the preference would be for an at-grade solution – that is, a solution that does not require any elevated structures. However, it may not be possible to achieve the required transport benefits with an at-grade option.
>
> In that case, the preference is for the simplest structure – one does not make this part of the city harder for people to find their way around, or compromise access to neighbouring facilities.

[1200] It was not until late March that [NZTA] acted. In late March 2013, the Project team carried out an option evaluation of Options A, F and X. According to the introduction of the Comparison of Options, the evaluation was undertaken to confirm the decision previously made by [NZTA] that Option A was the preferred option. The document is dated June 2013, and by this time, the application documents for Option A would have been well advanced, as they would have been in late March when the evaluation commenced. Furthermore, it would appear from the letter dated 19 December from Mr Dangerfield, the CEO of [NZTA], to the CEO of the City Council that [NZTA] had become entrenched with Option A well before November 2012. It had, as we have said, made its decision, making Option A its preferred option on 17 August 2012.

[1201] We were not provided with any documentation or evidence as to why the Project team was asked to do its assessment in March 2013. Nor was any reason given for the failure to carry out a feasible option type assessment soon after the Government's decision to underground Buckle Street, as was foreshadowed in the Feasible Options Report.

> [1202] The chronology of events and the failure to carry out the clear statement of intent to reassess options in the event of the undergrounding of Buckle Street raises doubts as to the adequacy of consideration of alternatives. This is particularly so having regard to Mr Durdin's comments on the March 2013 comparison of options:
>
> > 37. The simplified decision matrix for the comparison between Options A and F consolidates down to four evaluation criteria, mainly Built Heritage, CPTED, Transportation and Visual. That process shows Option A as considered positive against two criteria (CPTED and Transportation) and negative against the other two. In comparison, Option F is considered positive against all four criteria.
> >
> > 38. Given that the decision-making process is premised around selecting the option "… with the least social, community and environmental impacts" it would follow that Option F should have been selected.

*Issues*

[209] NZTA asserted that in those paragraphs the Board made three errors of law:

(a) By finding at [1196] that the review of alternatives carried out in July 2012 was "cursory".

(b) By inferring at [1200] that NZTA's consideration of alternatives in March 2013 was too late because the application documentation would have been well advanced, and NZTA appeared to have been entrenched with its preferred option by that time.

(c) By finding at [1201] that NZTA was required to carry out a "feasible option type assessment" following the Government's decision.

[210] Those errors translated into four different questions of law:

> 19(a) Was the Board's finding that the review of alternatives carried out in July 2012 was 'cursory' a finding to which it could reasonably have come on the evidence, including in relation to suppositious options (refer Subissue 1B)?
>
> 19(b) In order for the consideration of alternatives to be relevant must the consideration be completed before the application documentation is well advanced?

19(c) Is a requiring authority required to prepare a 'feasible option type assessment' when the environment changes? Or is it entitled to rely on earlier work?

19(d) Was the Board's finding that adequate consideration was not given to alternatives following the Government's decision a finding to which it could reasonably have come on the evidence?

*Q 19(a) [recast]: Is this a case in which the true and only reasonable conclusion contradicts the determination that the review of alternatives carried out in July 2012 was cursory?*

[211] Referring to the Opus letter and an undated cost estimate for Option F of 19 July 2012, NZTA's short submission was that, while those documents were not a "feasible options type assessment", they reflected a level of consideration appropriate to the circumstances. In particular it was said that the two documents provided expert advice that:

(a) Option F remained significantly more expensive than the Project; and

(b) Option X remained a less desirable option due to cost and other concerns.

[212] The question whether the 3 July 2012 review of alternatives was cursory is to be viewed, as NZTA says, in the context of the circumstances. Those circumstances included the stance earlier taken that Option F was to be assessed with other options which permitted SH1 to be located in a tunnel in front of the War Memorial once the government had made a decision on whether to fund the War Memorial Tunnel.[104]

[213] The Opus letter set out what it termed an alternate review.[105] The Board did not view it as a careful evaluation of options in light of the government's decision to underground Buckle Street, observing that it could not be compared with the vigour of the Feasible Options Report stage. It is apparent that the Board regarded the letter as superficial.

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[104] [1123] at [124] above.
[105] [1138] at [124] above.

[214] It may be that an alternative view was available. However, on the facts as recited in the Decision such an alternative view could not be said to be compelling. There was ample basis for the Board's assessment of the situation. Consequently it cannot be concluded that the true and only reasonable conclusion contradicted the Board's view.

*Q 19(b): In order for the consideration of alternatives to be relevant must the consideration be completed before the application documentation is well advanced?*

[215] NZTA submitted that s 171(1)(b) does not set a deadline by which alternatives must have been considered in order for that consideration to have been adequate. I agree. However, whether the consideration of alternatives, which occurs comparatively late in the process, will be adequate or not is a matter of fact.

[216] That point is illustrated by the authority cited by NZTA, *Nelson Intermediate School v Transit New Zealand*.[106] As NZTA notes, the Environment Court there did not find that alternatives needed to have been considered prior to a particular date. However it found that Transit's development and consideration of alternatives during an appeal hearing was not adequate.

[217] That was not a finding of law. Nor was the view reached by the Board in the present case, that NZTA had become entrenched with Option A well before November 2012, a finding which contains an error of law. For that reason I do not answer the question which, in any event, is inappropriately vague.

[218] Any attack on the Board's view would need to resort to an *Edwards v Bairstow* type challenge. That is the nature of NZTA's fourth question in Issue 1F to which I now turn.

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106 *Nelson Intermediate School v Transit New Zealand* (2010) 10 ELRNZ 369 (EnvC).

*Q19(d) [recast]: Is this a case in which the true and only reasonable conclusion contradicts the determination that adequate consideration was not given to alternatives following the Government's decision?*

[219] NZTA's primary submissions stated:

> 22.1 … on 20 February 2013, Opus briefed [NZTA's] specialists to assess Options A, F and X for the purposes of Technical Report 19: Alternative Options Omnibus. The results of that exercise are summarised in Technical Report 19: Alternative Options Omnibus at Appendix B.
>
> 22.2 The Majority gave this exercise little or no weight in its assessment of [NZTA's] consideration of alternatives. No explicit reason for this is given. However, at [1200] the Majority stated that it would appear that [NZTA] was "entrenched with Option A well before November 2012".
>
> 22.3 Absent an explicit finding of bias or predetermination, there was no reasonable basis on the evidence for the Majority to find or infer that [NZTA's] consideration of alternatives in March 2013 was too late.

[220] In my view NZTA falls well short of the high hurdle of establishing that the Board's view was insupportable. Indeed, with reference to NZTA's submission at para 22.3, I consider that there were ample grounds for the Board's view on the basis of the 19 December 2012 letter alone.

[221] Accordingly the answer to Q 19(d) is No.

*Q 19(c): Is a requiring authority required to prepare a "feasible option type assessment" when the environment changes? Or is it entitled to rely on earlier work?*

[222] In the heading to this issue in its primary submissions NZTA posed the question: was NZTA required to "start again" following the Government's decision? It acknowledged that the Opus letter and the updated cost estimate[107] were not a feasible option type assessment but submitted:

> 21.6 It is appropriate (and economically responsible) for a requiring authority to rely on its earlier consideration of alternatives when the environment for a project changes. It is not required to carry out a new 'feasible option type assessment' whenever the environment for receiving the project changes.

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[107] At [211] above.

[223] The response (it is obviously not an "answer") to this question is: it depends. It is dependent on the nature and extent of the change to the environment and the extent of the reconsideration that such change necessitates. A comparatively minor change would be unlikely to require a requiring authority to "start again". The earlier work could no doubt be relied upon in large part. However a significant change to the environment might require a substantial revisiting of the prior work.

[224] The relevant event here was the government's decision concerning funding of the War Memorial Tunnel. Whether that event was of such significance as to require a more thorough-going reconsideration than was reflected in the 3 July 2012 letter is essentially a question of fact. There is no question of law to be answered.

**Subissue 1G: Adequacy of the consideration**

[225] In support of an alleged error of law in finding that adequate consideration was not given to alternatives, NZTA advances the following grounds of appeal:

(a) The evidence was of a lengthy, detailed and thorough consideration of a range of alternatives.

(b) For the reasons set out under Issues 1A to 1F, the Board applied the wrong legal tests to what was required of NZTA in its consideration of alternatives. Had the Board applied the correct test it should have found on the evidence before it that the consideration was adequate.

(c) Further, the Board allowed itself to be distracted by the merits of alternatives preferred by submitters (including BRREO, Option X and the long tunnel option) and failed to properly consider the evidence of the consideration given by NZTA to alternatives. Section 171(1)(b) requires decision-makers to inquire as to the process, rather than the outcome of the consideration given to alternatives.

[226] From that footing NZTA proposed the following question of law:

> Q 22 Is the Board's finding that adequate consideration was not given to alternatives a finding that it could reasonably have come to on the evidence?

[227] For the reasons explained at [16] to [23] that question is reframed in this way:

> Is the case one in which the true and only reasonable conclusion contradicts the determination that adequate consideration was not given to alternatives?

As earlier noted[108] that question effectively subsumes the alternative question in Issue 1A which reframed is:

> Is the case one in which the true and only reasonable conclusion contradicts the determination that NZTA had not given sufficiently careful consideration to alternatives?

[228] NZTA's argument relied on Annexure A to its primary submissions which traversed the history of events from the Meritec Scheme Assessment Report in March 2001 to the lodgement of the NoR in June 2013.

[229] Clearly there was a large volume of evidence before the Board which it appears to have diligently considered. Further, given that Mr McMahon, in his alternate view at Part 2 of the Report, accepted that adequate consideration had been given to alternative sites, routes and methods of undertaking the work, it may well be that this is a case where different decision-makers, each acting rationally, might reach differing conclusions.[109]

[230] However the issue for me is whether the Board's decision is within the category of rare cases where its conclusion is so clearly untenable as to amount to an error of law because the proper application of the law requires a different answer.[110]

[231] If the law is as I have found in the course of my consideration of the earlier parts of Issue 1, then I consider that, on the basis of the Board's consideration of the

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108 At [144] above.
109 *Vodafone*, above n 2, at [56].
110 At [52].

dual issues of transparency/replicability and assessment of non-suppositious options, the answer to the questions in their reframed form can only be in the negative.

**Issue 2: Inquiring as to the outcome rather than the process of considering alternatives**

[232] In the course of considering Issue 1C reference was made to NZTA's contention that the Board had engaged inappropriately with the outcome rather than the process.[111] That theme is developed in Issue 2 where two errors of law are alleged:

> (a) When exercising its overall judgement in accordance with s 5, applying *McGuire v Hastings District Council* [2001] NZRMA 557 to hold that if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that (at [1324]. See also [1319] and [1182]–[1187]).
>
> (b) By assessing the effects of the Proposal by reference to alternatives that the Board considered would have less adverse effects on the environment (in particular, BRREO, Option X and tunnel options). (See [403], [510], [643], [1241], [1319]).

[233] Those dual errors give rise to a single question of law, Q 25, which incorporates two alternatives:

> Q 25 Is a decision-maker (in this case the Board) permitted to compare an option against other alternatives that it considers would have less adverse effects on the environment, either in assessing the effects of the Proposal under s 171(1), or in exercising its overall judgment in accordance with s 5?

[234] In Issue 1B reference was made to the circumstances in which and the reason why various options were put before the Board.[112] Those paragraphs, together with the following two paragraphs from that part of the Decision headed "Exercise of judgment in accordance with Section 5", are referred to in the first of the alleged errors of law:

> [1319] Having said that, we are satisfied on the evidence that similar transportation benefits that would give effect to such integrated management could be achieved by a tunnel option or variant similar to Option X. We are also satisfied on the evidence that an at-grade option, along the lines of the

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111 At [181] above.
112 [1182]–[1187] at [148] above.

> BRREO Option, could facilitate some benefits, albeit not as well as the Project, at least until the Mt Victoria Tunnel duplication and possibly well beyond. We consider such options should have been included as part of a robust option evaluation process.
>
> …
>
> [1324] In the final outcome, we are required to evaluate the significant adverse effects taken together with the significance of the national and regional need for and benefit of the Project. In carrying out this evaluation, we are conscious of the dicta of the Privy Council in *McGuire* that relevantly Sections 6 and 7 are strong directions to be borne in mind, and if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that.

[235] NZTA noted that *McGuire* was focused on Māori land rights and jurisprudence around the Treaty of Waitangi, including the processes in ss 6(e), 7(a) and 8 of the RMA. It said that the Privy Council's reference to "the spirit of the legislation" can only be read as referring to the particular discussion of Treaty jurisprudence and its place in the RMA. It argued that the Board was wrong in [1324] to extend those observations more generally.

[236] NZTA also relied on *Quay Property Management Ltd v Transit NZ*[113] in support of the proposition that a decision-maker should not cross the line into adjudication of the merits of the options and by that measure determine whether the chosen route was reasonable.[114] Hence it submitted:

> 23.6 The Majority therefore erred by comparing the Project to alternatives when assessing the Proposal's effects under s 171(1) or exercising its overall judgement in accordance with s 5. (See [403], [510], [643], [1241], [1319] and [1324].

[237] I do not consider that the Board was purporting or attempting to "cross the line" as described in *Quay Property*. The Board's understanding of the nature of its task is readily apparent from paragraphs to which reference has already been made. I consider that the respondents are correct when they say that a comparison of the relative effects of various aspects of the Project with those of alternatives was a natural corollary of the Board's considering whether NZTA had given adequate consideration to those alternatives.

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113 *Quay Property Management Ltd v Transit NZ* EnvC Wellington W28/00, 29 May 2000 at [152] applied in *Queenstown Airport*, above n 22, at [50].

114 [1090] at [125] above and [1167] at [178] above.

[238] I consider that the analysis of Mr Milne for TAC fairly responds to NZTA's complaint:

> 156. The Board did not assess the overall merits or effects of the alternatives. The Board did not draw a conclusion as to whether the alternatives referred to would have been *better* options overall. Rather, it considered whether Option X-type options, tunnel options and BRREO-type options were non-suppositious and whether it was likely that they might have less impact on heritage and amenity values. It reached the inevitable conclusion that such options would potentially have fewer adverse effects on amenity values and heritage values. It was necessary for the Board to understand the extent to which the various alternatives which submitters claimed had not been properly considered, had the potential to address project objectives with lesser environmental effects; so that it could reach a conclusion as to whether those alternatives should have been adequately considered.

[239] Consequently for these reasons I answer Q 25 in the affirmative.

**Issue 3: Misapplication of s 171(1) of the Act**

[240] The refined Issue 3 questions of law are recorded at [53] above. Three of those questions have been addressed in the course of the analysis of the statutory interpretation issues, namely:

- Q 28A at [72] to [76];
- Q 28C at [64] to [68];
- Q 28D at [99] to [118].

[241] It remains to address Q 28B which states:

> Was the Board in error by considering the effects of the environment of allowing the requirement without having particular regard to the matters listed in s 171(1)(a) to (d)?

[242] No light is shone on that very general question by reference to the error of law pleaded at paragraph 27(c) of the amended notice of appeal which simply alleges a failure by the Board to assess the effects of the environment of allowing the requirement having particular regard to the matters in s 171(1)(a) to (d).

[243] However some clarification is derived from the following grounds of appeal at paragraph 29:

> (c) In terms of the matters in s 171(1)(a) and (d), the Board failed to have particular regard to the following relevant matters when assessing the Proposal's effects:
>
> (i) the Proposal's consistency with regional/city transportation strategies, as discussed by the Board at [520]–[526], in particular, when considering what weight to give to the Proposal's 'enabling benefits' for future transportation developments (see below under Issue 3); and
>
> (ii) relevant matters in the District Plan when assessing the Proposal's effects on historic heritage and amenity values (see below under Issue 6).
>
> (d) In terms of s 171(1)(b), for the reasons set out above under Issue 1, the Board ought to have found that adequate consideration had been given to alternatives and assessed the Proposal's effects having particular regard to this finding.
>
> (e) In terms of s 171(1)(c), when assessing the Proposal's effects, the Board failed to have particular regard to its finding at [1230] that the work is reasonably necessary to achieve the objectives of the requiring authority.

[244] With reference to the s 171(1)(a), (b) and (d) matters, it will be observed that the grounds of appeal incorporate cross-references to other issues, namely Issues 1, 4[115] and 6. I did not receive discrete argument on these matters in the context of Issue 3 and consequently, like counsel, I treat these matters as addressed in the context of those other Issues. The point concerning s 171(1)(c) is addressed in the context of Q 45B at [356] below.

**Issue 4: Incorrect approach to assessment of enabling benefits**

*A stand-alone project*

[245] The Decision notes that a consistent issue during the hearing was the implications of NZTA's having sought approvals for the project separately from those for related parts of the network, particularly the Mt Victoria Tunnel

[115] The reference to Issue 3 in para 29(c)(i) should be a reference to Issue 4 which relates to enabling benefits.

duplication, and in advance of details of the Public Transport Spine Study and its outcomes being finalised.[116]

[246] NZTA's closing statement to the Board of 3 June 2014 explained its reasons for the Project being pursued on a stand-alone basis:[117]

> 12.9 It is for [NZTA], together with WCC and GWRC, to decide when applications for its various projects are lodged, and the make-up of each project. It would be ridiculous to suggest that, in Auckland for example, applications for all Auckland State highway and local roading improvements should be lodged at the same time, so that their inter-relationships can be explored. For Wellington, the Ngauranga to Wellington Airport Corridor Plan signalled in 2008 that the Basin Bridge Project is to be implemented before 2018, whereas the Mt Victoria and Terrace Tunnel duplication projects are described as "*measures that may be implemented (beyond 10 years)*". [NZTA] has structured the Project (and sought approvals for that Project) in a manner which is entirely consistent with that description.
>
> 12.10 Mr Blackmore's evidence is that one of the reasons for separating the Basin Bridge and Mt Victoria Tunnel Duplication Projects was [NZTA's] wish to improve the Basin Reserve road network and thereby facilitate public transport improvements (and increased use) prior to the duplication of the Mt Victoria and Terrace Tunnels. This is supported by the GWRC. In addition, [NZTA's] view was that the environmental and social aspects of both Projects were sufficiently different in nature that there was no need to combine the two Projects for consenting purposes. Mr Blackmore's evidence was that the Basin Bridge Project is a standalone project which is not dependent on the Mt Victoria Tunnel Project proceeding, and will have benefits for north-south traffic regardless of what happens at Mt Victoria. By comparison, the Mt Victoria and Terrace Tunnel Duplication Projects, and the Bus Rapid Transport Project, are reliant on the Basin Bridge Project being in place.

[247] The Board said:

> [232] We accept [NZTA's] submission that this is not a case where the Project itself requires further consents or authorisations under the RMA which are not currently before us. Rather, the issue is the extent to which the Project and its effects, can be properly understood and assessed having regard to the current status of the Public Transport Spine Study, and in isolation from the Mt Victoria Tunnel duplication project in particular.

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116 At [225].
117 Noted at [230].

> [233] The power to defer a matter lodged with the EPA under Part 6AA while other related applications are made lies with the Minister, not the Board. Further, this power is to be exercised before notification of the original applications. The matter now having been referred in accordance with Section 147(1)(a), we are required to make a determination on the Project before us, having regard to the effects of the Project (both positive and negative), and that Project alone. We address the scope of the relevant future state of the environment and effects (including additive and cumulative effects) we can consider (particularly with respect to the Mt Victoria Tunnel duplication) elsewhere in our decision.

[248] The Board accepted TAC's submission that it must take the position "as it is". It said:

> [234] … we must determine whether the project before us meets the Act's sustainable management purpose as a stand-alone Project (i.e. in the absence of the Mt Victoria Tunnel duplication), and on the basis of the information regarding the outcomes of the Public Transport Spine Study available to us. That is the key consequence of [NZTA's] decision to seek approval for the Project as a stand-alone project separate from that of the Mt Victoria Tunnel duplication, and in advance of the Public Transport Spine Study and its outcomes being finalised.

*Effects and benefits – terminology and meaning*

[249] The fact of the stand-alone nature of the Project was the catalyst for a significant debate about the benefits which could fairly be attributed to the Project, including contingent benefits and enabling effects. As Mr Cameron observed in the course of closing arguments before the Board, these are elusive concepts.[118]

[250] "Effects" are defined in s 3 of the RMA:

> In this Act, unless the context otherwise requires, the term **effect** includes–
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects–

[118] Transcript page 8146 line 27, 4 June 2014.

> regardless of the scale, intensity, duration, or frequency of the effect, and also includes–
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[251] In its written closing statement to the Board NZTA stated that future effects, cumulative effects arising over time or in combination with other effects, and uncertain effects, are all relevant effects. Challenging the opposing contention that contingent benefits (being those benefits reliant on another consenting process or event in order to materialise) should not be taken into account by the Board, NZTA contended that the cumulative and in-combination effects to be considered by the Board included the Project's effects in combination with contingent benefits of works which are yet to receive RMA or another type of approval, citing as examples the Mt Victoria and Terrace Tunnel duplications.

[252] TAC's submissions on appeal argued that NZTA had shifted its emphasis on appeal from "strategic fit" with objectives to "enabling benefits". Although NZTA's closing statement used the phrase "facilitate/enable", as the Decision recognises, in oral submissions NZTA had submitted that "enabling effects" were a separate and identifiable benefit of the Project and that the Board should treat them as such.[119]

[253] In its written reply submissions NZTA maintained that there is a difference between the strategic fit of a project and its enabling benefits. It explained:

> 22.12 To be clear, in response to the submissions of TAC, [NZTA] considers that there is a difference between 'strategic fit' of a project and 'enabling benefits'. An 'enabling benefit' is an effect of a proposal that facilitates or creates an opportunity for the achievement of an outcome. Such an effect is an identifiable positive benefit of a project. Of course, what that might be is dependent on context.
>
> 22.13 In the context of this Project, the positive enabling effect is how the Project facilitates (will not frustrate) the development and potential implementation of related projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study ('PTTS'). [NZTA] is not referring to the benefits from the actual implementation of the wider Roads of National Significance

[119] At [507] in [256] below.

> ('RoNS') programme or the PTSS. Rather, it is the fact that this Project enables/facilitates/provides the opportunity for those other projects to be implemented.

*The Board's Decision*

[254] The Board accepted as correct NZTA's final analysis of the existing or future state of the environment.[120] In addition it stated that the approved sections of the Wellington Northern Corridor RoNS should appropriately be considered as part of the environment for assessment of the Project, being the Transmission Gully and the Mackays to Peka Peka and Peka Peka to Otaki (Kapiti Expressway) sections of the Wellington Northern Corridor.

[255] At [343] to [346] the Board considered the issue whether contingent benefits, (benefits flowing from related projects which are intended but not consented) should be attributed as flowing from the Project. It recorded that at the end of the hearing it was agreed that the benefits from a second Mt Victoria Tunnel and a third lane as part of the Buckle Street Underpass should not be attributed to the Project because the tunnel duplication had yet to be consented to and the Buckle Street Underpass was part of the existing environment.

[256] At [506] to [519] the Board proceeded to address the issue of "enabling effects", namely the consequence that the Project facilitates (or at least does not frustrate) the development of related projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study. The following paragraphs provide the context for and are referred to in the discussion of the several questions of law posed in Issue 4:

> [506] One of the issues raised before us was whether (and if so, how) we are able to take into account the *enabling effect* of the Project. That is, how should we deal with [NZTA's] argument that the Project facilitates (or at least does not frustrate) the development of related projects, particularly the Mt Victoria tunnel duplication and Public Transport Spine Study.
>
> [507] In closing, Mr Cameron submitted that such effects are a separate and identifiable benefit of the Project, and we should treat them as such. We were not provided with any case law authority to support this submission. Nor are we aware of any.

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120 At [336].

[508] We acknowledge that the Project *enabling* element may arguably be viewed as a potential positive future effect which arises from the NoR before us, and thus is within the scope of what we are tasked to consider under Sections 149P(4) and 171(1). The RMA's definition of effects in Section 3 may also be wide enough to encapsulate or incorporate such effects. In particular, it includes any positive effects – although notably, unless the context otherwise requires. As the High Court held in *Elderslie* in the context of a resource consent application:

> … To ignore **real** benefits that an activity for which consent is sought would bring necessarily produces an artificial and unbalanced picture of the real effect of the activity.
>
> [*our emphasis*]

[509] However, even if we accept (without finally determining the matter) that we can treat the project's enabling element as a separate and identifiable positive benefit, we consider this is largely a moot point. That is because in our view, any such *benefit* can be given little (if any) weight, primarily for the reasons set out below.

[510] Even if we assume that some modifications to the Basin Reserve gyratory are required in order for the Mt Victoria Tunnel duplication and Public Transport Study to proceed, the Basin Bridge Project is only one of potentially several solutions that might be put in place for that purpose. Such solutions could equally (or to a greater or lesser degree) facilitate (or not frustrate) the progression of those projects.

[511] We do not consider the evidence before us sufficiently establishes that the *enabling* element of the Project is something unique to, or which can only be achieved by, [NZTA's] current NoR.

[512] Perhaps more importantly, we have no guarantee that either (or both) of those projects would in fact go ahead. Indeed, as outlined elsewhere in our decision, we are required to make our determination on the basis that the Mt Victoria Tunnel duplication does *not* form part of the future state of the environment, and on the basis of the limited information currently available to us regarding the Public Transport Spine Study outcomes.

[513] That is the key result of [NZTA's] election to seek approval for the Project separately from that for the Mt Victoria Tunnel duplication, and in advance of the Public Transport Spine Study and its outcomes being finalised. In having made that strategic decision, [NZTA] must now accept the consequences of doing so. Put simply, and using the wording from *Elderslie*, we cannot place any significant weight on a supposed (but not quantified) Project benefit which is not real – in that we have no certainty or assurance it would actually materialise.

…

[516] As we have already found, the Mt Victoria Tunnel duplication should not be assumed to occur for the purposes of evaluating the Project. Further, we do not see our approach in this regard as inconsistent (nor do we in any way disagree) with the Environment Court's observations in *Cammack* (cited to us by [NZTA] in opening) that the RMA's:

> … concept of sustainable management does not require the status quo to simply continue. Provided the imperatives contained in s 5(a)–(c) can be justified, RMA contemplates management of use, development and protection, not just retention of the status quo.

[517] Rather, it is a reflection of our view that it would not be sustainable, or provide for sustainable management, to approve projects such as this, primarily because they were necessary to facilitate future developments, which may (or may not) proceed.

[518] Accordingly, we consider the most appropriate way to take into account the Project's facilitating or enabling element is not as an identifiable benefit in and of itself, but in the context of Section 171(1), and particular sub-sections (a) and (d). That is, the extent to which the Project is consistent with the strategies identified and in the context of the other RoNS related projects.

[257] In that part of the Decision headed "Exercise of Judgment in accordance with Section 5" the Board said:

> [1318] The Project would have an enabling element to the extent that it would fit well with the proposed works planned to implement the City Council's Growth Spine form Ngauranga to the Airport. To this extent, it would be consistent with the transportation theme identified by the planning caucus and the integration of land use and transport planning.

There followed [1319][121] which has been discussed already in the context of Issue 2.

[258] On this aspect of the appeal it is appropriate to also note the distinctly different view of Mr McMahon:

> [1510] In my consideration, the Project's *enabling effect* is of considerable importance and should be acknowledged as an important and determinative transportation benefit of the Project.
>
> [1511] For the record, I should clarify that I am not referring to the other benefits that may result from the actual implementation of the wider RoNS programme or Public Transport Spine Study that are not part of this Project. Those are contingent benefits and I wholly accept that these should not form part of the Board's substantive consideration of this Project. Rather, what I am referring to is how the Project facilitates (or at least does not frustrate) the development and potential implementation of related Projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study.

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[121] At [234] above.

*The parties' positions*

[259] NZTA mounted a comprehensive attack on this aspect of the Decision which is encapsulated in the following extract from its primary written submissions:

> 31.7 There are significant errors of law in this aspect of the Majority's decision, including:
>
> a It has failed to treat enabling benefits as separate and identifiable positive effects of the Project that properly fall within the scope of 'effect' as defined by s 3 RMA.
>
> b It has failed to assess the effects of the Project 'having particular regard to' the fact that the Project is part of a programme of works set out in the relevant statutory and non-statutory documents under s 171(1)(a) and (d).
>
> c It has failed to access the effects of the Project 'having particular regard to' the requiring authority's objectives, which explicitly include 'not constraining opportunities for future transport developments'.
>
> d By requiring that a project's enable effects be 'unique' to the project (and to the particular option), it has failed to assess the effects of allowing the requirement and has instead engaged in a comparative exercise with other alternatives.
>
> e It has required the Appellant to demonstrate the certainty of benefits, when the RMA does not require this standard.
>
> f It has conflated the concepts of 'environment' and 'effects'.
>
> g Although it claims to have taken into account the enabling elements of the Project as a relevant factor under s 7(b) when exercising its overall judgment, the rest of the Majority's decision shows that this effect has been given little, if any, weight.
>
> 31.8 As a result of these errors of law, the Board wrongly attributed little, if any, weight to this highly relevant positive effect of the Project.

Seven questions of law were posed with reference to the Board's consideration of enabling benefits.

[260] While the burden of the opposition on this topic was carried by Mr Milne, Mr Palmer took the fundamental point that the seven different instances of alleged error all suffered from the same difficulty that the Board did treat enabling effects as relevant. He maintained that NZTA's real objection was that the Board did not give those enabling effects sufficient weight, a point which he reinforced by listing the

repeated references to weight in the relevant part of NZTA's primary written submissions.

*Q 31(a): Is a project's enabling benefit an effect in terms of s 3 that can and should be taken into account under s 171(1) and/or s 5?*

[261] There is no doubt that the Board took into account and gave at least some weight to the enabling element of the Project. NZTA's complaint concerns the manner in which the Board did so, as explained in ground of appeal 30(a):

> (a) At [506]–[519], by failing to treat and/or give weight to the enabling benefits of the Proposal as a positive effect in terms of s 3 and/or s 171(1) of the Act; and instead finding:
>
> (i) at [518] that the most appropriate way to take into account the Proposal's enabling element is by considering the extent to which the Proposal is consistent with the strategies identified in relevant documents identified under s 171(1)(a) and (d);
>
> (ii) at [519] that the enabling component is a matter which could be taken into account under s 7(b) (noting that this did not appear in the Board's reasoning in its draft Decision).

[262] It is apparent that the approach which the Board should adopt was traversed in oral closing submissions before the Board. NZTA's written reply submissions on appeal explained:

> 22.3 TAC submits that [NZTA] has shifted its emphasis from 'strategic fit' with objectives and transport plans, to 'enabling benefits'. This is incorrect. [NZTA's] closing submissions before the Board asked the Board to count the contingent benefits of the Project as relevant effects. This was the subject of some discussion between counsel and the Board. Counsel accepted that the Board may choose to consider the enabling aspect of the project as a relevant matter under s 171(1)(a) and (d), however, in doing so, it was anticipated that this aspect of the Project would be given appropriate weight. However, the effect of the Board's approach is to relegate the enabling benefit to an almost irrelevant 'other matter'.
>
> 22.4 It is of considerable importance that this issue is corrected as a matter of law. As discussed in [NZTA's] Primary Submissions, the Majority has made findings in relation to the 'enabling element' of the Project that [NZTA] says are wrong in law. The Minority has not. This appeal seeks to address those errors.[122]

[122] The reference to the Minority was to [1511] at [258] above.

[263] Both ground of appeal 30(a) and that extract from NZTA's reply submission provide traction for Mr Palmer's criticism that NZTA's real objection concerns the weight which the Board accorded to enabling benefits, a view with which I agree.

[264] However Q 31(a) as framed does appear to raise a question of law, at least with reference to the "can" rather than the "should" component. That said, I do not consider that the Board made an error of law of the nature implied. It did not reject the contention that an enabling benefit could be a potential positive future effect in terms of s 3.[123] In fact, it did not actually determine the point as it expressly acknowledges at [509]. Instead, it proceeded to take the enabling element into account at [518] in the manner which counsel had agreed was acceptable.[124]

[265] The enabling effect or benefits of a project will inevitably be circumstances specific. As the Board recognised in relation to this particular Project, in some cases the enabling element may properly be viewed as a potential positive future effect. In that sense I consider that an affirmative answer can be given to the question whether a project's enabling element "can" constitute an effect to be taken into account under s 171(1) and/or s 5.

[266] However, whether it will be appropriate to do so or instead to proceed as the Board did in this case at [518] will turn on the particular circumstances. The "should" component of Q 31(a) does not raise a question of law and is not susceptible of answer in abstract terms.

*Q 31(b): Where a project's enabling benefits are consistent with a programme of infrastructure development that is recognised in relevant documents under s 171(1)(a) and (d), should those enabling benefits be given considerable weight as an effect of the project under s 171(1) and/or s 5?*

[267] This question, which is directed to the weight to be given to a project's enabling benefits, does not involve a question of law. In any event a question framed in terms of "considerable" weight is too imprecise to sound in a useful answer.

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123 At [508].

124 In paragraph 22.3 at [262] above.

*Q 31(c): In order to be taken into account, must a project's enabling benefits be unique to that project, guaranteed to go ahead, and able to be quantified?*

[268] In my view the answer to this question is No. Nor do I consider that the Board made the erroneous finding alleged, namely that in order to be given weight, enabling benefits must be unique to a project, guaranteed to go ahead and able to be quantified.

[269] The Board certainly observed at [511]–[512] that the Project did not incorporate those characteristics. However I do not construe the Board's decision as stipulating that such characteristics were prerequisites to enabling elements being taken into account. If it had viewed such features as necessary pre-conditions, then the Board would not have taken the enabling element into account at all. Yet the Board did so. In my view the Board referred to those matters as bearing on the weight to be attributed to the enabling effects. Because those features were not present, the weight which the Board allocated to enabling elements was correspondingly less.

*Q 31(d): Does the definition of the future environment constrain the ability of a decision-maker to consider the enabling benefits of a project?*

[270] The concern which prompted this question is revealed in the relevant ground of appeal:

> 30(c) At [512] by wrongly conflating the environment with effects, and thereby finding that because the Mt Victoria Tunnel duplication and Public Transport Spine Study outcomes do not form part of the future state of the environment, the Board is prevented from giving weight to the enabling benefits of the Proposal for those future projects.

[271] Noting that s 171(1) directs a decision-maker to "consider the effects on the environment of allowing the requirement", NZTA drew attention to the direction of the Court of Appeal in *Royal Forest and Bird Protection Society of New Zealand v Buller District Council*[125] that decision-makers are required to distinguish the environment from the effects of a proposal:

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[125] *Royal Forest and Bird Protection Society of New Zealand v Buller District Council* [2013] NZCA 496, (2013) 17 ELRNZ 616 at [23].

> [W]e cannot see how s 3(f) comes into play at all in determining what is the "environment" against which the actual and potential effects of allowing the activity for which consent is sought are to be considered. In determining what the "environment" is, the attention of the consent authority or a court on appeal is directed toward the physical environment as it exists at the relevant time, modified by those considerations required to be taken into account by the Act and applying *Hawthorn*, treating any permitted activity or any activity for which resource consent has been granted and which is likely to be implemented as included in the "environment". None of this has anything to do with the definition of "effect" in s 3. The definition of "environment" is a prior question to consideration of the effects of the proposed activity on the environment.

[272] Submitting that the two exercises must be kept separate, NZTA contended:

> 31.32 The Majority has wrongly conflated the concept of 'environment' with the meaning of 'effect' by determining that the enabling benefit of the Project should not be considered to be/or attributed any weight as an 'effect' because the Mt Victoria Tunnel duplication is not considered to be part of the future state of the environment. In doing so, the Board unduly limited the meaning of 'effect' to the Board's assessment of what constitutes the environment, rather than ensuring that effects of the Project are properly identified and considered. This is a fundamental error of law.
>
> 31.33 With respect, what is considered to be part of the future state of the environment (whether that includes the Mt Victoria Tunnel Duplication or the Public Transport Spine outcomes) has nothing to do with the identification of the effects of the Project. What is important is that the evidence shows that the enabling benefit of the Project (being what this infrastructure project facilitates) is an effect attributable to the Project. As we have submitted, the evidence established that the Project will facilitate planned developments (whatever their final form may take) and that without this Project, future development will be frustrated/not enabled.

[273] Mr Milne observed that NZTA did not take issue with the Board's conclusion that the tunnel duplication process did not form part of the future state of the environment while at the same time it suggested that the Board should have treated the facilitation of such a project as a positive effect on the environment. In his submission the fatal flaw in NZTA's argument was that s 171 is concerned with effects on the environment, and an effect which does not affect the environment is not a relevant effect.

[274] I agree with Mr Milne that the Board decided as a first step what the environment was by resolving the contest about the existing, permitted and reasonably foreseeable future environment and concluding that the Mt Victoria

Tunnel duplication was not part of that environment. I do not consider that it is fair to say, as NZTA contends, that the Board conflated the environment with effects.

[275] The Board recognised the Project's enabling element.[126] However it considered that the most appropriate way to take that enabling benefit into account was in the manner explained at [518].

[276] Reverting to the content of Q 31(d), if "constrain" is given the same meaning as "prevent" (in ground of appeal 30(c)), then, as the Board's Decision demonstrates, a decision-maker is not precluded by the definition of the future environment from considering the enabling effect of a project. However, again as the Board's Decision demonstrates, the decision-maker's conclusion on the state of the future environment may influence the manner in which the decision-maker chooses to take an enabling benefit into account.

[277] Consequently I do not consider that Q 31(d) is susceptible of a simple Yes or No answer. As the explanation above indicates, the finding as to the state of the future environment is likely to be material to, and even influential on, the way in which a decision-maker considers and weighs a project's enabling elements.

*Q 31(e): In order for the positive effects of a future development to be taken into account must the approvals for that development be sought at the same time as (or in advance of) the project?*

[278] The answer to that question (which refers to the positive effects "of" a future development) must be in the affirmative. On that point I apprehend the Board was unanimous.[127]

[279] The error of law alleged in the amended notice of appeal read:

> 30(d) By finding at [513] that in order for the positive effects of a future development to be taken into account the approvals for that development must be sought at the same time or in advance of a project.

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126 [1318] at [257] above.

127 The majority at [233] at [247] above; Mr McMahon at [1511] at [258] above.

[280] However in the course of presentation of NZTA's submissions Mr Casey indicated that the preposition "of" should in fact have read "on". The consequence of that amendment was to significantly change the meaning of the question. Indeed, to make sense I consider that the question needs to be redrafted to introduce a reference to the project into the subject of the sentence.

[281] In my view a negative answer applies to the following reframed question:

> In order for a prior project's enabling effects on a future development to be taken into account on the prior project, must the approvals for the future development be sought at the same time or in advance of the project?

[282] In any event I do not discern any error in the Board's approach. It clearly did take into account the Project's facilitating or enabling element.[128]

*Q 31(f): Is it consistent with sustainable management (in terms of s 5) to approve an infrastructure project because it is necessary to facilitate future developments; and does it make a difference if the project is primarily necessary to facilitate those future infrastructure developments?*

[283] This question reflected what was said to be the Board's error in allegedly finding at [517] that it was not sustainable management to approve a project primarily because the project is necessary to facilitate future developments.

[284] Neither this question, nor Q 31(g) below, received attention in NZTA's presentation of its case. It was not a matter included in the list of significant errors of law listed in paragraph 31.7 at [259] above.

[285] The Board's statement at [517] was by way of explanation for its previously expressed view that the Mt Victoria Tunnel duplication should not be assumed to occur for the purposes of evaluating the Project,[129] which also appeared to be the view of Mr McMahon.[130] In [517] the Board stated that that approach was "a reflection" of the view criticised in the current question.

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128 At [518].
129 [234] at [248] above.
130 [1511] at [258] above.

[286] I do not consider that at [517] the Board was purporting to formulate any statement of general principle. It was an expression of view about a particular category of projects, namely those necessary to facilitate future developments which may or may not proceed. I do not discern an error of law in the Board's observation.

[287] In any event I do not consider that Q 31(f) aligns with, and hence is responsive to, the Board's statement at [517]. The question does not incorporate the component that the future development may or may not proceed.

*Q 31(g): In the alternative, given its conclusion that the Proposal was necessary primarily to enable future roading projects, did the Board err in law by failing to consider conditions to address this concern?*

[288] Although an error of law was alleged at para 30(f) in essentially the same terms as Q 31(g), there was no suggestion in NZTA's submission either that relevant conditions had been proposed to the Board or that the Board had failed to consider conditions which had been proposed. Indeed it is not apparent to me how a condition could be crafted which would address the issues the subject of Issue 4. In those circumstances I do not consider that Q 31(g) requires a response.

**Issue 5: Assessment of transportation benefits – an overview**

[289] It will be recalled that improvements in transportation featured prominently in the Project Objectives recorded at [30] above.

[290] The subject of transportation is addressed at length in the Decision from [260] to [505]. The breadth and structure of that consideration is conveyed in the opening paragraph:

> [260] The Project is a transport infrastructure project and the transportation effects are central to our consideration. In this part of our decision we set out the central transportation issues, briefly identify the key provisions of relevant statutory and other documents which provide guidance for our consideration of transport effects, then discuss the existing situation and appropriate baseline against which to assess the transport effects. We then discuss those transport effects, and assess them in terms of the stated objectives of the Project and the intended outcomes of the relevant statutory instruments and non-statutory documents, and the purpose of the RMA set out in Part 2 of the Act.

[291] The Board noted that regard had also been had to the fourth matter in the Minister's reasons for referring the Project to the Board:[131]

> The proposal is intended to reduce journey time and variability for people and freight, thereby facilitating economic development. The proposal is also likely to provide for public transport, walking and cycling opportunities; reduce congestion and accident rates in the area; and improve emergency access to the Wellington Regional Hospital. If realised, these benefits will assist the Crown in fulfilling its public health, welfare, security, and safety functions.

[292] NZTA's challenge to this part of the Decision was presented as three subissues:

(a) standard of proof required to demonstrate transportation benefits: subissue 5A;

(b) assessment of immediate transportation benefits: subissue 5B;

(c) requiring the proposal to demonstrate benefits that go beyond NZTA's objectives: subissue 5C.

**Subissue 5A: Standard of proof required to demonstrate transportation benefits**

[293] The focus of this aspect of the appeal was on two paragraphs in that part of the Decision which addressed underlying assumptions about traffic growth:

> [484] We have no doubt that the assumptions fed into the traffic models are the best estimates of competent and experienced people. The point rightly made by critics however is that these assumptions largely determine the outcomes of the complex modelling exercise. Any errors in the assumptions compound when they are used to project traffic flows beyond the immediate future.
>
> [485] The issue would not be important if we were considering infrastructure improvements with minimal adverse environmental effects. In that situation it would not be important from an RMA perspective if the works proved to be premature or not needed at all. The situation here is that, as discussed later in this decision, the Basin Bridge would have significant adverse effects, so the level of confidence we can have in the modelled need and benefits, which depend on the underlying assumptions, is important.

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131 At [3] above.

[294] NZTA asserted that the Board had erred in law in two respects:

- By inferring at [485] that a higher standard of proof (in relation to transportation modelling) is required if the adverse effects of a project are more than minimal.

- By requiring a higher standard of proof to demonstrate the transportation benefits of the Proposal.

[295] It was apparent from the grounds of appeal that NZTA maintained that the Board had effectively required it to demonstrate the transportation benefits of the Proposal beyond reasonable doubt.

[296] Two questions of law were proposed:

> Q 36(a) Is a higher standard of proof required to demonstrate the transportation benefits of a project where it will have adverse effects that are more than minimal?
>
> Q 36(b) If the Board applied the wrong standard of proof, were the Board's findings regarding the transportation benefits of the Proposal ones that the Board could reasonably have come to on the evidence?

*Q 36(a): Is a higher standard of proof required to demonstrate the transportation benefits of a project where it will have adverse effects that are more than minimal?*

[297] In support of its contention that the Board erred in law by effectively requiring NZTA to demonstrate the transportation benefits of the Project beyond reasonable doubt, NZTA first referred to the following decisions:

- *Genesis Power Ltd v Manawatu-Wanganui Regional Council*;[132]

- *Shirley Primary School v Telecom Mobile Communications Ltd*;[133]

- *McIntyre v Christchurch City Council*.[134]

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132 *Genesis Power Ltd v Manawatu-Wanganui Regional Council* (2006) 12 ELRNZ 241, [2006] NZRMA 536 (HC).

133 *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 (EnvC).

134 *McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84, [1996] NZRMA 289 (Planning Tribunal).

[298] It will suffice to refer to the decision of the Court of Appeal in *Ngati Rangi Trust v Genesis Power Ltd*[135] which was an appeal from *Genesis Power* above. Although dissenting in the result, the following statement of Ellen France J reflected the view of the Court:

> [23] On [the question of the onus of proof], it need only be noted I see no difficulty with the statement in *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 at para [121] that "[i]n a basic way there is always a persuasive burden" on an applicant for a resource consent. As the Environment Court said in *Shirley*, that approach reflects the requirement that a person who wants the Court to take action must prove his or her case. In addition, as the Court observed, there are also statutory reasons for speaking of a legal burden on an applicant:
>
> > [122] Since the ultimate issue in each case is always whether granting the consent will meet the single purpose of sustainable management, even if the Court hears no evidence from anyone other than the applicant it would still be entitled to decline consent.

[299] It is clear, and I did not understand the respondents to suggest otherwise, that the criminal standard of proof does not apply in RMA matters. The answer to Q 36(a) is plainly No.

[300] I do not accept NZTA's submission that an inference can be drawn that at [485] the Board was applying a standard of proof higher than the recognised standard. I find myself in agreement with Mr Palmer's submission on this point:

> 7.17 The Board simply said the level of confidence it could have in the assumptions of the model is important. So it focussed on them. Witnesses cast doubt on the assumptions (e.g. at [497]) and NZTA kept revising them (e.g. [386]) and the Board commissioned its own review by Abley. The Board simply made its own fair assessment of the assumptions and modelling outcomes. This was an important element of discharging its obligation to consider the effects of the proposed flyover requirement.

[301] In the course of its submission NZTA drew attention to a number of places in the Board's reasons which it said showed that the Board had required NZTA to demonstrate certain matters to a higher standard or to a level of "certainty". However none of those matters suggested to me that the Board was applying anything other than a conventional civil standard of proof.

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135 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZCA 222, (2009) 15 ELRNZ 164.

*Q 36(b): If the Board applied the wrong standard of proof, were the Board's findings regarding the transportation benefits of the Proposal ones that the Board could reasonably have come to on the evidence?*

[302] Given my view that the Board did not apply the wrong standard of proof, this question is otiose.

**Subissue 5B: Assessment of immediate transportation benefits**

[303] Under this heading the amended notice of appeal asserted a single error of law:

> The Board erred in law by finding at [517] that the Proposal is *primarily* necessary to facilitate future developments, and thereby failing to have regard to the immediate transportation benefits of the Proposal as a stand-alone project. (See also [466]).

[304] Paragraph [466], which was located in the Board's summary of transportation effects,[136] stated:

> [466] The Project has been put forward on the basis that it is a multi-modal, long term, integrated solution and is part of a sequence of road improvements along the Wellington Northern Corridor, most of which are consented and some of which are under construction. The evidence was that much or even most of the transport benefits from the Basin Bridge Project depend on completion of that sequence of road improvements and can be regarded as *contingent benefits*.

[305] Although paragraph [517] has already been noted in the consideration of enabling benefits it will be convenient to set it out again:

> [517] Rather, it is a reflection of our view that it would not be sustainable, or provide for sustainable management, to approve projects such as this, primarily because they were necessary to facilitate future developments, which may (or may not) proceed.

[306] The question of law framed under this heading contained two limbs:

> Q39 Did the Board fail to have regard to immediate transportation benefits of the Proposal, such that:

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136 [464]–[476].

(a) it failed to take into account relevant matters; and/or

(b) its decision regarding the immediate transportation benefits of the Proposal is not a decision that it could reasonably have come to on the evidence?

*Q 39(a): Did the Board fail to take into account a relevant matter in failing to have regard to the immediate transportation benefits of the Proposal?*

[307] NZTA submitted that the passages at [466] and [517] showed that the Board decided that the Project did not offer "any significant or worthwhile immediate benefit". It argued that that finding stemmed from the Board's "reductive approach" to the transportation benefits of the Project, which failed to have regard to the following matters said to be relevant under s 171(1)(a) to (d):

– a planning framework that recognises the importance of the Basin Reserve transportation node;

– a planning framework that provides for the immediate implementation of bus priority; and

– NZTA's objectives for the Project.

[308] NZTA advanced this aspect of its case by reference to three matters to which it contended the Board had failed to have regard or given any weight:

– the failure to resolve the critical issue of congestion;

– bus priority; and

– economic criteria.

[309] Each of these matters was addressed succinctly but comprehensively by Mr Palmer. Rather than attempting to paraphrase his responses I believe it is useful to recite them in full:

7.8 First, NZTA says (at 32.7) the Board gave no weight to the relief of congestion from Paterson St to Tory St but "analysed the time travel savings only". But the Board was explicit (at [329]) that is

considered congestion in terms of indicators that the consensus of experts agreed on, including "difficulties getting through controlled intersections in a single phase and major variability in travel times". It considered these benefits extensively, in particular at [305]–[316] and [359]–[381] and in its overall summary at [1242], [1244]–[1247] (noting the time savings were substantially less than originally put forward when the third lane at Buckle Street and the effect of the Mt Victoria tunnel duplication are accounted for). It noted that the proposed flyover requirement would provide a time saving for the west-bound journey of 90 seconds in 2021 (at [330], [365], [1244]).

7.9 Second, NZTA says (at 32.15) the Board failed to have regard to the immediate benefit of providing for bus priority. But one of the paragraphs NZTA cites (at 32.12) in the Board's report ([405]) demonstrates the opposite:

> We are satisfied the improved journey times discussed earlier would improve journey times for buses passing through the Basin Reserve area. [NZTA's] modelling shows that the partial bus lanes proposed as part of the Project would not prevent other vehicular traffic also gaining similar time savings. We can accept that the increased priority for public transport provided by the Project could be viewed as a precursor to BRT promoted by the Regional Council, but we have no evidence about the effect of what is proposed here on mode share, which is an objective of the planning documents.

…

7.11 Finally NZTA says (at 32.16, 32.19) that the Board failed to reference the quantification of economic benefits. The Board did (at [536], [539], [543], [545]–[550] and [552]), noting (at [543]) that "[a] number of Benefit-Cost Ratio figures were presented to us in the application documents and in the evidence". If the Board hadn't referenced specific evidence that would not justify NZTA's complaint. But it did even that, citing (at [542] the evidence of NZTA's expert, Mr Copeland, whose economic assessment of the project relied upon the BCRs developed by Mr Dunlop upon which NZTA now seeks to rely. The Board's conclusion (at [550]) is reached after seeing how contested were the BCR assumptions. Again the objection is to weight.

[310] I accept the respondents' argument on these three points. Mr Palmer made the further point that much of NZTA's complaint concerned the weight accorded to the relevant factors, drawing attention for example to NZTA's submission in the context of bus priority that it was a matter to which the Board should have given "considerable weight". I agree that the Board did not err in the manner asserted. The answer to Q 39(a) is in the negative.

*The meaning of Q 39(b)?*

[311] Question 39(b) attempts to combine an error in failing to have regard to a matter (immediate transportation benefits) with an *Edwards v Bairstow* type question directed to the conclusion on that same matter. As such, it does not make sense. That can be demonstrated by my attempt to reframe the *Edwards v Bairstow* question by reference to Lord Radcliffe's third formulation:

> Is this case one in which the true and only reasonable conclusion contradicts the determination that there were no immediate transportation benefits of the Proposal?

[312] Once it is accepted, as I have found in relation to Q 39(a), that the Board did not fail to have regard to the immediate transportation benefits of the Proposal, I have difficulty seeing how an *Edwards v Bairstow* type question can be appropriately framed.

**Subissue 5C: Requiring the Proposal to demonstrate benefits that go beyond the requiring authority's objections**

[313] The question of law posed under this heading is:

> 42 Did the Board err in requiring [NZTA] to demonstrate that the Proposal would achieve specific benefits that were not part of the project objectives (namely, mode shift and providing a long-term solution for eastbound State Highway traffic)?

*Mode shift*

[314] It will be recalled that Project Objective 3 stated:

> To support mobility and modal choices within Wellington City:
>
> (i) by providing opportunities for improved public transport, cycling and walking; …

[315] With reference to that objective, NZTA's grounds of appeal stated that the project objectives did not include an objective "actually to achieve mode shift" and that the Board erred in requiring NZTA to demonstrate that the Proposal would achieve mode shift/mode share. Two errors of law were alleged:

(a) By finding at [405] that [NZTA] was required to establish (and quantify) the extent and benefits of mode share (or mode shift) that would be achieved by the Proposal when the project objectives were to support modal choices, inter alia, by providing *opportunities* for improved public transport.

(b) By finding at [441] that the Proposal is not a truly multi-modal, integrated long-term solution for cycling and walking in the project area, when the project objectives were to support modal choices, inter alia, by providing *opportunities* for improved cycling and walking.

[316] The two paragraphs to which reference was made stated:

> [405] We are satisfied the improved journey times discussed earlier would improve journey times for buses passing through the Basin Reserve area. [NZTA's] modelling shows that the partial bus lanes proposed as part of the Project would not prevent other vehicular traffic also gaining similar time savings. We can accept that the increased priority for public transport provided by the Project could be viewed as a precursor to BRT promoted by the Regional Council, but we have no evidence about the effect of what is proposed here on mode share, which is an objective of the planning documents.
>
> …
>
> [441] In summary, the Project would make some improvements for circulation of cyclists and pedestrians in the Basin Reserve area, but as these are mostly in the form of shared paths they would introduce potential conflicts between these modes, especially if these modes continue to increase in popularity. We do not see this package of proposals as a truly multi-modal, integrated, long term solution for cycling and walking in the project area. …

[317] Specifically with reference to the provision of "opportunities" in Objective 3(i) NZTA argued:

> 33.7 It is submitted that framing its objectives in this way is appropriate. In this context, [NZTA] has requiring authority status under s 167 RMA for the construction and operation of any State highway or motorway. While [NZTA] has a significant role under the LTMA investing in outcomes for public transport, cycling and walking; in its capacity as requiring authority its role is to provide infrastructure which assists or facilitates such outcomes rather than providing them directly.

[318] To my mind the distinction which NZTA seeks to draw is excessively fine. I consider that the sense of the word "opportunities" (which is the plural) in Objective 3(i) means a state of affairs favourable for a particular action or aim. It was in that sense that I consider that the Board considered the implications for

improved cycling and walking. It noted that, like the shared pathway on the bridge itself, all of the proposed facilities for pedestrians and cyclists were shared paths[137] in relation to which the Board had a general concern about safety.[138]

[319] I do not consider that the Board can be criticised for its consideration (and rejection) at [441] of the package of proposals as amounting to a truly multi-modal, integrated long term solution for cycling and walking in the area when, as recorded in [418], it was NZTA's own case that the proposed pedestrian and cycling facilities would have significant benefits, with the phrase "multi-modal solution" featuring often in submissions and cross-examination.

[320] Finally there is the point made by Mr Milne that the Board was obliged to consider certain RMA and non-RMA documents under s 171(1)(a) and (d). By way of example he pointed to the Wellington RLTS's key outcomes which include increased mode share for pedestrians and cyclists. Mr Milne submitted, and I accept, that consideration of the extent to which the Project would contribute to mode shift was therefore necessary in order for the Board to consider the Project against those documents.

[321] For these reasons I do not consider that the Board erred in law in its consideration of mode shift.

*The issue of a long-term solution*

[322] The Board's lengthy discussion of transportation issues[139] concluded with the following comments:

> **A Long Term Solution?**
>
> [498] Counsel for [NZTA] made frequent reference to the Project being a *long term* and *enduring* solution. The first objective for the Project is: *To improve the* ***resilience****, efficiency and reliability of the State Highway network*. [our emphasis], although the methods then listed for achieving this refer only to the section of the westbound part of State Highway 1 from Paterson Street to Tory Street. We have a concern about the longer term

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137 At [433].
138 At [1252].
139 At [290] above.

resilience (ability to cope with change) of the eastbound part of State Highway 1 through the central city.

…

[502] The City Council's report: *Basin Reserve – Assessment of Alternative Options for Transport Improvements* notes that if the Project proceeds, in addition to the mitigation measures proposed by [NZTA] there should be:

> Commitment to consolidating state highway traffic away from Vivian Street and into a single east-west corridor.
>
> and:
>
> Consideration of how consolidating state highway traffic away from Vivian Street can be accommodated.

[503] This raises the question of whether the Basin Bridge would facilitate or impede that long term option. Only Mr Reid commented on this and his view was that a bridge in the position proposed would make it more difficult to bring the State Highway one-way pair together into a single corridor.

[504] There is of course no obligation for [NZTA] to convince us otherwise. The evidence is that Vivian Street would have to be revisited in about five years time (to allow time for planning another upgrade), and that the creation of additional eastbound capacity, especially at intersections, can be expected to have significant environmental implications.

[505] Thus we do not consider the Project can be credited with being a long term solution.

[323] With reference to those observations NZTA's ground of appeal stated:

> c The project objectives included 'to improve the resilience, efficiency and reliability of the State Highway network' inter alia, 'by providing relief from congestion on State Highway 1 between Paterson Street and Tory Street'.
>
> d The project objectives clearly related to the westbound section of the State Highway in this location.
>
> e The project objectives did not include providing a long-term solution for eastbound State Highway traffic in this location. The Board erred in requiring [NZTA] to demonstrate that the Proposal would address this issue.

[324] Mr Milne suggested a different interpretation of the relevant objectives. Noting that the identified section of SH1 did not specify a direction of travel, he contended that the objectives identified two roads (Paterson Street and Tory Street) between which two sections of SH1 lie, one eastbound and the other westbound. I

do not accept that interpretation. I note that at [498] the Board construed the objective as referring to the section of the westbound part of SH1 "from Paterson Street to Tory Street".

[325] Consequently I accept NZTA's submission that the project objectives clearly related to the westbound section of SH1 in this location. That view is reinforced by the reference to westbound traffic in the Minister's direction.

[326] However, if the Board had considered the eastbound part of SH1 through the central city to be part of its brief, then I am sure that the topic would have received much greater attention than in the closing paragraphs of the transportation discussion. In my view that very limited discussion was in the nature of a postscript which was responsive to what the Board referred to at [498] as NZTA's frequent references to the project being a long term and enduring solution. At [505] the Board rejected that proposition for the reasons given in that short discussion.

[327] While it may be thought to have been unnecessary for the Board to engage at all with NZTA's "solution" proposition, the fact that it did so does not suggest to me that the Board was requiring NZTA to demonstrate such a "solution" as a prerequisite for the approval of the NoR. Consequently I do not consider that the Board made the error alleged of wrongly interpreting the objective as applying to the eastbound part of SH1.

[328] For these reasons I answer Q 42 in the negative.

**Issues 6, 7 and 8: Questions of law relevant to heritage and amenity**

*The refinement of the questions of law*

[329] Issue 6 in the amended notice of appeal contained a single question:

> Q 45 For all or some of the reasons outlined above under paragraph 44, did the Board fail to have particular regard to relevant matters under s 171(1)(a) and (d) in assessing the effects of the Proposal on historic heritage and amenity?

[330] Paragraph 44 recited a series of alleged errors of law and para 46 listed 16 quite detailed grounds of appeal, including the contention at 46(e) that:

> The Board's finding at [782]–[783] that the Proposal constitutes an inappropriate development of historic heritage in terms of s 6(f) of the Act is based on the Board's finding that the environment constitutes a heritage area.

[331] Issue 7 posed questions Q 48(a) and Q 48(b) while Issue 8 specified a single question, Q 51.

[332] Although the amended notice of appeal contained distinct Issues 6, 7 and 8, NZTA's principal written submissions stated at para 35.2 that the questions of law relevant to heritage and amenity identified in those three issues had been refined to six questions which were set out and addressed in the submissions. Those refined questions were revised still further in the memorandum of 23 July 2015[140] as follows:

> In relation to Issue 6, we seek to refine the questions of law as outlined at para 35.2 of [NZTA's] Primary Submissions:
>
> [45A] When assessing the heritage or amenity effects on the environment under s 171(1), must the decision-maker do so 'through the lens' of the relevant plans under s 171(1)(a) and, if relevant, s 171(1)(d) documents? That is, should the effects be assessed 'through the lens' of the recognition and protection provided by those plans and/or documents?
>
> [45B] Further, should the Board have assessed the effects having particular regard to its finding at [1230] that the works were reasonably necessary to achieve the objectives under s 171(1)(c)?
>
> [45C] When there is no 'invalidity, incomplete coverage or uncertainty of meaning' in the relevant plans under s 171(1)(a), is it appropriate for a decision-maker to assess effects against s 6(f) (for historic heritage) and s 7(c) (for amenity values)?
>
> [45D] Did the Board correctly apply the definition of 'historic heritage' under s 2?
>
> [45E] What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

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[140] At [51] above.

*Q 45A: When assessing the heritage or amenity effects on the environment under s 171(1), must the decision-maker do so 'through the lens' of the relevant plans under s 171(1)(a) and, if relevant, s 171(1)(d) documents? That is, should the effects be assessed 'through the lens' of the recognition and protection provided by those plans and/or documents?*

[333] This question invokes NZTA's *King Salmon* argument. NZTA contends that the effects on the Project of heritage and amenity must be assessed having particular regard to the recognition and protection provided for in the Regional Policy Statement and the District Plan because those documents were prepared in accordance with and to give effect to Part 2. Consequently it argues that the correct approach to the assessment of heritage and amenity effects was:

> not within the framework of Part 2, rather it is through the lens of s 171.

The nub of the respondents' rejoinder is that planning documents do not determine the outcome of a s 171 decision.[141]

*The planning framework*

[334] The current Regional Policy Statement became operative in 2013 and the District Plan has been the subject of two plan changes in the last decade. Within that process new heritage items were added and the District Plan's objectives, policies and rules were amended in response to heritage becoming a matter of national importance under the RMA.

[335] The heritage items within the vicinity of the Basin Reserve and the wider bounds of the Project listed in the District Plan are:

(a) The Museum Stand;

(b) The Memorial Fountain;

(c) Government House;

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[141] At [117] above.

(d) Former Home of Compassion Crèche; and

(e) The Carillon.

As Mr McMahon noted,[142] neither the Basin Reserve generally nor its surrounds have been recognised in the planning documents as a listed heritage item or area.

[336] The District Plan recognises and provides for the protection of historic heritage in particular ways. Policy 20.2.1.4 is to ensure that the effects of subdivision and development on the same site as any listed building or object are avoided, remedied or mitigated. Other policies are to discourage demolition or relocation and to promote conservation and sustainable use (policies 20.2.1.1 and 20.2.1.3).

*The Board's decision*

[337] The Board suggested that in terms of heritage issues the case was somewhat unusual in that the Project did not result in the actual loss of any listed heritage fabric. However it considered that the geographical and historical context for the Project contained an unusual concentration of buildings, structures and places of heritage interest.[143]

[338] It recognised that the primary means for giving effect to the recognition of historic heritage is to include items of historic heritage in the District Plan under Schedule 1. However it stated that even if a place or area is not so scheduled, the requirement in s 6(f) would still apply.[144]

[339] The Board proceeded to recognise a "wider heritage area"[145] which it considered could be affected by the Project, which stretched from Taranaki Street in the west through the Basin Reserve and Council Reserve areas to Government House and the Town Belt in the east.[146]

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142 At [1603].
143 At [566].
144 At [556].
145 At [577].
146 At [588].

[340] In its summary of findings on heritage effects across the wider heritage area of interest it said:

> [757] Regarding adverse effects on historic heritage, we find that two issues stand out:
>
> (a) The risk to the status of the Basin Reserve as a venue for test cricket is confounded by the significance of the adverse effects on the heritage setting that arise from the mitigation required to address the risk to test-cricket status; and
>
> (b) The cumulative adverse effects of dominance and severance caused by the proposed transportation structure and associated mitigation structure in this sensitive heritage precinct, particularly on the northern and northeastern sectors of the Basin Reserve Historic Area setting.

[341] It is useful also to record Mr McMahon's different view on which NZTA placed emphasis:

> [1600] In respect of Section 6(f), I fully accept and support that the protection of historic heritage from inappropriate development is inextricably linked with sustainable management practice. In making an overall determination on any particular proposal's ability to fit with this strategic aim, I also find that the significance of the heritage resource(s) relevant in this case must also be factored in. In this respect, the settled provisions of the District Plan provide – for me – a critical filter through which significance is defined; and, in turn through which accordance with Section 6(f) can ultimately be determined.
>
> [1601] In this respect, I reiterate that there was agreement that there is no direct adverse effect arising from the Project on any heritage items currently identified (as significant and worthy of protection) in the operative District Plan. The evidence strongly suggests, therefore, that the Project is most certainly consistent with Section 6(f) as it relates to those listed items.

[342] After discussing the District Plan, the changes made to it and the non-inclusion of the Basin Reserve and its surrounds as a listed heritage item or area, Mr McMahon said:

> [1604] I am inclined, for this reason, not to afford the wider site the same significance that would otherwise be afforded to listed items. To do so would (in my view) undermine the integrity of the District Plan and the inherent effectiveness of the listing method as the primary tool to implement the District Plan's objectives and policies relating to the protection of historic heritage. This implementation role is important as it enables a process to test development against those policies and objectives which have already been deemed to be the most effective provisions to give effect to Section 6(f) and the Act's purpose.

He concluded that the Project did not represent inappropriate development in terms of s 6(f).

*The parties' contentions*

[343] NZTA submitted that, particularly in light of *King Salmon*, there was no mandate for a decision-maker on either a resource consent or designation to "re-write" the District Plan, citing the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd*:[147]

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed.

[344] NZTA developed that theme in this way:

> 36.15 There is a comprehensive suite of rules and criteria in Chapters 20 and 21 by which the District Plan recognises and provides for the protection of historic heritage from inappropriate use and development. This must be assumed to be a deliberate choice, tested and confirmed by the public participatory process. It is entirely appropriate in a built up, central city environment. Not only has the Majority failed to have particular regard to these provisions when considering the effects of the Project, it has imposed a wholly different regime for the recognition and protection of unlisted historic heritage well beyond what the Plan itself does.
>
> 36.16 Just as it would not have been permissible for the Board to find that any of the listed items was not a historic heritage value, nor is it open to the Board to substantially rewrite the Plan by adding items or, as in this case, whole 'precincts', which the Plan does not contemplate.
>
> …
>
> 36.19 [NZTA] submits that the Majority was wrong to undertake a sand-alone assessment of heritage within the Part 2 framework, as discussed above. Further, the Majority failed to have particular regard to the relevant planning documents when assessing the effects of the Project on historic heritage by finding heritage features in this location requiring protection under s 6(f); these being features

[147] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [10].

> beyond what the District Plan protects. This also led to the Majority finding that the Project was 'inappropriate' in relation to historic heritage without addressing that in the context of the District Plan and its regime for protection against inappropriate use and development.

[345] In his notes for oral reply Mr Casey emphasised that resort to Part 2 is only required in the case of conflict (or where a caveat applies, to which Q 45C relates). The point was made that there is no conflict between the planning documents and Part 2 and no conflict between the Project and the planning documents (including the derivative documents). It was submitted:

> The Board is required (before resorting to Part 2) to first assess effects having particular regard to the (a)–(d) matters and then consider whether a conflict exists that requires resolution. A 'thoroughgoing attempt' to resolve any apparent conflict must be made. If a conflict cannot be resolved, resort to Part 2 will be required.

[346] NZTA's position derived significant support from WCC on whose behalf Ms Anderson presented a thoughtful submission confined to the Issue 6 questions. Although aligned with NZTA's position on the historic heritage issue, WCC's submissions were not partisan in nature but reflected the fact that, as creator and regulator of the District Plan, WCC has a particular interest in how the District Plan is applied and interpreted.

[347] Key points made by WCC were:

- The effects of allowing the requirement must be considered "through the lens" or "in light of" the s 171(1)(a) to (d) matters. That means that the District Plan is a key "filter" of whether the effects that arise from a proposal are acceptable or appropriate;

- That analysis is supported by the requirement in s 171(1) to have "particular regard" to the listed matters which include the District Plan. That is to be contrasted with the lesser obligation to "have regard to" in s 104(1), albeit that both are subject to Part 2;

– Because of the lack of recognition of the Basin Reserve in the District Plan, the Board could not resort to Part 2 as justification for its elevated treatment of unlisted heritage items and views;

– The Board erred in recognising an extended important heritage area which was inconsistent with the significance the District Plan gives to the heritage values in the area.

[348] Although, like NZTA, WCC accepted that simply because the Basin Reserve or the view along Kent and Cambridge Terraces is not listed or specifically identified in the District Plan did not mean that they were not of any heritage value or importance, nevertheless the decision-maker cannot resort to Part 2 as justification for the elevated treatment of unlisted heritage items and views.

[349] WCC's position was that the District Plan is a key basis for decision-making under the RMA and its provisions "must be applied as written". In response to my question whether the District Plan is exhaustive on the topic of historic heritage, Ms Anderson replied in the affirmative.

[350] The respondents' submissions in response were no less comprehensive. In summary they submitted:

(a) NZTA's argument was based on an erroneous application of *King Salmon* to the present circumstances;[148]

(b) the adverse effects which the Board identified at [757][149] were directly relevant to the inquiry not only because they were environmental effects under s 171 but also under s 149P because concerns about them were an important part of the Minister's decision to refer the proposal to the Board;

(c) all that the Board was required to do was to have particular regard to the various plans, and it duly did so;

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148 See at [117] above.
149 At [340] above.

(d) the Board's concern about the adverse effects was consistent with the guidelines in Part 2 to which its s 171 consideration was subject.

*Analysis*

[351] The extensive argument which I heard convinced me that phrasing the question by reference to "through the lens" or by way of a "filter"[150] is more likely to confuse than to clarify.[151] The search for meaning inevitably invites elaboration of the theme, an example of which appeared in TAC's submissions:

> … Contrary to the Appellant's submissions, s 171 the (a–d) matters do not form themselves into a combined *lens* which magnify the benefit of a proposed designation and diminish or blur its adverse effects.

I prefer to focus on the words of the statute.

[352] It is plain that the Board was required to have particular regard to inter alia the District Plan including the heritage items listed in Schedule 1. As NZTA says, it would not have been permissible for the Board to purport to find that any of the listed items was not of historic heritage value. Nor would it have been permissible for the Board to ignore them. The Board was required to consider the s 171(1)(a) matters specifically and separately from other considerations.[152] That said, the obligation on the Board in a s 171(1) context is to have "particular regard to", not "to give effect to".

[353] How much weight the Board gives to an item to which it is required to have regard or particular regard is a matter solely for the Board in the context of an appeal that is confined to questions of law, subject of course to any *Edwards v Bairstow* challenge. The issue which I am required to decide is whether as a matter of law the Board was permitted to have regard to other areas or items of historic heritage beyond that specified by the District Plan. In other words: Is the Plan exhaustive on the topic?

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150 At [341] and [347] above.
151 Kim Lewison *Metaphors and Legal Reasoning*, The Chancery Bar Association Lecture 2015.
152 See [66] above.

[354] In my view the Board was not so confined. Its consideration of Part 2 considerations was not restricted to instances of unresolvable conflict. Provided it discharged the obligation to have particular regard to the specified matters, in pursuance of its Part 2 obligation the Board was not precluded from also taking into consideration as effects on the environment the adverse effects of the requirement on other items it identified as being of significant historic heritage. In doing so it did not inevitably fail to have particular regard to the Plan as a s 171(1)(a) matter.

[355] NZTA's submission was that the Board had imposed a wholly different regime for the recognition and protection of unlisted historic heritage that went "well beyond what the Plan itself does". However it is not the function of the Court on an appeal such as this to undertake a qualitative assessment. The question to be answered must be confined to whether the Board made an error of law in reaching its conclusion. In my view it did not do so.

*Q 45B: Further, should the Board have assessed the effects having particular regard to its finding at [1230] that the works were reasonably necessary to achieve the objectives under s 171(1)(c)?*

[356] This question was derived from ground of appeal 29(e) (in the context of Issue 3) which asserted that the Board had failed to have particular regard to the finding at [1230] that the work was reasonably necessary to achieve NZTA's objectives. The 23 July 2015 memorandum described Q 45B as a development of Q 28(b) in its application to the original Q 45.

[357] The answer to Q 45B is plainly in the affirmative. That is simply the statutory obligation.

[358] However the reality is that NZTA's contention is directed not to the nature of the obligation but to whether the obligation was in fact discharged. While such an inquiry could be pursued on a general right of appeal, I do not consider that it is properly the subject of an appeal limited to questions of law only. However, in the event that my analysis is incorrect, I make the following further observations.

[359] I apprehend that at least one of the reasons for the contention that the Board did not have "particular" regard to the finding at [1230] is that in its description of its proposed decision structure at [199][153] the Board did not include the word "particular" in its reference to s 171(1)(c) in subpara (d).[154] NZTA's submissions stated that one of three noteworthy aspects of [199] was:

> 28.5(b) The Majority explicitly separates the s 171(1)(b) and (c) considerations from the consideration of effects. That is, it says that it will consider the effects of the requirement; then consider the (b) and (c) matters separately. It does not say that it will consider the effects of the requirement, having particular regard to whether [NZTA] has adequately considered alternatives (s 171(1)(b)); or whether the designation and the work is reasonably necessary for [NZTA] to achieve its objectives (s 171(1)(c)).

[360] However it is quite apparent that the Board did have particular regard to the s 171(1)(c) consideration. In addition to the discussion spanning [1217] to [1230] under the heading "Reasonably necessary for achieving objectives (s 171(1)(c))", the Board touched again on the issue of [1277] to [1278] and implicitly in the course of its ultimate conclusion at [1317].

*Q 45C: When there is no 'invalidity, incomplete coverage or uncertainty of meaning' in the relevant plans under s 171(1)(a), is it appropriate for a decision-maker to assess effects against s 6(f) (for historic heritage) and s 7(c) (for amenity values)?*

[361] This question also invokes NZTA's *King Salmon* argument. In essence it asks whether it is appropriate to address Part 2 considerations in the absence of one of the three caveats explained in *King Salmon*,[155] namely:

(a) if the relevant plan is invalid;

(b) if the relevant plan does not "cover the field";

(c) if there are uncertainties as to the meaning of the particular policies in the plan.

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153 At [77] above.
154 The same is true in relation to the reference to s 171(1)(b) in subpara (c).
155 *King Salmon*, above n 26, at [88].

[362] WCC supported NZTA's case on this point, submitting that the key findings in *King Salmon* at [84]–[85] were as applicable to District Plans as to Regional Plans. It contended that *King Salmon* removed the ability for a decision-maker to have recourse to Part 2 when giving effect to or interpreting a plan unless one of the three specific caveats applied. This, it was said, was significantly different from the previous treatment of Part 2 as the "engine room"[156] of the RMA. Its submissions also explained why the second and third caveats were not of application in this case.

[363] I am unable to accept that submission. The role of the caveats identified in *King Salmon* was to address the situation where there was, what one might describe generically as, some inadequacy in the plan. The caveats accordingly qualified the obligation to give effect to such an inadequate plan and preserved the avenue of reference back to Part 2 which the "give effect to" formula had removed.

[364] As explained earlier, the manner of recourse to Part 2 in the context of s 171 (and other sections stated to be "subject to Part 2") is not limited in the manner described in *King Salmon*.[157] Of course the three caveats may still have application in relation to inadequate plans so far as concerns the obligation to have particular regard to them.

[365] I have some reservation about the formulation of the question so far as it incorporates the word "appropriate". As the Supreme Court remarked in *King Salmon*,[158] the scope of that word is heavily affected by context. I tend to think that the words "permissible" or "legitimate" would have been preferable.

[366] However, assuming that the consideration of an application under s 171 does in fact engage historic heritage or amenity values, for the reasons above the answer to Q 45C is in the affirmative.

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156 *Auckland City Council v John Woolley Trust*, above n 54; see also [111] above.
157 At [85] in [113] above.
158 *King Salmon*, above n 26, at [100].

*Q 45D: Did the Board correctly apply the definition of 'historic heritage' under s 2?*

[367] One of the matters of national importance listed in s 6 as (f) is the protection of historic heritage from inappropriate subdivision, use and development. "Historic heritage" is defined in s 2 of the RMA as follows:

> **historic heritage**–
> (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
> (i) archaeological:
> (ii) architectural:
> (iii) cultural:
> (iv) historic:
> (v) scientific:
> (vi) technological; and
> (b) includes–
> (i) historic sites, structures, places, and areas; and
> (ii) archaeological sites; and
> (iii) sites of significance to Māori, including wāhi tapu; and
> (iv) surroundings associated with the natural and physical resources.

[368] The nature of the Board's alleged error in its interpretation of s 2 was described in ground of appeal 40(c) as follows:

> The Board wrongly applied paragraph (b)(iv) of the definition of 'historic heritage' in s 2 of the Act and thereby extended its consideration beyond the surroundings associated with the natural and physical resources constituting the historic heritage within the project area (being the Basin Reserve and listed heritage items) to conclude that the wider setting to those resources was of itself a heritage area.

*The parties' contentions*

[369] NZTA's primary written submissions developed the argument in this way:

> 37.3 While the definition includes 'historic' places and areas it does not specifically provide for heritage precincts or landscapes. The fact that there may be a collection of heritage items within the locality does not make it an historic place or area, unless that locality is a place or area of historic significance in its own right. As a matter of law it was not open to the Majority to conclude that the wider Project area is a heritage precinct/landscape.
>
> 37.4 By establishing a heritage precinct at this location, the Majority has developed a heritage landscape construct which it found stretches from Taranaki Street in the west through the Basin Reserve and Canal Reserve areas to Government House and the Town Belt in the

> east and applied it to the wider Project site. It did so on the basis that there is an unusual concentration of heritage buildings, sites and places at this location, such that the Project is contained within what it describes as an important heritage area.
>
> 37.5 By establishing a heritage landscape of this scale in this location, the Majority has purported to confer s 6(f) protection over the entire landscape rather than the particular heritage items within it. This level of protection is not provided for in the District Plan which, as noted, protects scheduled sites and features while ensuring that the diversity of development provided for within the planning framework relevant to this location is not constrained.

[370] NZTA acknowledged that the Environment Court in *Waiareka Valley Preservation Society Inc v Waitaki District Council*[159] had been satisfied that a purposive interpretation of s 6(f) enabled that provision to describe a collection of historic sites, places or areas as a heritage landscape and had concluded that the nomenclature 'landscape' could easily be substituted by 'area' or 'surrounds', depending on the particular context.

[371] However NZTA noted that the Court has since expressed considerable caution regarding the extension of (b)(i) of the definition to include a collection of historic sites, places or areas as a "heritage landscape". In *Maniototo Environment Society Inc v Central Otago District Council*,[160] the Environment Court noted that such usage:

> … may be dangerous under the RMA where the word "landscape" is used only in s 6(b). Further, the concept of a landscape includes heritage values, so there is a danger of double-counting as well as of confusion if the word "landscape" is used generally in respect of section 6(f) of the Act.

Similarly in *Gavin H Wallace Ltd v Auckland Council*[161] the Court also expressed caution over the use of the term and its inclusion in the lexicon of the RMA.

[372] Consequently NZTA submitted, having regard to the definition of "historic heritage", the case law and the District Plan, that the RMA does not envisage protection being extended under s 6(f) to a central city urban landscape of the scale

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159 *Waiareka Valley Preservation Society Inc v Waitaki District Council* EnvC Christchurch C058/2009, 13 August 2009 at [230]–[231].

160 *Maniototo Environment Society Inc v Central Otago District Council* EnvC Christchurch 103/09, 28 October 2009 at [208].

161 *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120 at [66]–[67].

determined by the Board. To do so would result in all activities within that location being "effectively trapped" within a special heritage landscape thereby "locking up" future urban development contemplated by the planning framework.

[373] In brief summary the respondents submitted that:

(a) the definition of "historic heritage" is broad and explicitly "includes" historic sites, structures, place and areas as well as surroundings associated with physical resources;

(b) NZTA's interpretation is unduly narrow and at odds with the text and purpose of the RMA;

(c) the Board examined whether there was an area of historic heritage, as the definition permits, but NZTA wrongly suggests that the Board concluded that there was some formal heritage precinct or landscape.

*Analysis*

[374] The competing perspectives in the contest before the Board are captured in the following paragraphs:

> [614] Some heritage experts have chosen to focus their assessments on individual heritage items, particularly listed or registered items, while others give attention to considerations of heritage setting as well. With reference to terminology, this is partly a distinction between *built heritage* and *historic heritage*.
>
> …
>
> [616] The Assessment of Environmental Effects prepared by [NZTA] refers explicitly to *Built Heritage* as the title for Section 26 of the document, and Technical Report 12 is similarly entitled *Assessments of Effects on Built Heritage*. [NZTA's] closing submissions confirmed this thematic focus.
>
> …
>
> [617] … The City Council's closing submissions made no reference at all to section 6(f) of the RMA, nor to *historic heritage*, choosing rather to focus on issues related specifically to listed or registered heritage items.
>
> …

> [622] Mr Milne, in his closing submissions, made numerous references to *historic heritage* and argued explicitly that the focus of [NZTA's] case on heritage matters *was wrongly limited to built heritage*. Mr Bennion, in his closing submissions, having cited explicitly the relevant RMA sections, similarly made numerous references to *historic heritage* and argued for the proper recognition of *setting* when assessing effects on historic heritage.

[375] As earlier noted,[162] while the Board recognised the District Plan as the primary means of giving effect to the recognition of historic heritage, it proceeded on the basis that even if a place or area was not scheduled s 6(f) still applied.

[376] There are a number of reasons why it is not easy to attribute to the Board a particular interpretation of the definition of "historic heritage" in s 2. First, the Board's discussion under the heading "Heritage, Cultural and Archaeological" is extensive, spanning [535] to [783], and the evidence is exhaustively analysed. That said, within that thorough review there are certainly references to precincts and landscapes, which are the focus of NZTA's submission.

[377] Secondly, the protection of particular sites or areas is not confined to the District Plan. Although the Basin Reserve is not included in the schedule to the Plan, it is registered as an historic area under the Heritage New Zealand Pouhere Taonga Act 2014.[163] Similarly the Board viewed the fact of the creation of the National War Memorial Park under its own empowering legislation[164] as an indicator of its national significance.

[378] Thirdly, the mosaic which the Board was required to consider was augmented by the Minister's reasons for direction to which the Board was directed by s 149P(1)(a) to have regard. Relevant to the issue of historic heritage those reasons stated:

> • The proposal is adjacent to and partially within the Basin Reserve Historic Area and international test cricket ground; in the vicinity of other historic places including the former Home of Compassion Crèche, the former Mount Cook Police Station, Government House and the former National Art Gallery and Dominion Museum; and is adjacent to

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162 At [338] above.

163 At [562]. The definition of "historic area" in s 6 means an area of land that contains an inter-related group of historic places and forms part of the historical and cultural heritage of New Zealand.

164 National War Memorial Park (Pukeahu) Empowering Act 2012.

> the National War Memorial Park (Pukeahu). The proposal is likely to affect recreational, memorial, and heritage values associated with this area of national significance (including associated structures, features and places) which contribute to New Zealand's national identity.

[379] There is force in the respondents' submission that it is difficult to see how the Board could have complied with its obligation to have regard to the reasons of the Minister in referring the proposal to it without taking the approach it did to the "area" of historic heritage.

[380] Indeed one of the instances of the Board's use of "precinct" was with reference to three of those places of importance when, in relation to an anticipated Anzac Day centenary celebration, it said:[165]

> Such an event would clearly link the NWM Park, the Basin Reserve, and Government House – covering the entire precinct we have described.

[381] In seeking to identify from the Board's broad review the interpretation which the Board placed on s 2, there are three paragraphs which I consider are particularly instructive:

> [557] The protection given by Section 6(f) extends to the curtilage of the heritage item and the surrounding area that is significant for retaining and interpreting the heritage significance of the heritage item. This may include the land on which a heritage building is sited, its precincts and the relationship of the heritage item with its built context and other surroundings.
>
> …
>
> [615] In defining *historic heritage*, the RMA makes a clear distinction between historic sites and historic heritage. At their conferencing, the experts drew attention to *the definition of historic heritage in the RMA – which includes (b)(iv) surroundings associated with the natural and physical (historic heritage) resources.*
>
> …
>
> [623] We agree that we are obliged to consider the effects on historic heritage and that historic heritage includes not only built heritage but the surroundings and setting in which the built heritage exists. In our view, the explicit focus of [NZTA], Wellington City Council and Heritage NZ heritage assessments on *built heritage*, as distinct from *historic heritage*, unduly limited the scope of those assessments.

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165 At [589].

The third of those paragraphs represented the Board's conclusion on the competing contentions in the extracts at [374] above.

[382] While for the reasons in [376] to [379] above Q 45D has proved to be one of the more difficult issues in the case, my conclusion is that there was no error in the Board's interpretation of the definition of "historic heritage". I do not accept NZTA's submission that in its application of the definition the Board "went well beyond the surrounds and setting of historic heritage".[166]

[383] NZTA's submissions further argued that if s 6(f) protection as found by the Board was unobjectionable, then the Board had erred in law "by applying this concept to the Project area without any methodology being identified or followed on which to base such a significant finding". I do not address that submission because I do not consider that it involves either a question of law or an issue sufficiently connected to Q 45D.

*Q 45E: What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?*

[384] The bracketed words in the question reflect the fact that this question is conditional upon an affirmative answer to Q 45C and a rejection of NZTA's argument that it was not appropriate for the Board to assess historic heritage under Part 2.

[385] NZTA's argument in summary form was:

(a) prior to *King Salmon*, "inappropriate" in the context of s 6 was understood as having a wider meaning than "unnecessary" and was to be considered on a case by case basis;

(b) *King Salmon* held that the former approach did not accurately reflect the proper relationship between ss 5 and 6;

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[166] See [757] in [340] above.

(c) *King Salmon* held that "inappropriateness" is heavily affected by context and that the standard relates back to the attributes to be preserved or protected rather than the activity proposed;

(d) *King Salmon* also gave a clear direction that it is the relevant planning documents that provide the basis for decision-making under the RMA. This includes a decision-maker's evaluation of "inappropriateness" in the context of s 6.

[386] Consequently NZTA submitted:

> 38.6 … Therefore, in the absence of any allegation of invalidity, incomplete coverage or uncertainty of meaning; a decision-maker is required to assess s 6(f) matters as particularised by the relevant planning documents before them, from National Policy Statements down to district plans.
>
> 38.7 Even if the Majority was right to go beyond the District Plan in determining what constituted historic heritage, it should still have assessed what was appropriate by having particular regard to the scale and nature of the protection conferred by the District Plan. It did not do so.

[387] Mr Palmer raised the objection that this argument did not appear in the amended notice of appeal. However in my view the proposition advanced is in essence a variation on the theme reflected in Q 45A and Q 45C, in particular the "through the lens" argument.

[388] I first note that the Board explicitly recognised the guidance of *King Salmon* on the meaning of "inappropriate" in s 6(f):

> [558] Importantly, for this matter, we are guided by the Supreme Court in *King Salmon* as to the application of the word *inappropriate* as it is used in Section 6(f). Where the term inappropriate is used in the context of protecting historic heritage, the natural meaning is that inappropriateness should be assessed by reference to what it is that is being protected. That is, within the context of the heritage elements that exist within and around the Basin Reserve area, their value and the effects of the project on those values.

[389] In support of its conclusion at [783] that the Project was not consistent with s 6(f) the Board said:

> [780] Our overall evaluation is not simply a matter of considering effects on listed heritage items or confining our evaluation to a consideration only of the loss or restoration of heritage fabric, although such historic heritage

> effects are part of the cumulative picture. We must consider the character and significance of the whole wider heritage area and the appropriateness of such a structure within it.
>
> [781] We noted in our introduction to this section that the common theme in the relevant statutory documents – the RMA, Regional Policy Statement and District Plan – is to protect heritage from inappropriate use and development. We concluded in our findings from the sub-area analysis reported earlier in this decision two important issues: the inherent conflict in mitigating adverse effects, and the cumulative adverse effects of severance within the heritage setting. It appears to us that those conclusions align clearly with the final assessment of Mr Salmond on *appropriateness* and the findings of Ms Poff from her Part 2 assessment.
>
> [782] Consequently, we find that the evidence of historic heritage supports the conclusion that the Project before us constitutes an inappropriate development within this significant heritage area of the city.

[390] It is apparent in my view from [781] and a number of other paragraphs that the Board did have particular regard to the District Plan and other relevant documents. NZTA's complaint is with the Board's ultimate conclusion, as reflected in the submission:

> 38.8 … the Majority should have concluded that, because there was no direct adverse effect arising from the Project on any heritage items identified as significant and worthy of protection in the District Plan, the Project is consistent with s 6(f) as it relates to those listed items and therefore does not represent inappropriate development in terms of s 6(f).

[391] In effect NZTA's case is that the Board erred in not reaching a conclusion in accordance with (ie by giving effect to) the District Plan. As my earlier findings reflect, I do not agree that the Board's task under s 171(1) was so confined.

[392] I do not consider that there was any error of law in the Board's consideration of inappropriateness in s 6(f). In this context it is desirable to reiterate that this is not a general appeal by way rehearing and I am not sitting in judgment on the merits of the Board's conclusion.

**Issue 8: Failure to consider options within the scope of the application to address amenity and heritage related effects to the Gateway Building**

[393] Although this item was omitted from the memorandum of 23 July 2015[167] there was no issue that it remained live and the parties' written submissions addressed the following question:

> Q 51 Did the Board fail to have regard to a relevant matter, being options within the scope of the application that could balance the effects of the Proposal on the playing of cricket with other effects (heritage and amenity)?

[394] NZTA's grounds of appeal were:

> 52 The grounds of appeal in relation to this issue are:
>
> (a) The Board found at [965] that the cricketing experts were of the uncontested view that the 65m Northern Gateway Building was necessary to mitigate the effects on cricket when the evidence of Dr Sanderson was that a Northern Gateway Building of 45m would be sufficient to mitigate the risk of visual distraction to batters.
>
> (b) As a consequence, the Board found at [758] to [761] that there is an inherent conflict in mitigating the adverse effects on heritage. In particular, by finding that a Northern Gateway Building of 65m is required to mitigate the effects on cricket, but that mitigation has of itself other adverse heritage-related effects, including effects on views and amenity.
>
> (c) Consequently, the Board failed to consider as a relevant matter, options within the scope of the application to balance the needs of cricket with any other effects (historic heritage or amenity) of a longer structure, in particular by:
>
> (i) failing to consider a Northern Gateway Building of 45m or 55m;
>
> (ii) failing to consider a Northern Gateway Building of 65m together with conditions to ensure that the Building remain a sense of openness between 45 and 65 metres.
>
> (d) In the alternative, by rejecting the evidence of Dr Sanderson, the Board implicitly found that the evidence of the cricketers was more persuasive in assessing the Proposal's effects on the Basin Reserve. The Board therefore could only have reasonably found in accordance with the cricketers' evidence on amenity effects that the Northern Gateway

[167] At [332] above.

> Building would appropriately protect the ambience of the Basin Reserve (contrary to the Board's finding at [653]).

[395] It is quite apparent that the Board was cognisant of the options involving a Northern Gateway Building (NGB) of reduced length. At [36] the Board notes that the key elements of the Project included:

> (f) A new structure, known as the Northern Gateway Building, approximately 65m long and 13m high at or about the northern end of the Basin Reserve, adjacent and to the east of the R.A. Vance Stand. Shorter alternatives to the proposed structure within the same approximate 65m long and 13m high envelope/area are also proposed, together with landscaping;

[396] The primary function of the NGB was to screen the moving traffic on the Basin Bridge from views within the Basin Reserve so as to mitigate the effects of the Basin Bridge on cricket and amenity within the Basin Reserve. NZTA made it clear that it had no interest in developing the building, except as mitigation for the effects of the Basin Bridge.[168]

[397] Hence the longest option was naturally the focus of the Board's consideration because the cricketing experts were of the universal view that that option was necessary to mitigate the effects on cricket. So far as Dr Sanderson's evidence was concerned, Mr McMahon noted:[169]

> [1383] … The cricket evidence from the Basin Reserve Trust is preferred to the evidence of Dr Sanderson for the Applicant, who generously acknowledged that, despite his technical evidence in respect to ophthalmology, he should defer to cricket experts on the extent of the length of screening necessary to avoid distracting movement on the Basin Bridge for cricket players.

[398] I agree with Mr Palmer's submission that it is apparent from the Decision and from the Draft Decision (which included proposed conditions regarding design) that the Board did not fail to have regard to other options or conditions. I note the irony in his closing observation that NZTA appeared to be complaining that the Board did not consider options which would have had an even greater impact on historic heritage than the option it did focus on.

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168 [1424].
169 [1383].

**Summary**

[399] A decision on an appeal "only on a question of law" which raises more than 35 questions of law is not well-suited to a succinct summary. That is especially so when ten of the questions asked whether the Board's conclusions on various issues were findings to which it could reasonably have come on the evidence, that is, whether those conclusions were so insupportable that they amounted to errors of law.

The judgment finds that the Board's Decision does not contain any of the errors of law alleged. Although it is not practicable to recite each finding, attention is drawn to the following points of general application.

*The meaning of s 171(1)*

The provision in s 171(1) to have "particular regard to" the matters specified in (a) to (d) required the Board to consider these matters specifically and separately from other relevant considerations but did not indicate that extra weight should be placed on those matters.[170]

The relocation of "subject to Part 2" did not change the meaning of s 171(1).[171] The Board's role under s 171(1) was different from that in *King Salmon* where the obligation under s 67(3) was to give effect to the NZCPS. *King Salmon* did not change the import of Part 2 for the consideration under s 171(1) of the effects on the environment of a requirement.[172]

*Adequate consideration of alternative options*

Section 171(1)(b):

> (a) permits a more careful consideration of alternatives when there are more significant adverse effects of allowing a requirement;[173] and

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170 [64]–]68] above.
171 [86]–[98] above.
172 [99]–[118] above.
173 [140]–[142].

(b) does not require a requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environment effects.[174]

In some, but by no means in all, cases it may be necessary for the decision-maker to gain access to the weightings in a multi-criteria analysis in order to be satisfied that adequate consideration has been given to alternatives.

*Enabling effects*

A project's enabling benefit can constitute an effect to be taken into account under s 171(1) and/or s 5.[175] In order to be given weight the enabling benefit need not be unique to a project, guaranteed to go ahead or able to be quantified.[176]

*Transportation benefits*

Where a project will have more than minimal adverse effects no higher standard of proof is required to demonstrate the project's transportation benefits.[177]

*Heritage and amenity*

On a s 171(1) application a District Plan is not exhaustive concerning items of historic heritage. The decision-maker's consideration of Part 2 considerations is neither restricted to instances of unresolvable conflict[178] nor confined to situations where one of the three *King Salmon* caveats is applicable.[179]

The Board did not err either in its interpretation of the definition of "historic heritage" in s 2[180] or in its approach to the application of "inappropriateness" in s 6(f).[181]

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174 [156].
175 [265]–[266].
176 [268].
177 [299].
178 [354].
179 [363]–[364].
180 [382].
181 [392].

**Disposition**

[400] For the reasons above, NZTA has not established that in its Decision the Board made any error of law of the nature reflected in the several questions of law in the amended notice of appeal, as revised by the 23 July 2015 memorandum. Consequently NZTA's appeal under s 149V(1) is dismissed.

[401] The parties requested the opportunity to make submissions on costs. In view of the outcome of the appeal:

(a) the respondents are to file any costs memoranda by 11 September 2015;

(b) NZTA is to file a costs memorandum by 2 October 2015; and

(c) the respondents may file any memoranda strictly in reply by 16 October 2015.

Leave is reserved to apply to amend that timetable if necessary.

[402] Finally I record my appreciation to all counsel for the quality of their submissions and the assistance which they provided to the Court in navigating a course through this complex matter.

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Brown J

Solicitors:
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**IN THE ENVIRONMENT COURT**
**AT AUCKLAND**

[2016] NZEnvC 073

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|---|---|
| **IN THE MATTER OF** | an appeal pursuant to section 174 of the Resource Management Act 1991 **(the Act)** in respect of a Notice of Requirement |
| **BETWEEN** | NORTH EASTERN INVESTMENTS LIMITED<br>HERITAGE LAND LIMITED<br>(ENV-2014-AKL-000003)<br>Appellants |
| **AND** | AUCKLAND TRANSPORT<br>Respondent |

| | |
|---|---|
| Hearing: | at Auckland 18-22, 25 January and 23-26 February 2016 |
| Court: | Environment Judge J A Smith<br>Environment Commissioner K A Edmonds<br>Environment Commissioner D J Bunting |
| Appearances: | Mr M E Casey QC for North Eastern Investments Limited and Heritage Land Limited (**NEIL**)<br>Mr GC Lanning and Mr WMC Randal for Auckland Transport<br>Mr C J Brown for Auckland Council – watching brief only |
| Decision: | 29 April 2016 |

## DECISION OF THE ENVIRONMENT COURT

**A. For the reasons set out in detail in the Decision the Court will confirm a modified NOR subject to the following:**

1. **It is to be based upon:**

   (a) **the indicative operational road corridor shown in Annexure D attached to this decision, and covering a maximum width of 22m with the exception of areas specified in (2) and (3),**

   (b) **a vertical profile for the road as shown in Annexure D (or better);**

2. **In addition, the Designation over 1 and 2 being lots 2 DP199126, being 1,531m$^2$ owned by the Auckland Council, is to be designated in full, and lot 1 DP340400, being 856m$^2$, is designated in full.**

3. **In addition to the operational road corridor there shall be an additional area provided as follows:**

   (a) **an area necessary to construct the bridge abutments;**

   (b) **to connect with Fairview Avenue to the west of the proposed roundabout and on the eastern side of the roundabout to connect with the existing roading designation;**

   (c) **any area essential to allow construction of the road corridor or supporting infrastructure such as retaining walls.**

**B: The parties are encouraged to reach an agreement in respect of access for the purposes of construction of their respective activities.**

**C: By 30 June 2016 Auckland Transport is to produce and circulate an indicative plan of the modified designation area in accordance with this decision. The indicative plan is to identify the specific land identified in A1 and A2, and any further areas required under A3. Reasons for the extent of any additional area required for construction purposes are to be provided. In undertaking its assessment of construction needs,**

**Auckland Transport is to minimise the effect on the NEIL development proposal adjacent to the road corridor.**

**D:** **Auckland Transport is to provide proposed consents and conditions for the modified designation within a further ten working days.**

**E:** **NEIL then has fifteen working days in which to advise Auckland Transport and the Court whether it agrees with the area proposed to be designated in line with the Court's directions in the Decision, and particularly any additional area required for construction by Auckland Transport, as well as on the proposed conditions. NEIL is to advise of any concerns and ways in which these might be addressed, including any substitute condition wording.**

**F:** **Auckland Transport has a further ten working days to consider and advise NEIL and the Court of its response to any matters raised by NEIL.**

**G:** **The Court will then make a decision on the overall extent of the land to be designated, and the conditions to which the designation will be subject. In making this decision the Court will have regard to the memoranda lodged by the parties and, if necessary, convene a further hearing or conclude the matter on the papers.**

**H:** **Once the extent of the designation has been decided by the Court, Auckland Transport is to undertake a survey and prepare a plan that clearly identifies the area of the designation to be confirmed by the Court, and submit this plan to the Court within twenty working days.**

**I:** **Any applications for costs are reserved and application is to be made on issuing the final decision in accordance with directions given at that time.**

## REASONS FOR DECISION

### Introduction

[1] This notice of requirement (NOR) relates to the provision of much needed roading to allow the development of Fairview Catchment in Albany. The NOR goes through land owned by Heritage Land Limited, and which the company North Eastern Investments Limited (**NEIL**) is responsible for developing.

[2] Since around 2003, NEIL has been seeking to progress intensive residential and other development on this land, approximately 7.8 hectares in area, between Fairview Avenue and Oteha Valley Road. Over the ensuing decade a number of issues have arisen, leading to several hearings in the Environment Court and the current proceedings. There have been ongoing issues with obtaining resource consents for the project, with the resource consent for land use declined at the first instance hearing and an appeal lodged seeking that decision be overturned.

[3] The primary issues in this case are:

(a) should a requirement under s 171 of the Act, to a route through the NEIL site, be confirmed?

(b) if the assessment of alternatives has not been an adequate consideration of alternatives (including Fairview Avenue), should the designation nevertheless be confirmed?

[4] In relation to both issues, the effect on NEIL land available for intensive residential use is relevant.

### Background

[5] The NEIL site has been subject to a *preferred road indication* on the former North Shore City Council district plans since the late 1990s. During discussions for development, the North Shore City Council and its successor Auckland Council made it clear that it was anticipating a road going through this site linked to Medallion Drive and Fairview Avenue. We will discuss later the detailed history of this matter.

[6] Subsequently the North Shore City Council notified a plan change (PC32) constraining lot sizes within the Fairview Catchment. Eventually, PC32 came to a hearing before the Environment Court relating to whether or not the Council should or

could constrain development within certain areas of the Fairview Catchment (which includes land to the north and west of Fairview Avenue but not the NEIL site) until the necessary roading infrastructure was in place.

[7] During the course of that decision, the Court acknowledged, *the status of the notation is unclear and at best, can be described as indicative* and that it did not impact on the property in terms of any rule.[1] As well as identifying that the preferred road indication had no planning force, the Court upheld the rule maintaining larger lot sizes in certain parts of the Fairview Catchment, essentially those to the west of the motorway that use Lonely Track Road to access Fairview Road, until the necessary infrastructure was in place.

[8] In the meantime NEIL had advanced plans for a comprehensive development on its site with three main components:

(a) a mixed use area with residential and retail facing Oteha Valley Road;

(b) an intensive residential area over the majority of its land excluding a corridor some 20m wide for roading between Medallion Drive and Fairview Avenue; and

(c) the East-West Towers on a smaller portion of land between Fairview Avenue and Oteha Valley Road to the west of the proposed corridor.

[9] After the hearing on PC32 the parties engaged in discussions as to how to best address the issues. Although the alignment for a road between Medallion Drive and Fairview Avenue seemed to be agreed in traffic assessment terms, there were a number of caveats on whether this was the appropriate road and the particular design or modelling required for it.

[10] At the same time NEIL was pursuing its application for resource consent for the towers on the western portion of the site (**East-West Towers**), which was set down for hearing before Judge Thompson in 2012. Prior to that hearing, and as recorded in the decision, NEIL and the Auckland Council had reached agreement in respect of resource consents for the intensive residential development and mixed use business area. The Court decision recorded that the parties would be filing a consent order (sic) in the near future.

[1] ***Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council & Ors*** [2013] EnvC 082, paragraph [31]

[11] The Court then proceeded to hear that part of NEIL's appeal relating to the proposal for an East-West Towers complex on 12-13 November 2012. It is recorded in the decision of 6 December 2012 that at the time of that hearing the Court was advised about a notice of requirement, and notes:

> We were advised at the hearing that a notice of requirement has now been issued for the extension by Auckland Transport and that it conforms at least broadly, with the development's design for it.

[12] Subsequently the Court disallowed the East-West Tower residential development resource consent application.[2]

[13] It transpires that the notice of requirement was adopted by Auckland Transport on 2 November 2012, ten days prior to the Court hearing, but it was not advertised until February 2013, well after the date of the issue of the Court's decision on 6 December 2012. The notice of requirement was then notified and has proceeded to the Commissioner recommendation and decision by Auckland Transport.

**The current hearing**

[14] The designation decision was appealed to this Court in 2014, and was proceeding through preliminary stages to a hearing.

[15] In the meantime, this Court had assumed that matters relating to the intensive residential and mixed use business area appeals had been resolved and closed its file. It was not until 2015 that the parties advised the Court that they had not been able to settle the terms of the resource consent and required a hearing. The Court set both the designation and resource consents matters down to be heard in January/February 2016 with an estimate of three days for each hearing.

[16] After the first week of the designation hearing, which commenced on 8 January 2016, it was clear that it was unlikely that this matter would conclude, and the Court subsequently adjourned to continue hearing the NOR matter on 23 February. The Court has subsequently issued a Minute adjourning the intensive residential and mixed use area resource consent proceedings for the reasons set out in that Minute, which need not be repeated in this decision.

[17] However, we need to mention the plans detailing the proposals which are to be the subject of the two land use consent applications and appeals which were

[2] ***North Eastern Investments Ltd v Auckland Council*** [2012] NZEnvC 266