

BEFORE THE INDEPENDENT COMMISSIONER

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a Notice of Requirement from the Palmerston North City Council for a designation of a new road connection between Abby Road and Johnstone Drive, Palmerston North

LEGAL SUBMISSIONS IN REPLY FOR THE COUNCIL AS REQUIRING AUTHORITY

Dated: 19 April 2021



227-231 Broadway Avenue
PO Box 1945
Palmerston North
DX PP80001



Nicholas Jessen

06 353 5210

06 356 4345

njessen@crlaw.co.nz

LEGAL SUBMISSIONS IN REPLY FOR THE REQUIRING AUTHORITY

MAY IT PLEASE THE COMMISSIONER:

Conditions

- [1] The Reporting Officers (via Mr O’Leary), were to provide a final set of recommended conditions if the decision is to confirm the designation. Mr O’Leary has reviewed the conditions sent a copy to the Council as requiring authority (“Council”) for its final review, with no substantive changes made to conditions. Changes include ‘structural’ changes as discussed at the hearing, and consequential changes to cross-referencing within conditions. The Council confirms that there are no outstanding issues in relation to conditions, and accordingly they are filed with this reply.

Reasonably necessary as a ‘scope’ issue

- [2] At the hearing of this matter, counsel for ALHL developed an oral argument that focussed on the intended boundary connection of the road with the Manga o Tane Reserve.
- [3] As understood by the Council, the argument relates to ALHL’s interpretation of s 168A(3)(c) which requires the decision-maker to 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*”.
- [4] The proposition advanced by ALHL was that the boundary connection created with the Manga o Tane Reserve does not form or *fall within* the Council’s stated objectives.
- [5] It is understood that ALHL is contending that because the connection to the Manga o Tane reserve as a feature of the NoR’s layout or design does not ‘fall within’ the Council’s statement of purpose, then it cannot

be said that the work or designation is reasonably necessary for achieving the objectives of the Requiring Authority.

[6] The oral submissions elaborate on the evidence presented in the affidavit of Leslie William Fugle dated 24 March 2021, at paragraphs 26 – 35. The affidavit informs an understanding of the oral submission.

[7] In response, the Council's primary submission is that connection to the Manga o Tane Reserve does in fact fall within or is implicit in the statement of the Council's purpose in the Notice of Requirement.

[8] The Council's stated purposes, or "*objectives*" for the purposes of s 168A(3)(c) are accepted by Counsel for ALHL to be those expressed at page 7 and 8 of the NoR:

The NoR will secure the potential to extend Abby Road so that it joins up with Johnstone Drive for the purpose of:

- Preserving and providing an efficient and logical connection between Abby Road and Johnstone Drive.
- Preserving and providing an efficient and logical access to the eastern side of the Adderstone Reserve from Abby Road, to enable recreational opportunities.

[9] Despite some discussion at the hearing about whether the connection to the Manga o Tane reserve falls within the second bullet point, there is no dispute that it does not. The second bullet point is not relevant to the Manga o Tane Reserve at all, referring instead to the specific connectivity created with the Council's Adderstone Reserve.

[10] The first bullet pointed statement of purpose is, however, relevant. In this case the alignment chosen for the NoR (which extends to a boundary connection with the Manga o Tane Reserve) was directly influenced by the factors explained in the NoR at page 10:

- (a) better road gradients;

- (b) better connectivity with the reserve;
- (c) provided sufficient space for the recommended landscaping mitigations (between the road and the reserve);
- (d) it allowed for the necessary fill work associated with the road works.

[11] All those factors influenced the chosen alignment and are brought within the stated purpose of the Council because they relate to considerations of efficiency and logic. The Council's purpose is not to create a bare minimum connection between Abby Road and Johnstone Drive, but rather, as stated in its purpose, to provide an "*efficient and logical connection*" between Abby Road and Johnstone Drive.

[12] *Efficiency* has many factors, and pure spatial or geometric efficiency as referred to by ALHL inadequately captures the broader efficiencies gained by the proposed alignment as referred to above. Further, it is simply *logical* for Council to take the opportunity to interconnect its roading network with its reserve network in such a way as to avoid an illogical residual parcel of non-contiguous land resembling an awkward 'gap' between Manga o Tane and the proposed road.

[13] The Council's second submission in reply is that ALHL is misapplying the inquiry required by s 168A(3)(c) and the effect of a statement of 'objective' or 'purpose' for an NOR.

[14] The inquiry under s 168A(3)(c) requires regard to whether '*the work and designation*' is '*reasonably necessary*' to achieve the Council's objectives. The Environment Court has held that the reasonably necessary inquiry is an objective but qualified test. In *Watkins v New Zealand Transport Agency*, it was held as follows:

... In short "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.

[15] The '*reasonably necessary*' consideration can involve inquiring into whether the scale or extent of a NoR is too broad or otherwise exceeds what is *reasonably necessary* to achieve the objectives. That was the case in *North Eastern Investments v Auckland Transport*¹ where the Environment Court confirmed a narrower NoR than what had been sought by the requiring authority, determining that the width 'required' by Auckland Transport was wider than what was reasonably necessary to achieve its objectives.

[16] In this case, however, the Council has not exaggerated its configuration such as to be at odds with its objectives. It is submitted that the required land is not excessive, and the configuration is indeed reasonably necessary. Mr O'Leary makes the point well in his s 42A report, which the Council as requiring authority agrees with:

4.70 I am satisfied that the extent of work and the designation area is reasonably necessary to achieve the above outcomes of the designation. The configuration and alignment of the designation corridor will preserve and provide an efficient and logical connection: a) between Abby Road and Johnstone Drive; and, b) to the eastern side of Adderstone Reserve.

4.71 The northern and southern extent of the designation corridor will ensure appropriate area, slope and gradient for fill batter slopes. The designation corridor appropriately abuts the Manga o Tane reserve which will enable the revegetation of exposed earthworks areas to be planted in a manner which integrates with the reserve, and will avoid a situation where a portion of residual private land physically and legally separates the proposed road from connecting to the reserve.

¹ [2016] NZEnvC 73.

- [17] Finally, the Council submits that even if the statements of its purpose did not explicitly refer to an “*efficient and logical*,” connection then it would still be expected that the NoR configuration allowed for the connection of Abby Road and Johnstone Drive while ensuring that the precise configuration allowed for the adverse effects of the project to be mitigated. That is because it is necessary in any proposed project to ensure that the configuration of the requirement will allow the requiring authority to provide for the adverse effects of the work to be appropriately mitigated, or otherwise ensure the NoR achieves the sustainable management purpose of the RMA, in accordance with the range of other considerations for a decision maker to have regard to under s 168A, being considerations which give shape to a proposal.
- [18] In this case, the configuration including the connection with the Manga o Tane Reserve was directly and appropriately influenced by environmental considerations such as better road gradients, better connectivity with the reserve, that it provided sufficient space for the recommended landscaping mitigation measures, and that it allowed sufficient space for the for the necessary fill works.

Alternatives Assessment

- [19] The hearing included some discussion as to the Council’s assessment of alternatives. The adequacy of the Council’s assessment of alternatives is relevant under s 168A(3)(b). The Commissioner is (subject to Part 2) required 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; and

[20] In this case, the requiring authority does not have an interest in the land, and therefore s 168A(3)(b) becomes a mandatory consideration. As to the meaning of “adequacy” of the assessment, Brown J held in *New Zealand Transport Agency v Architectural Centre Inc*,² that:

[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’.

[21] Further, the enquiry is into whether the requiring authority has acted arbitrarily or given only cursory consideration to the alternatives, and this enquiry is in relation to the process of the assessment, rather than its outcome.

[22] The Council’s position is that its assessment of alternatives is sufficient, satisfactory, or perfectly adequate in the circumstances of this case. This is a case in which the geography and nature of the project (to connect Abby Road with Johnstone Drive) naturally limits the breadth of alternatives available to achieve the Council’s objectives. Within those limits, however, the Council has in fact undertaken a robust assessment with a focus on a ‘northern’ and ‘southern’ alignment as sub-options. It is testament to the adequacy of the alternatives

² [2015] NZHC 1991.

assessment that the Council issued a new notice of requirement favouring the northern alignment in reliance on the views of its technical advisors.

- [23] The discussion at the hearing centred loosely on an ‘alternative’ road link described in Mr Fugle’s evidence at paragraphs [8]-[19]. While this was not clearly articulated by ALHL as an issue of “*alternatives*” under s 168A(3)(b), it is appropriate in reply to explain why this was not an alternative that required consideration by the Council.
- [24] The connection specifically described by Mr Fugle has not been considered as an alternative because it has already been demonstrated as unviable, as it depends upon the gully being filled to the level of the surrounding land.³ ALHL has previously attempted to obtain a resource consent to fill the gully to this level, and that resource consent was refused for being, among other things, a non-complying activity and in contravention of district plan policy relating to modifications to landform.⁴
- [25] Again referring to *New Zealand Transport Agency v Architectural Centre Inc*, a requiring authority need not fully evaluate every possible identified alternative, even when the environmental effects are potentially lower than the proposed activity, and the alternatives are non-suppositious.⁵ The connection described by Mr Fugle has greater environmental effects than the proposed alignment and, given its contravention of the district plan’s landform policies, is essentially suppositious. It cannot have been incumbent on the Council to consider it as an ‘alternative’, as described.

³ See Appendix D, cross sections, of ALHL’s previous Resource Consent Application at the following link: <https://www.pncc.govt.nz/media/3130727/agenda-and-application.pdf>

⁴ <https://www.pncc.govt.nz/media/3130849/commissioners-hearing-decision-lu-4085-29-may-2018.pdf>

⁵ At [152]–[159].

[26] However, the Council has, in fact, considered an alternative that is viable, non-suppositious, and which does follow the alignment of the roading connection that Mr Fugle is referring to. That is the Southern Alignment sub-option. The significant difference between the option described by Mr Fugle and the option assessed by the Council as an alternative is that the Council's southern alignment alternative does not include such extensive fill works, altering the landform only to the extent necessary to construct a safe road. Ultimately, this option was not preferred for reasons highlighted already in this reply.

Plan provisions as alternatives

[27] Another question raised at the hearing, through the Commissioner, was whether provisions in a district plan could conceivably be regarded as an alternative deserving of consideration. This was understood to be a reference to the impending plan change process that the Council is involved in, and the potential that proposed provisions could conceivably achieve the purpose of the Council.

[28] Council has not found case law on the specific question of whether reliance on district plan provisions can be assessed as alternatives.

[29] It is submitted, however, that district plan provisions are generally not viable for assessment as alternatives. That is because the consideration is "*whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work*". Bearing in mind that a NoR is for a public work or project, the alternatives assessment has a focus on different ways that the project may be undertaken. While planning provisions may well be useful in terms of their ability to 'preserve' a connection by imposing planning restrictions/ controls on land development over identified connections, they cannot provide the Council as the requiring authority with financial responsibility for the work with the legal rights necessary to carry out the project.

Financial considerations

[30] ALHL contended that the financial viability of the proposed alignment was a relevant consideration for the Commissioner when assessing the NoR. The argument, as understood by counsel, is that as ALHL has an altruistic concern for the city's ratepayers in circumstances where it says that ALHL's own intentions for a roading proposal would be far cheaper to construct.

[31] The ability for the requiring authority to pay for, or sustain ventures resulting from, a NoR is not a relevant consideration for the Commissioner. In *New Zealand Rail v Marlborough District Council*, financial viability was raised as a potentially relevant consideration under Part 2 of the Act. The High Court remarked (emphasis added):⁶

It was the appellant's submission that financial viability, in the words used by Mr Cavanagh, is a relevant consideration under Part II of the Act. Mr Cavanagh said if the proposal is not viable then it is in conflict with Part II. With comparative reference to the decision in *Environmental Defence Soc v Mangonui County Council* it was submitted that there was an onus on an applicant to establish the economic practicability of the proposal. In the result, it was said, the evidence before the Tribunal which showed some doubts as to the costings and the possibility of increased port charges, resulting in undue charges and subsidy by New Zealand Rail, put in doubt the financial viability of the proposal.

[...]

Financial viability in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic well-being is a factor in the definition of sustainable management in s 5(2). Economic considerations are also involved in the

⁶ *NZ Rail Ltd v Marlborough District Council* (HC) [1994] NZRMA 70 at 88, reiterated in *Nelson Intermediate School v Transit New Zealand* (2004) 10 ELRNZ 369 at [66].

consideration of the efficient use and development of natural resources in s 7(b). They would also be likely considerations in regard to actual and potential effects of allowing an activity under s 104(1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of profitability or otherwise of a venture and the means by which it is to be accomplished. **Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom.**

[32] Applying *New Zealand Rail*, the Environment Court noted in *Beadle v Minister of Corrections* that the same reasoning can, and should, apply to publicly funded projects as well:⁷

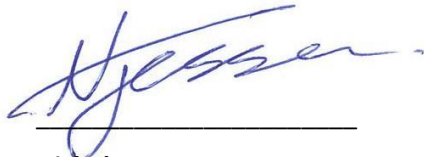
Of course in this case the promoter is a Minister of the Crown, and the cost will be met from public funds. However the fact that public funds are to be employed does not mean that the financial viability of the project, and the means by which it is to be accomplished, are relevant factors.

We accept the Minister's submissions and hold that the extent to which public funds should be allocated to a corrections facility is a policy issue for the Minister. It is not appropriate for local authorities exercising functions under the Resource Management Act 1991 (or for the Environment Court on appeal) to decide that the amount that the Minister considers appropriate is uneconomical, extravagant or wasteful. The Minister will be accountable for the expenditure of public funds to the electorate and to Parliament.

⁷ *Beadle v Minister of Corrections* [2002] NZEnvC 124 at [741]–[748].

[33] The relevant case law demonstrates, as originally submitted, that the financial viability of the proposal which is the subject of a NoR is a matter for the requiring authority to resolve internally, and that it is not appropriate to characterise financial viability as a consideration for the Commissioner in assessing that NoR.

DATED 19 April 2021

A handwritten signature in blue ink, appearing to read 'Nicholas Jessen', is written over a horizontal line.

Nicholas Jessen

Counsel for Palmerston North City Council