BEFORE INDEPENDENT COMMISSIONERS
AT PALMERSTON NORTH

UNDER	the Resource Management Act 1991 ("**RMA**")
IN THE MATTER	of a notice of requirement ("**NoR**") for a designation by KiwiRail Holdings Limited ("**KiwiRail**") for the Palmerston North Regional Freight Hub ("**Freight Hub**") under section 168 of the RMA

BUNDLE OF AUTHORITIES FOR KIWIRAIL HOLDINGS LIMITED
DATED 6 AUGUST 2021

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Tab	Document
Cases	
1.	*Beadle v Minister of Corrections* NZEnvC A074/02, 8 April 2002
2.	*Beda Family Trust and Ors v Transit New Zealand* Decision No. A139/2004
3.	*City Rail Link Limited v Auckland Council* [2017] NZEnvC 204
4.	*Director-General of Conservation v Taranaki Regional Council* [2018] NZEnvC 203
5.	*Dye v Auckland Regional Council* [2002] 1 NZLR 337
6.	*Ellis v Minister of Education* [2014] NZEnvC 109
7.	*Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120
8.	*Malvern Hills Protection Society Inc v Selwyn District Council* C105/07
9.	*Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77
10.	*Minister of Corrections v Otorohanga District Council* [2017] NZEnvC 213
11.	*Nash v Queenstown Lakes District Council* [2015] NZHC 1041
12.	*New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991
13.	*Norsho Bulc Ltd v Auckland Council* [2017] NZEnvC 109
14.	*North Eastern Investments Ltd v Auckland Transport* [2016] NZEnvC 73
15.	*Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159
16.	*Quay Property Management Ltd v Transit New Zealand* 29/5/2000, W028/00
17.	*Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347
18.	*Queenstown-Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 (CA)
19.	*Re Meridian Energy Ltd* [2013] NZEnvC 59
20.	*Rodney District Council v Eyres Eco-Park Limited* [2007] NZRMA 1 (HC)

Tab	Document
21.	*Shirley Primary School v Christchurch City Council* [1999] NZRMA 66
22.	*Sustainable Matata v Bay of Plenty Regional Council* [2015] NZEnvC 90
23.	Te Ara Tupua - Ngā Ūranga Ki Pito–One - Shared Path Expert Panel Decision, issued 5 February 2021
24.	*Te Runanga o Ngai Te Rangi Iwi Trust Board v Bay of Plenty Regional Council* [2011] NZEnvC 402
25.	*Tram Lease v Auckland Transport* [2015] NZEnvC 137
26.	*Waitaki District Council v Waitaki District Council* [2007] NZRMA 68
Other authorities	
27.	KiwiRail's Application for Approval as a Requiring Authority Under Section 167 of the Resource Management Act, dated 29 November 2012
28.	KiwiRail's Requiring Authority Gazette Notice, dated 14 March 2013
29.	Queenstown Airport Corporation Limited *Gazette* notice, dated 5 August 2019

DOUBLE SIDED

ORIGINAL

Decision No. A074/2002

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two appeals under section 174 of the Act

BETWEEN **SHAYRON LEE BEADLE**

(RMA408/00)

RONALD WIHONGI and RIANA WIHONGI

(RMA429/00)

Appellants

AND **THE MINISTER OF CORRECTIONS**

Respondent

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **THE MINISTER OF CORRECTIONS**

(RMA306/01)

Appellant

AND **THE NORTHLAND REGIONAL COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner D H Menzies

HEARING at Paihia on 10, 11, 12, 13, 14, 17, 18, 19, 20 and 21 September, 8, 9, 10, 11, 12, 23, 24, and 25 October 2001 and 14, 15, and 16 January 2002. (Final submissions received 1 February 2002.)

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

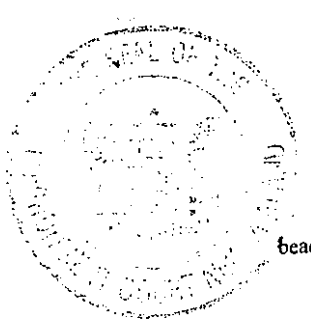
beadle (dfg)

COUNSEL

G M Illingworth and K R M Littlejohn for S L Beadle, R and R WiHongi (Appellants in Appeals RMA408/00 and 429/00) and for Friends and Community of Ngawha Inc, E Clarke, Te Kereru Trust, and Ngatirangi Ahuwhenua Trust (all under section 271A in Appeal RMA306/01)
P J Milne and D G Allen for the Minister of Corrections
R M Bell and C N Whata for the Northland Regional Council

DECISION

Table of Contents



INTRODUCTION

The Proceedings

[1] The Minister of Corrections proposes to establish a new "corrections facility" for the Northland region on a site in the Ngawha locality, about 5 kilometres east of Kaikohe. For that purpose, the Minister's predecessor gave notice of his requirement under the Resource Management Act 1991 that the site be designated in the Far North district plan for "a comprehensive regional prison and associated facilities". The Minister has also applied to the Northland Regional Council for various resource consents that would be needed to develop and maintain the proposed corrections facility.

[2] Three appeals to the Environment Court have arisen. Two are appeals against the Minister's decision accepting that the requirement be confirmed. The appellants are opposed to the proposed facility, and seek that the requirement be cancelled. The third appeal was brought by the Minister against a decision by the Regional Council refusing the resource consents. By his appeal the Minister sought that the consents be granted subject to appropriate conditions. That was opposed by the Regional Council and by individuals and groups from the locality.

The Participants

The Minister of Corrections

[3] The Minister of Corrections has responsibility (among other things) for the administration of custodial sentences imposed by the courts in a safe, humane and effective manner, and providing rehabilitative and re-integrative interventions. For that purpose the Minister is responsible for provision of prisons and other correction facilities.

[4] Being a Minister of the Crown, the Minister of Corrections is by section 166 of the Resource Management Act a requiring authority for the purpose of Part VIII of that Act. The current Minister assumed responsibility for the requirement issued by his predecessor for designation of the site; and himself accepted recommendations by the Far North District Council that the requirement be confirmed only in respect

of part of the land identified as site D2, subject to detailed amendments to the recommended conditions.

[5] At the Environment Court hearing the Minister was represented by counsel who presented a full case in support of the amended designation and the resource consent applications, called 26 witnesses, and cross-examined the witnesses called by those opposing them. In addition by consent the affidavit evidence of ten other witnesses (whose testimony was not contested) was admitted by consent without their being called in person.

The Northland Regional Council

[6] The Northland Regional Council is the regional council for the region in which the site is located. The Minister applied to the Northland Regional Council for the resource consents for earthworks and stream-bed works, and water and stormwater discharge permits, required to develop the proposed prison.

[7] The Regional Council appointed two commissioners to hear and decide the applications and submissions on them. The commissioners declined the consents, because of adverse effects on the relationship of tangata whenua with their ancestral lands waters, waahi tapu and other taonga; and failing to enable tangata whenua to provide for their social and cultural well-being.

[8] The commissioners stated that but for those matters the resource consent applications would have been granted.

[9] The Regional Council took an active part in the proceedings before the Environment Court to justify the commissioners' decision declining the resource consents on those grounds, presenting full legal submissions and calling expert evidence.

[10] The Regional Council was not a party to the designation appeals, and made no submission on the substantive merits of those appeals. It stated that it did not support the cases of submitters in opposition to the extent that they contended that the resource consent applications should be declined on non-cultural grounds.

The Far North District Council

[11] The Far North District Council is the territorial authority for the district in which the site is located. The Minister's requirement for designation of the site was accordingly addressed to that Council, which appointed three commissioners to hear the submissions. The District Council adopted the commissioners' recommendation that the requirement be confirmed only in respect of part of the land identified as site D2, and imposed conditions. It made a recommendation to that effect to the Minister as requiring authority.

[12] The Minister accepted the District Council's recommendations, subject to detailed amendments to the recommended conditions. The District Council did not appeal to the Environment Court in respect of those amendments.

[13] Depending on the outcome of these proceedings, the District Council may also have a function in respect of possible future resource consent applications in terms of its district plan for earthworks and works in a stream bed.

[14] The District Council did not seek to be heard on these appeals, and took no part in the proceedings in respect of them.

Shayron Beadle

[15] Ms Shayron Lee Beadle is the director of Ginn's Ngawha Spa Limited which owns land at Ngawha Springs and operates a spa business on it. She contended that the proposed prison would have an adverse effect on the business of the spa.

[16] Ms Beadle had lodged a submission on the Minister's requirement for a designation for the proposed prison. She was substituted for Ngawha Springs Hotel Limited as appellant in the appeal lodged on behalf of that company opposing the requirement.

[17] At the Environment Court hearing, Ms Beadle was represented by counsel (in common with other submitters in opposition) and gave evidence herself in support of her appeal.

[18] Land adjoining that owned by Ginn's Ngawha Spa Limited is owned by another member of the Beadle family. The latter property was not the subject of Ms Beadle's submission or her case before the Court.

Ronald & Riana WiHongi

[19] Ronald Te Ripi WiHongi is of Te Uri o Hua and other hapu of Ngapuhi. He has a lifetime association with the mineral pools at Ngawha Springs.

[20] Ronald's daughter, Riana Akinihi WiHongi, lives at Ngawha Springs Village. She is a kaitiaki of the Ngawha Waiariki, and a trustee of the Parahirahi C1 Trust.

[21] Both of them, father and daughter, are opposed to the proposed prison on the ground that it would detract from the value of the Ngawha Waiariki pools. They lodged submissions on the designation requirement to that effect. They were substituted for Te Ahi Ko Mau as appellant in the appeal lodged in that name opposing the requirement.

[22] At the Environment Court hearing, the WiHongis were represented by counsel (in common with other submitters in opposition), and each of them gave evidence in support of their appeal.

Friends and Community of Ngawha Incorporated

[23] This society was incorporated[1] on 7 December 2000. The society has seven charitable objects, of which we quote these:

> (a) The protection and preservation of Maori cultural and spiritual heritage of Ngawha, its rivers, streams, springs and other waterways above and below ground.
> (b) To promote understanding of the significance of Ngawha and its relationships traditionally and actually to the waterways and communities of Taitokerau.
> ...
> (d) To promote and preserve the fauna, flora and environment throughout the whole of the Ngawha geothermal area.
> (e) To oppose by any lawful means any development of any kind which may prejudice in any way the public enjoyment of Ngawha's geothermal springs and their environs either visually or audibly.

[1] The society was incorporated under the Incorporated Societies Act 1908.

(f) To promote the well-being of the Ngawha community (comprising Ngawha Springs Village and the surrounding area) ...

[24] The society had lodged a submission in opposition to the Minister's resource consent applications to the Regional Council. It was heard in opposition to the Minister's appeal against the refusal of the resource consents, being represented (in common with other submitters in opposition) by counsel and called evidence. The chairperson of the society, Ms M Mangu was called to give evidence.

[25] As well as its activities in opposition to the proposed prison, the society had also been involved in establishing a community garden, in participating in Waitangi Day observances, and in arranging a public debate, a village festival, an ecumenical church service, and other activities.

Eileen M Clarke

[26] Mrs Eileen McNicol Clarke is a householder at Ngawha Springs.[2] She had lodged a submission opposing the Minister's resource consent applications, and was heard in the Environment Court proceedings in opposition to the Minister's appeal against the decision refusing those consents.

[27] In common with other submitters in opposition to that appeal, Mrs Clarke was represented by counsel and called evidence. In addition Mrs Clarke gave evidence herself.

Te Kereru Trust

[28] Notice had been given that Te Kereru Trust, having been a submitter on the resource consent applications, wished to be heard in the Environment Court proceedings.

[29] However, although the Trust was represented by counsel who appeared for all the submitters seeking to be heard, no evidence was given about the existence, or the status of the Trust, even though they were put in issue by counsel for the Minister.

[2] She lives at Auckland.

[30] In response to the Court's enquiry on the last day of the hearing, counsel announced that the Trust was not pursuing its notified wish to be heard in the proceedings.

[31] Accordingly we treat Te Kereru Trust as having then withdrawn from the proceedings.

Ngati Rangi Ahuwhenua Trust

[32] The Ngati Rangi Ahuwhenua Trust was established in 1987. It holds about 500 acres of land in and around Ngawha (including the part of the land the subject of the Minister's original requirement identified as D1) in trust for 1208 beneficiaries.

[33] Having lodged a submission on the resource consent applications, the Trust was heard in the Environment Court in opposition to the Minister's case. The chairman of the trustees, Mr A V Clarke, was to have given evidence, but ill-health precluded his doing so. By consent, an affidavit by Mr Clarke was admitted in evidence.

[34] The Minister questioned whether the Trust's notice (under section 271A of the Act) of its wish to be heard had been lodged with the authority of the Trust.

[35] The notice had been signed by Mr Clarke as chairman of the Trust, and there was no dispute that he was chairman at that time. Although the minutes of the Trust did not record express authority for giving the notice, the evidence was that the practice of the trustees is that opposition is recorded, but in the absence of a record of opposition a motion is taken as having been carried; and there was a record of approval of outward correspondence including the notice to the Court. Mr Clarke testified that there had been unanimous support for the action.

[36] We hold that Mr Clarke's authority to give the notice to the Registrar on behalf of the Trust is a matter of the internal management of the Trust's affairs; and we find that his having done so was approved in accordance with the Trustees' practice.

The opponents

[37] The WiHongis, Ms Beadle, and the various submitters who sought to be heard under section 271A in opposition to the proposal, had much in common, and were represented by the same counsel. In this decision we refer to them collectively as "the opponents".

The Proposal

[38] The Minister's proposal is to establish a comprehensive regional corrections facility in Northland for male inmates. It is to contain specialist facilities for youth, for Maori, for high and low security, and for those remanded in custody. In addition to its custodial function, it would provide facilities to address educational, vocational, cultural, spiritual, recreational and criminogenic needs of inmates. It would provide improved security and improved access for those involved in rehabilitation and healing.

[39] The facility is to contain 350 inmates initially, with room to expand to accommodate 450 if needed. There would also be provision for extra beds in some cells for use in emergency.

[40] The facility would cater for all security classifications. Although maximum security inmates would not be permanently accommodated there, ten cells would meet the standard for secure containment of maximum security inmates when they need to be temporarily contained in Northland. In addition to high-medium security beds, and cells for minimum security inmates, there would be 12 self-care units providing a total of 48 beds.

[41] All accommodation (other than five self-care units for up to 20 minimum security inmates) would be enclosed by a high-security perimeter with electronic detection and a 6-metre high wall (containing 16.8 hectares) topped by an anti-scale metal cowl. The units outside the perimeter would be for inmates at the ends of their sentences, and would be electronically monitored.

[42] In addition to inmate accommodation, the facility is to include a health unit with two-bed wards, consulting rooms and a dental room; a whare hui and spiritual centre; a recreation building; education rooms; visiting facilities; a dedicated youth

unit with industry and education spaces; kitchen, laundry and workshop facilities; staff facilities; inmate receiving and gatehouse; and a stores building.

[43] The total building platform would have an area of 21 hectares, of which about 2 hectares would be covered by buildings, a further 5 hectares by roads, paths and carparking spaces, leaving about 14 hectares of open landscaped environment.

[44] The Ngawha Stream, which passes through the site, would be temporarily diverted during site works. The course of the stream would be straightened, and the channel lined, with culverts provided at either end of the secure compound. Part of the peak flow would be diverted around the secure compound during periods of high flows. An eastern tributary of the stream would also be realigned and flood protection works carried out.

[45] Earthworks would be needed to create graded areas for the secure compound and platforms for buildings structures and related outdoor areas. Fill material would be won from other parts of the property and cut material that is unsuitable for use as fill would be disposed of on the land. A two-lane access drive would be constructed across the land from State Highway 12, and the intersection with the highway formed.

[46] Substantial screen planting of trees has already been carried out on the site. Further amenity and screen planting is proposed. The planting is designed to screen the facility from view, especially from the south, as well as to enhance the amenity of the facility. The remainder of the site would be used for agricultural, horticultural and recreational activities.

The Main Issues

[47] Numerous issues were raised in the hearing of these proceedings. In this decision we address all of them that are capable of significantly influencing the outcome.

[48] There are three main issues, on which the parties directed much evidence. The first main issue is whether or not the proposal adequately recognises and provides for the relationship of Maori and their culture and traditions with their ancestral land, waters, waahi tapu and other taonga. This issue involves many aspects and sub-issues. Among them are questions about the localities of battles, the

place of tuakanatanga, the significance of a taniwha of the locality, and kaitiakitanga. It also includes whether or not the Minister had adequately entered into consultation about the proposed corrections facility with iwi, so as to discharge the Crown's duty of consultation as a principle of the Treaty of Waitangi.

[49] The second main issue is whether or not the site is unsuitable by its juxtaposition with the Ngawha Geothermal Field, and whether the safety or health of inmates, visitors and staff are at risk from eruption of gas or other material.

[50] The third main issue is whether or not there would be adverse effects on the social and economic well-being and safety of the people and community of Ngawha Springs, including the attractiveness of the springs and spa located there, from the presence and sight of the proposed corrections facility.

[51] Those main issues are relevant in applying the various criteria stipulated by the Act and subordinate instruments. So we address the evidence and state our findings on them before applying the statutory criteria.

[52] To provide the context, we describe the site and its environment, and set out the affirmative case for the proposed facility, and our findings on the selection of the site. We then state our findings on the development works, to give context to some of the main issues.

Integration of Evidence and Separation of Criteria

[53] First we need to decide questions that arose whether the cases of the submitters in opposition to the resource consents are to be taken into account in deciding the appeals about the designation; and whether availability of alternative sites is confined to adequacy of consideration of them in deciding the resource consent applications, or is to be considered separately and directly.

Integration

[54] The Court is directed to hear together two or more proceedings relating to the same subject-matter, unless it is impractical, unnecessary or undesirable to do so.[3]

[3] Resource Management Act 1991, s 270(1).

[55] No party objecting, or contending otherwise, the Court heard together the two appeals arising from the Minister's requirement for the designation, and the Minister's own appeal against refusal of the resource consents.

[56] However the appellants in respect of the designation requirement (Ms Beadle and the WiHongis) had not given notice (under section 271A of the Act) of any wish to be a party in the Minister's appeal against refusal of the resource consents, or notice (under section 274 of the Act) of any wish to appear in the proceedings of the Minister's appeal. Similarly, none of them: the Regional Council, the Friends and Community of Ngawha Incorporated, Mrs E M Clarke or the Ngatirangi Ahuwhenua Trust had given any such notice in respect of the proceedings of Ms Beadle's and the WiHongis' appeals in respect of the designation requirement. In those circumstances the question arose whether evidence adduced by any party (other than the Minister) was only to be received in respect of the proceedings in which that party was taking part, or was to be received as evidence in all the proceedings that were being heard together.

[57] The Minister expressly consented to the Court taking into account in the appeals about the designation requirement the evidence of Dr M Isaac, and of Messrs R P Brand, R D Beetham and V R C Warren, who had been called on behalf of the Friends and Community of Ngawha Incorporated.

[58] However the Minister observed that counsel for the appellants Ms Beadle and the WiHongis had not sought leave for other evidence to be taken into account in the designation requirement proceedings, in particular that of Dr P W Hohepa (called on behalf of the Regional Council), Mr G Hooker (called on behalf of the Friends and Community of Ngawha Incorporated), Mrs E M Clarke (who gave evidence in support of her own case) and Mr A V Clarke (Ngatirangi Ahuwhenua Trust). Counsel for the Minister contended that it would be unfair to the Minister if the Court were to take into account that evidence on the designation appeals when that is not sought by any party in those proceedings.

[59] Counsel for the Minister observed that when (as contemplated by section 270) two or more proceedings are being heard together, the Court is still hearing two or more proceedings. He submitted that they do not become one proceeding simply because they are being heard together. Counsel accepted that the Court has a discretion under section 276(1)(a) to receive evidence from the other proceedings if it considers appropriate. He contended that it is not appropriate because it is unfair

to the Minister, whose case had been prepared on the basis that the parties to the resource consent proceedings did not wish to take part in the designation requirement appeal, because they had not given notice of any wish to do so.

[60] Counsel for the Regional Council made submissions to the contrary. They contended that one of the benefits of hearing matters together is that it allows the Court in one hearing to receive evidence from different parties to two or more separate proceedings. They urged that there would be practical difficulties if, in a joint hearing, evidence had to be divided up and allocated only to specific proceedings. This, they contended, would cut across the statutory goal of integrated resource management, and may result in relevant evidence in a joint hearing excluded from consideration, risk inconsistent rulings (because evidence is received in one proceeding but not another) and make the hearing process more cumbersome and unwieldly.

[61] The opponents to the Minister's appeal against refusal of the resource consents expressly stipulated that they did not seek to rely on the evidence in the designation requirement proceedings on behalf of Ms Beadle or the WiHongis.

[62] Counsel for the opponents submitted that it would not be possible for the Court to segregate the evidence in one proceeding from that in the other. They contended that as the designated use could not occur without the resource consents, the two sets of approvals are inextricable linked.

[63] In his testimony, Mr Warren gave the opinion that the various elements of the project for which resource consents are required overlap and form a comprehensive whole, the project.

[64] We accept that. Our approach to the question is also influenced by the fact that none of the proceedings are private law proceedings. They are all to be determined for the public purpose of the Resource Management Act 1991. It is our understanding that this shared purpose, as well as efficiency, underlie Parliament's direction that the Court hear together two or more proceedings relating to the same subject-matter, except where it is impractical, unnecessary or undesirable to do so.

[65] The public purpose that they have in common indicates that where more than two or more proceedings are heard together, evidence in any one of the proceedings should be received as evidence in all of them, to the extent that it is relevant. That

assists the Court to make the best decision for the public purpose of the Act. It has been the practice in this Court, and its predecessor the Planning Tribunal, for decades. Of course that practice must be dispensed with in a particular case where it would be impractical, unnecessary or undesirable (particularly if a party would be prejudiced).

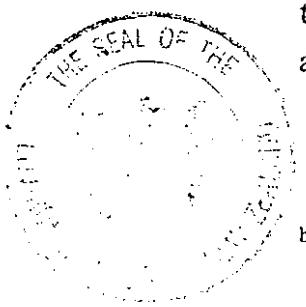
[66] We are not persuaded that in this case it would be impractical or unnecessary to receive all the evidence as being evidence in all three proceedings. Rather, we accept the Regional Council's submission that it would be impractical if the Court had to receive evidence for making findings in one or two of the proceedings, but not receive it for making findings in the other or others. We think that would make the decision-making process cumbersome and unwieldy, if not impossible, and would risk inconsistent findings.

[67] Even so, we may have had to take on the added task, if to follow the normal practice would lead to significant prejudice to a party. Certainly the Minister has a strong point in that neither Ms Beadle nor the WiHongis had given notice of their wish to be a party in, or to appear in, the Minister's appeal. However in the end the joint hearing extended over 21 hearing days, and that gave the Minister's counsel opportunity to review the Minister's case in the light of what in fact transpired. There was of course opportunity for the Minister's counsel to cross-examine every witness called on behalf of the opponents, and to present a prepared reply.

[68] Omission of notices stipulated by sections 271A and 274 was not explained, and is not condoned. But bearing in mind that the Court has to make findings leading to determinations in all three proceedings for the same purpose stated by Parliament, it is our judgement that the Minister's case would not be sufficiently prejudiced to outweigh the combined advantages of following the usual practice of receiving the evidence adduced by all parties as evidence in all proceedings. Accordingly that is how we have proceeded in the preparation of this decision.

Separation

[69] Counsel for the Regional Council observed that the resource consent applications have to be considered independently of the designation, and referred to the different criteria applying to each. That was not contested, and we accept that although our findings on fact are made on the totality of the evidence (whichever



party adduced it), we have to arrive at our decision on each proceeding according to the provisions specifically applicable to it.

Relevance of end-use to resource consents

The issue

[70] However the parties differed on another point. That was whether it is relevant to the decision on the resource consent applications that the purpose of the earthworks and streamworks (for which the resource consents are sought) is to establish a corrections facility in which inmates would be detained near a stream or over a geothermal resource.

[71] Counsel for the Minister submitted that the purpose is not relevant to the decisions on the resource consent applications. They should be decided on the basis of the works the subject of the consents sought, not on the basis of effects of the intended use of the land for a corrections facility, a matter beyond the functions of the Regional Council which has primary authority to grant or refuse the consents.

[72] Counsel for the Regional Council submitted that the end-use has to be considered, citing *Royal Forest and Bird Protection Society v Manawatu-Wanganui Regional Council*[4] and *Metekingi v Rangitikei-Wanganui Regional Water Board*.[5]

[73] Counsel observed that the Minister had invoked the national interest and claimed the beneficial use of a prison for the purpose of section 104, and submitted that the opponents were entitled to submit to the contrary.

[74] Counsel for the opponents submitted that it is not possible for the Court to artificially segregate the proposal, that the two sets of approvals (designation and resource consents) are inextricably linked, and that it is appropriate to consider the end-use of the land that exercise of the consents would enable, as potential effects of allowing the activities the subject of the resource consent applications. They contended that if the requirement is confirmed, an inevitable or reasonably foreseeable outcome of granting the consents would be that the designated use (the prison) would be established on the site, so the effects of that use are relevant in considering the resource consent applications, including the effects of the stigma of

[4] [1996] NZRMA 241.
[5] [1975] 2 NZLR 150.

Ngawha Springs as a prison town, and risks of harm from escaping inmates. Counsel cited *Lee v Auckland City Council,*[6] *Aquamarine v Southland Regional Council*[7] and *Cayford v Waikato Regional Council.* [8]

[75] In reply, counsel for the Minister accepted that the effects of the earthworks and stream works in terms of Part II issues require consideration, but not that the effects of end-use of the land for a prison are relevant. He observed that the direction in section 104(1)(a) to have regard to "... any actual and potential effects on the environment of allowing the activity" refers to the effects of allowing the activity for which consent has been applied, and cited *Ngati Rauhoto Land Rights Committee v Waikato Regional Council.*[9] Counsel urged that there is not an objective link between the works and the effects of the prison, nor a sufficient degree of inevitability or reasonable foreseeability. He also referred to *Pokeno Farm Family Trust v Franklin District Council,*[10] and *Gilmore v National Water and Soil Conservation Authority.* [11]

The decisions

[76] We start by considering *Metekingi* and *Gilmore*, as (being judgments of superior Courts) if they stand for propositions in point, we are bound to apply them.

[77] *Metekingi* concerned an application under the Water and Soil Conservation Act 1967 to permit a stream to be dammed for a hydro-electricity station. The owners and lessees of the land objected as the storage lake would take about 700 acres of land out of production. The Appeal Board had rejected their argument that the Act did not provide for resolution of conflict of priorities between land use and water use. On appeal, the Supreme Court[12] accepted that the Act was not primarily aimed at resolving issues between competing land uses, but as the appellants had no other legal forum where they could advance their contentions, and their case was not plainly unconnected with the purpose of the Act, the statutory object of 'soil conservation' should be understood as not precluding the objectors' case.

[6] [1995] NZRMA 241, 262.
[7] (1996) 2 ELRNZ 361.
[8] Environment Court Decision A127/98.
[9] Environment Court Decision A65/97
[10] Environment Court Decision A37/97.
[11] (1982) 8 NZTPA 298, 304.
[12] Cooke J (as he was then).

[78] *Gilmore* was also about a hydro dam under the Water and Soil Conservation Act 1967. The Planning Tribunal had held that it could not consider the end-use of the power for a proposed aluminium smelter. On appeal, the High Court[13] held that the subject *could* be relevant, and that it was for the Tribunal to decide whether in the particular case the end-use of the power was relevant, and what weight to give to it.

[79] The case was remitted to the Planning Tribunal for reconsideration. The Tribunal identified the question as not being an inquiry whether a smelter *should* exist, but whether it *would* exist, since it may never come into existence. The Tribunal found that the generating capacity was not likely to be needed.[14] (In the event, the dam was built, under specific legislative authority, but the smelter never did come into existence).

[80] We have reviewed those cases to see if they stand for propositions in point that we are bound to apply in deciding the difference in this case. In a strict sense, they do not, because they were based on the purposes of a previous Act that was repealed on the enactment of the Resource Management Act 1991. With respect, the most guidance we can draw from them in the 1991 regime is that an end-use *could* be relevant, and that where there is no other forum for consideration of a concern cognate to what is provided for, an Act may be given a liberal interpretation to allow it to be considered on the merits. We now consider whether the Planning Tribunal and Environment Court decisions under the Resource Management Act 1991 reveal further guidance on the point.

[81] On an application by the Canterbury Regional Council for declarations, the Planning Tribunal made a declaration[15] that in considering applications for resource consents, the Regional Council was not limited to considering adverse effects of activities directly related to the Canterbury Regional Council's functions, but was also able to consider adverse effects on other matters under sections 6 and 7 of the Act such as the protection of heritage values of sites, and the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.

[13] Casey J.
[14] *Annan v National Water and Soil Conservation Authority (No 2)* (1982) 8 NZTPA 369.
[15] *Application by the Canterbury Regional Council* [1995] NZRMA 110.

[82] The Planning Tribunal decision in *Lee v Auckland City Council*[16] was cited for a valuable observation about the scope of section 104(1)(i)–

> ... what is allowable under section 104(1)(i) of the Act must be related back to the issues contemplated by the purpose of the Act as it is subject to provisions of Part II. Any decision under section 104(1)(i) cannot be made in a vacuum and on extraneous matters.

[83] In the *Royal Forest and Bird Protection Society* case[17] resource consent applications had been made to a Regional Council for logging native trees. The Environment Court held that section 6(c) issues were relevant even though not related to the Regional Council's functions and they could have been considered in the context of District Council land-use consents.

[84] The *Aquamarine* case[18] concerned resource consent for taking water for export by ship. The Environment Court held that potential adverse effects of the passage of the ships and discharges from them were relevant, even though the passage of the ships did not itself require consent under the Act, and would not be under the direct control of the applicant.

[85] In *Pokeno Farm,* [19] it was held that the fact that a particular activity is authorised under another resource consent or by another council's plan does not preclude the effects of that activity from being assessed in the context of a related proposal.

[86] The *Ngati Rauhoto* case[20] was cited for the proposition that although sections 6, 7 and 8 are to be given effect to the extent material to the circumstances of the case, they could not be used to turn an appeal about a discharge into an appeal about taking geothermal fluid.

[87] The decision in *Cayford's* case [21] was mentioned because the Environment Court held in that case that regard is to be had to the direct effects of exercising the resource consent which are inevitable and reasonably foreseeable, and also to effects of other activities that would inevitably follow from the granting of consent, but that

[16] [1995] NZRMA 241, 262.
[17] [1996] NZRMA 241.
[18] (1996) 2 ELRNZ 361.
[19] Environment Court Decision A37/97.
[20] Environment Court Decision A65/97.
[21] Environment Court Decision A127/98.

regard is not to be had to effects that are independent of the activity authorised by the resource consent.

Consideration

[88] From reviewing all those cases, we discern a general thrust towards having regard to the consequential effects of granting resource consents, particularly if they are environmental effects for which there is no other forum, but with limits of nexus and remoteness. Of course the weight to be placed on them has to be case-specific. *Lee's* case is a reminder that a decision-maker should not have regard to matters extraneous to the Act; *Ngati Rauhoto* that an appeal on one topic cannot be turned into an appeal on another; and *Cayford* that consequential effects may be too slightly connected to the consent sought, and too remote.

[89] In the present case, the decision on the point would not necessarily make much difference to the outcome, bearing in mind our decision that findings may be based on the totality of the relevant evidence, but that we have to arrive at our decision on each proceeding according to the provisions specifically applicable to it.

[90] However the Minister expects the Court, in deciding the resource consent applications, to have regard to the purpose of the earthworks and streamworks to create a site for what he urges is a necessary public facility and one that will provide public benefits in Northland. The submitters must be entitled to challenge those claims. But their rights are not limited to direct denial. They must also be entitled to try and prove that the facility would have adverse effects on the environment that should be offset against its positive benefits, and indeed to prevail over them. To preclude submissions and evidence along those lines would be to deprive the Court of the opportunity to make a judgement based on a more complete understanding of the proposal.

[91] So, for what difference it may turn out to make, we hold that in deciding the resource consent applications we are able to have regard to the intended end-use of a corrections facility, and any consequential effects on the environment that might have, if not too uncertain or remote. But we will also need to bear in mind the nature of the consents sought, to avoid turning proceedings about earthworks and streamworks into appeals about use of land for the facility.

THE SITE AND ITS ENVIRONMENT

The Site

[92] The site is part of the Tuwhakino Block. It is in open pasture, having been a dairy farm (known as the Timperley Farm[22] after the previous owners), and has an area of 189.6 hectares. It is generally undulating or rolling, with a flatter central basin bounded by ridges to the east and to the west having some locally steeper slopes. The central (or internal) basin itself slopes from the north to the south, with a steep escarpment at the southern edge to the Ngawha Stream. From State Highway 12, the site extends in a narrow 'pan handle' strip for about 750 metres before widening out into the central basin.

[93] The flatter area is about 207 metres above sea level, and there is a prominent landform within the site (the western hill) rising to 256 metres above sea level.

[94] The Ngawha Stream flows through the site in a generally north-west to south-easterly direction. The stream is incised and meandering, with low gradients and conspicuous banks. An eastern tributary rises in the north-east of the site and flows into the main stream in the central area of the site. The margins of the streams contain a predominance of gorse and pine, with a small area of wetland in the lower portion of the eastern tributary.

[95] The site is currently used for pastoral farming. The land is mostly open pasture (dominated by exotic grass species) with some plantations of exotic tree species (including pinus radiata) and shelter belts. Pines have been planted along some stream margins. Manuka scrubland and gorse are also present on parts of the site. There are exotic rushes on parts of the site that are poorly drained, and there are patches of indigenous sedgeland along the streams.

[96] The site is within the area underlain by the Ngawha Geothermal System. There are some minor surface manifestations of geothermal origin within the site, though none within the site for the secure compound, designated building zones or roads. There are the warm Waitotara mud pools near the western boundary (some 800 metres from State Highway 12), and a small pond called Waiapawa (smoking lake) near the eastern boundary. There are other cold mineralised springs, and areas of cold gas emission (including in the bed of the Ngawha Stream) that may be

[22] Or Timperley's Farm, according to Mr Heaps, see paragraph 5 of his statement of evidence.

associated with fracturing in the cap rock. There are also locations of elevated subsurface temperature.

[97] There are raised concentrations of mercury in topsoils on the site, more widely in topsoil than in subsoil. (Analysis of samples for arsenic and antimony revealed concentrations below levels of concern.)

[98] The Waitotara and Waiapawa ponds are surrounded by bare peaty gumland soils. Manuka and gorse grow around the edge of the Waiapawa Pond.

[99] Although they are part of the site, the Minister does not require those ponds and their surrounds for the proposed corrections facility. They are to be fenced off from the rest of the site for their protection. The Minister is investigating options for transferring control, or perhaps ownership, of the ponds to Maori.

[100] The outflow from the Waitotara ponds is another tributary of the Ngawha Stream. A further tributary joins the main stream from the southern boundary between the site and the Ginn's Ngawha Springs Limited property.

[101] Geologically, the site is close to the contact of volcanic deposits of less than 10,000 years old (basalts) and undifferentiated alluvial deposits of Pleistocene age (less than 1-2 million years old). Those alluvial deposits include old lake sediments. On a larger scale, this contact zone is surrounded and possibly underlain by sedimentary rocks of weak mudstone and sandstone.

[102] The eastern hill is underlain by fractured mudstone with varying degrees of weathering. An area on the eastern hill has been used in the past for quarrying hardfill. The soils underlying the upper terrace on both sides of the stream are alluvial/lake deposit in origin. Below about 1 to 1.5 metres, the soils there are generally wet and soft. The topography of the western hill appears to have been created by an eruption of basaltic lava. An area of eucalyptus trees contains a landslip of about 20 to 30 years ago. There are areas of peat on the site, up to 3 metres deep.

[103] Low-angle slope instability is typical for Northland soil. Within the site there is evidence of shallow slope instability and soil creep on the gentle to moderately steep east-facing slopes, hummocky ground at the toe of the western hill indicates

past downslope movement, and there is evidence of local slumping along the banks of the Ngawha Stream.

[104] Northland has the lowest seismic hazard potential in New Zealand. Three fault lines have been inferred crossing the property, but they are outside the site of the proposed complex. There is no evidence of movement of the faults within the last 10,000 years. No active faults have been mapped in the area.

[105] Following the District Council's decision on the submissions on the Minister's requirement, the Department unconditionally purchased the site.

The Environment of the Site

[106] The site is surrounded by scrub and regenerating bush to the north, east and south-east, and open grassland to the west and south-west. The wider Ngawha basin has rolling topography, with pockets of intensively farmed areas interspersed with areas of regenerating scrub and bush. There are remnant patches and stands of native forest, some of which have been cut over. There are also extensive plantings of pine forest, particularly along the southern and western edges of the basin.

[107] The site is located about 2.3 kilometres south of the settlement of Ngawha, and about a kilometre north of Ngawha Springs village. Access to Ngawha Springs is by a side road from State Highway 12, Ngawha Springs Road, which branches from the highway about 600 metres south-west of the site.

[108] Ngawha Springs village consists of about 60 or 70 houses, and three hot springs complexes. One is on the property of Ginn's Ngawha Spa Limited; one (being part of the Parahirahi Block) is on adjacent property administered by the Parahirahi C1 Trust; and the third is at the guest house called Ngawha Springs Hotel. The property of Ginn's Ngawha Spa Limited (another part of the Tuwhakino Block) also contains remains of a former mercury mine, which are included in a conducted walking tour of that property.

[109] The Ginn's Ngawha Spa Limited property adjoins the site to the south. The closest boundary point of that property is about 50 metres from the proposed facility. The access road on the northern ridge of that property would be about 300 metres from the facility.

[110] Lake Tuwhakino is a large geothermal pool on the Ginn's Ngawha Spa Limited property. Downstream of the site, the outflow from that pool enters the Ngawha Stream which in turn flows into the Mangamutu Stream and then to the Waiaruhe River, a tributary of the Waitangi River. The main Ngawha Stream does not flow into Ngawha Springs, or Ngawha township.

[111] To the north-east of the site, the adjoining land (identified as D1) was initially included in the Minister's requirement, but later deleted at his request. That land is held by the Ngatirangi Ahuwhenua Trust and is part of the Waiwhariki Block. It is characterised by flat, swampy ground with rolling hills. It has areas of wetland, pasture, indigenous trees and predominantly manuka scrubland. The Ngawha marae is located to the south of State Highway 12 about 1.5 kilometres north of the site.

[112] The western headwaters of the Ngawha Stream are located in the vicinity of St Michael's Church on the northern side of State Highway 12. The stream passes under the highway and meanders south towards the site.

[113] The adjoining land to the west of the site (the remaining part of the Tuwhakino Block) is the Kaikohe Golf Course.

[114] Agricultural activity in the surrounding area is a mixture of small rural holdings and large fattening and dairy units.

[115] The Ngawha geothermal reservoir underlies the whole locality at a depth of half a kilometre or more, is covered by a sequence of impermeable sediments that make up a cap rock, and has very limited communication with the surface. The pressures within the reservoir are strongly positive with respect to the surface. Relevant minor surface activity extends over an area of about 180 square kilometres.

[116] A number of possible faults at depth have been inferred from observation of the results of deep geothermal exploration wells. Most of the flow through the geothermal system, and its surface manifestations, occurs on three north-east trending fault zones. These manifestations are confined to localised areas where the isolated deep fault zones act as feeder channels by which a small amount of geothermal fluid reaches the surface causing the known 'thermal' activity (including cold gas emissions). Each of the surface manifestations is fed independently from the deep reservoir.

[117] The possibility of flows outside the fault lines had been tested by drilling wells, some of which were between the faults. One of them[23] was on the Timperley Farm. Those wells, though hot, proved unproductive.

[118] Changes have occurred in the location and intensity of thermal activity at Ngawha in historic times, with some features getting hotter and others cooler. There is evidence of prehistoric hydrothermal eruptions in the area. However the hydrothermal eruptions and changes in activity have been localised along the north-east trending fault zones.

[119] There is a geothermal electricity generating station about 1 kilometre from Ngawha Springs village, operated by Top Energy. It takes about 10,000 tonnes per day of fluid from the geothermal reservoir, cools it, and reinjects it to the ground. It also discharges geothermal gases to the air, in addition to those naturally emitted. It produces about 6 tonnes per year of solid toxic waste in the form of a compound of antimony, with traces of arsenic, mercury and thallium, which is disposed of off-site.

[120] The thermal features at Ngawha emit mercury, which accumulated in the soil. Mercury was mined last century on what is now the Ginn's Ngawha Springs Limited property.

[121] There are also concentrations of hydrogen sulphide in the air of the wider Ngawha area, up to 130 micrograms per cubic metre of air at times. (This level might be considered an odour nuisance, but is far below the level of toxicity.)

[122] Kaikohe is about 5 kilometres to the west of the site. The town has a population of about 4000 people, and contains the principal offices of the Far North District Council, a medical centre, schools, a District Court, a police station, retail, service, sports and recreation facilities.

[123] About 6 kilometres north-west of the site there lies a shallow lake, Lake Omapere.

[23] Well NG-5.

THE AFFIRMATIVE CASE

The Case for a Prison in Northland

Northland need

[124] The Department of Corrections is committed to a regional prisons policy by which (subject to prison and sentence management) inmates are held as near to their own families and communities as practicable, so as to facilitate family visits, and assist inmates' re-integration into the community on release.[24]

[125] There is currently insufficient prison accommodation in the region north of the Bombay Hills; and there is none in Northland. At 1 September 2000, inmates sentenced in Northland courts accounted for 244 of the total male prison population of 5650. At 1 July 2001, 383 of the present male inmate muster had Northland iwi affiliations. There being no corrections facility in Northland, these inmates are housed away from their home region. In the twelve months to June 2001, 1035 people travelled from Northland to visit inmates elsewhere in New Zealand.

[126] Virtually half the current prison population are Maori, and many of them are held in prisons remote from their rohe, with limited opportunities for maintaining close links with their whanau, iwi and communities.

[127] In the absence of a corrections facility in Northland, there is no secure facility for holding in custody persons who are appearing before Northland courts. People have to be transported from Auckland on a daily basis for court appearances in Whangarei, Kaikohe and Kaitaia.

[128] The new corrections facility in Northland has been designed to enable the Department to apply its integrated offender management programme for re-integration of offenders and to reduce re-offending. The Department seeks to provide programmes and training concentrating on rehabilitation and respect for the needs of individual inmates.

[24] This policy follows recommendations in reports by committees chaired by Sir Maurice Casey (1981) and Sir Clinton Roper (1989), and experience with the first regional prison at Hastings.

[129] Mr Ron WiHongi agreed that his concern in making his submission had been that there should not be a prison anywhere in Tai Tokerau, and that to him it is not a prison that they want.

National need

[130] Mr J Hamilton, the Department's Project Director for the proposed Northland facility, testified that the Ministry of Justice has projected that by October 2003 the number of male inmate beds required nationally will be 6792, and 7651 by September 2008. Without the Northland facility, the Department would be 538 beds short of projected demand by October 2003. If the 350-bed facility in Northland is fully occupied, the Department would still be 167 male beds short in April 2004. Because unexpected and uncontrollable external factors can cause increased needs, the practical shortage of beds for male inmates may be higher than currently projected.

[131] Prison accommodation in Auckland, the region nearest to Northland, is under severe pressure and is inadequate to meet current and future needs. Currently there are about 136 inmates from Northland housed in Auckland. This in turn displaces inmates from Auckland to other regions.

[132] Counsel for the opponents put to Mr Hamilton that the urgency he referred to was of the Government's own making. The witness was not able to answer that, but he assured the Court that the Minister was certainly not asking the Court to "cut any corners" in its scrutiny of the project.

[133] Mr Paul WiHongi deposed that in his experience those who have whanau in prison experience feelings of hopelessness and despair, and that having a prison in their home will not give an opportunity to break cycles. He considered that prison is not the answer, and that the community must work towards preventative solutions.

[134] The Regional Council stated that it had taken no account of penological issues, and that its refusal of the resource consents had not been based on the end-use of the site for a prison. Its counsel submitted that it would be appropriate for the Court to take into account all positive and negative aspects of the works; and acknowledged that prisons serve an important social function. They submitted that the prison does not have to be located at Ngawha, and does not have to involve such extensive earthworks and diversion of a stream.

[135] The criteria for deciding the appeals against the requirement do not call for the Court to review the Minister's objective for the proposal. So the opinions of Messrs Ron and Paul WiHongi about the value of a prison, or of having one in Northland, do not bear on the decision of those appeals.

[136] However we accept the correctness of the Regional Council's submission that positive and negative effects of the works are to be considered in deciding the resource consent applications, and we have given our reasons for holding that we are able to have regard to the intended end-use of a corrections facility. That is a context in which the WiHongis' opinions could be relevant.

[137] Ideally, prisons and other corrections facilities should not be needed anywhere. But regrettably, for whatever reasons, some people's behaviour is aggressively hostile to others' rights and freedoms. The use of prisons and other corrections facilities for detention and rehabilitation of the worst offenders is a policy of the New Zealand Government, a political matter, and it is not for the Environment Court to express an opinion whether or not it is a sound policy.[25] The Court can take judicial knowledge of the Government's active programme to pursue preventative solutions which might break cycles of crime and address feelings of hopelessness and despair. The integrated offender-management programme described in evidence is one example. Whether the programme is well directed, and adequately resourced, are also political questions on which the Court should not form an opinion.

[138] We address the opinions of Messrs Ron and Paul WiHongi that there should not be a prison in Tai Tokerau in the next section of this decision.

[139] Accepting, as we do, that the Government has a policy of having prisons and other correction facilities, on the evidence we find that there is a need for a further facility as proposed, and that there is a need for one in Northland (as well as in other regions).

Positive Effects

[140] It was the Minister's case that as well as meeting a national and regional need, the proposed prison would have other positive effects.

[25] *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 198 (CA).

[141] Mr J Hamilton testified that there is potential for 70 per cent of the staff positions of the facility being filled by local people, and that a suitable pool of candidates is available in Northland. In addition there would be opportunities for local individuals and organisations to be involved in supply of goods and services. The facility would contribute about $8.4 million per annum to the Northland economy by payment of salaries and wages, and a further $2.8 million per annum purchasing materials, food, health services, programmes and maintenance.

[142] Mr Kenderdine testified that the current estimate of the cost of construction and fit-out of the facility is $92 million and a total of $100 million for completion. He gave a schedule of the estimated construction workforce, rising from 10 to 20 at the start of earthworks to as many as 370, then reducing to 20 to 40. He deposed that apart from a core of on-site managers, most construction employment would be of short-term duration (3 to 6 months) related to the particular skills needed at specific stages. Mr Kenderdine expected that the majority of the skilled workforce would commute daily from their homes from distances of up to 100 kilometres or more, but any from further afield would be likely to seek temporary accommodation.

[143] Mr M C Copeland, a consulting economist, reviewed direct and indirect employment and income effects of the proposal and concluded that they would be positive and significant during the construction phase and thereafter during the operational phase.

[144] Mr Copeland had also examined impacts of the prison on utilities, and concluded that it would enable more efficient use of them. It would also assist to broaden the economic base for the district, making it less susceptible to cyclical downturns in agriculture and forestry. Mr Copeland also rejected opposition based on loss of agricultural production, observing that the opportunity cost of the land would have been reflected in the purchase price for the site. He also dismissed claims that the cost of the prison would bring better benefits if diverted to market gardening, or health and education infrastructure improvements.

[145] Mr Copeland concluded that the proposal would bring substantial economic benefits to the Far North District in increased employment, incomes and economic activity; a broader economic base; and more efficient utilisation of infrastructure. He was not cross-examined; and we accept his conclusions.

[146] Ms N Barton is an experienced resource-management planning consultant. Having been responsible for social impact assessments and consultation in respect of several major projects, she had been engaged by the Department of Corrections to make an independent peer review of the consultation process and social impact assessment of the Northland regional prison project.

[147] From her peer review, Ms Barton concluded that the community would benefit from the central location of the site, and with the economic benefits, the net social impact would be positive.

[148] The testimony of Mrs B Edmonds confirmed that from her long experience in the Ngawha community that a prison in the locality would have positive effects for families of inmates from Northland. She agreed that a lot of the good that can be achieved with the prison could be achieved at another location in Northland.

[149] Mrs Bella Tari, a member of the Ngati Rangi hapu, gave the opinion that the prison would be an opportunity for Ngati Rangi to participate in the healing process for inmates, consistent with the tradition of healing at Ngawha Springs. She observed that healing is not exclusive to women, or to those who have never committed a crime. She considered that if Ngapuhi want to seek change with these people, then bringing inmates to a place of healing is an appropriate place to start.

[150] Mr M Anania, another member of Ngati Rangi, gave the opinion that the prison facility would provide an opportunity to assist in the rehabilitation of Maori inmates who are of Ngapuhi descent.

[151] The opinions of Messrs Ron and Paul WiHongi that there should not be a prison in Tai Tokerau are in conflict with those of Ms Edmonds and Mrs Tari. They are not consistent, either, with reducing lengthy travel for those in custody who are appearing before Northland courts, or with the Department's wish to apply its integrated offender-management programme for rehabilitation of inmates from Northland.

[152] Although we respect the opinions of Messrs Ron and Paul WiHongi on the topic, we are persuaded on the evidence that in present and foreseeable conditions there is a need for a corrections facility in Northland, and we so find.

Selection of the Site

The issue

[153] It was the appellants' case that adequate consideration had not been given to alternative sites for the proposed corrections facility, both in factual enquiry and in consultation, resulting in selection of an inappropriate site. In particular reliance was placed on the extent of earthworks needed to develop the subject site.

[154] The Minister's response was that all correction facilities of the scale proposed need significant earthworks, and most sites in Northland are likely to have significance for Maori. Counsel urged that it was appropriate that further consideration was given to the chosen site after it had been selected, so that it was given more full site-specific assessment than alternative sites.

The evidence

[155] Mr Warren agreed with the initial approach that had been taken by the Department of Corrections in inviting owners to offer properties for the project, and then reducing those offered to a short list. He observed that the Timperley property was not one of those originally offered. Mr Warren also deposed that the comparison methodology used by the Department and its advisers was of a kind widely used in that kind of work.

[156] However Mr Warren also expressed criticisms of the site selection process. He said–

> If adequate consideration had been given to alternative sites then one would not expect the final preferred site to be located in the middle of the only geothermal resource north of Waiwera, with a cost penalty of $30 - $40 million more than on a normal site.
>
> ...
>
> ... detailed investigation of the subject site should have put up red flags as soon as the extent of site modification and likely level of costs became apparent. In my view, this should have led to a revisiting of the consideration of alternative sites.
>
> Whilst agreeing with much of the approach taken to the comparison of alternative sites, the results speak for themselves. The process has proved to be flawed as a result of which I have reached the conclusion that "adequate consideration" was not given to alternative sites.

[157] In cross-examination, Mr Warren was asked whether his concern was with the outcome of the process rather than the process itself. He affirmed that he considered the outcome as important, and that if the outcome is poor, then it was his opinion that the process had failed. He agreed that it was a fair summary that because in his view the site is unsuitable and expensive, therefore the process must have been inadequate.

[158] Evidence was given by Mr W G Whewell, an official of the Department who had supervised the site selection process. He described in detail a methodical process in which (over two and a half years) the Department and independent consultants had considered and evaluated 74 possible sites, in a context of consultation with the public, and Maori in particular. The witness deposed that in evaluating them, appropriate weight had been given to environmental, social and cultural concerns.

[159] During the process the Department had adjusted the guidelines in response to representations received. The final site selection criteria had been circulated to over 2500 people. At all stages Maori cultural issues had been considered, with consultation with iwi and other Maori organisations.

[160] The subject site (D2) had not been included in the site selection process until after shortlisting the final four sites, when the combined site D1 and D2 had been fully evaluated against two other shortlisted sites. The Minister's decision to proceed with a site at Ngawha had been conditional on acquiring the land of site D2, and on a satisfactory technical report. The subsequent technical evaluation of the site D1 and D2 had shown that it scored very well and ranked ahead of the other two, sites A and C. A cultural report on it by Ngatirangi Ahuwhenua Trust was also favourable.

[161] Mr Whewell gave the opinion that if site D2 had been evaluated on its own, without the ecologically sensitive site D1, that may well have made D2 even more attractive. Later claims of cultural issues in respect of site D1, if well founded, would have made site D1 even less suitable.

[162] Mr Whewell identified a number of respects in which the subject site, D2, rates particularly well. He referred to its being close to one of the three service centres of Northland (within the central triangle of Whangarei, Dargaville and Kaikohe); being located off State Highway 12; the significant degree of tangata

whenua and kaitaiki support; the ability for visual impact to be low and to be mitigated; the availability of water and sewage services; the ability to protect the water, soil and ecological values of the site; the potential for greater relative economic benefits for the immediate community than a site nearer Whangarei would; and the high level of acceptance of the proposed facility in the general community.

[163] In short, Mr Whewell concluded that the subject site, D2, is a suitable site, is preferable to the other 74 sites considered; and that it meets the objectives for the work.

[164] In cross-examination Mr Whewell was asked about a property in Wakelins Road near Puketona that a witness for the opponents was to suggest as an alternative site for the corrections facility. In that regard Mr Whewell agreed that Kerikeri Airport is the best serviced airport between Whangarei and Kaitaia. He was asked whether a location within a few kilometres of that airport would be a significant advantage for servicing a prison, and responded in the negative, observing that there are a large number of other criteria which provide a stronger lead to a location. He agreed that Kerikeri would be a suitable community to be near.

[165] Mr Whewell testified that a points scoring system had been used in the first phase of reducing the number of site options, but had not been used to narrow the selection to a single site because a weak score on one category can be masked.

[166] Asked about the influence of Ngatig Rangi hapu as tangata whenua and kaitiaki in respect of the D1 site, Mr Whewell responded that in relation to the land (as distinct from the geothermal resource) there was an identified hierarchy or leading responsibility; and that Ngatirangi Ahuwhenua Trust hold responsibility for the piece of land being D1. Mr Illingworth suggested that the advice Mr Whewell had given the Minister had been misleading because the Department were not going to take any steps to mitigate the concerns of those opposed on cultural grounds, but simply ignore those concerns and believe the opposing faction. The witness disagreed with that, on the basis that the site is now located on D2. The moving of the site mitigated the effect.

[167] Mr Whewell gave his understanding that the site of a significant battle (which has spiritual significance to some) was in the Waiwharihi Block, which does not contain the final site.

[168] Mr P J Cunningham is an independent consultant who had overseen preparation of a technical report on, and evaluation of, alternative short-listed sites by a multi-disciplinary team of eleven consultants. In his testimony he described the methods followed, which involved scoring the potential effects and engineering issues that a prison would have on each site to assist in the decision-making process. Alternative weightings were used to test the sensitivity of the weighting and scoring process.

[169] The original four sites had been reduced to three on withdrawal of site B. In the first assessment site C was preferred, and site D1 rejected on ecological grounds. The addition of site D2 enabled re-evaluation. Sites A and C were technically feasible, but on the basis of the lowest overall effects Sites D1 and D2 were preferred, with the building platform and prison development on Site D2 and Site D1 being reserved as a buffer.

[170] Mr Cunningham deposed that deletion of site D1 does not alter the ranking of Site D2 in comparison with Sites A and C. He gave the opinion Site D2 is preferable over Sites A and C on both environmental and operational grounds. He reported that the Minister had made the final site selection decision.

[171] Having reviewed the evidence, Mr Bhana deposed that the process of selecting a suitable site had included consideration of a large number of alternatives, and that the detailed approach taken to consultation and involvement of the wider community pointed to a careful evaluation of the selection of the site. The witness observed that the subject site had not been predetermined, and that once it had come into consideration it had been fully evaluated and compared with the other shortlisted sites and identified as preferable. He gave the opinion that proper consideration had been given to alternative sites.

Findings on site selection

[172] Mr Warren's condemnation of the site selection process was based on his disapproval of the site ultimately selected, because of the location and scale of earthworks required and the resultant cost.

[173] We accept that the site will be expensive to develop for the proposed prison, and that it is likely that another site could have been found that would have been less expensive to develop.

[174] Later in this decision we address the opponents' claims that the proposal represents an inefficient and uneconomical use of resources, particularly because of the additional cost of the earthworks. Having reviewed the evidence on that, in the light of our understanding of the law, we hold that the cost of developing the site is part of the responsibility of the Minister as promoter, and not an appropriate matter to influence the Court's decision in these proceedings.

[175] On the criticism of the selection process based on inadequate consultation, that is also a topic addressed more fully later in this decision. The outcome is that we find no basis for holding the consultation process deficient.

[176] In any event, we do not find persuasive the approach adopted by Mr Warren, in which he argues that because he does not approve of the site, the process of selecting it must have been flawed. That seems to us to be working backwards.[26] We prefer the method adopted by Mr Bhana, of reviewing the method and the steps taken, and expressing an opinion on that basis.

[177] Having ourselves reviewed the evidence of how the site was selected, Judge Sheppard and Commissioner Catchpole are satisfied that the process was a rigorous one, and was conducted systematically and with integrity. Commissioner Menzies' view is that a system was adopted, and the subject site was not predetermined. We all accept Mr Bhana's opinion, and find that adequate consideration was given to alternative sites.

Development Works

[178] Considerable works are proposed for development of the site for the corrections facility. To create platforms for the buildings and grounds (including recreation and horticulture) within the secure compound, an area of about 21 hectares is to be levelled. The stream is to be diverted temporarily, and high-level flows (greater than about 1.7 cubic metres per second) directed permanently to the diversion channel. The main channel would be straightened, and constructed to restrict velocities to no more than 0.3 metres per second, allowing fish to pass upstream.

[26] Cf *Arrigato Investments v Auckland Regional Council,* [2001] NZRMA 481 (CA); *Dye v Auckland Regional Council* [2001] NZRMA 513; 7 ELRNZ 209, paragraph [13].

[179] Most of the buildings are to be single-storey. The exceptions are the gatehouse, administration and mechanical plant rooms, which would be about 8 metres high. The recreation building would have a similar height.

[180] In addition it is proposed to have five self-care units and an associated communal building (about 140 square metres) for a total of 20 inmates outside the secure perimeter. These units are for preparing inmates for release from custody, and would be located to the north of the access road on a small flat area presently in pasture, about 350 metres west of the entry point to the car-parking area. The area to be occupied by these units would be 3150 square metres. They would be single-storey residential style buildings, with a mesh security fence.

[181] The security perimeter would consist of a 15-metre wide 'no-go' area between the nearest building and a 4.5-metre high inner fence. A further 10-metre wide 'sterile' zone would lie between the inner fence and the 6-metre high wall. Beyond that there would be a further 20-metre wide 'no-go' grassed zone clear of buildings and landscaping.

[182] The standard lighting of the perimeter would be a minimum of 5 lux at a height of 1.5 metres above ground level. This would dissipate to under 1 lux at 35 metres from the fence. When required in security alerts, the light level will rise to 50 to 60 lux directly under the light standards, with an average of 20 lux across the access roads and sterile zone. The lighting plan incorporates the need to direct light at the facility, not towards neighbouring properties.

[183] Of the 21 hectares to be levelled, about 2 hectares would be covered by buildings, and 5 hectares by roads, paths and car-parking areas, leaving about 14 hectares of open landscaped environment through which the stream would meander.

[184] The extent of the earthworks has been minimised to retain the integrity of the site, and leave the western ridge predominantly intact, by creating a series of benches across the site. The total quantity of the earthworks involved is of the order of 450,000 cubic metres.

[185] The works also include formation of a two-lane access road from State Highway 12 to the compound, stormwater diversion and treatment works, and provision of water-supply and sewage lines connecting with the Kaikohe systems. The alignment for the access road generally sidles along the existing contour and

would involve cuts and fills of less than 2 metres vertical. A water storage tank with capacity for 600 cubic metres would be provided to cater for peak fluctuations and dry periods. Stormwater detention ponds would be provided to reduce suspended sediment and chemical levels, and attenuate peak runoff to the stream.

[186] The earthworks on the site would involve cuts of up to 8 metres, and filling in the range of 2 metres to 7 metres. Most of the fill material would be obtained from excavation of the secure compound and associated areas, and from excavation within the property, principally the western hill, the south-western slope of a eucalyptus grove, and the eastern hill. Material from earthworks that is not suitable for fill would be placed in areas of the site not required for the secure compound or buildings, including the eastern hill (where it would replace material cut for filling). The amount of material to be backfilled there could be of the order of 100,000 cubic metres. The deposit areas would be contoured, topsoiled and re-grassed.

[187] If concentrations of mercury are found in excavated materials, they would be diluted by mixing with uncontaminated material in the process of excavation and placement. However the natural sediments in the Ngawha Stream have more mercury than do the soils that are to be excavated.

[188] Some filling material may need to be imported from a borrow pit at the end of Quarry Road, Kaikohe, about 4 kilometres from the site, or from the Puketona Quarry, some 22 kilometres from the site.

[189] An erosion and sediment management plan would be prepared for Regional Council approval. Runoff of silt and sediment from the work would be controlled so as to avoid adverse impact on stream water. Measures for mitigation of dust are to be adopted. Batter slopes are to be designed to minimise risk of erosion. The completed works would include grassing and planting, and installation of stormwater drains and ponds.

[190] Areas of diffuse gas emissions have been observed at some locations in the existing streambed, but none within the area of the proposed works. If any geothermal gas seeps are discovered in the course of the earthworks or streamworks, the vents are to be protected with gravel so that they would still vent freely to the surface.

[191] To shorten the time required for consolidation of filling, wick drains are to be installed where filling is more than 1 metre deep. These are pervious plastic strips about 3 millimetres thick and 100 millimetres wide, wrapped in geotextile cloth, and would be inserted into holes drilled in the low-permeability soil layers. They would be placed at between 1 and 2 metre spacing, and would extend to hard ground. A layer of sand and gravel drainage blanket would be placed over the wick drainage area, which would be drained to discharge outside the filling.

[192] It is expected that there would be more than 20,000 wick drains, going to depths of between 5 and 20 metres. Once the entire fill load has been transferred to the soil structure, the drains would cease to flow. The total quantity of water that would be extracted by the wick drains would be about 30,000 or 40,000 cubic metres.

PHYSICAL EFFECTS

The Issue

[193] It was the case for the appellants that designation of the site would not be compatible with the provisions of Part II of the Act designed to protect community health and safety. Reliance was placed on sections 5(1) and (2) and section 7(f) of the Act.[27]

[194] In particular, it was contended that there is a low but appreciable and potentially serious risk of hydrothermal eruption and/or toxic gas discharges on or near the site. It was claimed that the low-lying location of the proposed building platform is at risk of accumulation of gas, the effect of which would almost certainly be disastrous on persons who are not free.

[195] The other opponents (the section 271A parties) also contended that there would be potential for geological and geothermal repercussions as a result of the proposed land disturbances (hydrothermal eruption, subsidence), and due to location of the prison in an active geothermal system.

Earthworks

[196] First, we consider the claims of physical effects caused by the proposed earthworks. We address the hazard of hydrothermal and seismic activity later.

The issue

[197] Counsel for the section 271A parties submitted that under section 104(1)(a) regard has to be had to the potential for geological and geothermal repercussions as a result of the proposed land disturbances, such as hydrothermal eruption and subsidence. He also submitted that in considering the requirement for designation of the site, by combination of section 174(4) and section 171(1) the Court is to have regard to any effects of the work on the environment that are set out in the notice of

[27] S 7(f) directs functionaries to have particular regard to "Maintenance and enhancement of the quality of the environment."

requirement under section 168(3)(c). They include the physical effects of the land disturbances to implement the designation.

Effects of works in triggering hydrothermal activity

[198] Mr R P Brand is an experienced consulting exploration geologist, who has had a personal interest in the geology of Northland. He gave the opinion that historically, hydrothermal eruptions have been triggered as a result of lake evacuation from the Ngawha Basin, and that similar events may occur as a result of the extensive earthworks that are proposed for stripping and removing soil and subsoil for the development. He gave the opinion that initiation of an eruption may be from a shallow gas pocket and close-by boiling water, which turns to steam as pressure is released.

[199] Mr Brand gave the opinion that a major eruption has potential for discharge of considerable quantities of ground-hugging carbon dioxide that would have lethal consequences for both prison inmates and staff and the local community; and could also necessitate a temporary shutdown of the geothermal power station. The witness cited occurrences of widespread asphyxiation by carbon dioxide recorded at Lake Nyos in Cameroon in 1986 (about 1700 deaths) and on the Dieng Plateau in Indonesia in 1979 (146 deaths). He observed that the Ngawha geothermal system is particularly noted for its high carbon dioxide content, and that the volume of carbon dioxide currently passing through the system is approximately 20 kilograms per second or 1728 tonnes per day.

[200] Mr Brand continued that since carbon dioxide is heavier than air, any lethal gas cloud would accumulate in topographic lows, like the valley at Ngawha, where on a windless day it would cover an area of 5 square kilometres to a depth of 2 metres, with disastrous effects on both the inmates of the prison facility and the local community of Ngawha.

[201] Mr R D Beetham is an engineering geologist with considerable experience in site investigations and assessment for large projects. He has had little experience with geothermal hazards, but he has had extensive experience with the evaluation of earthquake, landslide, and volcanic hazards.

[202] Mr Beetham deposed that groundwater lowering of more than several metres, together with deeper excavations that are proposed at the site, may be the type of overburden unloading that could trigger new hydrothermal eruptions at the site.

[203] Dr M Isaac is an experienced geologist who is the author of a standard reference work on the geology of Northland, senior author of another, and sole author or co-author of at least seven other publications on Northland geology. Dr Isaac gave the opinion that excavation of unsuitable material would have a similar effect to draining the prehistoric lake bed, in that the lithostatic and hydrostatic pressure would be reduced, adding to the risk of hydrothermal eruption.

[204] Mr J V Lawless is a senior consulting geothermal scientist with extensive knowledge of the Ngawha geothermal system, and many other geothermal fields. He concluded that measures had been incorporated in the engineering design of the project to avoid the very low risk that geothermal activity might have adverse effects on the development, and to ensure that the even lower risks that the development might have on the geothermal resource and geothermal activity in the area are avoided or minimised.

[205] Mr Lawless testified that the proposed works would not affect geothermal manifestations on the site by burying them or diversion of water into them. Buffer zones have been placed around all known thermal manifestations and along the inferred fault lines, and sediment traps are to be placed downstream of significant earthworks. He regarded that as a very conservative approach. He also deposed that thermal manifestations on the site would not be indirectly affected by effects on the deep reservoir that feeds them, because the reservoir would not be affected in any way by the project.

[206] Mr Lawless gave his reasons for his opinion that the potential for the prison development to affect the geothermal system is infinitesimal. In short, the deepest of the wick drains would be 20 metres deep, but the impermeable cap rock overlying the geothermal reservoir is 500 metres thick and there is very little communication through it. The proposed works would be far shallower than the reservoir, they would not penetrate or encounter it, and they could not affect it. Further, because of the broadly distributed nature of the fluid recharge to the reservoir, and the positive pressures within it, there is no potential for surface works, diversion of surface waters, or temporary diversion of shallow groundwater by wick drains to indirectly affect the reservoir.

[207] Mr Lawless acknowledged that removal of overburden from above geothermal systems can in rare cases artificially induce hydrothermal eruptions. He considered it an extremely remote possibility in the case of the proposed works, because the site had been investigated to a sufficient depth to eliminate the possibility. He observed that no hydrothermal eruptions had been recorded during the period of mercury mining in the hottest area at Ngawha Springs to a depth at least as great as the cuts proposed for the development of the corrections facility.

[208] Mr Lawless gave the opinion that the gas release scenario given by Mr Brand is unrealistic and of very low probability, as it would require a very large hydrothermal eruption which has a very low risk of occurring.

[209] In cross-examination Mr Lawless confirmed that the removal of several hundred thousand cubic metres of soil would not be significant in relation to the reservoir 500 metres below the cap rock. He explained that it is the thickness, not the total quantity removed, that is important, and the proposal is to remove about 5 metres. An eruption would have to start at great depth, and removing the quantity of overburden proposed would have negligible effect on pressures at those great depths. On the basis of detailed investigation of the building site and to a lesser extent the eastern hill, he was confident that the proposed excavation could not induce a hydrothermal eruption on the building site.

[210] Dr M A Grant is an experienced geothermal reservoir engineer and resource analyst. He has professional experience of over 50 geothermal fields, and is senior author of the standard industry text on geothermal reservoir engineering. In the 1980s he had provided the reservoir engineering (hydrology) assessment of an exploration and drilling programme at Ngawha, published in two reports. He had also published two scientific papers on possible development of Ngawha and four papers on wells at Ngawha.

[211] Dr Grant deposed that a hydrothermal eruption could not be induced by excavation, as such an induced eruption would need boiling temperatures. He added that although it had been prudent initially to avoid (by buffer zones) features such as faults, fractures and existing vents, given the level of investigation that had occurred, there would be no need for a buffer zone around any new weaknesses.

[212] This witness added perspective to his evidence that the effect on the geothermal reservoir of excavating several hundred thousand tonnes of soil would be

trivial. He did that by testifying that over an area of 10 square kilometres (only a part of the geothermal field) the following load is applied or removed:

(a) 100,000 tonnes when 10 millimetres of rain falls, then drains:

(b) 2,000,000 tonnes when barometric pressure changes by 20 millibars:

(c) up to 1,000,000 tonnes twice daily due to earth tides.

[213] In cross-examination Mr Brand stated that as a local resident and a Far North District Council ratepayer he believed that having a prison at Ngawha would be a serious drain in the resources of the Far North. He accepted that he had a minor vested interest in not wishing the prison to continue.

[214] In re-examination Mr Brand was asked whether his scientific assessment had been affected at all by any personal interest, and he replied that it had not.

[215] Mr Brand stated that he is primarily a petroleum geologist and that his own involvement in geothermal matters involved hydrocarbons associated with geothermal emissions. He had looked at Ngawha with regard to its methane and ethane contents, and in geochemical surveys in Taranaki where there is a geothermal system. Apart from that he had not been involved in any studies about geothermal issues.

[216] In re-examination Mr Brand was asked whether his evidence was within or outside his area of expertise. The witness responded that it was largely within his field of expertise in as much as his profession was to look at all aspects of the Earth including down to 6 or 7 kilometres depth, whether or not it contains an extra heat component as a result of geothermal activity. Mr Brand was also asked to what extent his qualifications and studies involved chemical analysis. He responded that chemical analysis forms a large part of hydrocarbon exploration and oil field development.

[217] The differing evidence on this issue is between Mr Brand, Mr Beetham and Dr Isaac (all of whom consider that the proposed earthworks could trigger a hydrothermal eruption), and Mr Lawless and Dr Grant (both of whom rejected the possibility). There is no question that if a major hydrothermal eruption were to occur in the vicinity, there would be serious risk to people, including staff and inmates of the proposed prison. However the magnitude of the consequences of such an eruption, if it did occur, is a separate question from the possibility of it occurring.

[218] The question whether the proposed excavations could trigger a hydrothermal eruption is a question about the behaviour of geothermal systems. The expertise of Mr Lawless and Dr Grant is in geothermal systems and geothermal reservoirs. That is the science to which both of them have devoted their professional careers. The reasons stated by them for disallowing the possibility derive from their knowledge of Ngawha Geothermal System, and of geothermal systems generally.

[219] Mr Brand, Mr Beetham and Dr Isaac are all geologists by profession. However, despite the extensive knowledge of each of them of various aspects of geology (including especially in the case of Dr Isaac, and also Mr Brand, the geology of Northland), none of them has made the Ngawha geothermal system, or other geothermal systems, the particular focus of his professional work.

[220] On the question of the response of the Ngawha Geothermal System to the proposed excavations, we place more reliance on the opinions of the two experts who are more particularly qualified in respect of geothermal systems generally, and the Ngawha Geothermal System in particular, than we do on the opinions of the three experts in other aspects of geology who lack that specific expertise. In addition we find persuasive the reasons given by Mr Lawless and Dr Grant for their opinions. The reasons given by the others depend on features, such of substantial shallow gas pockets in the cap rock, for which there does not appear to be evidence.

[221] In summary, the claim that the proposed excavation and site works would or might trigger a hydrothermal eruption has not been made out and we do not accept it.

Mercury concentrations

[222] Being in a geothermal field, the soil of the site contains some minerals of geothermal origin, notably mercury, which may be disturbed by the proposed site works. Two main questions arose about effects on the environment of those works. The first was whether the presence of mercury in the surface soil following completion of the works would imperil the health and safety of inmates. The second was whether the works, including use of excavated material for filling, would result in leaching of minerals which would contaminate the waterways of the locality.

Mercury and other toxic minerals in soil

[223] Mr Brand gave the opinion that high mercury and boron levels in the soils and subsoils would require that all excavated material from the site would need sealed disposal.

[224] Mr Beetham deposed that the soils at the site are possibly contaminated by geothermal minerals other than mercury, naming stibnite and boron.

[225] Mr Lawless responded that analyses had been carried out for antimony (stibnite is antimony sulphide) and arsenic, and no levels of either had been found that approached the trigger levels of concern. The highest concentration of arsenic found was 15 milligrams per kilogram, and the highest concentration of antimony found was 1 milligram per kilogram.

[226] Dr Isaac observed that there is significant variation in the mercury values between adjacent sampling sites, and considered that there may be small areas within the area of the proposed development with higher mercury contents than the values determined to date. He considered this necessitated additional work and interpretation by a suitably qualified environmental geochemist who has relevant experience.

[227] Dr Isaac added that to ensure the findings are accepted by all parties, the study would have to be undertaken by experts who have no association with the Department of Corrections and paid for by an independent body. However counsel for the opponents stated that they placed no reliance on that.

[228] In cross-examination, Dr Isaac stated that he did not have qualifications in geochemistry, he did not have experience in geothermal or volcanic system hazards, nor did he have relevant experience in assessment of site contamination hazards such as those related to mercury, and it is outside his expertise to judge whether the work done by Mr Starke was adequate. He stated that the probability of harm to inmates of mercury ingestion is low, but unquantified.

[229] Mr Lawless reported raised concentrations of mercury in soils at depths of 1 to 5 metres on the site of the secure compound and associated areas where

earthworks and buildings are planned; and more widely in topsoil above lake sediments.

[230] Mr C Hickling, a consulting civil engineer, testified that it is not intended that any soil be removed from the site. He also deposed that where topsoil is under areas to be filled, it will generally be filled over, and where it needs removal, it will be temporarily stockpiled clear of earthworks, from which it would be removed for topsoiling. Excess topsoil would be disposed of in the northern disposal area, a process in which the double handling would dilute any higher mercury concentrations.

[231] Mr Hickling added that runoff from the temporary stockpile across grass land would intercept mercury particles, and that if monitoring shows elevated mercury concentrations peat bed or other filters are available.

[232] Mr Lawless deposed that in the unlikely event that soil is excavated which contains mercury at concentrations which could constitute a health hazard due to leaching, it would be placed in a secure fill area, well upstream of neighbouring properties. Topsoils and sub-soils would be kept separate. The fill area would be designed so that any leachate could be monitored so that if leaching raises the level in stream waters immediately downstream above the drinking water standard (2 ppb) the fill area would be sealed from above.

[233] Mr Lawless expressed himself to be satisfied that the measures to be put in place would avoid or mitigate the risks from mercury in the soil as a result of the work, referring to conditions of consent suggested by the Regional Council.

[234] In cross-examination Mr Lawless testified that in the areas of excavation there are wide differences between the mercury levels, some very low and some very high.

[235] Mr W Starke is a consulting geo-environmental and geotechnical engineer, with 12 years' experience of geo-environmental engineering issues related to contaminated land. He gave the opinion from his risk assessment that the site is safe from risk to human health from soil mercury.

[236] From his soil geochemistry investigations he had concluded that in respect of human health risk from mercury, using conservative assumptions, the topsoil at the

site can be safely re-used for a prison land-use, and the subsoil that would be left exposed at the site would also be safe for a prison land-use. In reaching that opinion, Mr Starke had derived extra-conservative maximum exposure values, taking into account the possibility of ingestion of soil by a rugby-playing inmate.

[237] Mr Starke had assumed that topsoil would be excavated, stockpiled and replaced, a process in which the topsoil would be mixed; but he had made no such assumption in respect of subsoil, which might be in a slope or bank, even though a person would not be exposed to it for any length of time. He had also had 32 leachate tests carried out in an acidic environment to simulate worst-case conditions which do not exist at the site.

[238] Mr Starke referred to Dr Isaac's comment that not enough work has been done to characterise and quantify the different materials to be removed. Mr Starke disagreed with that comment, relying on the work detailed in his own testimony to determine the health and safety issues of soil mercury.

[239] Responding to Dr Isaac's recommendation that the excavation and containment of sediment with mercury warranted consideration by an environmental geochemist with appropriate experience, Mr Starke described in detail the leachate tests that he had carried out.

[240] We find that Mr Starke possesses the professional expertise appropriate to give opinion evidence on this question, and appropriate to supervise the proposed works to ensure that exposed surfaces do not have concentrations of minerals that are unsafe for users of the land, including inmates playing football. We have no reason for doubting his professional objectivity and scientific integrity, and we do not accept any need for further study by an expert paid for by an independent body (even if one could be found).

[241] Accepting Mr Starke's opinion, and with the assurance of the proposed Condition for analysis for mercury content of samples taken monthly during earthworks, we find that both topsoil and subsoil can safely be re-used on site. The claimed adverse environmental effect in this respect has not been made out.

Mercury in groundwater and streams

[242] Mr Beetham deposed that excavations at the site would be mainly carried out below the present groundwater table, and groundwater inflows into excavations are likely to be large and would need to be disposed of. He continued that groundwater at the site could be contaminated with mercury and other geothermal minerals, and may be readily discharged into waterways without prior treatment.

[243] Mr Lawless responded that this is not consistent with what the investigations had shown. Groundwater from the investigation drill holes had been analysed for mercury, and none had shown any detectable mercury with a detection limit of 0.1 ppb, even when samples of soil from the same drillholes had shown elevated mercury contents.

[244] Mr McPherson was asked in cross-examination what would happen if groundwater encountered in excavation contained high concentrations of mercury. The witness responded that the groundwater would be the same as had always been flowing from the site, and would flow to the existing stream-bed or the new diversion channel.

[245] Mr Lawless testified that mercury and its naturally-occurring inorganic compounds are all relatively insoluble. He reported that leaching trials had been carried out on samples with elevated mercury concentrations, and that in most cases no mercury had been leached from the samples. In a few cases detectable mercury could be leached with acid solutions, but at very low concentrations. In the worst case, the leachate had only twice the mercury content (4 ppb) allowed by the New Zealand Drinking Water Standard,[28] so he considered that an acceptable level could be achieved by only two-fold dilution in the stream.

[246] Mr Lawless concluded that there is a very low probability of any leachate from the shifted soil significantly affecting the quality of the water in the streams, as the soil to be removed has a lower mercury content than that measured in existing natural sediments in the Ngawha Stream. (The highest measured concentration in the site soils was 248 mg/kg, but the sediments in the stream had been measured at up to 688 mg/kg mercury.)

[28] Citing a maximum acceptable value of 2 ppb according to the Standard.

[247] Finally, Mr Lawless reported that mercury content had been measured in samples of groundwater from deep geotechnical drillholes, and from surface water draining from the area of trial wick drains. The limit of detection was 0.1 ppb, and none had been found to contain detectable mercury. The witness was confident that installation of the wick drains, and the outflow of groundwater from the site due to excavation and drainage, would not add to the dissolved mercury content of the Ngawha Stream.

[248] Mr Lawless reported that levels of boron measured in groundwater from boreholes on the prison site were 0.1 to 5.7 milligrams per litre.

[249] Dr D S Sheppard is an experienced environmental geochemist. He has had professional experience on 7 New Zealand geothermal systems, and has made specific studies of mercury in the environment.

[250] Dr Sheppard gave the opinion that unless mercury is physically washed into the streams, mercury in the soils would not be released to waterways in the area during excavation or after subsequent reburial. His main reason for that opinion was that mercury is either attached to organic material (and the bond is very strong), or is in a sulphide compound, cinnabar, which is extremely insoluble, and it could only be released if exposed to strong acid. Organic matter in the subsoil would create a reducing environment, acid would not be produced, so mercury would not be leached by self-produced acid.

[251] Dr Sheppard also testified that for this project, high mercury topsoils are to be mixed with low-mercury topsoils, so the resulting mercury concentration levels would be much less than the concentrations which have been determined as safe. The witness also referred to the use of sediment traps with runoff over grassed areas. If monitoring of runoff and drainage water showed significant levels of mercury, it could be dealt with by techniques such as running through peat beds.

[252] Dr Sheppard also deposed that any soil, subsoil or sediment from sediment traps which had elevated concentrations of mercury could be safely disposed of in either of the fill areas and covered with sufficient clean fill to prevent physical erosion. The witness observed that the results of leaching tests described by Mr Starke showed that in practice the soils do not release significant concentrations of mercury.

[253] Mr Starke deposed that it is very unlikely that any leachate generated from the site soils would contain significant amounts of mercury, nor could they raise mercury concentrations in the stream to an unacceptable level.

[254] We prefer the opinions of Dr Sheppard, Mr Starke and Mr Lawless to that of Mr Beetham. Again there is the assurance of the proposed condition for analysis for mercury content of samples taken monthly during earthworks. In relation to the existing high concentration of mercury in the natural sediments of the Ngawha Stream, the claim that mercury and other geothermal minerals resulting from the proposed works would contaminate waterways was not made out.

Ecological effects

[255] Evidence about ecological effects of the project was given by Mr W B Shaw, a qualified and experienced consulting ecologist who had made an ecological survey of the site and had prepared a conservation management plan for the property.

[256] Mr Shaw deposed that some negative effects on the stream are likely during the construction phase, but the combination of stream bank rehabilitation and planting would lead to an overall improvement in water quality. He testified that indigenous fish would not be affected, and potential fish passage would not be compromised. He considered it very unlikely that potential light spill would have significant effect on kiwi. There is potential for positive ecological restoration works, which could include participation by inmates. It was Mr Shaw's conclusion that net positive ecological effects are likely.

[257] The opinions expressed by Mr Shaw were not challenged by any party by cross-examination or contradictory evidence. We accept them, and find accordingly.

Effects on water quality

[258] Effects of the project on the quality of surface waters had been studied in detail by a qualified consulting environmental scientist, Ms P M Scott. This witness gave reasons for her opinions that existing water quality and aquatic environments are poor, and that the potential effects of proposed works on water quality will be avoided, remedied or mitigated by implementation of the proposed discharge management and sediment control measures.

[259] Ms Scott's opinions were not challenged by any party by cross-examination or contradictory evidence. We accept them, and find accordingly.

Effects on indigenous freshwater fish

[260] Mr M J McGlynn, an experienced environmental consultant, had made a survey of streams on the Timperley property and elsewhere on the Ngawha Stream. He testified that the fisheries habitats on the property are of low value, probably due to the combined effects of geothermal inflows and effects from dairy farming.

[261] Mr McGlynn deposed that realignment of the stream would have a temporary impact on ecological processes, and that the proposed fencing and planting of the riparian margins would result in an overall improvement of habitat. He also testified that the design of culverts would allow for fish passage.

[262] Mr McGlynn's evidence was not challenged by any party by cross-examination or contradictory evidence. We accept it, and find accordingly.

Hazard from geothermal activity

[263] It was the case for the appellants that there is a low but appreciable and potentially serious risk of hydrothermal eruption and/or toxic gas discharges on or near the site; that the proposed building platform is low-lying where there is a risk of gas accumulation, the effect of which would almost certainly be disastrous on persons who are not free.

[264] Concerning the probability of such an occurrence as low, we were reminded that by section 3 of the Act the term 'effect' extends to "any potential effect of low probability which has a high potential impact". However the parties appearing under section 271A of the Act reminded us that the definition in section 3 is not applicable to the duty imposed by section 104(1)(a) to have regard to the actual or potential effects on the environment of allowing the activity. That duty is to have regard to effects that are actual and potential.[29]

[265] In reply to suggestions that the hazard is much greater at Rotorua and Taupo, counsel for the appellants reminded us that the inmates would not be voluntarily

[29] *Dye v Auckland Regional Council* [2001] NZRMA 513; 7 ELRNZ 209 (CA).

choosing to be there, and that they and prison staff would have limited rights of egress.

[266] Counsel for the section 271A parties submitted that under section 104(1)(a) regard has to be had to the potential for geological and geothermal repercussions as a result of the proposed land disturbances, such as hydrothermal eruption and subsidence. He also submitted that in considering the requirement for designation of the site, by a combination of section 174(4) and section 171(1) the Court is to have regard to any effects of the work on the environment that are set out in the notice of requirement under section 168(3)(c). They include the physical effects of the land disturbances necessary to implement the designation.

[267] Again we accept that if a major hydrothermal eruption occurred at or near the site, there would be serious risk to people, including staff and inmates of the proposed prison. We start by reviewing the evidence about the likelihood (hazard) of a hydrothermal eruption affecting the site. Next we consider the evidence of other geothermal activity affecting it. In that context we also address claims about the adequacy of buffer zones from which building is excluded. Then we address claims about hazard and risk of gas emissions.

Likelihood of hydrothermal eruption affecting the site

[268] Mr Beetham testified that the geothermal field is presently active and the craters are recent. He testified that there is a possibility that a new hydrothermal eruption could occur at or near the site, which could splatter the proposed prison site with mud, and could rapidly release a large quantity of ground-hugging gas (carbon dioxide and hydrogen sulphide) which would have potential to asphyxiate residents in the valley basin.

[269] In cross-examination Mr Beetham agreed that he had not himself carried out a risk assessment of a hydrothermal eruption at the site, and that he would defer to Mr Lawless's experience on the subject.

[270] Mr Beetham deposed that ejecta and mud from hydrothermal eruptions can travel up to several kilometres, citing an event at Waimangu in 1917 where mud had reputedly travelled 3,200 metres from the vent, and debris from a house destroyed by the blast had been transported 1600 metres.

[271] Mr Lawless commented that this event had not been a normal hydrothermal eruption but part of a period of major instability in the Waimangu-Rotomahana geothermal system, caused by an injection of magma during the 1886 eruption of Mt Tarawera. He deposed that it is not comparable with the situation at Ngawha.

[272] Dr Isaac agreed that there is a chance of further hydrothermal eruption, and that parts of the site with alignment of geothermal features are more susceptible than others. He considered the risks associated with this site are too great, and that it is simply not wise to site the facility in the Ngawha Geothermal Field.

[273] In cross-examination Dr Isaac stated that the hazard of a hydrothermal eruption is low. In re-examination he was asked whether the degree of hazard is so low that it could be discounted for practical purposes, and the witness responded that he could not agree with that, because he expected to see quantification, the craters dated, and careful consideration of the likely faulting pattern to revise the buffer zones.

[274] Mr Lawless deposed that all parts of the area overlying the Ngawha geothermal system have some degree of hydrothermal eruption risk (as is the case with any geothermal area world-wide) as a result of some profound geological disturbance to the system such as a major earthquake or an injection of fresh magma to the system. However it is far less likely to have the type of small, frequent hydrothermal eruptions that are observed at Rotorua for example, because the Ngawha system is well capped, the amount of geothermal liquid reaching the surface is less than 1% of that at some of the large systems in the Taupo Volcanic Zone, and except right on one of the conduits feeding the hottest springs, there is not a boiling point for depth temperature gradient.

[275] Mr Lawless gave the opinion that the frequency of future hazardous geological events can be predicted from the frequency of past events. He gave detailed reasoning for his opinion that the large hydrothermal eruptions at Ngawha occurred not less than about 5,000 years ago and not more than 15,000 years ago, and that it has since waned until the present. From that he concluded that the likelihood of a hydrothermal eruption somewhere in the Ngawha area is very much less than that of a hydrothermal eruption in Rotorua (where there have been several occurrences within the past year), at Taupo (where the last occurrence at Tauhara was within 30 years), at Wairakei (where there was an occurrence at Alum Lakes within the past year), a volcanic eruption at Auckland (last occurrence within 600

years), anywhere in the central volcanic region (last occurrence within 150 years), Taranaki (last occurrence probably within the last 500 years), or a severe earthquake in the lower North Island (two within the past 150 years), or the West Coast of the South Island (several within the past 100 years).

[276] On differential probability of hydrothermal eruption within the Ngawha area, Mr Lawless deposed that areas close to current or past thermal activity, including past hydrothermal eruptions, are at higher risk of future eruptions, and that the area of greatest risk is close to the Ngawha Springs themselves. However the witness gave the opinion that this risk is very remote, since the last eruption large enough to leave a detectable crater took place thousands of years ago.

[277] Mr Lawless observed that the site for the corrections facility is not close to current or past thermal activity or sites of previous hydrothermal eruptions, and gave the opinion that the likelihood of an eruption there is less than elsewhere over the Ngawha geothermal system. Although he could not eliminate the possibility of a hydrothermal eruption at Ngawha, it would be an occurrence of very low probability comparable with the occurrence of volcanic eruptions.

[278] Mr Lawless acknowledged that it is remotely conceivable, though improbable, that in future geothermal activity could shift and/or intensify to the point where it threatens damage to facilities close to the activity. However he observed that hydrothermal eruptions and changes in activity have been localised along the north-east trending fault zones. He gave the opinion that it is highly unlikely that the building site would be affected by natural changes in thermal activity, as it had been specifically sited away from both thermal features and the fault zones that are controlling their locations.

[279] Mr Lawless acknowledged the possibility of an antithetical fault set more or less at right angles to the fault set postulated by him. He observed that numerous geological studies had not found it necessary to postulate a north-west fault through the building site. He stated that the likelihood of an increase in permeability near the surface such as is caused by faults, during the life of the proposed facility, is extremely low, like the possibility of a seismic event in Northland.

[280] In cross-examination it was put to Mr Lawless that it is important to know the structure of the allochthon cap rock. The witness did not agree, and observed that what is important is to know how it behaves as a whole. He accepted that a

proper understanding of the degree of permeability of the cap rock, and the extent to which it is faulted is crucial. He testified that the cap rock acts as a whole as a seal, and that although the faults allow a very small amount of fluid through, they still contain the pressure.

[281] Mr Lawless also testified that quite a lot is known about the structure of the allochthon cap rock, particularly from the geologist who had logged the geothermal wells. The witness reported that it is mainly marine sediment mudstones, and that there is no continuous aquifer within it that is capable of conducting large quantities of geothermal fluid at depth.

[282] Mr Lawless also explained that greater knowledge of faults would not affect his estimate of the likelihood of a hydrothermal eruption. If it was established that there is a fault cutting across the building platform and if there was some evidence that the fault had been conducting geothermal fluid to the surface in the past (such as evidence of past and present thermal activity), then he would recommend that the facility be shifted away from the fault line. But he observed that there are many faults, and only a few are large and active enough to act as vents for the geothermal system.

[283] Mr Lawless did not agree with the opinion of Mr Brand that it would be possible by using electric logs in wells and bores to complete a database of detailed information about the cap rock: clay content, porosity, fluid and gas content. Mr Lawless deposed that those techniques, although standard in the petroleum industry, are not standard practice in the geothermal industry for two reasons. The first was that in the geothermal industry there is not the same large database of information for correlation with electric logs as there is in the petroleum industry. The second was that many of the downhole tools used in the petroleum industry do not work in geothermal wells because they are too hot, although he agreed that the temperature would not preclude using an electric log in the upper half of the cap rock. Mr Lawless also testified that his examination of the deep well logs prepared by DSIR showed that some of them had passed through fault zones within the allochthon.

[284] Dr Grant testified that electric logs are very problematic in geothermal conditions (except in sedimentary rocks), are not routinely used, and had so far not to his knowledge ever been used for the purpose of measuring fluid/gas saturations. He added that electric logs could not be used as a means of compiling information about

the cap rock, because all the wells are cased through the cap rock. In cross-examination he explained that it would be necessary to drill a well expressly for the purpose, and given that the cap rock is sedimentary, you would get something but he doubted it would be much use. He added that with the exception if a small number of geothermal fields in the United States and Mexico (which are in sandstone), the results of electric logs in geothermal fields have not been useful.

[285] Mr Lawless accepted that it is difficult to see how the current hydrothermal system could produce a large hydrothermal eruption. Past eruptions may have occurred in conditions of significantly hotter temperatures and higher pressures than at present, and it would have taken a major geological event to open a fracture over such a vertical interval. He believed the evidence led to the conclusion that future hydrothermal eruptions are improbable or certainly of very low frequency.

[286] Dr Grant agreed with Mr Lawless that there is negligible hazard of hydrothermal eruption. He considered the possibility of faults is largely irrelevant to this issue, explaining that as the subsurface temperatures show no boiling or near-boiling conditions, a hydrothermal eruption is not possible whatever structural weaknesses may or may not exist.

[287] Dr Grant deposed that the average vertical permeability of the caprock is measured directly from the known pressure differential and known flow of geothermal fluid, and that this known low permeability limits the ability of the cap rock to transmit pressure or sustain flow of gas.

[288] Dr Grant also testified that zones in the cap rock containing gas have limited capacity, due to limited permeability. He reported that such a pocket had been intersected by Well NG1, and had quickly been depleted. He also testified that the characteristics of the cap rock were already known, and that he had himself determined the overall permeability of the cap rock by calculating from the known pressure difference. In cross-examination he confirmed that this cap rock is extremely impermeable, and this is a distinctive feature of the Ngawha Geothermal Field.

[289] Dr Grant referred to suggestions that fractures could form, or gas pockets be released, causing an eruptive event. He gave the opinion that all these were highly improbable, requiring very special coincidences, and testified that the geologic history of the field confirmed that judgement. The witness deposed that the risk of

an eruption, hydrothermal or volcanic, at Ngawha is much less than volcanic eruption in Auckland or earthquake in Wellington.

[290] Of the suggestion that the field itself might heat up and so generate hazard of hydrothermal eruption, Dr Grant observed that this would require injection of cubic kilometres of magma, a major volcanic event, and is much less likely in Northland than, for example, in Auckland.

[291] In his testimony, Mr Beetham asserted that the evidence of Mr Lawless does not present an objective assessment of the potential for hydrothermal eruptions at the proposed site. In response to a question from the Court about that, Mr Beetham accepted that the understanding of a geothermal field is a subject on which expert opinions can differ without one of them being completely unprofessional. He based his charge of lack of objectivity on what he understood to be differences between the evidence given by Mr Lawless and contents of a scientific paper of which Mr Lawless had been a co-author.

[292] In re-examination, Mr Beetham agreed that since preparing his statement of evidence he had read Mr Lawless's supplementary statement explaining the opinions expressed in his evidence compared with what had been in the scientific paper of which he had been co-author. Mr Beetham stated his belief that investigation by trenching, detailed study and dating of the previous eruption has not been done to justify the opinion expressed by Mr Lawless in his evidence. Mr Beetham also agreed that he deferred to Mr Lawless's expertise in geothermal matters, and that he had no remaining criticism of him.

[293] Courts are entitled to expect that those who are called to give expert evidence are objective in forming their opinions. A charge that a professional person lacked objectivity in giving expert evidence to the Court is a serious matter. It implies that the formation of the witness's opinion is influenced by the outcome that suits the case of the party calling the witness.

[294] Mr Beetham's charge that Mr Lawless's evidence had lacked objectivity had not been put to Mr Lawless in cross-examination. Although it appeared from the answers given in re-examination that Mr Beetham did not wish to press his charge, it was not withdrawn as such.

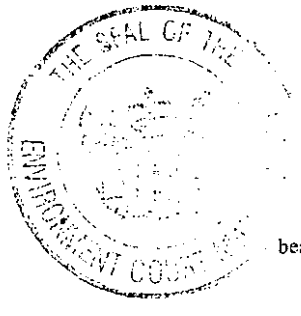
[295] A difference between experts about the adequacy of evidence to support an opinion is not itself a ground for finding a lack of objectivity in the evidence of one of them. We have reviewed the matters initially relied on by Mr Beetham, and we do not find in them, or in any other evidence before the Court, any basis for finding that Mr Lawless's testimony lacked that objectivity which the Court is entitled to expect. We find that the evidence discloses no foundation for Mr Beetham's charge against Mr Lawless.

[296] On the main issue, there is no question that a hydrothermal eruption could occur anywhere in a geothermal field as a result of some profound geological disturbance to the system such as a major earthquake, or an injection of fresh magma. However we accept Mr Lawless's opinion that without such a major disturbance, an eruption is less likely at Ngawha than at Rotorua or in the Taupo Volcanic Zone, because of the relatively small amount of geothermal liquid reaching the surface at boiling point. We also accept his opinion that the prison site, being located away from thermal features, is less likely to be affected than parts of the field closer to them.

[297] We also accept Dr Grant's opinion that while the absence of boiling conditions at or near the surface remains, a hydrothermal eruption would not occur without such a profound disturbance. In the light of that, we do not accept that further investigation of the date of previous eruptions, and of the faulting pattern, is necessary to be able to discount the hazard.

[298] We return to the point that the inmates would not be voluntarily choosing to be in the Ngawha Geothermal Field, and that they and prison staff would have limited rights of egress. Even so, the probability of a major eruption that might affect the proposed prison is smaller than the risk accepted voluntarily by the residents of Ngawha Springs Village. It is far smaller than the risks accepted voluntarily by the residents of Auckland, Rotorua, Taupo, and Wellington.

[299] Of course prison inmates are not to be placed in any risk of harm from natural disasters greater than the population generally. However in our judgement the hazard of hydrothermal eruption affecting the subject site is so remote that it would be disproportionate to decide that it is unsuitable for a prison for that reason.



Effects of other geothermal activity on the prison

[300] Mr Beetham testified that there is evidence that volcanic risk or hazards from volcanic activity at Ngawha is low, probably lower than Auckland. In re-examination he stated that there could be more work done to investigate when geothermal eruptions occurred, whether eruption breccias were thrown out, and if so, how many and how far, and whether there was more than one such event. Without that he could not say what the risk of eruption is.

[301] Mr I D McPherson, a specialist consulting geotechnical engineer, testified that the area of the western hill from which material is to be excavated had been drilled to confirm that the proposed cuts would not encounter geothermal activity.

[302] The witness also deposed that as the geothermal reservoir is more than 500 m below the surface, and because of the low permeability of the upper soil layers, the risk of the wick drains encountering and releasing a large amount of geothermal hot fluid and gas is extremely low. He reported that in current field trials involving over 300 wick drains to a depth of 15 to 20 metres, no geothermal activity had been observed.

[303] Mr McPherson also presented a table of methods established to avoid or mitigate effect of wick drains on the geothermal aquifer. If hot water is encountered, with no outflow or gentle outflow for only a short time, sand drains are to be installed instead of wick drains. If there is a continuing or very significant outflow, the holes are to be sealed. (This evidence corrected an apparent misunderstanding by the Regional Council commissioners.)

[304] We accept Mr McPherson's opinions and find that appropriate precautions are available to ensure that the works would not disturb geothermal activity. On Mr Beetham's supposition about ejecta from a geothermal eruption, it is our judgement that this hazard is so remote that it can sensibly be disregarded.

Buffer zones

[305] Mr Brand gave the opinion that a lack of quality site investigatory evidence raises considerable doubt as to the validity of the proposed buffer zones. He described the buffer zones as having been adopted somewhat arbitrarily from the

presence of geothermal hazards, that is, inferred faults, gas emissions and hydrothermal eruption craters.

[306] Mr Brand referred to high mercury concentrations found close to the Ngawha Stream as a zone of weakness within the near-surface over considerable periods.

[307] Dr Isaac also referred to the areas of mercury mineralisation and areas of elevated groundwater temperatures. He suggested that if it was felt necessary to erect buffer zones around other geothermal features, then it may also be necessary to erect buffer zones about these.

[308] Mr Lawless regarded that suggestion about the high mercury areas as unconvincing, as the anomaly is seen only in the topsoil, not in the underlying subsoil. It is not necessarily a sign of any thermal activity on the site. The actual mercury contents measured, up to 248 milligrams per kilogram, were low compared with those found adjacent to the vigorous thermal features in the wider area. Mr Lawless remarked that mercury is known to be mobile in the near-surface environment, and stated that he suspected the accumulation of mercury was by organic matter in a poorly-drained area near the Ngawha Stream, rather than of deep-seated origin through gases flowing up a fault.

[309] Mr Brand referred to temperatures some 6 degrees Celsius above normal at 20 metres depth in two boreholes in and close to the site, which he described as indicating movement of hot hydrothermal fluids through fractures in the otherwise impervious lake sediments.

[310] Mr Lawless considered that those slightly elevated temperatures may represent some slight admixture of thermal fluid to the groundwater. He considered that they might equally well be moving laterally through the permeable peat horizons in the lake sediments. He gave the opinion that it is not convincing evidence of thermal activity on the site.

[311] Mr Brand asserted that creation of the buffer zones was "...at best hopeful and at the worst disingenuous". He recognised the east-north-east lineations, but considered just as likely an associated antithetic north-west trend paralleling the form of the Ngawha Basin. Mr Brand gave the opinion that the entire area merits 'buffer zone' status and that any building there should be of minimal impact, and should not entail long-term occupation of the area by people.

[312] Dr Isaac deposed that alignment of surface features is probably a reasonable indication of faults that penetrate both the deep basement and the cap rock; that recognition of faults at Ngawha is difficult; that the risk of fault rupture is small, the greater hazard may be upflow of geothermal fluids (including carbon dioxide). He agreed that the inference of three east-north-east to north-east trending fault patterns was reasonable, but it is possible that other faults as yet unidentified cross the area but have no surface expression. More work would be required to verify the inferred fault pattern, and to prove or disprove the presence of north-north-west to south-south-west structures.

[313] Mr Lawless testified that he had discarded the possibility of north-west faults crossing the site for want of evidence to support it. Even if such a fault could be inferred, he did not consider that sufficient reason to place a buffer zone there, because drilling had shown the area cold at depth, and there was no evidence of previous thermal activity on the site.

[314] Mr Lawless gave evidence about the buffer zones that he had recommended so as to identify parts of the property where buildings might be permitted without restriction, and parts where there is some risk. Detailed investigation had been made of the building site and to a lesser extent the eastern hill. Buffer zones had been constructed extending to 200 metres from active thermal features, and 100 metres from inactive but possible paths. A 100-metre buffer zone had been constructed around the cold gas seep near a low-lying creek intersection to the south of the site and to the west of the Waiapawa Pond, as it is not a thermal feature.

[315] Dr Grant gave the opinion that there would be no need for a buffer zone around any new weaknesses if such were found, given the level of investigation that has already occurred. Of Mr Brand's assertion that the entire area merits 'buffer zone' status, and Dr Isaac's opinion that it is simply not wise to site the facility in the Ngawha Geothermal Field, Dr Grant testified that he did not consider that a reasonable approach to a potential but remote geothermal hazard.

[316] We accept that the point of the buffer zones was to locate the buildings away from what were supposed to be the parts of the site at greater risk of hydrothermal eruption. Mr Lawless's buffer zones extend to somewhat arbitrary distances from the known features. No one suggested the use of different distances. We do not regard the buffer zones as inappropriate in that respect.

[317] Although it is possible that faults trending north-north-west to south-south-west may exist, there is no evidence for inferring that such faults exist. In the absence of such evidence, construction of buffer zones about such suppositious features is not justified. Moreover, we accept Dr Grant's opinion that, in the light of the better knowledge gained since the buffer zones were first delineated, further revision of the buffer zones is not justified.

Gas emissions

[318] We now address the opponents' claim about hazard of gas emissions, and risk to inmates and staff from them.

[319] Mr McPherson reported that gas emissions had been identified in the existing streambed at some locations, but none of those were in the area of proposed works. The site within the security perimeter generally slopes down towards the stream, so in calm conditions any gas would flow towards the stream, which has a culvert outlet available for passage of any gas. All buildings are at least 5 metres above the stream-bed, and floor levels have to be at least 150 millimetres above the surrounding ground if paved, or 225 millimetres if unpaved. All cell accommodation is to be mechanically ventilated.

[320] Mr Lawless testified about a detailed survey by his staff in August 2001 which had traversed the full length of the Ngawha Stream through the construction site and the section of the upper (eastern) tributary that would be affected by the diversion. The witness reported that his staff had not found any gas vents comparable to those known upstream or downstream of the prison site. They had found two areas where small intermittent gas bubbles were coming to the surface of the stream but with no detectable change in temperature of the stream, but he was not sure that they were of geothermal origin (being too small to readily sample and analyse). Even if they were of geothermal origin, they had rates of emission an order of magnitude less than the other geothermal vents known in the area. Mr Lawless considered that they had no practical significance in terms of constituting a hazard, but recommended that they be re-examined after the stream has been drained and cleared of vegetation.

[321] Mr Lawless acknowledged the possibility, under certain climatic conditions, that a low-level natural odour (hydrogen sulphide) would occur within the proposed facility. However because of the distance of the buildings from active vents, and the

buffer zone around natural thermal activity, he had no reason to suppose that the frequency of such events would be as common as occurs at Ngawha Springs Village.

[322] The witness referred to concerns that the proposed stream works might cover up and seal geothermal vents in the stream. He confirmed that no such vents are known to exist in the area to be affected. He added that even if there were, allowance would be made for permanent venting of the gas through a gravel pack and/or standpipe, in accordance with standard procedure in the geothermal energy industry in New Zealand. Covering the vents with gravel would have no adverse effect on the geothermal resource and would not pose any hazard to the facility, because the gas would be allowed to freely vent. It would neither increase the total quantity of gas emitted, nor seal off the vents so that sub-surface pressure could build up.

[323] Mr Lawless testified that the geothermal gases in the area had been established by numerous surveys and found to constitute 97 % carbon dioxide, 2 % methane, 0.5 % hydrogen sulphide, and 0.5 % nitrogen. There is no sulphur dioxide in the Ngawha gases.

[324] Mr Lawless deposed that the level of methane is far below any level of concern regarding toxicity or inflammability, and that it could not accumulate in depressions, being lighter than air. The occupational safety and health limit for carbon dioxide is about 240 times the World Health Organisation limit for hydrogen sulphide to avoid health effects (150 micrograms per cubic metre), so the latter is the controlling limit.

[325] Mr Lawless testified that measured hydrogen sulphide levels within the area are far below accepted limits of toxicity. However he accepted that both carbon dioxide and hydrogen sulphide are heavier than air, and could accumulate in low-lying areas.

[326] Mr Lawless gave the opinion that, given the lack of direct gas emission within the prison site, the probability of gas reaching toxic levels within the prison development is very low. In addition, positive ventilation of all sleeping areas of the prison would avoid the risk of harm. Further, hydrogen sulphide levels in the buildings are to be monitored, and an automatic detection and alarm system installed if necessary. The witness added that as the site is sloping there is no possibility of dangerous gas accumulations outdoors within the secure compound. It would be

remotely possible for gases to accumulate at the stream, but he deposed that they would be vented through the culverts, even in time of flood.

[327] In cross-examination Mr Lawless reported that the elevated ground temperature found on the site of the secure compound was a temperature of 20 degrees, not detectable as warm to touch. He also deposed that the elevated mercury levels in that area are a factor of 100 less that the levels measured close to the active spring, and that he did not find that convincing evidence of thermal activity on the site. The witness reported that test pits had been dug on a 50-metre grid covering the entire area to be excavated, with a number of boreholes to greater depth, and a large number of wick drains. He gave the opinion that it is extremely unlikely that any further areas of gas emissions would be found.

[328] Asked in cross-examination about an incident in 1979 at Dieng, Indonesia, in which 142 people had been killed following a gas discharge, Mr Lawless deposed that it was not clear to him that the incident had been purely a hydrothermal eruption. He testified that very large gas eruptions can only occur where there are comparatively low temperatures for the gas to accumulate. The witness explained that this is not the case at Ngawha, and he eliminated any connection between the Dieng event and potential risk at Ngawha.

[329] Asked in cross-examination about an incident in 1986 at Lake Nyos, Cameroon, in which about 1700 people had been killed following a discharge of mainly carbon dioxide gas, Mr Lawless gave the opinion that the model postulated by the scientists who had studied the event did not apply to Ngawha because the cause of the discharge had been a pneumatic eruption, not a hydrothermal eruption, and the hydrogen sulphide concentration in the gas was extremely low.

[330] Dr Grant described Mr Brand's reference to the Lake Nyos event as specious, explaining that the event was neither geothermal nor hydrothermal. Dr Sheppard testified that neither the Dieng nor the Lake Nyos event was connected with geothermal systems, the one being from a volcanic vent, the other from degassing lake waters. He gave the opinion that comparing those occurrences with the situation at Ngawha was inappropriate as the diffusive flow of carbon dioxide over most of the area of the Ngawha geothermal system is quite different from the sudden and dramatic discharges of huge quantities of carbon dioxide such as occurred at Dieng and Lake Nyos.

[331] Mr Lawless agreed that if there was a large volume of permeable material within the allochthon, there would be a possibility of a cold gas eruption. Counsel for the opponents put to him that at the present state of scientific knowledge not enough is known about the allochthon to be sure that there are not dangerous accumulations of gas. The witness gave two reasons for not agreeing with that. The first was that the gas composition in all the cases quoted had differed from the gas at Ngawha. The second was that everything that is known about the geology of the allochthon is inconsistent with the presence of a large volume of material of high permeability. Gas pockets had been encountered in geothermal drilling, but had dissipated within hours. Small pockets have no real significance to risk assessment. The scenario is significantly different from the commonly accepted view of the allochthon and to the way in which the faults in it appear to operate.

[332] Mr Lawless observed that the lakes at Ngawha are not as large or as deep as Lake Nyos; and that accumulations of gas within the earth can be eliminated because there is no evidence of extensive high permeability zones sufficiently close to the surface of the cap rock, and the temperatures at a depth of about 1 kilometre are not as low.

[333] Mr Lawless was also asked in cross-examination about the gas vent at the creek confluence to the west of the Waiapawa Pond already mentioned. He testified that the south-eastern border of the secure perimeter would be about 150 metres from that vent, and the nearest building a little more.

[334] Mr Lawless also agreed that the site of the self-care units is one where there are multiple gas vents. He deposed that it is not intended to lower overburden pressure there by excavation, nor to install large areas of asphalt or concrete slabs in areas of present or past thermal activity within the secure compound or the self-care units.

[335] Dr Sheppard deposed that the risk of gas build-up in buildings is likely to be very low because in the unlikely event of high gas flows, the building design provides good ventilation at ground level and there would be no fully enclosed basement areas where gas could accumulate.

[336] Based on the evidence we find that the gas emission hazard is very remote, and the precautions taken to protect prison inmates and staff are sufficient. In our judgement this hazard was overstated by the opponents, and was not made out.

Seismic risk

[337] Seismic risk is within Mr Beetham's particular expertise, he being manager of the Earthquakes section of the Institute of Geological and Nuclear Sciences, and having professional experience of hazard assessment for earthquakes. In cross-examination he testified that seismic activity in Northland is the lowest in the country, and the recurrence interval for faulting is regarded as long, in terms of thousands of years.

[338] Acknowledging that Ngawha has a low level of seismicity, Mr Lawless reported that there is no evidence that the inferred faults are still active. He considered that leaving the 50-metre buffer zone around mapped faults would not only avoid areas of thermal activity, but would also avoid siting any structure on the faults, with the secondary benefit of avoiding any seismic hazard from fault movement.

[339] On the evidence we find no basis for rejecting the subject site for a prison on the ground of seismic risk.

Effects on Ngawha Springs

[340] The Regional Council commissioners accepted claims that there is a physical connection between the springs at Ngawha Springs and the site, and found that the proposal would sever that physical connection, referring in that context to the proposed wick drains, and to sealing gas emissions from the stream bed.

[341] By their amended appeal the WiHongis claimed that Ngawha Springs would be polluted and degraded by the presence of the prison. Dr C Barlow gave the opinion that it would be a major tragedy if the springs and mineral pools fell into disuse through geological and other types of interventions and disturbances from the proposed construction of a Government prison facility.

[342] In respect of those findings, Mr Lawless gave evidence on three matters. First he deposed that no gas vent is known to exist in the area of the stream proposed to be realigned. Secondly, he explained that if any is discovered, the proposal is not to seal it, but to protect it with gravel so that it would be able to vent freely. That would neither increase the total quantity of gas emitted, nor seal off the vent or allow sub-surface pressures to build up.

[343] Thirdly, in respect of the wick drains Mr Lawless confirmed that their purpose is not to seal off the flow of water: it is to temporarily accelerate the flow of groundwater so the process of settlement on the building site will occur more quickly. If geothermal activity is encountered in installing a wick drain, the drain would be withdrawn. Mr Lawless deposed that the channel would then fill with soft sediment and seal itself, and only if it did not would the drain be grouted. He gave the opinion that this would not "sever the physical connection between the springs and the application area" (as found by the commissioners) because there is no physical connection between Ngawha Springs and the site except in the sense that both are part of the surface of the Earth.

[344] The testimony of Mr McPherson about the function of the wick drains was consistent with that described by Mr Lawless.

[345] Dr Grant addressed the findings by the Regional Council commissioners that there is a real physical connection between the springs and the application site, and the wick drains would seal off emissions of waters, steam and cold gas. This witness confirmed that there is no real, physical connection between the springs and the application site. He gave the opinion that there would be no measurable effect on the geothermal reservoir, or its flow to Ngawha Springs, from the construction of the prison and the associated earthworks; and no measurable change would occur at Ngawha Springs as a consequence of the prison construction.

[346] Dr Grant added that the commissioners' finding had mistaken the purpose of the wick drains, confirming that those drains have nothing to do with controlling geothermal fluid, and would not produce a disturbance that could reach Ngawha Springs or the geothermal reservoir.

[347] Dr Grant also addressed Mr Brand's evidence that an eruption or uncontrolled blowout has the potential to deplete the underlying geothermal reservoir and temporarily shut down part of the geothermal system, including the springs, baths and power plant, and that this would mean temporary suspension of activities at Ngawha. Dr Grant gave the opinion that this evidence mistakes the size of the geothermal resource. He explained that an eruption or blowout would involve a flow of the order of a hundred tonnes an hour, and that such events typically last a few hours, or days at the most. Over that time such a flow would take perhaps a millionth of the fluid in the geothermal reservoir. He considered it a gross

exaggeration to describe that loss as depletion, and it would not cause any suspension.

[348] Mr Gordon Te Haara testified that the waters of Tuwhakino D2 have no effects on Ngawha Springs, because they flow away from them.

[349] On the evidence we find that there is no physical connection between the subject site and the springs at Ngawha Springs; that the wick drains would have no effect at all on those springs; that the proposed prison would not result in pollution or other degrading effect on the springs; and that no proposed activity in respect of gas seeps or vents would affect the springs either.

Effects on Lake Omapere

[350] Concern had been expressed at the primary hearing of the resource consent applications of possible inter-connections between the site and Lake Omapere. By their amended appeal the WiHongis claimed that Lake Omapere would be polluted and degraded by the presence of the prison.

[351] Mr Brand deposed that there is continuity in the higher heat content of the subsurface Waipapa basement which constitutes the geothermal reservoir of the Ngawha Geothermal System and which in turn gives rise to the many hot and cold water soda-rich springs evident at the surface between Ngawha and Omapere Lake. He gave the opinion that any major irreversible change in one part of the geothermal system is likely to affect the whole.

[352] In that respect, Mr Lawless gave the opinion that in physical terms there is no possibility that the development would affect Lake Omapere. He cited a number of reasons.

[353] First, Mr Lawless observed that the site and the lake are about 6 kilometres apart, and that Lake Omapere is about 20 metres higher in elevation than the majority of the prison site. The witness considered that this represents a considerable hydrological gradient, implying that the areas are not directly hydrologically connected. He added that this also means that any activities at Ngawha could not cause sediment to flow to Lake Omapere.

[354] Secondly, Mr Lawless testified that Lake Omapere drains to the west coast, by the Utakura River, while the Ngawha area drains to the east coast by the Waiaruhe River. They are in separate catchments.

[355] Mr Lawless deposed that the near-surface geology of the Ngawha-Kaikohe area is comprised of a large number of geologically diverse units, many of which are clay-rich and of low permeability. He gave the opinion that it is very unlikely that any laterally extensive sub-surface aquifers exist which could provide a sub-surface connection between Lake Omapere and Ngawha area.

[356] Dr Grant testified that the geothermal reservoir is at high pressure relative to ground surface. He explained that this means that recharge water does not derive from rainfall on the ground directly above, or from Lake Omapere: the reservoir is at such high pressure that water would flow upwards, not downwards.

[357] We accept the evidence of Mr Lawless and Dr Grant, and find that there is no physical connection between the site and Lake Omapere. We find that the proposed works will have no effect on that lake. The claims to the contrary were not made out, and we do not accept them.

Traffic effects

[358] Evidence on effects of the proposal on traffic conditions was given by a qualified and experienced consulting traffic engineer, Mr D S McCoy. He gave detailed reasons for the opinions that the expected level of traffic generated by the prison would have no more than minor effect on the existing road network; that the proposed prison access from State Highway 12, including local road widening and construction of a right turn bay, would ensure safe access to and from the site; and that access to adjoining properties would be improved without affecting through traffic.

[359] Mr McCoy's opinions were not challenged by cross-examination or contradictory evidence. We accept them, and find accordingly.

Noise effects

[360] Mr X G N Oh, a consulting acoustics engineer, deposed that he had assessed the potential noise effects of the proposed prison. He gave detailed reasons for his

conclusions that the proposed site is well located with a minimum separation distance between the security fence and any existing dwelling of 500 metres; that there would be no significant noise effects from prison activity; and that the small increase in noise for road traffic is not likely to be noticed by residents near State Highway 12.

[361] Mr Oh's conclusions were not challenged by cross-examination or contradictory evidence. We accept them, and find accordingly.

MAORI CULTURAL AND TRADITIONAL ISSUES

[362] The amended appeal by the WiHongis contained grounds for their opposition to the designation of the prison site, including Maori traditional occupation of land in and about Ngawha, streams and springs, and cultural values in respect of it (citing section 6(e) of the Act), kaitiakitanga (section 7(a)), and Maori rights under the Treaty of Waitangi (section 8).

[363] Those grounds were stated more clearly and fully by counsel for the opponents in their address. First it was their case that the designation would fail to recognise the relationship of Nga Hapu o Ngawha and of Ngapuhi with their ancestral lands, their water, their sites and their taonga. Secondly, they contended that in making the requirement the Minister failed to have sufficient regard to the role of Nga Hapu o Ngawha and Ngapuhi generally as kaitiaki of the Ngawha geothermal resource (including its surface manifestations in the Ngawha landscape) as a taonga of Nga Hapu o Ngawha and the most precious resource of Ngapuhi. Thirdly, it was contended that the Minister's process of consultation with Maori was deeply and fatally flawed, both by failing to recognise and include all kaitiaki, and by lack of evidence that in the consultation process, the Minister had himself considered the Ngawha Geothermal Resource Report by the Waitangi Tribunal, and had himself considered the attitudes of those consulted who were opposed to the proposed prison.

[364] The commissioners appointed by the Northland Regional Council to hear and decide the resource consent applications had found that –

> To grant the applications would result in significant adverse effects on the ancestral lands, water, waahi tapu and other taonga of Ngati Rangi and Ngapuhi. It would also fail to enable them as tangata whenua, to provide for their social well-being.

[365] The commissioners expressly recorded that, but for the issues of Maori cultural importance, they would have granted the consents. In the proceedings in the Environment Court, it was the Regional Council's case that the consents should be refused for Maori cultural grounds.

[366] In that respect it was the Regional Council's case that the proposed works would fail to enable some (at least) of Ngawha Maori to provide for their cultural well-being, in that it demeans the mana and wairua of Ngawha and devalues their

traditions, including their traditional association with Takauere (a taniwha). It was also contended that the works fail to recognise and provide for the relationship of Ngawha Maori and their traditions with the land, water and other taonga of Ngawha.

[367] The Regional Council also invoked the Treaty principle of active protection, and claimed that this demands that consideration be given to reasonable alternatives, and as alternative works are not possible, alternative locations should be considered but, for the Minister's own reasons, those had not been pursued.

[368] The Regional Council joined issue over the consideration of tuakanatanga, claiming that regional councils cannot be expected to make findings on this in deciding resource consent applications.

[369] The Regional Council also questioned according a role as primary kaitiaki in respect of the site to a whanau derived from title having been vested in their tupuna by the Native Land Court. Counsel advanced criticism of individualisation of Maori land by that Court, and claimed that it was a trend that had been reversed by Parliament.[30]

[370] In his reply to the WiHongis' appeal, the Minister denied that the WiHongis have mana whenua status or are kaitiaki in respect of the D2 site, and claimed that proper weight had been given to Maori interests as required by sections 6(e) and 7(a). He also asserted that he had at all times taken into account the principles of the Treaty of Waitangi.

[371] The result then was that major issues in these proceedings were Maori traditional and cultural issues, and much evidence and feeling was devoted to them.

Differing Attitudes among Maori

[372] Maori were not of one accord over the traditional and cultural issues raised in the hearing. Opinions were confidently expressed on both sides.

[30] Mr Whata relied on remarks by the then Minister of Maori Affairs in Parliament in moving the introduction of the Bill which on enactment became Te Ture Whenua Maori Act/Maori Land Act 1993.

[373] Ms Mangu gave evidence of a survey of attitudes among residents of Ngawha Springs Village in late 1999 and stated her belief that they were almost unanimously opposed to the prison; and a subsequent survey in the Village in which 3 people had indicated support for the prison, 41 against, and 7 undecided. The results of a more general survey had been 22 in support, 245 opposed, and 15 undecided.

[374] Mr J S Torbet testified that he had made enquiries among residents of Ngawha Springs Village, from which he had found that the Friends and Community of Ngawha Incorporated did not represent the consensus view in Ngawha Springs Village, that many did not wish to align themselves with either view, and that the active opposition through the society or Mr WiHongi represent a small proportion of the households in the Ngawha Springs Village. In cross-examination he accepted that responses to Ms Mangu's survey showed 51 residents of Ngawha Springs Village had signified opposition to the prison.

[375] Bishop Waiohau (Ben) Te Haara deposed that from his discussions within Ngapuhi, there were many who support the proposal, many who were against it, and many who took a more neutral position.

[376] Mr J Hamilton responded to Ms Tipene's claims that the Department had been critical to destruction of whanau relationships in Ngati Rangi, and had worked to ruin them as a hapu. He observed that Ms Tipene offered no evidence to support that statement. He affirmed that the Department had at all times endeavoured to maintain relationships with the wider community, both Maori and pakeha, but especially Ngati Rangi, including those who opposed the building of the facility. Mr Hamilton also stated that the Department had actively supported initiatives such as a recent hui to try and ensure that those relationships were maintained. He added that that while not agreeing with the opponents' views, it had at all times respected them and provided opportunity for them to be discussed.

[377] Mr C Fraser in cross-examination accepted that the dissent in the local community was significant and substantial, but there is also a considerable measure of support.

[378] Mr Ron WiHongi gave his opinion that the prison should not proceed unless all of the hapu of Ngawha area agreed with it.

[379] Mr M Anania agreed that the proposal had caused a lot of disagreement within Ngati Rangi, and gave the opinion that the dissension had largely been from a small number of very vocal opponents who had always been very strongly opposed to the prison and to continuing any consultation with the Department. He considered that a unified view is unlikely given the many groups involved in Ngawha and in Ngapuhi.

[380] It is the Court's understanding that the Resource Management Act regime allows for differing points of view to be expressed and explained. That is true for the ultimate question whether a project is to be allowed to proceed or not. It is also true in respect of questions that arise in the course of deciding the ultimate issue, such as questions over whether a decision to grant consent recognises and provides for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, or whether particular regard is had to kaitiakitanga.

[381] It is also our understanding that the Resource Management Act does not provide for decisions on proposals to made according to whether more people support the proposal or more oppose it. Where Parliament has wanted decisions to be made on that kind of basis, it has provided for elections or polls.

[382] But the Resource Management Act provides for decisions to be made after consideration of the reasons for the attitudes of those who express them, of the evidence that is presented, and by reference to the purpose of the Act and the criteria for decision stated or implied in it, and in instruments made under it.[31] So we do not find it necessary to make any finding on the dispute whether more people of the Ngawha locality, or of any wider area, are opposed to the prison than support it.

[383] In the same way, we have no right to expect that all Maori will necessarily agree on questions such as the particular relationship of Maori, and their culture and traditions, with particular land, water, and so on. Parliament has not restricted its direction in that regard to Maori having a particular status. The role of decision-makers under the Resource Management Act is to identify carefully the question raised by the statutory provision, to hear the attitudes and evidence of the parties in the proceedings on that question, and then make its findings. The duty to do so cannot be avoided because Maori are not in agreement over it.

[31] *Contact Energy v Waikato Regional Council* Environment Court Decision A004/00, paragraph 254; *Wanganui District Council* Environment Court Decision C211/00, paragraph 17.

[384] The Maori cultural and traditional questions in these proceedings were regarded as important by all the parties and witnesses, and also by the Court. Various people indicated having taken offence at attitudes and parts taken by others, or at events and actions prior to or during the course of the hearing.

[385] To the extent that evidence or questions in cross-examination were objectionable in law, all parties had opportunity to raise objections at the time, and if they wished, to have the Court rule on them. But it is not the Court's business to protect parties or witnesses from the possibility that the attitudes or testimony of another witness might upset them, nor to relieve witnesses of the duty to answer questions in cross-examination to which no objection in law was raised. When appropriate, the Court allowed opportunity for an apology to be expressed. There is no occasion for any such matters of personal sensitivity or offence to be recorded in more detail in this decision.

Tuakanatanga

The issue

[386] It was the case for the Minister that the tangata whenua witnesses called on his behalf rely on seniority (tuakanatanga), ability, acceptance and knowledge as a basis for their authority to speak on behalf of the Te Haara whanau and/or Ngati Rangi. Counsel for the Minister expressly stated that tuakanatanga is not relied on except to assist the Court in determining issues of authority and weight.

[387] The Regional Council submitted that it was not in a position to judge whether or not tuakanatanga is the tikanga of Ngapuhi, and to require regional councils (and ultimately the Environment Court) to make an assessment of who is and who is not tuakana would be a recipe for an administrative quagmire. The Regional Council acknowledged that Bishop Te Haara and the other kaumatua and the kuia who gave evidence for the Minister were senior persons of Ngati Rangi or Ngapuhi, whose views deserved careful consideration. Counsel submitted that tuakanatanga is not a matter to which the Regional Council should be obliged to give considerable weight.

[388] However the evidence for the Regional Council and for the opponents challenged the notion that tuakanatanga is part of the tikanga of Ngati Rangi and of Ngapuhi.

The evidence

[389] Bishop Te Haara's evidence contained these passages about tuakanatanga:

> 2. Within Ngati Rangi hapu, I am recognised as a Tuakana (senior elder) of the whanau most closely associated with the land known as Tuwhakino. The Tuakana is recognised as the senior person in relation to others of a whanau or hapu. The proposed prison site (D2) is part of Tuwhakino and is now owned by the Minister. At one time this particular block was owned by my grandfather. I am the senior kaitiaki representative in relation to the block and Tuwhakino generally.
>
> ...
>
> 8. Tikanga comprises various concepts and one of them is the Tuakana/Teina mentioned above. Literally this means elder and younger but in effect it is much more important. I will say it is the manner by which one exercises eldership towards whanau, hapu and iwi. The balance between teina and tuakana has to be based on trust and transparency.
>
> 9. In Maori cultural terms, the tuakana had rights above that of teina. It was offensive for a teina to publicly correct or disagree with the tuakana; in bygone days it could have resulted in banishment for the offender or some other form of discipline. Today discussions and ideally consensus is the preferred option.

[390] In his evidence in reply, the Bishop deposed that the tuakana role relates to seniority, qualifications and experience, and testified that his brother Gordon and he were the accepted senior tuakana for the Te Haara whanau. Of the opinions given by Dr Hohepa (called to give evidence on behalf of the Regional Council), Bishop Te Haara observed that Dr Hohepa is not from Ngati Rangi and is not of Ngawha, cannot speak as to Ngati Rangi tikanga, and he (the Bishop) did not agree with his (the Doctor's) interpretation of Ngapuhi tikanga, which were inconsistent with what he (the Bishop) knew about Ngapuhi tikanga.

[391] Bishop Te Haara explained that tuakana denotes seniority but does not mean that that person is right and everybody else is wrong. It is relevant to the decision making process and to the question of who has authority to speak on particular issues. He had never relied on his tuakana status in coming to opinions. He had consulted with others and reached a consensus view, but tuakanatanga was one of the bases on which he had mandate to speak in relation to the Tuwhakino block and on other matters relating to Ngati Rangi.

[392] Mr Gordon Te Haara, a kaumatua of Ngati Rangi, supported the evidence of the Bishop on the tuakana and teina practice in Ngati Rangi. He testified that the Bishop, as living heir of the last Ngati Rangi Chief Heta Te Haara, had agreed in consultation with the Te Haara whanau and many kaumatua and kuia of Ngati Rangi and others that the particular site is appropriate for the prison facility. The witness

deposed that this was the appropriate way for Ngati Rangi to make decisions, and that Ngati Rangi kaumatua had proceeded with traditional methods of decision-making which take into account the wider view.

[393] Mr Reuben Clarke, another kaumatua of Ngati Rangi, confirmed that tuakanatanga is important as to which has the right to be spokespeople on behalf of a whanau or a hapu, but that it does not prevent others expressing their own opinion.

[394] Mr M Anania testified that the site is within the rohe of Ngati Rangi, and that the decision-making processes within Ngati Rangi are based on the kawa of consensus decision-making within the context of the final say being with kaumatua and tuakana. He deposed that the principle of matua tuakana/teina is also applied to iwi and hapu levels, not just whanau.

[395] Mr Wallace WiHongi of Ngati Mahia, Te Uri o Hua and Ngati Hine, stated his belief in the right of tuakana to speak, in accordance with tradition, devolved to Ben Te Haara and his whanau, he being tuakana. The witness added that the clear purpose of this concept in modern times is to maintain the future survival and order of Maori, and in this instance Ngati Rangi. He deposed that women exercise tuakanatanga too. In cross-examination he agreed that Nga Hapu o Ngawha have a right to speak about the geothermal taonga of Ngawha.

[396] Mr H T Gardiner is an independent consultant on Maori cultural matters, and has considerable experience with the application of the provisions of Part II of the Resource Management Act 1991 that relate to those matters.

[397] Mr Gardiner testified that the Te Haara family, and in particular Bishop Te Haara and Mr Gordon Te Haara, being direct descendants of Heta Te Haara to whom the Tuwhakino block was awarded in 1873 by the Native Land Court, are tuakana of the land in question. He explained that in traditional Maori society the tuakana has the right to determine the broad direction and operational policies of the group over which he has authority, and the younger sibling or teina is to support those decisions. The witness deposed that in contemporary Maori society, the role of tuakana is still generally observed across and within most tribes, and is clearly important to Ngati Rangi.

[398] Mr Gardiner also deposed that the WiHongi whanau, who are affiliated to Te Uri o Hua hapu, have no authority by whakapapa to disturb the rights of the tuakana line to speak on the spiritual or cultural issues of the D2 site on the Tuwhakino block. The witness acknowledged that the Clarke whanau are Ngati Rangi, but deposed that they are teina to Bishop Te Haara and Mr Gordon Te Haara, who are their tuakana. So although they have a right to speak on the spiritual and cultural issues of the Tuwhakino block, the overriding authority for making decisions is vested in the tuakana line, and where there is dispute over spiritual matters relating to the land, the view of the tuakana should be accorded greatest weight.

[399] Mr Gardiner was the object of criticism similar to that made of Dr Hohepa, namely that he is not of Ngati Rangi.

[400] Ms Mangu testified that Mrs Anania and Mrs Agnes Clarke were both tuakana to Bishop Ben Te Haara, being his older sisters; and that Mr Gordon Te Haara's father was older than Agnes Te Haara. The witness was asked whether she accepted that Bishop Ben Te Haara was the accepted and acknowledged senior spokesperson for Ngati Rangi, and she responded:

> In some respects that would be correct.

[401] Dr P W Hohepa is the Maori Language Commissioner, and has extensive university teaching experience in anthropology, structural linguistics and Maori language culture and history. He is of Te Mahurehure, Ngapuhi ki Hokianga, with family links to other Ngapuhi groups. He was called as a witness by the Regional Council.

[402] Dr Hohepa gave the opinion that consensus decision-making is Ngapuhi tikanga, not tuakanatanga tane. The witness accepted that most families use some kind of pecking order of control in whanau, but deposed that this does not extend through adulthood, where the right of all to have a say was inalienable. He acknowledged that it can happen that seniormost males are selected as the recognised leaders of a whanau, hapu or iwi for certain functions, but stated that the Ngapuhi database did not support the existence of tuakanatanga or tuakanatanga tane as the formal and permanent Ngapuhi tikanga of long standing in its patterns of leadership. Ability was also a requirement.

[403] Dr Hohepa continued–

> I acknowledge that Bishop Waiohau Ben Te Haara is a leader and spokesperson of Ngati Rangi and he does not need a non-existent 'tikanga' of tuakanatanga to establish that. He is clearly a leader and spokesperson of Ngati Rangi through seniority and ability and choice and that is in accordance with Ngapuhitanga.

Significance of tuakanatanga

[404] We have reviewed the claims of the parties and the evidence concerning tuakanatanga. We have not been persuaded that this concept has significance for the Court's decision in these proceedings.

[405] First, the Court has to make findings on issues raised by the purpose of the Resource Management Act which is described in section 5, and the particular aspects of that purpose described in sections 6(e), 7(a) and 8. None of those sections indicates that persons of a particular status are to be preferred over others.

[406] Rather, on the issues raised by those provisions, findings have to be made on the evidence. Even where the evidence of one or more witnesses is in conflict with that of other witnesses, the Court has to make a finding. In doing so, it may give greater weight to the testimony of a witness of greater experience of the subject, or it may be persuaded by the evidence of another witness who may lack customary authority but whose testimony carries conviction for other reasons.

[407] In this case, Bishop Te Haara's claimed status as tuakanatanga was put forward only to assist the Court in determining issues of authority and weight. Neither the Minister, nor the Bishop himself, claimed that the Bishop's asserted status as tuakana meant that the Court could only accept their evidence, and could not accept conflicting evidence of others. All that was claimed was that his status was a factor, along with others, that should add weight to the testimony of those witnesses.

[408] In these proceedings the Court has no occasion to make any finding about who has the right to speak on behalf of any whanau, hapu or iwi, according to its tikanga. No opinion on that topic is to be inferred from anything in this decision.

[409] On factual issues where there is conflicting testimony, such as the existence of relationships of the kinds described in section 6(e), and the effects on kaitiakitanga, the Bishop's claimed status as tuakana is no more relevant than his (undoubted) status as Bishop. We imply no disrespect. Rather, his holding the position of Bishop is worthy of respect, but has no bearing on the acceptability of his testimony about the relationships and effects on which findings have to be made. Similarly, his status as tuakana, accepted by some but not by others, deserves respect, but it also has no bearing on the acceptability of his testimony on those questions. Instead, weight might be given to his testimony on account of the extent of his own knowledge and experience of the subject land, and the relationships of Maori and their culture and traditions, with that land, and the exercise of kaitiakitanga in respect of it.

[410] We forsake making any finding about the significance of tuakanatanga in Ngati Rangi and Ngapuhi, or whether Bishop Te Haara is indeed entitled to that status, simply because there is no need to decide those questions in order to make the findings required to determine these proceedings. We imply no disrespect to the Bishop, or to any who regard him as tuakana.

***Takauere,* a Taniwha**

The issue

[411] In their amended appeal in respect of the prison designation, the WiHongis claimed that the prison would interfere with their relationship with the taniwha Takauere, and that the proposed wick drains would be a gross intrusion upon the domain of Takauere.

[412] In their decision refusing the Minister's resource consent applications, the hearing commissioners appointed by the Regional Council made a finding that the whole area, including waterways, is within the domain of taniwha, especially Takauere, and that the proposed earth and stream works are a desecration.

[413] Counsel for the Regional Council submitted that the area has a special nature, manifested by the presence of the taniwha, Takauere, who is revered by many within Ngapuhi. He contended that the earthworks and stream works would adversely affect Takauere, in two ways. The first was a potential direct effect of interference with the pathways of the taniwha to the surface. The second was an indirect effect

on the mana, wairua, and mauri of Takauere by adverse effect on the mana, wairua, and mauri of the land and the stream.

[414] In response the Minister submitted that the taniwha has little if any modern-day significance to Ngati Rangi, that the works will not cause any interference with the taniwha, or with the belief in it, and are not generally considered by Maori to demean the taniwha or his domain.

The evidence

[415] Mr Ron WiHongi gave evidence about the taniwha *Takauere*, whom he described as the guardian of all the waters of Tai Tokerau. The witness testified that *Takauere* can take many forms, can manifest itself as a kauri log, or as a tuna (eel), and can appear in any waterway, above the ground and under it.

[416] In his testimony Mr Ron WiHongi said –

> In no way can Takauere be merely regarded as a mascot in the Pakeha manner.

[417] Mr Ron WiHongi spoke of the wick drains as altering the natural flow and disturbing the aquifer, the home of *Takauere*. He deposed that its mana is subsurface, and is released in the form of healing springs; and he also referred to poisonous gases, saying –

> Whenever the taniwha flatulates whatever is growing around the holes are killed off.
> No one knows with certainty the space, the time, the depth, or the place that Takauere will appear next. Sometimes all that is left is a rusty residue.

[418] In his testimony Dr Hohepa asked, rhetorically, –

> ... I am asking who is responsible for looking after the rights, health and welfare of our esoteric kaitiaki or minder, the taniwha Takauere, and the taonga called ngawha ... Rationalising him out of existence or as a figment of metaphysicalness as mentioned in several statements of evidence in no way guards the guardian. Suggesting that while taniwha have favourite residences on and under the surface and favoured routes, they can be polluted out of lakes or forced to go elsewhere by physically destroying his residence and routes is really a nasty and callous suggestion and in no way does that guard the guardian.

[419] In another passage of his testimony, Dr Hohepa said–

> ... all the vents and areas where ngawha flow are the tracks of Takauere. To deliberately decide to seal off areas of 'ngawha' leaks with fillers does hinder the traditional free movement of the taniwha, Takauere and does literally throw mud in his eyes.

[420] Ms E M Clarke also expressed concern about sealing gas emissions for the stream bed, and described them as *Takauere* "having mud thrown in his eye".

[421] Mr Lawless responded that there is no intention through the earthworks to seal up any existing geothermal vents or emissions and that there is no potential for the prison to affect the geothermal system.

[422] In cross-examination Dr Hohepa testified that there are myriad taniwha in North Auckland, and agreed that quite an extensive part of Tai Tokerau is under the influence of taniwha.

[423] Bishop Te Haara gave his understanding that the taniwha was a term used by tohunga to determine the appropriateness or inappropriateness of certain action that must be taken by a tribe whenever there was a disaster or mishap that was about to occur within the tribe. A taniwha was regarded as a manifestation of an unnatural occurrence. Taniwha were used to support the decision-making of a tohunga.

[424] In commenting on evidence by Dr Hohepa, the Bishop said that in the old days the taniwha was used to explain the inexplicable. If bad things occurred then it might be attributed to the taniwha being offended, so people considered it important not to offend the taniwha. Bishop Te Haara did not accept that the taniwha is guardian of the geothermal resource, asserting that it is the hapu of Ngawha who are the kaitaiki.

[425] The Bishop testified that his elders had never mentioned *Takauere* to him, and that it is not one of their taonga. He gave the opinion that the concept was being used by people for their own purposes. Bishop Te Haara gave the opinion that using the site for caring for those who have needs and helping to heal them would not offend the taniwha if there is such a manifestation in one's mind.

[426] In cross-examination, the Bishop agreed that a taniwha often symbolised how important a particular resource was.

[427] Mr Reuben Clarke gave the opinion that *Takauere* was being misused to fight a prison, and that this was offensive to him (Mr Clarke).

[428] Mrs Bella Tari denied that the wick drains, which would not even go into the hot waters, would have any effect on the taniwha. In cross-examination she stated that the drains would not interfere with the taniwha's existence.

[429] Mr Anania deposed that a taniwha is a mythical creature, and in the case of *Takauere*, is the guardian of Lake Omapere, and a mascot for the North Auckland rugby team. He gave the opinions that the prison would not bother *Takauere* at all, that the wick drains and stream works would not affect him, nor would he bother the inmates; and that the taniwha should not have been used as a basis of declining consent for the prison.

[430] Mr A Sarich testified that based on stories from his old people, within the myths and legends, *Takauere* did travel to Ngawha. This witness did not testify that the proposed works would impede the taniwha's travel.

[431] Mr Wallace WiHongi deposed that the taniwha was a specific size and it did not extend through the underground waterways from Omapere to Ngawha. It lives in its ana (lair) on the eastern side of Lake Omapere, and does travel, having been as far away as Awarua, 25 kilometres from Omapere. The opponents had portrayed the taniwha as all-extensive, but it is not.

[432] Mr Wallace WiHongi also deposed that the taniwha adapts to its environment so if the geothermal passages were affected for some reason by the prison, *Takauere* would adapt to this environment also. He would simply find other passageways and other places to reside. The prison and the taniwha can co-exist.

[433] In cross-examination Mr Wallace WiHongi affirmed that *Takauere* is a taonga, deserving of respect, that he has mana and wairua, and presides over the geothermal activities of the area, including Ngawha. He explained that this way:

> The taniwha Takauere is regarded as something of an elder statesman, his importance to us is in his association with important ancestors, he does not influence personally Lake Omapere nor the geothermal field of which Ngawha Springs is a part, he has absolutely no influence on the temperature, on the chemical content, on the curative properties of Ngawha Springs.
> ...the pathways that the taniwha uses through Ngawha Springs lead to Owhareiti, another important lake at Pakaraka where Takauere's master Nukutawhiti lies, Takauere uses the Ngawha pathway to gain access to

> Owhareiti where he visits his former master's resting place, it is not the only pathway to Owhareiti.

[434] Mr Gardiner deposed that taniwha are highly adaptable to their environment and gave his firm view that the temporary stream diversion would not affect the taniwha. He considered that the essential nature of the taniwha is internal to the minds of those who uphold its presence, and that physical changes are unlikely to deter that presence; that to the extent that he is real in the minds of some, the earthworks and the facility would not affect the residence or movement of the taniwha *Takauere*.

[435] Dr Hohepa described the taniwha *Takauere* as an esoteric minder or guardian, and a taonga of Ngapuhi. In cross-examination the witness explained that by esoteric he meant that it is a minder that is spiritual, metaphysical, non-tangible.

***Findings in respect of the taniwha,* Takauere.**

[436] From the evidence that we have reviewed, we find that there are people who believe in the existence of the taniwha, *Takauere*, and respect what it stands for. It may be that there are some differences of detail among them about the nature, and the behaviour of *Takauere*. What is clear is that this taniwha is not a human person, nor a physical creature. To describe it as a mythical, spiritual, symbolic and metaphysical being may be incomplete or inaccurate, but will suffice for the present purpose.

[437] The Resource Management Act 1991, and the jurisdictions of decision-makers under it, are creations of the Parliament which has protected these rights–

> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.[32]

> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or private.[33]

[438] Consistent with those precepts, the Court respects the right of people who believe in the taniwha, *Takauere*.

[32] New Zealand Bill of Rights Act 1990, s 13.
[33] Ibid, s 15.

[439] Even so, the Act and the Court are creations of the Parliament of a secular State. The enabling purpose of the Resource Management Act is for the well-being of people and communities, and does not extend to protecting the domains of taniwha, or other mythical, spiritual, symbolic or metaphysical beings. The definition of the term 'environment' in section 2(1) does not extend to such. Although sections 6(e), 7(a) and 8 are sometimes referred to as protecting Maori spiritual and cultural values, those sections have been carefully worded. Their meaning is to be ascertained from their text and in the light of the purpose of the Act.[34] Neither the statutory purpose, nor the texts of those provisions, indicates that those making decisions under the Act are to be influenced by claimed interference with pathways of mythical, spiritual, symbolic or metaphysical beings, or effects on their mythical, spiritual, symbolic or metaphysical qualities.

[440] There are difficulties in expecting a judicial body to decide questions about mythical, spiritual, symbolic or metaphysical beings. First, although findings might be made about sincerity of belief, there is no reliable basis for deciding conflicting claims about the beings the subject of the belief. For example, if some say that proposed earthworks would impede passages of the taniwha to the surface, and others say that they would not, the question is not susceptible of proof, nor of a judicial finding based on the evidence. The flow in the stream will remain. None of the vents in the stream is to be blocked, the earthworks will not interfere with any known gas vents, and if any new vent is discovered, it is not intended to be blocked. The taniwha's pathways are not physical passages that can be measured, and (at least on some accounts) the dimensions of the taniwha vary from time to time.

[441] The second aspect of the difficulty is that judicial findings are based on what the deciders of fact are persuaded is more probably than not the fact. While respecting the freedoms of those who believe in *Takauere*, the members of the Court are not compelled to find that the taniwha exists, or that its pathways and other characteristics would be adversely affected, if we are not persuaded by the evidence of those facts.

[442] We have attentively listened to the evidence about *Takauere*, and have reviewed it all carefully. We fully accord respect to those who do believe in *Takauere*. Nothing in the decision is to be taken as belittling them, or the importance that their belief in *Takauere* has for them.

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[34] Interpretation Act 1999, s 5.

[443] None of us has been persuaded for herself or himself that, to whatever extent *Takauere* may exist as a mythical, spiritual, symbolic or metaphysical being, it would be affected in pathways to the surface or in any way at all by the proposed prison, or any earthworks, streamworks, or other works or development for the prison.

[444] In respect of tuakanatanga, the Regional Council submitted that it was not in a position to judge whether or not tuakanatanga is the tikanga of Ngapuhi, and that to require regional councils to make an assessment of who is, and who is not, tuakana would be a recipe for an administrative quagmire. The Council urged that tuakanatanga is not a matter to which a regional council should be obliged to give considerable weight. Yet in regard to the taniwha, *Takauere*, the Regional Council urged that the Court place considerable weight on claims that the earthworks and streamworks would interfere with the pathways of the taniwha to the surface, and would indirectly affect *Takauere's* mana, wairua, and mauri.

[445] For ourselves, we do not accept that making findings about tuakanatanga is as problematic as making findings about a taniwha. The first may be difficult, but is capable of determination when it is necessary. Disputes about a taniwha are simply not justiciable.

[446] The outcome is that the Court does not accept that the claims about the taniwha, *Takauere*, should influence its decision in these proceedings.

Maori Relationship with other Ancestral Taonga

[447] We now address the issues arising from section 6(e), which we quote–

> 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:
>
> ...
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[448] Because of the importance of this provision in the Act, and the importance placed on it in these proceedings by the Regional Council and the opponents, we consider separately the several relationships referred to.

Do Maori have a relationship with the site as ancestral land?

[449] Mr Hooker testified to Te Roroa's spiritual links with the Ngawha area, and gave the opinion that any signficant alteration to the landscape appearance of Ngawha, such as construction of the prison, could only destroy those spiritual links, and make impossible visits to ancestral land, once vast amounts of concrete occupy the site. The witness did not give any evidence of any such visits to the site in past.

[450] Bishop Te Haara, as a senior kaitiaki representative, and based on his knowledge of the tikanga of Ngati Rangi, deposed that use of the site for a prison facility would not offend their relationship with their ancestral land. He stated that he was satisfied that the Crown is protecting their ancestral lands.

[451] Mr Reuben Clarke, another kaumatua of Ngati Rangi, confirmed that there are no significant cultural issues pertinent to Tuwhakino D2, and that appropriate processes are in place with the Department of Corrections should any issues arise. Mr Anania deposed that the Minister had recognised and provided for Ngati Rangi's relationship to its ancestral land and the waters on and under that land, including protecting the two ponds which are taonga.

[452] Mr Gardiner gave the opinion that the prison would not affect the mauri or the wairua of the area. The mauri of existing physical features is unlikely to be affected by coming into contact with the physical elements of the prison; and the mauri of the water and land is likely to come under greater threat of degradation from farming pollutants and previous mining activities than from the proposed works and activities on the site. He gave the opinion that there are no significant spiritual or cultural issues affecting the Ngawha Stream of the Tuwhakino land.

[453] From the evidence we find that Te Roroa have a traditional relationship with land in the Ngawha locality in general as an area that was once occupied by their ancestors; and that there is no evidence of Maori having a traditional relationship with the site itself as ancestral land. There was no evidence of substance for any cultural expression of a relationship any Maori have with the site as ancestral land that would be precluded or impaired by the proposed prison or development works.

Do Maori have a relationship with water on the site?

[454] Mr Ron WiHongi deposed that the Ngawha stream through the site is tapu because a tributary drains from a swamp where there are bones of people killed in a battle in the early 1800s.

[455] Dr Hohepa deposed that the proposed diversion and realignment of the stream would adversely affect the mauri of the stream at the prison site. He also testified that use of the stream for the relief and medical needs of prisoners caused concern, in that there are water table and geothermal links between the prison site and the Ngawha Springs.

[456] Mrs Eileen Clarke deposed that it would be offensive to have this part of the taonga that is the geothermal aquifer modified and constrained as proposed, and that the offence would be compounded by use of the stream by male inmates (a number of whom would have been incarcerated for crimes of violence against women) for spiritual purification and cleansing.

[457] Bishop Te Haara, based on his knowledge of the tikanga of Ngati Rangi, deposed that use of the site for a prison facility would not offend their relationship with the waters of Tuwhakino. In evidence in reply he denied that interfering with the stream would cause offence to Ngati Rangi and denied that the stream is tapu. He stated that he was satisfied that the Crown is protecting their waters.

[458] In response to the concerns expressed by Dr Hohepa and Mrs Clarke about inmates bathing in the stream, the Bishop testified that the stream through the prison site is not geothermal, is not tapu, and the inmates would not be interacting with the geothermal resource.

[459] Mr Gordon Te Haara testified of the stream that runs through the proposed prison site that there are traces of sulphur towards the middle, that eeling takes place at the top and the bottom of the stream but not in the middle on the Tuwhakino D2 land because of the sulphur. He added that to his knowledge this was not a traditional area of food gathering for Ngati Rangi. The witness also deposed that the stream is not tapu, and has little fish life where it flows through Tuwhakino D2. As kaitiaki, Ngati Rangi had agreed to the proposed alteration to the stream and that it would not harm the mauri, nor cause any issue for the whanau living within the boundaries of Ngati Rangi.

[460] Mr Gordon Te Haara confirmed that the geothermal ponds, Waitotara and Waiapawa, are not affected by the proposed prison facilities and earthworks, as they are to be fenced off and reserved, the margins planted, and excised from the designation.

[461] Mr Gardiner refuted Mr Ron WiHongi's suggestion that the waters that flow through the D2 site are tapu because they come from the site of the Battle of Waiwhariki. Ngati Rangi kaumatua had not identified any reason for the water of the stream to be tapu. The prison would not impose any threat to the existing mauri attributable to the water, land and vegetation on the site. He had not been able to establish that any battle occurred in the adjacent Waiwhariki block. Even if there had, any tapu would have been restricted to the immediate area of the battle.

[462] We start by finding that Maori do have a cultural and traditional relationship with the Waiapawa and Waitotara Ponds. In compliance with the duty under section 6(e) the Minister has recognised and provided for that relationship by agreeing to fence them off for their protection, and to exclude them from the designation. They would not be affected by the works for which authority is sought by the Minister's resource consent applications.

[463] Next we refer to the concerns expressed by Mrs Clarke and Dr Hohepa about use of the stream by inmates. We have found no evidence at all of any intention that the stream be used in that way. It has been disclaimed by counsel for the Minister.

[464] We now refer to Mr WiHongi's claim that the Ngawha Stream through the site is tapu, a claim that is disputed by Bishop Te Haara, by Mr Gordon Te Haara, and by Mr Gardiner. Such a claim is easily made, and when it is disputed, evidence of conduct that is consistent with the claim can give weight to it. In this case there was no evidence of anyone having behaved in a way that would be consistent with the stretch of the Ngawha stream through the Timperley land being regarded as tapu. Mr Gordon Te Haara's unchallenged evidence that eeling takes place in parts of that stretch is not consistent with Mr WiHongi's claim.

[465] The site is part of the total district around Ngawha Springs, and Maori have a diffuse and general cultural and traditional relationship with all that ancestral land. However the relationship is focused on the surface manifestations of the geothermal field. The use of the Timperley land for a prison, and the works proposed to develop

the land for that purpose, would not affect the geothermal field or any surface manifestations of it in any significant way, nor would it impair that relationship.

[466] We find that in protecting the ponds, the Minister has made the recognition and provision required for the relationship of Maori and their culture and traditions with water on the site.

Do Maori have a relationship with sites on the land?

[467] There was evidence of historic battles in the district.

[468] In his testimony Mr Ron WiHongi acknowledged the battle of Waiwhariki that occurred at Puketona, and referred to an earlier battle of Waiwhariki that had taken place in Taiamai in the early 1800s, before muskets. He stated that a swamp of Waiwhariki is said to be filled with bones as a result of the battle, and a stream which comes from Waiwhariki Swamp joins the Ngawha Stream and continues on through the Timperley land that had been purchased by the Department of Corrections for a prison. In cross-examination the witness pointed on an aerial photograph to the site of the battle, being to the north-east of St Michael's Church and 2 kilometres towards Ohaeawai. Asked to point to the battle site on a map, he pointed to a position south of Ohaeawai, and west of Pakaraka.

[469] In cross-examination the witness agreed that the waahi tapu area of the battle site was to the east of Ngawha Springs Road, not on the Minister's land.

[470] Bishop Te Haara also testified that he knows the history of the site and that there have been no known battles on it. He deposed that the nearest battle site is Marunui (site of the Battle of Ohaeawai) where St Michael's Church now stands. He added that the battle of Waiwhariki occurred at Puketona, and not on the site now known as Waiwhariki.

[471] Mr Anania identified the site of the battle of Waiwhariki 16 kilometres from Tuwhakino "as the crow flies".

[472] In cross-examination Mr J Hamilton deposed to the belief that no specific event is recorded on the proposed prison site.

[473] Having reviewed the testimony we find that there is no evidence of any battle site on the Timperley land.

[474] It was not suggested that there is any other site on the land with which Maori have any cultural or traditional relationship.

Do Maori have a relationship with any waahi tapu on the site?

[475] Mr Hooker stated his belief that following the Battle of Pikoi in 1790 (as places where blood of people of mana had stained the soil and two people had been speared to death) there are two waahi tapu on Tuwhakino block. Asked in cross-examination where the soil had been stained with blood, the witness replied that he could not be specific, as his informant (now deceased) had merely referred to the stream and said the site was close to the golf course. Asked if he was able to say where the two people had been killed, he agreed that it was outside the Minister's site, but said that it was very close to it. He agreed that he could not go so far as to suggest that there are waahi tapu sites on the Minister's property, but there was a possibility.

[476] Bishop Te Haara testified that there are no waahi tapu sites on Tuwhakino D2. The land had been common ground as far back as he could remember. There are no particular rules about what you can and cannot do on this site. In evidence in reply the Bishop testified directly that it is not true that the site is subject to waahi tapu.

[477] The Bishop also deposed that the stream is not subject to awa tapu, and that claims that it is tapu because it comes from a battle site are not correct.

[478] In reply to evidence by Mr Hooker that two waahi tapu declared by Te Maunga are on the Tuwhakino block, the Bishop observed that Mr Hooker is not Ngati Rangi, is not one of the kaitiaki of Tuwhakino, and is not in a position to speak as to taonga on the land. The Bishop continued that there had never been any reference to the site being waahi tapu, that if it had been it would have been known to his tupuna Heta Te Haara, who would have passed that knowledge on and ensured that any waahi tapu were protected when he parted with title to the land. Heta Te Haara had protected a burial site by setting aside some 30 acres of land.

[479] Mr Gordon Te Haara testified that his kaumatua had never mentioned any waahi tapu on Tuwhakino D2, and that the particular site is free of waahi tapu. He described activities that had been carried out on the D2 land during his lifetime and deposed that for Ngati Rangi, those activities confirmed that no waahi tapu exists on that land.

[480] Mrs Bella Tari, who had grown up in the Ngawha area, also testified that the prison site is not waahi tapu. Mr Anania testified that he was not aware that there are any waahi tapu issues on this site.

[481] Mr Wallace WiHongi testified that he had been told by his elders which areas are waahi tapu, and that his elders had been very particular about land and its state. If a piece of land was tapu, he was informed as a young boy and instructed on how to conduct himself on the land. Tapu land was identified and known to all people of the hapu. The Tuwhakino block had never been mentioned, and the hapu had had free access to it without any need to participate in noa activities (cleansing or neutralising the tapu).

[482] Mr Gardiner confirmed that there are no waahi tapu sites on the D2 site of the Tuwhakino block of land.

[483] On the totality of the evidence we do not find that Maori have a cultural or traditional relationship with any waahi tapu on the prison site.

Do Maori have a relationship with any other taonga on the site?

[484] Bishop Te Haara deposed that the Ngawha geothermal resource, including surface manifestations, are a taonga. But he had never held the view that the taonga extends to all of the land above the field. He testified that the significant surface manifestations on the Tuwhakino land are to be protected by the Minister, and he was satisfied that they would not be harmed.

[485] The Bishop rejected Dr Hohepa's claim that the Ngawha Stream is a taonga, and expressed his disagreement with the Doctor's claim that realignment of the stream would adversely affect the mauri of the stream.

[486] We find that save in respect of the general diffuse relationship with the land of the Ngawha district as ancestral land, and with the geothermal field and system as a valued taonga, Maori have no cultural or traditional relationship with any taonga on the Timperley land other than with the Waiapawa and Waitotara Ponds. As mentioned already, the relationship with them has been recognised and provided for. Gas vents have been excluded from the sites of development works. The site of the proposed prison and works contains no other taonga, nor would the works interfere with the geothermal system in any way.

The Holistic Approach

[487] On one matter there was common ground: that traditional Maori viewed the environment holistically, in that elements of the environment are treated as inter-related.

[488] Dr Hohepa deposed that Ngapuhi viewed Ngawha, the geothermal reservoir and fluid and springs, as including all the areas of geothermal emissions, including Lake Omapere, and not an artificially and arbitrarily partitioned-off piece of land.

[489] The witness stated that in holistic terms the proposal is a physical interference with the ngawha taonga including Takauere. He described it as deeply offensive affecting both human and esoteric kaitiaki. In cross-examination he explained that the geothermal resource has to be seen as part of the landscape, the whole environment of Ngawha.

[490] Mr Hooker stated with respect to his belief that the prison would adversely affect the tapu, taonga and wairua of Ngawha, that he was referring to the total Ngawha area in a totally Maori holistic manner, not only the designated site, but the whole area, above the ground and below the ground. His view was that the wairua is one and indivisible.

[491] Ms Chanel Clarke stated her opposition to the facility because of the adverse impact it would have on the historical, cultural, visual and spiritual character of the district as a whole. Her testimony contained these passages explaining her attitude–

> 24. ... The current site cannot be seen in isolation from this early Maori history and later contact history. The historic value of the area as a whole needs to be taken into account and with such significant sites across the whole Bay of Islands area, including inland areas such as Ngawha, it is

> imperative that these sites are kept free from large scale developments which significantly alter the natural features of the site as the construction of the corrections facility proposes to do.
> 25. The proposed site chosen for the regional corrections facility cannot be seen in isolation from the early history of the surrounding area and also the physical and cultural significance of the area as a geothermal resource.
> ...
> 31. ... The whole Ngawha resource cannot be divided into separate distinct parts (such as a reservoir, surface manifestation, fluid and gas) and is viewed as a complete whole.
> ...
> 40. ... While there is some difference of opinion as to the tapu nature of the stream, nevertheless it, like many of the other features discussed cannot be seen in isolation from Ngawha Springs and the general surrounds, which are rich in cultural and historical significance. Realigning this stream will alter the integrity of this culturally significant feature and indeed the integrity of the area as a whole.
> 41. The proposed site chosen for the regional corrections facility cannot be seen in isolation from the early history of the surrounding area and also the physical and cultural significance of the area as a geothermal resource.

[492] Mr R Thompson, the architect engaged by the Department to develop the cultural concept for the prison, also deposed that the Maori world is holistic. In relation to the concept for the prison, he testified that the site is to be developed for the benefit of all people and more specifically iwi of Tai Tokerau; tikanga is to include long-term sustainability, protection of resources, restoration of the ecological, spiritual, natural, historic issues and beautification; resources especially waterways are to be protected, and improvements made to protect and enhance the whenua. He referred to details in the design to respect nga maunga, Ngawha Stream, and symbolic weaving together of the elements of the facility as an integrated whole. The witness also described the principles for modifying the ground and creating and arranging spaces to inscribe the land with meaning so as to reinforce the cleansing and healing process.

[493] In cross-examination Bishop Te Haara agreed that traditionally Maori viewed the environment holistically. Similarly, in cross-examination in the context of not separating a lake from its bed, Mr Gardiner accepted that in traditional terms, when one views objects they are viewed in a holistic fashion; and that the pre-contact Maori attitude towards land and the life it carried was holistic.

[494] In his address in reply, counsel for the Minister reminded us (correctly) that the evidence does not show that the site of the proposed works is land that has any particular cultural or spiritual significance. The ponds have been excluded and protected, and the nearest identified battle site is beyond the Timperley property.

[495] We accept that evidence about the traditional Maori view of the environment. But that does not justify a finding, as urged by counsel for the Regional Council, that because the district in general was once occupied by ancestors of Maori, activity on a site within the district, such as the proposed prison and its development works, is to be seen as a desecration.

[496] We also accept Mr Thompson's testimony that the project has been deliberately designed to respond to the Maori holistic view of the environment, and his particular reference to respecting nga maunga, the Ngawha Stream, and to symbolic weaving together of the elements of the facility as an integrated whole, and creating and arranging spaces to inscribe the land with meaning. We find that the proposed works express the Maori holistic view of the environment, and recognise and do not demean any relationship that Maori have with the land.

[497] There are specific provisions in the Resource Management Act concerning Maori cultural and traditional values. Section 6(e) calls for recognition and provision for the relationships of Maori and their culture and traditions that are described. The Maori traditional 'holistic' view of the environment does not warrant treating those provisions as if they extended to diffuse relationships with whole districts, and with features many kilometres distant, as Lake Omapere is from the prison site.

Kaitiakitanga

The attitudes of the parties

[498] Another important duty is imposed on functionaries by section 7(a)–

> 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 ...

[499] By their amended appeal, the WiHongis claimed to be holders of mana whenua in respect of an area of land that included the subject land D2, and to have the role of kaitiaki.

[500] In that respect, the Regional Council's hearing commissioners made the finding that –

> The overwhelming evidence presented to us is that Ngati Rangi are kaitiaki of the application site.[35]

[501] Despite that, in the Environment Court hearing, the Regional Council challenged that finding by its own hearing commissioners made on what they considered "overwhelming evidence". Instead the Regional Council criticised Ngati Rangi's claim to be kaitaiki of the land as being derived from the Te Haara whanau's succession from Heta Te Haara in whom the Tuwhakino Block had been vested by the Native Land Court. It was the Regional Council's case that, because the Native Land Court decision was an expression of individualisation of Maori land, the Court should not recognise kaitiakitanga based on that title.[36]

[502] The Regional Council acknowledged the ancestral connection of the Te Haara whanau, and accepted that Ngati Rangi should be accorded special recognition in the area. It argued that it is too restrictive to single out one hapu, that a more flexible approach is required, and submitted that nga hapu o Ngawha collectively act together as kaitiaki.

[503] The Regional Council submitted that kaitiakitanga is guardianship in accordance with customary values, which have as their starting point respect for the mana, wairua and mauri of the resources affected. It contended that this had not been "encompassed in the Minister's proposals when the identified kaitiaki have no idea whatsoever as to the scale of the works involved or their implications, in Maori terms, for the environment".[37] The Regional Council also argued that having regard to kaitiakitanga requires the Crown to satisfy the kaitiaki that there is no reasonable alternative to the scale of earthworks and streamworks involved.[38]

[504] The opponents adopted the submissions for the Regional Council in these respects.

[505] In his reply to the WiHongis' appeal, the Minister stated his understanding that the Te Haara family holds mana whenua status over the site D2, and did not accept that the WiHongis are kaitiaki or have mana whenua status in relation to the site D2.

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[35] Report and Decision, pg 11.
[36] Submissions of counsel for the Northland Regional Council, paragraphs 9.12 to 9.15.
[37] Ibid, paragraph 12.19.
[38] Ibid, paragraph 12.20.

The Regional Council's challenge to Native Land Court decision

[506] Before we review the main evidence on kaitiakitanga, we address the Regional Council's challenge to Ngati Rangi's claim to be kaitiaki based on the Regional Council's impugning of the Native Land Court 1873 decision vesting the Tuwhakino Block in Heta Te Haara.

[507] The objection taken by the Regional Council to the Native Land Court's decision was not directed at some aspect of the specific decision itself. Rather, the Regional Council takes exception to the decision as giving effect to a practice of individualisation of titles to Maori land. From questions asked by counsel for the Regional Council in cross-examination of Mr Gardiner, it appears that the Regional Council regards the individualisation of titles as a breach of the Treaty of Waitangi. The Court was not informed whether the Regional Council has adopted a consistent policy of questioning all decisions by the Native Land Court concerning land in its region that gave effect to that practice.

[508] As the Regional Council's criticism is not specific to the particular decision vesting the Tuwhakino Block in Heta Te Haara, but is a general objection to individualisation of titles to Maori land, it is an objection to the policy, a political position. The Regional Council is, of course, an elected body, and there are respects in which it might properly take part in campaigns on political issues. However the Regional Council's part in these proceedings is as the primary decision-maker on the Minister's resource consent applications under the Resource Management Act 1991. We are unsure that *in that capacity* taking part in political issues is within the Regional Council's functions under that Act.[39]

[509] In any event the functions of the Environment Court do not extend to taking sides on political issues, and it has no authority to make findings about "breaches" of the Treaty, or to entertain claims impugning decisions of the Native Land Court. We hold that these proceedings do not provide an appropriate forum for resolution of the issue about individualisation of titles to Maori land.

[510] We decline to form any opinion about that practice, or about whether the 1873 Native Land Court decision was in any way questionable for that or any other reason, or is questionable now. If the Regional Council wishes to have that decision set aside, it will have to find another forum.

[39] Resource Management Act 1991, s 30.

[516] Mr Anania testified that the Tuwhakino block is within the rohe of Ngati Rangi, and the decision on the use of the land according to Ngati Rangi tikanga rests primarily with the Te Haara whanau, and generally with Ngati Rangi. He gave the opinion that claims that the prison violates Maori culture are unfounded. He denied that Te Roroa iwi are kaitiaki of Tuwhakino.

[517] Mr Gardiner also testified that from his research although Ngati Rangi, Ngati Hine and Te Uri o Hua share the kaitiaki duties over the Ngawha Springs and the geothermal resource, Ngati Rangi are kaitiaki in respect of the D2 site on the Tuwhakino block of land and the waters that flow through and under that site. While members of Te Uri o Hua and Ngati Hine hapu have a general interest in the D2 area, it is Ngati Rangi which has primary responsibility for being kaitiaki.

[518] Mr Gardiner explained that kaitiaki status is based on possession or authority over land; and although the land was disposed of in the 19th century, the Te Haara whanau are specifically responsible kaitiaki for the Tuwhakino land and the D2 site and the waters which run through or under the site, and retain spiritual and cultural authority over the area. He testified that the Department of Corrections had listened to the kaitiaki and properly provided for their relationship with the Ngawha stream.

[519] In cross-examination Mr Gardiner accepted that a decision which affected the resources of an area which were important to several hapu would involve the rangatira of those hapu. That is consistent with the evidence of Dr Hohepa that what is under the land, the taonga called Ngawha, is the business of a multitude of tribal guardians because its use affects all others beyond the demarcated land holdings. He stated that there has to be wide decision-making and consensus.

[520] Mr Ron WiHongi deposed that prior to the grant of the Tuwhakino Block to Heta Te Haara there had been ten owners of the land, and that they were of Te Uri o Hua hapu o Ngapuhi, not Ngati Rangi, and were his tupuna. He claimed that this gave him the right as kaitiaki also.

[521] Mr Hooker deposed that at the time of the Battle of Pikoi, about 1790, kaitiakitanga to the Ngawha area was held jointly by Te Uri o Hua and Ngati Pou; and gave the opinion that Ngati Rangi could not have succeeded to any kaitiakitanga rights additional to those they had obtained from Ngati Pou. Mr Hooker stated that he could not support Mr Gardiner's view that Ngati Rangi had primary kaitiakitanga

over the Tuwhakino block, a view he considered had been influenced more by consideration of European concepts of surveys and land titles than Maori custom.

Findings on kaitiakitanga

[522] From our review of evidence it appears that there is general acceptance that Ngati Rangi (and particularly the Te Haara whanau) are kaitiaki of Tuwhakino Block, and indeed the primary kaitiaki in respect of it. We accept that Te Uri o Hua also have a claim to be kaitiaki in respect of a general area that includes the Tuwhakino block based on occupation prior to 1790. However there was no evidence that Te Uri o Hua had in recent decades, prior to the Minister's proposal, asserted their claim to kaitiakitanga in respect of the D2 land or exercised any kaitiakitanga in respect of it.

[523] Accordingly we find that Ngati Rangi (particularly the Te Haara whanau) are the primary kaitiaki in respect of the site (Tuwhakino D2). We also find that Te Uri o Hua have a claim to be kaitiaki in respect of a general area that includes that block too, although that claim depends on conditions more than two centuries ago, and not having been asserted or exercised in recent decades, is additional to Ngati Rangi's role as kaitiaki.

[524] We also find that Ngati Rangi, as the primary kaitiaki, are satisfied that the Minister's proposal has particular regard to kaitiakitanga. We do not accept the suggestion that their satisfaction on the point is questionable on the basis that they did not understand the scale of the proposed works. We find that the scale of the works is not as significant as the extent to which the project has been deliberately designed to respond to the cultural matters raised by the primary kaitiaki, that it excludes the geothermal ponds on the site that are valued taonga, and would not interfere with the geothermal system (in respect of which Ngati Rangi shares kaitiakitanga with other Ngawha iwi, and indeed all of Ngapuhi) in any way.

[525] The assertion by the WiHongis, of Te Uri o Hua, that the proposal does not have particular regard to kaitiakitanga appears to be based on the understanding that the works will affect the geothermal system. Earlier in this decision we reviewed the expert evidence on that question. We found that the works will not affect the geothermal system in any way at all.

[526] In the result we find that the proposed works and designation have particular regard to kaitiakitanga.

Principles of the Treaty of Waitangi

[527] The other important provision of Part II of the Act is section 8–

> 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).

[528] The principles of the Treaty that were raised in these proceedings were the principle of consultation, and the principle of active protection. We consider them in turn.

The Principle of Consultation

The Issue

The opponents' contentions

[529] The opponents submitted that the Minister had a duty to consult with iwi on the proposal, and that "the Minister's consultation process was deeply and fatally flawed", and "falls far short of meeting the minimum legal requirements, especially having regard to the importance of what is at stake for those involved".

[530] The first ground of that contention was that importance had been given in the consultation process to Ngati Rangi hapu and its spokesman, Bishop Ben Te Haara; that this had meant that "those outside the Ngati Rangi 'in-crowd' (the Bishop's close associates) had been left feeling unimportant and unrecognised", and "feeling, rightly or wrongly, that their views do not matter to the Minister nearly as much as the views of those from Ngati Rangi who have been saying what the Minister wants to hear"; and that this amounted to "a travesty of the whole notion of consultation," in that "instead of all kaitiaki being 'heard' (in the natural justice sense) on an equal footing, some appear to have been 'heard' more than others".

[531] The second ground of the contention was that the evidence called on behalf of the Minister did not establish whether the Waitangi Tribunal Report had been drawn to the attention of the Minister, nor whether the information gathered in the

community had been reported accurately back to the Minister; and it was claimed that some information "which may have been reported back to the Minister, was incorrect (ie the report which indicated that there was a high level of community acceptance at Ngawha in respect of the prison proposal)".

The attitudes of other parties

[532] The Regional Council's hearing commissioners made a finding that extensive consultation had been undertaken by the applicant with tangata whenua. The Regional Council's case in the Environment Court proceedings did not challenge the adequacy of the Minister's consultation with iwi.

[533] Counsel for the Minister pointed out that section 8 does not impose a duty to apply Treaty principles in every case. The duty is to have particular regard to the principles of the Treaty.

[534] The Minister accepted that he had a duty to consult relevant tangata whenua. It was his case that the Te Haara hapu were the relevant tangata whenua, the site being their ancestral land, and that there had been extensive and appropriate consultation with them, both in respect of the requirement for designation of the prison, and in respect of the resource consent applications. It was claimed that the consultation had extended to the WiHongis and their hapu, and to the Ngati Rangi Ahuwhenua Trust.

The Minister's media release

[535] On the opponents' contentions of inadequate consultation, additional submissions were presented later, following the issue on behalf of the Minister of a media release prior to the hearing of the proceedings having been completed.

[536] On 12 October 2001, a media statement and speech notes were issued from the office of the Minister and placed on his website. The media statement was a precis of a speech the Minister intended to make at the Annual General Meeting of the Far North Justices of the Peace Association. It contained the following sentence:

> ... let me say, I am pleased that a regional prison will be built at Ngawha. It will be a community asset and nothing like the 19th century Mt Eden Prison, which I intend to close.

[537] In a statement to the Court, the Minister said that he had not written those words, and although the press release had been authorised by him, he had not read those words until they had been faxed to him prior to the meeting. He added that after seeing the speech notes, he had removed the reference to the proposed prison being built at Ngawha, because he had been well aware that the proposal for Ngawha was not a matter for him to comment on. At the meeting he had not expressed confidence that the prison would proceed at Ngawha, nor had he made any statement about the suitability of the Ngawha site.

[538] The Minister acknowledged that the media release should have made clear that the decision as to whether the facility would proceed at the Ngawha site was one for the Court. He affirmed that he had not intended to influence the Court or to imply that opposing parties' cases would not be given careful and impartial consideration by the Court. The Minister apologised to the Court.

[539] Additional contentions on consultation were made on behalf of the opponents arising from the Minister's media release. We quote the relevant passage from counsel's additional submissions:

> 5. If, at the time he gave his speech, the Minister had been properly aware if the concerns of those in the Ngawha community who are opposed to the prison proposal, it is highly unlikely that he would have allowed material concerning that proposal to go out from his office without it being carefully vetted, let alone permitting it to be released to the media without his even looking at it at all. It is also highly unlikely that he would have presented a speech mentioning the proposed prison in even the limited form which he has admitted and as is described in the supporting documents which he himself has tendered to the Court.
> 6. As the Court well knows, all persons exercising functions and powers under the Act are required to give effect to the provisions of Part II. Of course, that must include a Minister acting as a decision-maker. But if a Minister has not properly been made aware of concerns in the local community, including in particular the concerns of Maori as *tangata whenua* and/or as *kaitiaki*, it is surely impossible for the Minister to carry out his function in accordance with the requirements of the Act.
> 7. The relevance of the admissions made by the Minister is that they provide support for the arguments advanced earlier concerning consultation and the protection of Maori interests. The Minister has admitted conduct which, with all due respect, may properly be described as both casual and careless. Indeed it may be said that the Minister's conduct was completely lacking in any sensitivity to the concerns of those in the local community for whom the prison proposal represents a desecration of a very special place.
> 8. An available inference is, therefore, that the Minister's officials had not bothered to acquaint him properly with the concerns of the local community. Alternatively, the Minister had not taken in such advice as he had been given. Either way, the situation represents an abject failure so far as the consultation process is concerned. How could any opponent of the prison proposal who had been 'consulted' by the Minister's officials be expected to believe that his or her message had 'got through' to the decision-making

level in circumstances where the responsible Minister admits releasing material to the media in which the outcome of the adjudicative process is treated as a forgone conclusion?

The Minister's response

[540] Counsel for the Minister submitted that this issue was an attempt to make a mountain out of a molehill. Counsel observed that that the issue arises from a few ill-chosen words, which were not the words of the Minister but of someone in his office who had prepared the press release on his behalf.

[541] Counsel announced that the Minister had been well aware that he should not make statements about the merits of the issues before the Court or the likely outcome of the proceedings, and had not done so. Counsel also pointed out there was no evidence that what the Minister actually said at the meeting of the Justices of the Peace was objectionable.

[542] Furthermore, counsel maintained that the adequacy of the consultation on the Minister's behalf is not to be measured by whether the Minister agrees with the issues raised, nor by what advice the Minister may have received as to the possible outcome of the proceedings.

[543] Counsel observed that the Minister's position is no different from that of a developer who has an application before the Court, in that a developer is entitled to tell the public what type of development is proposed (at least where that is not in issue before the Court). Counsel also observed that a statement released by the Minister's office in 2001 is not relevant to the adequacy of the site selection process that ended in 1999.

The Requirements of the Law

[544] There is no dispute that the Minister had a duty, in accordance with the Treaty principle of consultation, to consult with Maori over the proposal. The dispute is over the adequacy of the consultation that was made. Before reviewing the evidence on that question, we should establish what the requirements of the law are in respect of such consultation.

[545] Counsel for the opponents relied on an article by Paul Beverley *The Mechanisms for the Protection of Maori Interests Under Part II of the Resource*

Management Act 1991[41] which collects many of the materials available in this respect. Counsel for the Minister preferred to rely on the case law direct, and particularly the desirable features of consultation with Maori that were identified more recently by the Environment Court in *Land Air Water Association v Waikato Regional Council.*[42]

[546] Even the section of Mr Beverley's article that relates to consultation extends over 13 printed pages. We do not need to consider all the contents. Our present purpose is to consider two particular questions that arise in this case, namely: Who should be consulted? and What should be the content?

[547] Mr Beverley suggested dual purposes of consultation.[43] The first is recognition of the rights of Maori under the Treaty as a party who has a right to be consulted (the recognition limb). The second purpose is to obtain appropriate and accurate information on the potential effects on affected Maori (the information limb).

[548] For the present, we provisionally accept that description of the purposes of the consultation principle. From them we draw that the Maori who are to be consulted are those who hold rangatiratanga or kaitiakitanga in respect of the natural and physical resources affected by the proposal, and those who possess appropriate and accurate information on the potential effects of the proposal on affected Maori. In a particular case, the second class might extend beyond those who hold rangatiratanga or kaitiakitanga in respect of the resource affected.

[549] The dual purposes may also inform the content of the consultation. Those consulting need to impart enough about the proposal that those consulted are able to respond with appropriate and accurate information on the potential effects on affected Maori, so that it may be considered by the decision-maker. The consulting party, while entitled to have a working plan in mind, has to keep its mind open and be ready to change or even start afresh. However, although consultation involves meaningful discussion, it does not require agreement, and does not necessarily involve negotiation towards an agreement.[44] As counsel for the Minister submitted, the principle does not give a right to veto any proposal.[45]

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[41] (1998) 2 NZJEL 121.
[42] Environment Court Decision A110/01, paragraph [453].
[43] 2 NZJEL 121, 131.
[44] See *Wellington International Airport v Air New Zealand* [1993] NZLR 671, 675.
[45] *Watercare Services v Minhinnick* [1998] NZRMA 113 (CA).

[550] In its decision in the *Land Air Water* case, the Environment Court identified the information purpose. That does not mean that it rejected the purpose identified by Mr Beverley as the recognition purpose. Rather, it does not appear that any party submitted that this was a possible purpose of consultation as a principle of the Treaty.

[551] From our review of the Minister's submissions, and the list of desirable features identified in the *Land Air Water Association* decision, they are not inconsistent with the propositions in the previous two paragraphs. Accordingly we adopt them for the purpose of this decision.

The Evidence

[552] We now review the evidence on the consultation carried out on the Minister's behalf.

Witnesses for the Minister

[553] Mr J Hamilton, the Project Director responsible for the proposed Northland regional corrections facility, testified that the Crown's obligations to its Treaty partner had always been a significant part of the project. He deposed that in the spirit of partnership the Department had deliberately sought out and entered into discussions with the Ngati Rangi hapu, the kaitiaki of the site, and had built strong relationships with the hapu development committee and with key Ngati Rangi leaders.

[554] Mr Hamilton summarised numerous meetings he had had with the committee and individual meetings with its members; and reported having attended a two-day hui sponsored by Ngati Rangi at Ngawha Marae. The witness also reported that senior representatives of Ngati Rangi and supporters from wider Tai Tokerau had visited Wellington and met with the Minister, the Associate Minister, the Minister of Maori Affairs, and other Members of Parliament. Meetings had also been held with senior staff of the Department of Corrections.

[555] Mr Hamilton testified that many of Ngati Rangi's concerns about aspects of the project had been addressed at an early stage; and that this had ensured that their status as kaitiaki of the land had been clearly recognised. He reported that the Department had entered into a formal memorandum of partnership with Ngati Rangi

as kaitiaki. This instrument provides a framework by which issues can be resolved. The memorandum also provides procedures relating to the discovery of wahi tapu, koiwi or taonga on the site.

[556] Mr Hamilton confirmed that although the Crown's relationship with Ngati Rangi would continue to be special, it would not exclude other Maori and the wider community from becoming involved in the project; and that the Department had been actively pursuing development of relationships with other Ngawha hapu and with wider Ngapuhi. The Department had provided extensive information about the proposed facility and earthworks, listened to concerns, and actively sought feedback from Maori and from the public at large. Mr Hamilton had taken part in meetings with Mr Ron WiHongi and members of his whanau and with members of Parahirahi C1 Trust; with the community liaison group (three occasions); with the Ngawha Marae Committee; with Hone Harawira and Cyril Chapman to discuss effective consultation with the wider Tai Tokerau; and with owners of adjacent properties (two occasions). He had also attended a meeting of the Community Board, a community meeting at Ngawha Springs Hall; and a public meeting at Kaikohe to hear views primarily of those opposed to the facility. He had attended a briefing in Whangarei of the Northland Urban-Rural Mission to explain the Minister's objectives and listen to concerns of members. There had also been ongoing liaison with other Government agencies, including Te Puni Kokiri.

[557] It was put to Mr Hamilton in cross-examination that consultation should have taken place with all the hapu who claimed to be kaitaiki of the geothermal resource. The witness responded that he did not see that given that there was to be no interference with the resource and no impact on the resource, but the Department had still endeavoured to have as wide consultation as possible.

[558] Mr Hamilton stated that the relationship with Ngati Rangi had not been exclusive of other hapu, and that the Department had worked very closely with Ngati Rangi to include other hapu and consult with them. He continued that the representatives of Ngati Rangi did actually ensure that there was consultation with the other hapu, and that he had been in meetings with Ron WiHongi and others. We quote from the record of the cross-examination of the witness on this point by Mr Illingworth:[46]

[46] Transcript of evidence page 12, line 26.

... why the great emphasis on one only of a group of hapu all of whom have an equal interest in this project? Ngati Rangi have the status of guardian over the land on which the facility is being built, that is our clear understanding and that has always been my understanding and I don't think that that has been challenged, and because the nature of the work will impact upon that land and also because of the importance of developing relationships with the local community which I referred to in my evidence then we obviously had had a significant focus on our relationship with Ngati Rangi. However as I said before even though there is no evidence to suggest that we will have any impact upon the geothermal resource or the springs at Ngawha, we have endeavoured to consult with all parties, but I agree that there has been a greater emphasis on the relationship with Ngati Rangi but that that is not at the exclusion of others, and in fact they have been able to communicate far more effectively with other hapu than on occasion with respect of the Department.

So can we have it clear do you accept that all of the hapu referred to in the Waitangi report have a proper basis upon which to be heard and consulted in relation to this project? No, not in respect of the geothermal resources, we are not impacting upon that resource, however we do obviously to build a relationship that has driven our consultation with others.

I suggest to you that is an extraordinarily blinkered approach to take in this matter? The issue is not whether or not consulted because we definitely have consulted, what you have asked me is whether the primary driver for that consultation was an acknowledgement of the geothermal issues and what I am saying is that no, that has not been the primary driver for the consultation that has gone on.

[559] Mr C Fraser is an official of the Department of Corrections who had personally been involved in consultation on the project to ensure that the Northland community were informed of the nature of the proposal, and that the Department was informed of community concerns so they could be considered and addressed as far as practicable. In his testimony he described ten phases of the consultation process (from a broad regional focus to a site-specific focus), describing the focus of each phase, the information provided by the Department, the methods used and the main issues raised. He produced details of numerous key meetings and summaries of the main issues.

[560] In the first phase, meetings had included representatives of Te Rarawa and other Northland iwi.

[561] In the second phase, a bilingual brochure was issued which addressed Maori cultural issues. Seventeen key meetings with iwi included Te Tai Tokerau Trust Board, Te Runanga of Nga Puhi, and a meeting with Nga Puhi at Awataha Marae.

[562] Specifically for consultation with tangata whenua, a Mr G Martin had been appointed as community liaison advisor to advise on cultural matters, provide local contact, maintain informal dialogue with Maori and facilitate the interface between Maori and the Department.

[563] The third stage included 22 meetings, mostly with Maori groups, including a meeting at Kaikohe with the late Mr Graham Rankin, a respected senior kaumatua of Ngapuhi.

[564] Mr Fraser reported that at the site-selection phase, iwi had expressed in numerous meetings the prime importance to them of accessibility of the site and a central location near an urban service centre. The site-selection criteria were changed as a result of those and other comments.

[565] In phase 4 the amended guidelines were published and the public were invited to register possible sites. Among the 74 put forward was the Ngawha site D1 submitted on behalf of Ngatirangi Ahuwhenua Trust. This phase also included a tour of the Hawkes Bay regional prison by representatives of each hapu of Te Tai Tokerau.

[566] Phase 5 focused on publication of preliminary investigations and evaluation of four short-listed sites, and inviting comments. There were a number of public meetings as well as numerous small group and individual discussions in the communities associated with the four sites. Face-to-face consultation focused on neighbouring communities, hapu, and adjoining property-owners.

[567] In this phase there were meetings with neighbours of the Ngawha site, with Mr Ron WiHongi and Ms R Tipene, and with Te Runanga a Iwi o Ngapuhi. At the latter, opposition was expressed to any prison in Ngapuhi Whaanui, the majority preferring "an institution that will give Ngapuhi Whaanui total autonomy and control in the management, delivery, and rehabilitation of our people". In cross-examination Mr Fraser gave his perception that this dissent was more of a social nature concerned with the prison rather than with environmental effects.

[568] Phase 6 had started with a mail-out of 700 information packs concerning the preferred Ngawha site. They were sent (among others) to the people of Ngawha, of Ngawha Springs, and others in the vicinity of the site. A brochure was delivered to all houses in Kaikohe.

[569] Mr Fraser testified that the Department had identified Ngati Rangi as the relevant kaitiaki and in respect of the D2 site, particularly the Te Haara whanau. So in respect of earthworks, streamworks and architectural design consultation had primarily been with Ngati Rangi (including the Te Haaras) since the works would affect their ancestral lands and waters. In respect of operation of the facility, there was an effort to consult with other hapu and wider Ngapuhi. He reported that some of those who were strongly opposed to the facility had been unwilling to engage in discussions.

[570] The ensuing consultation focused on the Kaikohe and Ngawha areas and particularly on iwi and adjoining property owners. Key meetings included Ngatirangi Ahuwhenua Trust, Ms Beadle and her sister, and a public meeting at Ngawha Springs.

[571] Following notification of the Minister's requirement, Phase 7 of the consultation process was directed to understanding the concerns of stakeholders and ensuring that they understood the project and how it was likely to affect them. Individual meetings were held on request to discuss concerns and answer questions about the project. A meeting with submitters was held at which sixteen submitters and 8 others attended.

[572] Phase 8 of the consultation process followed the requirement hearing. Specialist Maori design consultants were engaged to help ensure a traditional cultural perspective in the plans. The architect Mr Rewi Thompson is of Maori descent, and his professional practice emphasises design that incorporates Maori cultural elements. He deposed to having been involved in many consultative meetings (including with people from Ngati Rangi and Ngati Hine).

[573] Concept plans were presented at meetings of the wider Ngati Rangi hapu, and a hui involving Ngati Rangi, Te Runanga o Ngapuhi, Te Uri-o-Hua, Ngati Whatua, Hiku o Te Ika and Te Kauhanganui Trust at which some time was spent discussing

design issues. Design issues were also discussed at two meetings with Te Tai Tokerau interim working party.

[574] Numerous further meetings were held over the resource consent applications to the Regional Council and the assessment of environmental effects of implementing those consents. Thirteen Maori groups were identified by the Regional Council for consultation. Again the meetings included (among others) Te Runanga o Ngapuhi, Ngati Rangi, Te Uri-o-Hua and Ngati Hine hapu, and specifically Riana and Ron WiHongi.

[575] In phase 9 of the consultation process, meetings were held with adjacent landowners, iwi, and submitters. In addition meetings of Trust beneficiaries were held in Whangarei and at Auckland. In practice it proved difficult to identify and establish contact with the great many owners of blocks of Maori land held in collective ownership adjoining the site.

[576] The tenth phase of consultation included meetings with the community liaison group and attendance at a public meeting at Kaikohe which about 150 people attended. Mr Fraser's note recorded: "The meeting was boisterous and most of those attending were opposed to the project."

[577] Mr Fraser testified that two meetings had been held specifically for discussion between the Department and the WiHongis to explain the proposal, are to discuss their concerns and how they could be addressed.

[578] In cross-examination Mr Fraser was asked whether, during the consultation process, it had been explained to the community that the proposed facility would accommodate in part maximum security prisoners. The witness referred to the first information pack which stated "accommodating all security levels of inmates", and to the second information pack which stated "a small number of cells for maximum security inmates". In re-examination he agreed that the notice of requirement itself also referred to inmate accommodation ranging from low through medium to maximum security.

[579] Mr Fraser was also asked whether the community had been told that some units would be situated outside the security perimeter. He responded that design solutions of that nature had not been addressed until further down in the process.

[580] Ms Barton testified to having reviewed the Department's consultation process. She gave the opinions that the time allowed for each phase had been sufficient for discussion with and obtaining responses from interested parties; that the material distributed had been clear and timely, and enabled those consulted to make informed and useful responses; that responses had influenced a number of decisions, including site selection criteria and site layout and design. The witness considered that the department had made a genuine effort to consult and had shown considerable good faith in consultation.

[581] In cross-examination, Ms Barton confirmed that in her review she had been aware that there was diversity of views about the proposal among the residents of Ngawha Springs village, some being quite strongly opposed.

[582] Bishop Te Haara confirmed that there had been extensive consultation between the Minister's representatives and Ngati Rangi and the Te Haara whanau, in the spirit of partnership under the Treaty of Waitangi. The matter had been discussed in the whanau, and although some were opposed, the family consensus was in support.

[583] In evidence in reply, Bishop Te Haara denied that those who were involved in discussions with the tribe had been hiding information from Ngati Rangi. In February 1999 there had not been a great deal to tell people; they had not had details of the proposal until much later, but he, Gordon Te Haara, and others had strived to keep wider Ngati Rangi involved. A committee had been formed for discussions with the Minister, made up of organisations based in Ngawha, and anyone could join.

[584] Mr Gordon Te Haara, a senior kaumatua of Ngati Rangi, and a kaitiaki of Tuwhakino, testified that the Department of Corrections had consulted with Ngati Rangi and Ngapuhi. He had been involved in many meetings since 1998, in which the Minister's representatives had presented their views and ideas and sought the views of the community and iwi on their proposals. In cross-examination he explained that the consultation was done with wider Ngati Rangi.

[585] Mr Reuben Clarke testified that other hapu had been offered a role but some had chosen not to take part. He agreed that the other Ngawha hapu have a role in relation to ensuring the Ngawha geothermal taonga is protected, but stated that their

role is more limited in relation to the Tuwhakino land. Ngati Rangi has long held customary authority over Tuwhakino.

[586] Mr M Anania testified that Ngati Rangi had been properly consulted, the consultation being carried out with those kaumatua and others who represent Ngati Rangi and with the Te Haara whanau as the primary kaitiaki of the site and the waters on and under it.

[587] In reply to testimony by Ms R Tipene that she had found out about the prison by accident, Mr Anania referred to a special meeting in February 1999 at which there had been discussions with beneficiaries of the Ngati Rangi Ahuwhenua Trust about use of the D1 site for a prison. Mr Anania observed that this had been well before the Minister's decision adopting Ngawha as his preferred site. He also observed that Ms Tipene had made it clear that she was opposed to a prison anywhere near Ngawha and that she did not wish to consult with the Department of Corrections over the issue. She had been free to take part in discussions with the Department but often had chosen not to do that.

[588] Mr Anania reported that it had been his experience that the Department had gone to great lengths to involve Ngati Rangi in the proposal and to seek its views, and that those who were opposed to the prison had been given ample opportunity to express their views. He agreed that there had been no general hui of Ngati Rangi in 1999 to discuss the prison proposal, and explained that this was because the proposal at that stage related only to land of the Ahuwhenua Trust and it had been appropriate that the discussions be held with the trustees.

[589] On consultation with Te Roroa iwi, Mr Anania testified that this consultation had been carried out as part of a hikoi in February 2001, when Mr A Sarich and he had taken the proposed memorandum of partnership with the Minister around Te Tai Tokerau. He reported that Te Roroa had responded that they were not necessarily in support of the building of the facility for inmates in the north. Mr Anania also testified that Ngati Rangi had regularly reported to the other Ngawha hapu by takiwa meetings. He also testified to meetings at which the proposed earthworks and stream works had been talked about, and that he had attended meetings at Auckland of shareholders of the adjoining block on that subject, at which Bishop Te Haara and Mr Gordon Te Haara had been present.

[590] On consultation with Te Roroa, Mr A Sarich, a kaumatua from Waimate North, described a meeting at Pakanae Marae held on 8 July 2000 at which Department of Corrections officials had met with a large number of people from Waimamaku, Kokohuia, Pakane, Whirinaki, Rawene and Oamania areas. Mr Gordon Te Haara and Mr Anania had also been present.

[591] On consultation with Te Rarawa, Mr Sarich referred to a meeting held on 30 August 2000 at which representatives of the Department had met with members of Te Rarawa, some of whom he named, and with three from Te Runanga o Te Aupouri.

[592] Mr Sarich also referred to a meeting on 22 September 2000 at which representatives of the Department had met with Far North Iwi at Kaitaia, including representatives of Te Aupouri, Ngati Kuri and Ngati Kahu. The witness reported that quite a lively discussion had ensued, both for and against the proposed prison.

[593] Mr Sarich described a further meeting on 26 February 2001 at which an itinerary for a further round of consultation meetings with various hapu and iwi of the Far North, Ngati Whatua, and other areas of Te Tai Tokerau had been discussed with representatives of Te Tai Tokerau and Te Aupouri. Over following days meetings had been held with Te Aupouri, Te Rarawa, the Chairperson of Te Tai Tokerau Maori Trust Board, Ngati Kahu Trust Board and Te Tai Tokerau District Maori Council. At the meeting with Ngati Kahu Social Services and Te Runanga O Ngati Kuri Ngai Takoto, those groups had brought together quite a delegation. Meetings were also held with the regional director of the Ministry of Maori Development, a spokesperson for Ngati Hine, with a number of people of Ngati Wai Runanga, and with representatives of Ngati Whatua. The witness reported that Mr Taoho ('Mighty') Nathan (an elder of Te Roroa) had stated that he wanted to stay out of any consultation concerning the facility. In cross-examination he agreed that Te Roroa, which had a long association with the Ngawha area, had not been consulted prior to the designation hearing or the Regional Council hearing.

[594] Mr Sarich also referred to a hui on 28 July 2001 designed to bring together the opposers and supporters, to provide an opportunity for both sides to meet to listen to each others perspective.

[595] Mr Gardiner deposed that the Department of Corrections had conducted numerous discussions with all of the major iwi entities and Maori organisations, including Te Runanga o Ngapuhi, Te Tai Tokerau Trust Board and the New Zealand Maori Council. It had engaged the hapu and organisations in the immediate area over the construction of the prison itself once the site had been selected. Efforts had been made to engage the three key hapu in the Ngawha area, although some were not prepared to take an active part in the consultation. It had consulted with those who were mandated to speak on behalf of the hapu. It had provided opportunity for whanau, hapu, iwi and Maori to express their views and have them considered, including those who opposed the proposal. From his experience, Mr Gardiner described the consultation as commendable, extremely extensive, and well exceeding the level of consultation that more usually occurs.

[596] Mr R Thompson described his consultation with Ngati Rangi as with those having mana whenua and being kaitiaki of the site in respect of cultural safety. He described the cultural concerns that had been expressed to him, and the way in which they had been addressed in development of the cultural concept, including impact on whenua.

[597] Mr Thompson deposed that he had consulted with Ngati Rangi in an appropriate and meaningful way, and had responded to their concerns in developing the cultural concept.

[598] Mr Gordon Te Haara referred to suggestions that the prison would have a negative visual impact. The witness responded that the proposal incorporates features of the land into the design, which incorporates tikanga concepts. Ngati Rangi continues to be consulted on the design and their views continue to be taken into account, particularly about retaining the natural flow of the stream through the site.

Witnesses for the opponents

[599] Dr Hohepa, a witness called on behalf of the Regional Council, asserted that Ngapuhi nui tonu, especially iwi and hapu such as Te Roroa and Ngati Pou, had not been consulted in a clear, formal and culturally sensitive way. He continued that the rights of other kaitiaki hapu to discuss the possible disturbance of their ngawha taonga should be heeded.

[600] Dr Hohepa gave the opinion that some 60,000 Ngapuhi live in Auckland out of a total of 100,000; and about 6,000 live in Wellington. He stated that no formal consultation had taken place with Ngapuhi in Wellington, nor with some 4,000 of them who work for, or are associated with consultancies, for Government.

[601] (Dr Hohepa had been called as a witness on behalf of the Regional Council, which expressly disclaimed any question of the adequacy of consultation with iwi. The apparent inconsistency between that disclaimer and asking its witness to read a statement of evidence that contained those statements is not clear to the Court.)

[602] In cross-examination Mr Ron WiHongi agreed that he understood the scope of the earthworks and streamworks involved in the proposal, that he had been on a site visit with other opponents when officials from the Department had fully explained the extent by reference to stakes in the ground.

[603] Ms Riana WiHongi questioned the Minister's consultation. In cross-examination she agreed that she had attended meetings at which the Minister's representatives had presented what they were going to do, and that she had voiced her views on the matter. The witness testified that she had also voiced her views at meetings at Ngawha marae, had made submissions to the District Council and to the Regional Council, had attended the Regional Council's prehearing meeting and had taken part in a site visit. In re-examination she explained that the Minister's officials had not treated her as tangata whenua, but as an afterthought. She referred to the architects coming to show them plans that looked complete, and that it was offensive to her that someone from another tribe came to tell her what was on the land and was not willing to listen to tangata whenua.

[604] Mr Waiora WiHongi testified that at all the hui he had attended at which the Department of Correctinos was present, he had only heard them tell what they proposed to do, and that they had not actually listened to what the people were saying, but had formed an allegiance with those who were in agreement with their plans.

[605] Mr Tamaiti WiHongi testified that he had attended every meeting he could reach, he had gone to meetings at Northland College, at Ngawha Marae, at Ngawha Springs community hall, at Kohewhata Marae and many others, and that people had said very clearly how they felt about the prison being sited at Ngawha and about having a prison at all. He felt that they had been ignored.

[606] Mr Hooker testified that no consultation had taken place with Te Roroa, an iwi with ancestral associations with Ngawha. He produced copies of correspondence between Te Roroa and the Minister from March to August 2001 protesting about lack of consultation.

[607] Ms R Tipene is Ngati Rangi, though not of the Te Haara whanau. She lives in Whangarei and has an interest in family land lying to the north of the subject land, containing the closest occupied building to the site for the facility. She gave her attitude of being "opposed to our whenua being used to lock up our own", and deposed that from September 1999 the Department of Corrections "just ran over the locals and those in opposition and ignored or did not speak with those who would be most affected, like ourselves". In cross-examination she explained that her family's primary concern was that had their grandfather been alive, he would not have allowed this to progress.

Payments for consultation services

[608] Mr J Hamilton was asked in cross-examination if any of the persons called as witnesses on behalf of the Minister had been given indications that they would receive benefits if the project goes ahead. The witness responded that all the Ngati Rangi witnesses were supporting the project because they believed it would bring benefits to Ngati Rangi and the wider community by bringing inmates back and by bringing a higher level of activity to Kaikohe. He added that there had been no individual assurances in respect of personal benefit.

[609] The witness was asked if any benefits, financial or otherwise, had been given to any of those witnesses. He responded that over three years or so people of Ngati Rangi had been paid for services they had given to the Crown in time, in advice, and in organising hui on behalf of the Department, and participating in public hearings, and this had been by normal payment for services.

[610] At the request of counsel for the opponents, the Department provided the Court with a list of payments made during the consultation process. The list was identified as Exhibit 10. In order to protect the privacy of the individuals named, publication of the list without leave of the Court was prohibited. Consistent with that, we refrain from naming, in this decision, the witnesses who were cross-examined about payments recorded in the list as having been made to them.

[611] One witness was asked what a payment made to him had been for. He replied that it had been to do with a lot of research, which had been put forward to the Far North District Council, for time spent and documents collected, and for attendance at a hearing.

[612] That witness was asked about another payment, of $57.00 for reimbursement of a power account for an office at Kaikohe for continuing discussions with the Minister's representatives. Other payments had been for reimbursement of caterers who provided food at a two-day meeting resulting in settling a memorandum of partnership. He agreed that there had been payments to him in remuneration for helping the Department with its consultation with tangata whenua.

[613] Another witness was asked what payments that had been made to him had been for. He replied that they had been for –

> ... consultation, dealings with Maori organisations, Government agencies, WINZ, the Federation of Maori Authorities, runanga, trust boards throughout Tai Tokerau, whanau groups, marae consultation, a whole raft of other other activities, organising meetings, venues, people to attend, kaumatua and all that sort of thing.

[614] The witness agreed that he had spoken at many of the meetings in support of the proposal. He denied that he had been promised payment for any future activities.

[615] Another witness agreed that the total of the amounts paid to him came to over $9600, and that he considered he was worth it.

Responses to consultation

[616] Mr Kenderdine deposed that an initial intention of culverting the stream under the secure area had not been favoured by Ngati Rangi and was abandoned.

[617] Mr Rewi Thompson had been engaged by the Department of Corrections at the nomination of Ngati Rangi for the cultural design advisory team for the facility. He deposed that he had incorporated in the layout and building design numerous suggestions by them.

[618] Mr Fraser testified that issues raised during consultation had been considered and addressed as far as practical through amendments to the design approach,

mitigation measures (landscaping and conservation management) and proposals for ongoing monitoring and community liaison. Early consultation had been taken into account in site evaluation and site selection.

Findings on consultation

[619] Counsel for the opponents contended that the consultation process had been defective both in respect of who had not been consulted, and in respect of failure to inform the Minister of the responses of those who were consulted. The submissions about the Minister's media release were related to that second question. We will make our findings on those elements of consultation separately. The evidence about payments can only be relevant to the second question, so we will consider it in that context.

Adequacy of the class of those consulted (the recognition limb)

[620] We have to consider whether those who were consulted included those who hold rangatiratanga or kaitiakitanga in respect of the natural and physical resources affected by the proposal, and those who possess appropriate and accurate information on the potential effects of the proposal on affected Maori.

[621] There was no evidence about rangatiratanga in respect of the resources affected. Presumably that is because the land had been alienated by Heta Te Haara more than a century ago.

[622] We have already made our findings about those who primarily hold kaitiakitanga in respect of the site are Ngati Rangi (particularly the Te Haara whanau) and that Te Uri o Hua also hold kaitiakitanga in respect of a general area that includes that block, although it is additional to Ngati Rangi's role as kaitiaki.

[623] The evidence supports the claim that the consultation was particularly with Ngati Rangi, and especially with the Te Haara whanau. Although that was criticised by the opponents, we do not accept that this was objectionable. There was no dispute that Ngati Rangi are at least the primary kaitiaki in respect of the land where it is proposed to build the prison.

[624] The hapu which holds ancillary kaitiakitanga in respect of the general area that includes the site, Te Uri o Hua, were plainly also consulted. That is clear from the testimony of Mr J Hamilton and Mr Fraser of the Department, and from the testimony of Mr Ron WiHongi and Ms Riana WiHongi. Mr Waiora WiHongi and Mr Tamati WiHongi had also attended meetings, even though the former felt that the Department had not been listening, and the latter said he felt ignored.

[625] The evidence of Mr Fraser and Mr Sarich establishes that the other hapu of Ngawha, Ngati Hine, were consulted, and the evidence of Mr Fraser and Bishop Te Haara that the runanga o Ngapuhi was consulted. There was also consultation with iwi further afield, Te Rarawa (according to the testimony of Mr Fraser and Mr Sarich) and with Te Roroa (Mr Anania and Mr Sarich). Mr Hooker denied that Te Roroa were consulted, but we accept the testimony of Mr Anania and Mr Sarich on the point, supposing that Mr Hooker was not among those Te Roroa who were consulted.

[626] The evidence also shows that the consultation extended even further to Te Aupouri, Ngati Kahu, Ngati Kuri, Ngati Whatua, and included Te Tai Tokerau Trust Board.

[627] We refer to Dr Hohepa's criticism that no formal consultation had taken place with Ngapuhi living in Auckland and Wellington. The Maori cultural tradition is one of living collectively in whanau, hapu and iwi and of ahi kaa. If the appropriate whanau, hapu and iwi are consulted, both the recognition and the information purposes of consultation can be met. We do not accept that as a matter of law the Treaty principle of consultation requires a proponent to trace every member of every tribe to wherever in the world he or she has gone, and consult with them individually.

[628] The opponents' main criticism about the scope of the classes of Maori who were consulted was that it failed to have sufficient regard to those having kaitiakitanga in respect of the geothermal resource. Counsel expressly did not claim that they had not been heard at all. Rather the complaint was that they had been left with the feeling that their views did not matter to the Minister nearly as much as the views of Ngati Rangi; that they felt unimportant and unrecognised; that some had been heard more than others.

[629] We do not accept that the consultation process was defective in that respect. It is not the geothermal resource that stands to be affected by the Minister's proposal, it is the Tuwhakino D2 land, and the stretch of the Ngawha stream that passes through it. As Ngati Rangi hold the primary kaitiakitanga role in respect of those resources, and have done for more than a century, it was appropriate that consultation with them was regarded as the first priority, and indeed their views were important to the Minister. The views of others were also canvassed, particularly those of Te Uri o Hau. However because their kaitiakitanga in respect of the resources to be affected (Tuwhakino D2 and the stretch of Ngawha Stream through it) is additional to that of Ngati Rangi, we find that consultation with Te Uri O Hua was not defective by being supplementary to that with Ngati Rangi.

[630] In short, we find that the range of the whanau, hapu, iwi, and runanga with whom the Minister's consultation was conducted was adequate for both the recognition and the information purposes.

Adequacy of the response to the comments of those consulted (the information limb)

[631] The appellants contended that the information purpose had not been met in that there was no evidence of what information gathered in consultation was reported to the Minister, that there was not even evidence that the Waitangi Tribunal's report on the Ngawha Geothermal Resource had been drawn to the Minister's attention, and that a report to the Minister of a high level of community acceptance of the proposed facility had been incorrect. So the challenge is not that insufficient information was gathered, but that the information was not reported to the Minister.

[632] Since the media release issued by the Minister's office cannot bear on the recognition purpose of consultation, we infer that it is to be considered in the context of the challenge to the achievement of the information purpose of consultation with Maori.

[633] As counsel for the Minister observed in his final submissions, there was nothing in the notices of appeal, or statements of issues, or statements of evidence to put the Minister on notice that inadequate reporting to the Minister of information gathered in consultation was in issue. If counsel for the opponents had wanted a list of all the reports provided to the Minister and details of every Ministerial briefing, timely notice of that should have been given.

[634] Further, in respect of a decision to issue a designation requirement, the collective knowledge of the officials in the Department of Corrections can be treated as the knowledge of the Minister.[47]

[635] We do not consider that reliable evidence about what was before the Minister (or his predecessor) can be gained from the fact that certain witnesses called on behalf of the Minister were not aware of what had been placed before him.

[636] The Waitangi Tribunal's report was made in 1993 on claims by trustees of the Parahirahi C1 Maori reservation in respect of the Ngawha Geothermal Resource. The main text occupies 185 pages, and the covering message to the Minister of Maori Affairs states–

> ... a full appreciation of the quite complex and novel issues involved could only be had by a perusal of the whole report.

[637] Those who do make a perusal of the whole report will be amply rewarded by that impressive document. Officials of the Department of Corrections were aware of it. However, as the proposed corrections facility and its development works have no physical effect on the geothermal system, we are not persuaded that the Minister himself had necessarily to have the report drawn to his attention before deciding to require designation of the site, and to make resource consent applications for the development works.

[638] Those who oppose the proposal are not able to accept the correctness of a report that there is a high level of community acceptance of the project. The evidence shows that there is a considerable level of community acceptance, and there is a considerable level of opposition in the community. Whether the level of community acceptance is correctly described as 'high' is a matter of opinion on which reasonable people might sincerely differ.

[639] In the event, the Minister's decision to require designation of the site, and make the requisite resource consent applications, were not the effective decisions on whether the project can proceed. In these proceedings the Environment Court has authority to confirm, modify or cancel the requirement,[48] and to grant or refuse the

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[47] *Bushell v Secretary of State for the Environment* [1980] 2 All ER 608, 613 (HL). The decision was not of the kind entrusted to the Executive Council by the National Development Act 1979 for which direct consideration by Ministers was required: see *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 183 (CA).

[48] Resource Management Act 1991, s 174(4).

resource consents.[49] Valuable as the Waitangi Tribunal report is, in deciding these appeals this Court has to make its own findings of fact on the evidence presented at its own hearing.

[640] The opponents have had full opportunity to present to the Court, face-to-face in a public sitting, all the information that they possess that they consider should influence the Court's decisions. They had the services of experienced professional counsel and expert witnesses. They took full advantage of those opportunities, and also of the opportunity to cross-examine the witnesses called on behalf of the Minister.

[641] Counsel for the opponents maintained that the defects in the consultation process bring into question the adequacy and reasonableness of the site selection process. That is a separate question from adequacy of consultation with Maori. Counsel also contended that the Minister had an on-going role by continuing to press the requirement before the Court. He observed that the Court is not in a position to repeat the site selection process, nor to carry out any consultation process of its own.

[642] We addressed the site selection process earlier in this decision. We do not accept that the process was defective on account of the failure (if such there was) to draw to the Minister's attention the Waitangi Tribunal report; nor on account of reporting 'high' community acceptance, even if no more than 'considerable' community acceptance was justified.

[643] It is true that the Minister has continued in the Court proceedings to seek the designation and resource consents. It is also true that the Court is not in a position to carry out its own consultation process. However the hearing of these proceedings has provided us with abundant information that is relevant to the issues on which we have to make findings in the process of deciding the appeals. We include in that the Waitangi Tribunal report on the Ngawha Geothermal Field (produced as an exhibit), evidence of the variety of beliefs and attitudes of Maori (especially those based on their culture and traditions), and the variety of opinion in the community generally about the proposed facility. We have no doubt that anyone who wished to do so has had full opportunity to present the Court with evidence on all relevant issues.

[644] We have now to consider the significance to meeting the information purpose of consultation with Maori of the media statement released by the Minister's office.

[49] Ibid, ss 290 and 105(1).

[645] It might be expected that the Minister, in his capacity as requiring authority for the designation and as applicant for the resource consents, would have satisfied himself that the case for the designation and the consents was sound, and to that extent might properly feel confidence in a successful outcome.

[646] That is not to accept that the Minister's position is no different from that of any developer. As a Minister of the Crown he shares particular responsibility for the integrity of the Treaty partnership, and for observing the conventions about the relationship between the Executive and the Judiciary.

[647] In conformity with those conventions, he himself recognised that it was not appropriate during the course of the Court proceedings for a statement to be published in his name implying that the outcome was forgone, and in his favour. It was regrettable that the media release issued by the Minister's office included the passage quoted; and his apology was appropriate.

[648] Even so, the thoughtless action was not his personally, but that of a staffer in the Minister's office. On reading the speech notes, the Minister recognised the transgression, and in the statement presented by counsel he told the Court that he had omitted it from the speech delivered orally.

[649] The opponents suggest that he may still have said something of the kind, but we have no evidence of that. We accept the Minister's statement to the Court.

[650] In any event, for the purpose of questioning the adequacy of the consultation to meet the information purpose, what is significant is the fact that the Minister himself recognised that a statement on his behalf that the prison would be built at Ngawha was inappropriate. Whatever may be said about the staffer, it is that recognition by the Minister which denies the claim that the Minister's conduct was casual and careless, or lacked sensitivity to the opponents' concerns. Similarly it negates the suggestion that the opponents' concerns had not got through to the Minister. He himself recognised that the offending sentence was inconsistent with the Court's duty to decide on those concerns independently of the Executive.

[651] In summary, we do not accept that the issue of the media release from the Minister's office demonstrated a failure in meeting the information purpose of consultation with Maori, nor that any other basis was established for doubting that

this purpose was met in respect of informing the Minister. In addition that purpose has been fully met by the proceedings in the Environment Court.

The significance of payments

[652] We have reviewed the evidence of payments by the Department of Corrections to various residents of the locality for services rendered, mostly in the consultation process.

[653] The Minister could not be expected to carry out the consultation personally. Engagement of people with local knowledge was reasonable and practical. Engagement of opponents of the proposal would be counter-productive. We find no objection in principle to the Department making payments to those who provided services.

[654] Of course there is a risk of payments of amounts that so greatly exceed the value of the services provided that they might be misunderstood as buying people's support for the project. It is not the task of the Environment Court, of its own initiative, to probe for evidence of misdoing of that kind. None was revealed in the answers to cross-examination of the Minister's witnesses, or in any other evidence.

[655] There is no basis for the Court to find that the consultation process was defective on account of payments made to local residents for services provided to the Department.

[656] In summary we do not accept that what Mr Beverley called the information purpose of consultation with Maori, was frustrated by imperfections in reports to the Minister, by the media statement released by the Minister's office, by payments for services to local residents who supported the proposal, or otherwise. We find that the Minister had a full and respectful process of consultation with Maori carried out, in accordance with the consultation principle of the Treaty of Waitangi; and we reject the claims that the process was so flawed that the Minister failed in the duty to take into account the consultation principle of the Treaty.

The Principle of Active Protection

[657] The other Treaty principle that was raised in the proceedings is the principle of active protection of Maori taonga.

The attitudes of the parties

[658] In that respect it was the case for the Regional Council that where Maori cultural and traditional relationships would be adversely affected, but the project must proceed in the public interest, this principle demands that consideration is given to alternative methods or sites. It was contended that alternative locations had not been considered for the Minister's own reasons. The Regional Council urged that a prison could be achieved with substantially less earthworks, and in a locality in Northland which is not a place of cultural importance, and that reasonable alternatives had not been properly investigated and considered.

[659] The section 271A parties also submitted that the duty of active protection had been given scant regard.

[660] The Minister joined issue with the claim that he was under a duty to actively protect Maori taonga, submitting that section 8 does not go that far. His counsel argued that the requirement is to have particular regard to the Treaty principles, not to apply them in every case; and that duty is not absolute but is qualified by reasonableness in the prevailing circumstances –citing the opinion of the Privy Council in *New Zealand Maori Council v Attorney-General* [50] (the Broadcasting case). Counsel observed that the principle of active protection derives from recognition of rangatiratanga, and in relation to the Tuwhakino block, rangatiratanga had been ceded.

[661] In addition, the Minister argued that he is ensuring that the taonga of most importance to Ngapuhi and to nga hapu o Ngawha is actively protected. If the Regional Council is suggesting that the duty of active protection requires that no significant earthworks are carried out by the Crown or its agencies on Maori ancestral land without complete agreement by tangata whenua, that was denied. There is no right of veto.

[50] [1994] 1 NZLR 513, 517.

[662] Counsel for the Minister also addressed the Regional Council's contention that the principle demands that consideration be given to alternative methods or sites. The Minister accepted that if proposed works have significant adverse effects on Maori relationships with their taonga, then he should demonstrate that adequate consideration had been given to alternatives.

[663] In relation to the present case the Minister submitted that the evidence does not establish that there would be significant adverse effects, or significant interference with Maori relationships with the land, the stream, or the underlying geothermal resource. He also contended that alternatives had been properly considered and discarded; and that all alternative sites would have required significant earthworks. Counsel referred to the Judgment of the High Court in *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council and Glendon Trust.* [51]

The law on the active protection principle

[664] In its opinion in the Broadcasting case,[52] the Privy Council said of the principle of active protection–

> Foremost among those 'principles' are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate Government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the Government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.

[665] The Hazardous Substances and New Organisms Act 1996 is cognate with the Resource Management Act 1991, and by section 8 imposes a duty similar to that imposed by section 8 of the Resource Management Act. In a case under the 1996 Act cited by counsel for the Regional Council, *Bleakley v Environmental Risk*

[51] High Court, Wellington, AP6/01; 25 June 2001, Chisholm J.
[52] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC).

Management Authority,[53] the Full Court held that the words "other taonga" in section 6 of the 1996 Act (corresponding with section 6(e) of the 1991 Act) are not limited to the merely physical and tangible, but extends to matters that have spiritual or intrinsic value beyond their physical properties.

[666] Counsel for the Regional Council referred to dicta in the Judgment of Justice Goddard. To provide context we quote parts of the preceding paragraphs as well–

> 25. [The Authority sought guidance from the Court on how spiritual values] can be measured, quantified, weighed, and balanced in accordance with the requirements of the methodology and the Act.
> 26. ... the situation must be assessed on a case by case basis. Each application under the Act will have to be determined in context of the issues arising and in light of the purpose of the Act. No blueprint for spiritual values can be developed for slavish application in every case.
> 27. In that regard two overstatements appear in the majority's decision. The first is the expressed view that spiritual beliefs 'are different' from taonga as understood in previous cases and 'are not amenable to active protection in the same way as more tangible taonga'. The second is the statement that 'active protection as sought by Ngati Wairere would mean decisions under the Act should be made according to tenets of Maori spiritual beliefs, as defined from time to time, and the principles of the Treaty do not go so far'.
> 28. I cannot agree with either statement as correctly interpreting either the Act or Treaty principles. Active protection under the Act may, in some cases, require decisions to be made according to tenets of Maori spiritual belief, where those are significant. As I have said, whether they are significant in any particular case will depend on all the circumstances and the issues arising.

[667] The *Glendon* case[54] concerned application of district plan objectives and policies for protection of heritage resources. The High Court rejected a claim that the Environment Court had erred in law by considering what protection was appropriate in the case, and rejected a claim that the Environment Court had erred in law in holding that protection was not synonymous with preserving the status quo and prohibiting development. Justice Chisholm held that this rigid proposition did not accurately reflect the Act or the district plan. Having quoted section 5 of the Act, the learned Judge said–

> When there is an issue about whether the use or development is compatible with sustainable management those required to exercise functions or powers under the Act have to evaluate all relevant matters and undertake the balancing exercise contemplated by subs (2). In situations involving Maori spiritual and cultural values sections 6, 7 and 8 will also come into play.

[53] High Court, Wellington, AP177/00; 2 May 2001, McGechan and Goddard JJ.
[54] *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council and Glendon Trust* (High Court, Wellington, AP6/01; 25 June 2001, Chisholm J).

[668] Later in his Judgment, Justice Chisholm said–

> ... it needs to be recognised that an application for consent to use or develop a resource is not automatically ruled out because one of the matters referred to in s8 is brought into play.

[669] The learned Judge also referred to the Judgment in the High Court in *Minhinnick v Watercare Services* [55] where it had been held that this section was not intended to confer individuals with a right to veto a legitimate proposal. (That conclusion had been endorsed by the Court of Appeal,[56] which observed that argument to the contrary serves only to reduce the effectiveness of the principles of the Treaty, rather than to enhance them).

[670] Counsel for the Regional Council also referred to a decision of the Planning Tribunal: *Te Runanga o Taumarere v Northland Regional Council,*[57] and a decision of the Environment Court: *Mason-Riseborough v Matamata-Piako District Council.*[58] Of course they do not provide authoritative statements of the law, as the judgments in the superior Courts do. With respect, they are examples of application of section 8 in the particular circumstances of those cases. They do not assist in the interpretation of section 8, or its application to the circumstances of this case.

[671] From the text of section 8, and the Judgments in the superior Courts, we derive these propositions as representing the law about the active protection principle to be applied in this case.

> The person making a decision on a designation requirement or resource consent application has to take into account the principle of the Treaty by which the Crown has an obligation of active protection of Maori property and taonga, which are not limited to physical and tangible resources but extends to spiritual and intrinsic values. The Crown's obligation is not absolute, being qualified by its other responsibilities as the Government, but is to take such action as is reasonable in the circumstances prevailing at the particular time. It may, in some cases where they are significant, require decisions to be made according to tenets of Maori spiritual belief. It does not necessarily require preserving the status quo and prohibiting development of a resource. It does not imply a veto of development by those asserting Maori interests.

[672] It is true that in the *Runanga o Taumarere* case, the Planning Tribunal held that to have neglected to investigate the feasibility of an alternative effluent disposal method which avoided offence to Maori was to fail to honour the principle of active

[55] [1997] NZRMA 553, 571 (Salmon J).
[56] *Watercare Services v Minhinnick* [1998] 1 NZLR 294; [1998] NZRMA 113; 3 ELRNZ 511.
[57] Environment Court Decision A081/95.
[58] 4 ELRNZ 31.

protection. However at the time that decision was given, the Tribunal did not have the benefit of the Judgments of the superior Courts cited above, none of which support the Regional Council's contention that the principle demands that consideration is given to alternatives. We consider that the contention was too broadly stated, and is not an element of the law on this Treaty principle of general application. However consideration of alternatives may, in some cases, be a way of testing whether proposed development of resources is reasonable in the prevailing circumstances.

Application of the law to the case

[673] We now review the respects on which the proposal protects Maori taonga.

[674] First, the site was not selected by random, but as a result of a deliberate process that allowed for Maori interests to be considered. (We described the site selection process more fully earlier in this decision.)

[675] Secondly, the site finally selected is not Maori property, having been alienated more than a century ago, and developed and used for pastoral farming.

[676] Thirdly, save for the geothermal pools that are to be protected, the property contains no battle site, waahi tapu or other taonga. There is no evidence of the development site having being used for any cultural or traditional observances.

[677] Fourthly, the site contains no significant surface manifestations of geothermal activity, and the works will not physically affect Ngawha Springs, Lake Omapere, or the geothermal system in any way. The hearing commissioners' findings about sealing of gas vents and the functioning of wick drains were not correct.

[678] Fifthly, the whanau and hapu who have exercised customary authority over the property for more than a century support the proposal.

[679] Sixthly, although considerable earthworks and streamworks are necessary, the terracing of the building platforms and the realignment of the stream have been planned in accordance with the wishes of tangata whenua.

[680] Seventhly, the Minister has agreed that the geothermal ponds on the site with which the hapu o Ngawha have a relationship are specifically to be protected.

[681] Eighthly, the Minister has agreed to protocols to apply in the event of the discovery of waahi tapu, koiwi or other taonga on the site.

[682] Ninthly, the proposal has been designed so that potential effects on the quality of the water in the Ngawha Stream would be avoided, remedied or mitigated; its habitat for indigenous fish would be improved; and net positive ecological effects are likely. Human wastes would not be disposed of on site, but conveyed to the Kaikohe sewage treatment system.

[683] Tenthly, the corrections facility would be about a kilometre distant from, and would not be visible from, the mineral pools at Ngawha Springs which is the focus of the geothermal taonga of the Ngapuhi iwi.

[684] Although the Minister has sought to protect Maori property and taonga in at least those ten ways, the Regional Council and the other opponents seek that the site not be developed, and the prison be developed elsewhere. The basis for that is that it would be an affront to the mana of Ngapuhi for earthworks of the scale proposed, stream alignment and a prison to be located within the total area of the geothermal field. Obviously that attitude is not shared by all Ngapuhi, but it is strongly held by some.

[685] In these proceedings the Environment Court is exercising functions and powers under the Resource Management Act in relation to managing the use and development of natural and physical resources. As such the Court's duty under section 8 is to take into account the principles of the Treaty. In taking into account the Treaty principle of the Crown's obligation of active protection of Maori property and taonga, it is our judgment that the Crown has taken deliberate steps to do so, at least in the ten respects just listed, and that this action was reasonable in the prevailing circumstances. The fact that some Maori prefer preservation of the status quo, and a veto on, or prohibition of, development of all land within the geothermal field (an area of 180 square kilometres) does not lead us to conclude that the Crown's protection of Maori property and taonga was deficient in the circumstances of this case.

OTHER NON-PHYSICAL EFFECTS

[686] We have reviewd the evidence and stated our findings on the physical effects of the proposal, and Maori cultural and traditional issues arising from it. We now address other non-physical effects that were raised in evidence.

Visual effects

[687] Ms Beadle expressed concern that the siting of the prison would affect the operation of the spa as a result of its visibility, mentioning parts of the spa property from which it would be visible.

[688] The only witness qualified to give opinion evidence on visual effects of the proposal was Mr F Boffa, an experienced landscape architect. Ms Beadle stated that with respect to visibility, she relied on his evidence.

[689] Mr Boffa gave detailed evidence to support his opinion that overall the visual effect of the project would be minor. He deposed that the site had been well chosen, and is well sited and designed, to minimise its visual impact and landscape effects, which can be effectively contained and adequately mitigated.

[690] In particular Mr Boffa testified that the facility would be visible from the area south of State Highway 12 generally between the golf course and the marae; from the northern edge of Ngawha Springs village; from the Ginn's Ngawha Spa Limited property (particularly the northern ridge); and from Ngawha Springs Road between the power station turnoff and Ngawha Springs village. He considered that there would be no adverse visual effects from the State highway, Ngawha Springs Road, or Ngawha Springs village.

[691] Mr Boffa gave his opinion that sight of the corrections facility from the Ginn's Ngawha Spa Limited property would be minor, and it would be completely screened once the proposed mitigation planting is fully established in 4 or 5 years. From the geothermal valley itself, the proposed facility would not be visible. The main tourist attractions on the Ginn's property would not be adversely affected in visual terms.

[692] Mr Boffa's testimony was not challenged by cross-examination or contradictory evidence. We accept it, and adopt his opinions as our findings.

Lighting effects

[693] Ms Beadle expressed concern that security lighting of the facility would be visible to a wide viewing audience, and at night would form a constant reminder of the scale and type of facility that exists. She was concerned that the lighting would be on all night, and would cause a glow over a large area.

[694] Evidence was given by Mr K M Gibson, a consultant lighting engineer, on the effects of lighting at the prison on the surrounding environment, adjacent residential properties, and vehicle traffic. The witness testified that the requirements of the transitional and proposed district plans concerning glare and light spill would be met. He gave reasons for his opinions that due to distances, intervening landforms and landscaping and the types of luminaires proposed, glare would not be a source of irritation or nuisance to the adjacent residential properties, township or vehicle traffic.

[695] In particular Mr Gibson testified that the intended perimeter lights would direct all light intensities downwards, and there would be no lighting directed above the horizontal. All inner lighting would be similar to the perimeter lights or small fluorescent lamps. The illumination levels under the perimeter luminaires at ground level (a maximum of 60 lux, and standard lighting of 40 lux directly below the luminaires) would be relatively low. The proposed lighting would not present a glow in the sky effect, or a glow over the area, even on a misty or wet night. Any light spill would avoid any impact on Ngawha Springs Village and the springs.

[696] Mr Gibson's testimony was not challenged by cross-examination or by contradictory evidence. We accept it, and adopt his opinions as our findings.

Non-physical Effects on Ngawha Springs

[697] We have already stated our finding that the proposal would not have any physical effect on the Ngawha Springs. Now we address the claims of non-physical effects on the springs and the bathing pools at Ngawha Springs.

The evidence

[698] Mr Ron WiHongi described the Ngawha springs as healing waters that heal physically and give sustenance to wairua. In his testimony he asked the rhetorical question–

> How are the Ngawha Waiariki to survive the interference that is planned to enable the prison to be built?

[699] Dr Hohepa gave this opinion in his testimony–

> ... the physical proximity of the prison to the springs, creating its own presence with an adjacent entry way, the aurora and glow of prison lighting and the physical effect its closeness will have on the serenity, peace and ahua (physical and spiritual nature) of the springs. These concerns, and that of women who feel that the prison presence and use of the prison ngawha stream is totally inappropriate to them as women must surely be respected.

[700] In cross-examination Dr Hohepa agreed that his concern was a psychological effect of having a prison near the springs, that

> ... I would hate to see a time when we think Ngawha and a prison leaps up into our minds. That's what I mean from psychological effects.[59]

[701] Mr M Rakena testified that Ngawha is a taonga known throughout New Zealand and the world for its healing powers, and that a prison would undermine this. He did not explain how that would occur.

[702] Mr R R H H Hau, alias R Thompson, stated that he found it offensive for a prison to be sited next to the taonga known as Ngawha Springs, that "to cage people at Ngawha, to kill them in spirit, is to cage and destroy the life-giving essence of Ngawha itself".

[703] Mr T Ogle testified that to him it would be an insult to place a prison anywhere near the great healing powers of Ngawha Springs, that it would destroy the respect shown to the area and the image of Ngawha as a whole. He also gave the opinion that rehabilitation in prison is outdated, solves nothing, and he would not want that in his backyard.

[59] Transcript of evidence page 297, line 26.

[704] Mr Waiora WiHongi testified that the prison would have grave effects on the whenua, the waterways and on Maori culture and beliefs, and would destroy the natural qualities of healing for the body and soul that Ngawha Springs has to offer. He described it as an insult for the Department of Corrections to want to build a prison in Ngawha for Ngapuhi, as Ngapuhi embraces a whole tribe of people, not just a few.

[705] In cross-examination, Mr J Hamilton agreed that there was evidence that some of the tangata whenua regard the Ngawha Springs as a place of healing and therapy. He gave his understanding that building the proposed facility would have no impact on the underlying geothermal resource, nor would it impact on the springs of Ngawha.

[706] Mr Lawless testified that as the building site is located between the two northernmost of the three north-east trending fault zones, it is horizontally as well as vertically removed from the exploitable geothermal resource. He deposed that there is no potential for the project to adversely affect the Ginn's Ngawha Spa operation, or the public springs at Ngawha, or other cold springs and gas seeps in the wider area.

[707] Mr Anania testified that the stream that runs from the prison site does not mingle with the springs, and deposed that the prison will not harm the mauri of the geothermal resources.

[708] In cross-examination Mr Wallace WiHongi deposed that the lake and the springs are interconnected and inter-related, and the land of Ngawha with the lake, so a significant effect on mana whenua of the land could result in a significant effect on the mana of Ngawha. In traditional thinking the land is kin to Maori.

[709] Mr Gardiner testified that there are no connecting streams, or rivers or surface tributaries that link from the D2 site on the Tuwhakino block to the Ngawha Springs, so what happens on the prison site will not be transported to the Ngawha Springs area.

[710] Dr C Barlow deposed that the Ngawha Springs are an historic site and should remain "undisturbed by the ravages promoted under the guise of modernism".

[711] Mr Albert Clarke stated that the Ngati Rangi Ahu Whenua Trust believed that the wairua of Ngawha would be changed forever, and a significant taonga of Te Tai Tokerau destroyed.

[712] Mr D Rankin testified that the lake [Omapere] and the springs were the last taonga of Ngapuhi, and were under threat from the project. If it proceeds their mana as kaitiaki would be gone, and that a place of violence and punishment should not be placed there.

[713] Ms R Martin testified that the Ngawha area is a taonga tuku iho on the surface as well as underneath, and gave the opinion that the imposition of a prison on this site would desecrate the taonga.

[714] Ms M Lee stated that she was against a prison at Ngawha because it would be built over the waters of the taonga, would be a desecration against tikanga and a place of anger and violence that would destroy the spirit of positive healing.

[715] Mr Hooker deposed that resort by Te Roroa to the Ngawha pools for healing and cultural experiences must be preserved from inappropriate development such as prisons, which he described as the antithesis of all that Ngawha stands for.

[716] Mr D B Cunneen had regularly bathed in the pools for relief of arthritis. He deposed that if a prison is erected nearby, the restfulness of the place would be lost, and he would not like to go there. In cross-examination he was not able to tell how visible the prison buildings and structures would be from the springs at Ngawha.

[717] Mrs A M G Sheppard gave the opinion that with a prison there Ngawha would become known for a prison, like Paremoremo has; and that this association would affect people's feelings of Ngawha as a place of peace and rest, and the healing benefits of the pools would be lost to all those who may otherwise have come there.

[718] Ms E M Clarke gave her belief that the Ngawha waters (a taonga of all Ngapuhi) are life-giving and healing, and associated with Papatuanuku. In the following passages Ms Clarke stated her concerns clearly–

> 8. With this in mind, it is offensive, in my view, to have this part of the taonga that is the geothermal aquifer modified and constrained in the proposed manner and for this proposed purpose. This offence is

compounded by the injustice of an intended aim of the Barnes and Thompson design requiring this modification, i.e. the use of the stream by male inmates (a number of whom will be incarcerated for crimes of violence against woman) for 'spiritual purification and cleansing'. Meanwhile, the victims will not be afforded the same opportunity as the perpetrators to access the healing power of this taonga, nor to enjoy the luxury of bathing in 'small pools of warm water'. In fact they will be completely alienated from the resource...

9. It is likely that many women, mothers, and their children, will no longer be able, or indeed willing, to access the healing powers of this resource either on this, or neighbouring sites, because they will simply be too frightened by the threat of the harm that may be inflicted on them by known violent offenders, just 500 metres distant, claims of secure containment notwithstanding.

10. ... I am affronted that [the Minister] seeks to modify in such a way the aesthetic, let alone esoteric, nature of this site which is so significant to women and in particular those within the hapu of Ngapuhi.

11. In a similar manner, and with reference to the allusion of the life-giving passage of the woman, the intention to reform the meandering passage of the stream into a more controlled and direct route because this is where it passes through the secure part of the compound, is objectionable, reflecting as it does the abuse of women, of which a number of inmates within this proposed institution, will be guilty.

[719] That witness's elder daughter, Chanel, expressed her own attitude in this respect–

31. While Mr Lawless can give evidence as to the effects on the geothermal taonga from the 'scientific' perspective he is not able to comment on the effects that such development will have in Maori terms upon the mauri and character of this taonga and whanau relationships with this taonga.

...

42. The Ngawha Springs, another significant physical and cultural feature, are merely a few metres from the proposed site and ... hold a 'special place in the mind of Ngapuhi and also particularly Ngati Rangi. Taniwha both good and bad inhabit the water and give the region its special qualities of healing and reconciliation'.

43. These are qualities which will be seriously compromised by the closeness of the proposed prison site. They will also be qualities to which Ngati Rangi descendants such as myself, who suffer from chronic illnesses to which the pools provide some immediate relief will now be unwilling to access.

44. ... Should the proposed prison be constructed, I am of the opinion that my grandmother will not partake of the healing waters for relief of medical problems and general well-being. I say this because, like others she will have a sense of anxiety about bathing in pools in such close proximity to the Corrections facility and as a consequence I suspect she will not go.

The Minister's response

[720] The Minister's response was first, that there will be no physical interference with the geothermal resource, springs or pools; that some Maori deny that there

would be any 'spiritual' pollution of the resource, while others claim that there would; that the issue was raised only the late in the process; and that those claiming harm represent a limited range of Maori groups.

[721] Counsel urged that what is relevant is not the traditional Maori view, but whether objectively the particular activity is intrinsically offensive to cultural considerations (citing *Minhinnick's* case),[60] and how the effects of the proposal may impact on the relationship of Maori with the springs and pools (citing *Mahuta v Waikato Regional Council*[61]). He questioned whether reasonably informed Maori people understanding what is proposed would be offended in cultural or spiritual terms.

[722] The Minister also maintained that the relationship of Maori, their culture and traditions, with the springs and pools at Ngawha is appropriately recognised and provided for by acknowledging their importance to Ngapuhi, and ensuring that they would not be harmed.

Findings

[723] It is true that the Minister's case acknowledged the importance to Ngapuhi of the springs and pools at Ngawha, and provided for them by designing the proposal so that they would not be physically harmed. The question is whether, despite that, the Court's decision should be influenced by attitudes held by some Maori (though not by others) that the presence of the prison out of sight about a kilometre away but within the same geothermal field would be offensive. These attitudes were variously described as psychological effects (by Dr Hohepa); in cultural terms as affecting mana, wairua and mauri (Mr Albert Clarke, Mr Rankin); in terms of effects on dignity as being insulting, offensive, objectionable, desecrating, affronting (Mr Hau, Mr Ogle, Mr Waiora WiHongi, Ms Martin, Ms Lee, Mrs Clarke, Ms Chanel Clarke's grandmother); or in terms of fear, anxiety, loss of restfulness and peace (Mr Cunneen, Mrs Sheppard, Mrs Clarke, Ms Chanel Clarke).

[724] In this jurisdiction it is well established that claims about people's attitudes, and fears, however genuinely held, have to be assessed objectively,[62] and if unsubstantiated by factors properly cognisable under the Act, should not influence

[60] *Minhinnick*, supra.
[61] Environment Court Decision A91/98.
[62] *Allens Service Station v Glen Eden Borough Council* (1985) 10 NZTPA 400 (HC).

the decision.[63] If it is found on probative evidence that there would be no adverse actual or potential effect on the environment of allowing the activity, then the fact that some people remain fearful and unconvinced by the weight of evidence is not a relevant matter to be taken into account.[64] Fears can only be given weight if they are reasonably based on real risk.[65]

[725] So without questioning the sincerity of the witnesses, we consider whether there are objective bases for the various attitudes described.

[726] The unchallenged objective evidence is that the prison would be about a kilometre from the springs and pools; it would not be visible from them; that the inmates would not be using the Ngawha stream; that the lighting would not present a glow in the sky effect, or a glow over the area, and would avoid any impact on the springs; and that there would be no significant noise effects from prison activity. We find no objective basis for Dr Hohepa's testimony.

[727] No objective bases were offered for the attitudes expressed by Mr Hau, Mr Ogle, Mr Waiora WiHongi, Mr Wallace WiHongi, Dr Barlow, Mr Albert Clarke, Mr Rankin, Ms Martin, Ms Lee, or Mr Hooker. The objective evidence about noise leaves no basis for the attitudes of adverse effects on the peace and restfulness of the pools expressed by Mr Cunneen and Mrs Sheppard. The sincerity of none of them was questioned. Rather it is a matter of the extent to which their genuinely felt attitudes influence decisions under the Resource Management Act.

[728] Nor do we belittle Mrs Clarke's eloquent representation of the plight of victims of violence against women, and the value of the comfort they can obtain from bathing in the pools. However the basis of her attitude that inmates (some of whom may have been guilty of highly regrettable abuse of women, causing them long-term harm) will have access to bathing in the mineral waters is not supported by the objective evidence before the Court.

[729] Later in this decision we address the risk of inmates escaping. Regrettably, on the record, there is a risk. However the evidence shows that escaped inmates tend to leave the district of the prison promptly. The possibility of an escaped inmate harming a woman who has come to Ngawha Springs for bathing in the mineral pools is remote. The suggestions that people would not bathe in the pools because of that

[63] *Hawkes Bay Hospital Board v Napier City Council* (1986) 11 NZTPA 404.
[64] *Telecom v Christchurch City Council* Environment Court Decision W165/96.
[65] *Shirley Primary School v Christchurch City Council* Environment Court Decision C136/98.

risk describes a self-denying restraint without a sound basis in reality. Without in any way demeaning the witnesses who put it forward, or people whose behaviour might be affected in that way, we are not able to find a sufficient objective basis for influencing a decision under the Act on the basis that some people might be dissuaded from using the pools for fear of harm by an escaped inmate.

[730] We now refer to the claims that it would be insulting, offensive, objectionable, desecrating, or affronting that a prison is established in the Ngawha district, or that the mana, wairua and mauri of Ngapuhi, of the land or of the geothermal taonga would be affected. There is no unanimity about that. Some feel in those ways, others do not. There is no objective right or wrong about it. There is nothing intrinsically offensive about the facility, nor any objective basis for feeling insulted, or offended, or affronted by its existence, or that mana, wairua or mauri would in any way be undermined by its location. The Minister has recognised the interest of Ngapuhi in the geothermal resource and the Ngawha springs. His proposal has been developed and designed to respect Maori culture, and so as to avoid any physical harm to them. If some Maori remain offended, that is regrettable. But they do not have a veto, and we find no basis for their sense of affront to warrant influencing the decision in these proceedings.

Ngawha Springs an Outstanding Natural Feature

[731] A further ground advanced by the opponents was that the surface manifestations of the geothermal resource are 'outstanding natural features' which ought to be protected from inappropriate use. It was contended that the site is at the heart of the only significant geothermal area in Northland, a region in which geothermal landscape features are an unusual resource that ought to be preserved for the benefit of the community.

[732] That relates to section 6(b) of the Act, which reads–

> 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:
>
> ...
>
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> ...

[733] The Minister's response was that there is nothing to indicate that the site for the proposed facility is one of any great significance, and to the extent that the ponds on the property are of significance, they are protected and the development avoids them.

[734] However the opponents' claim was not that the site is an outstanding natural feature, but that the surface manifestations of the geothermal resource are.

[735] The surface geothermal manifestations are plainly a natural feature. It is not necessary for us to make a finding in this decision whether the feature qualifies as outstanding, because the Minister's proposal would not make any use of, or otherwise affect, any of the surface geothermal manifestations that make up the natural feature. Any gas vents found on the site, however small, are to be protected.

[736] It is our finding that the proposal recognises and provides for the protection of the surface manifestations of the Ngawha Geothermal Field from inappropriate use and development.

Efficient Use of Resources

The positions of the parties

[737] Another ground of opposition relied on by the appellants was that the proposal represents an inefficient and uneconomical use of resources in two respects. The first was that it is an extravagant and wasteful use of unusual and important natural features. The second respect was that it is an extremely uneconomical way to provide a prison facility in Northland. Counsel quoted a passage from the Planning Tribunal decision in *Olsen v Minister of Social Welfare*.[66]

[738] In particular reliance was placed on three inter-related features. First, that the site is swampy, subject to flooding, and has a stream running through the middle of the building platform. The second feature was that the proposal would involve spending a substantial sum on special works over and above what would be required for a more 'normal' site. The third feature is that there are other, more 'normal' sites which could easily have been chosen in preference to this one. Counsel urged that

[66] [1995] NZRMA 385.

efficiency must include at least some assessment of whether the economics are sound.

[739] It was the Minister's case that the economics of the project and the construction costs are not a relevant concern for the Environment Court. Counsel urged that a decision whether the locational advantages and community and tangata whenua support for this site outweigh any additional capital costs that may be involved is for the Minister to make; and that it is the long-term economics, including operational costs, that are relevant, rather than establishment costs.

The law applicable

[740] This ground was based on section 7(b) of the Act, which we quote–

> 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 -
>
> ...
>
> (b) The efficient use and development of natural and physical resources:

[741] In *New Zealand Rail v Marlborough District Council* [67] the appellant contended that financial viability of a project was a relevant consideration under Part II of the Act, in that if the proposal was not viable, then it is in conflict with Part II. The law on that point is contained in this passage from the judgment of Justice Greig–[68]

> 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 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.

[67] [1993] 2 NZLR 641; [1994] NZRMA 70 (HC).
[68] [1994] NZRMA 70, 88.

[742] In *Imrie Family Trust v Whangarei District Council* [69] the Planning Tribunal held that although the economic effects of a proposal on the environment need to be considered, it is only to the extent that they affect the community at large, not the effects on the expectation of individual investors.

[743] *Olsen v Minister of Social Welfare* concerned a requirement for a designation. The passages from the Planning Tribunal decision that were quoted by counsel for the appellants were–[70]

> The question of adequacy of consideration in the present case largely depends on the advice given to the Minister for his consideration by the Department. We found on the evidence given to us that, apart from very cursory attention to cost of total relocation, the Department effectively accepted that the works should proceed on is site because it was an existing site.
>
> ...
>
> This brings us to the question of "adequacy". The Department virtually ignored the RMA. It did not set its mind to the repercussions of an enlarged centre upon the environment, indeed, the only evidence we can find as to any consideration by the Department in that regard is contained in the notice of requirement
>
> ...
>
> If this is the extent of the matters brought to the attention of the Minister, and on the evidence we have little to suggest otherwise, then it is inadequate under present legislation. We find as a fact that there has been no in-depth investigation of alternative sites in the context of the RMA and in the context of Part II of that Act to which we have previously referred. It is not sufficient to state that economics or convenience, or existing inadequate facilities, are any reason for the creation of a large and permanent security institution within a residential community.

[744] In *Marlborough Ridge v Marlborough District Council* [71] the Environment Court recognised that there is a distinct economic approach to sustainable management in the Act, derived from various provisions including sections 5(2) and 7(b), and said–[72]

> ... our isolation of the economic jargon in the RMA may lead to incorrect confinement of economic issues and principles and misunderstanding of their relevance to the RMA. If, as we understand it, economics is about the use of resources generally, [see R.A. Posner Economic Analysis of Law 4th Edition (1992) p.7] then resource management can be seen as a subset of economics. Bearing that in mind will prevent unnecessary debates as to whether the use of the word 'efficiency' in the RMA is about 'economic' efficiencies or some other kind. All aspects of efficiency are 'economic' by definition.

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[69] [1994] NZRMA 153; 1B ELRNZ 274.
[70] Pages 395 - 397.
[71] [1998] NZRMA 73; 3 ELRNZ 483.
[72] Paragraph 4.3.

[745] In that decision the Court agreed with *Imrie Family Trust*. Although it expressed some doubts about whether it is impermissible or irrelevant to have regard to the benefits of a proposal for its promoter, it did not make a decision to that effect.

[746] The Environment Court is, of course, bound to apply the law as found by the High Court in *New Zealand Rail*. So our starting point is that the broad aspect of the economic effect of a proposal on the community at large is a relevant consideration, but that the financial viability of a project, the profitability or otherwise of the venture and the means by which it is to be accomplished, are not relevant considerations. Consistent with that we hold, following *Imrie Family Trust* and *Marlborough Ridge*, that economic effects on the expectations of individual investors, and the benefits for the promoter are not relevant. We are not aware that in so holding, we are differing from *Olsen*.

[747] 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.

[748] 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.[73] 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.[74]

[749] Having established our understanding of the extent to which efficient use of resources is a relevant consideration, we now review the evidence before the Court.

The evidence

[750] Mr Brand gave the opinion that the geotechnical case for the proposed prison development has "no real foundation because of the large additional costs associated with its development upon a soft valley floor and the added risks of being within a

[73] Cf *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 185 (CA).
[74] Perhaps also to the Controller and Auditor-General.

major geothermal system". He considered that the proposed earthworks may be impossible to accomplish within a sensible time and cost frame.

[751] Mr Brand questioned the time and efficiency of dewatering the site through installing wick drains, and stated that it is probable that the wick drains would still be discharging an artesian water flow for evermore.

[752] In cross-examination Mr Brand stated that he is not qualified in civil engineering matters.

[753] Mr Beetham testified that the site is surrounded by large recently active hydrothermal eruption craters and would require extensive and costly remedial works to make it suitable for the proposed prison. He gave the opinion that the costs and risks of development of this site would be very high, and it is likely to cost $30 million to $40 million more to develop than a more 'normal' site.

[754] In cross-examination Mr J Hamilton stated that he regarded the project as an economical and efficient project. He accepted that it is a substantial project; that there is some surface material that would have to be removed for the building platform; and that a small amount of it may require different storage or placement because of concentrations of mercury.

[755] Mr P J Cunningham rejected the suggestion that the cost of development of the subject site is abnormal, and asserted that the costs are not abnormal in comparison with similar developments.

[756] In response to Mr Beetham's opinion that the project is not economically feasible or efficient, estimating $10 million for earthworks and $20 million for wick drains, Mr Kenderdine testified that the Department's estimates are $4.5 million for bulk earthworks and $1.6 million for wick drains. Cross-examined about the estimate for wick drains, Mr Kenderdine reported that the average depth of wick drains in an on-site trial had been between 11 and 12 metres, and the drains had cost in the order of $5 to $6 installed.

[757] In response to Mr Beetham's claim that unsuitable organic peat material should be cut to waste, Mr Hickling described geotechnical investigations showing that much can be re-used as fill, and if the estimated quantity is not available,

adequate volumes of bulk fill are available from the eastern hill and the imported volumes already provided for.

[758] Addressing Mr Brand's opinion about the cost of importing free-draining rock fill because volumes of potential borrow from the eastern and western hills will be inadequate, Mr Hickling gave the opinion that adequate volumes of suitable fill will be available from the main site area, the eastern hill borrow area, and outside quarry reserves.

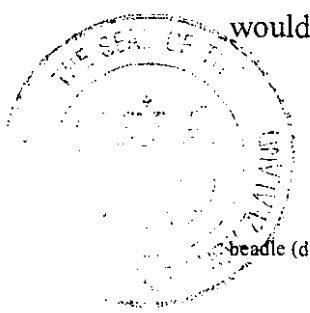
[759] Mr Hickling also addressed Mr Brand's claim that 420,000 cubic metres of soft soils would be unsuitable for fill and should be removed from the site and disposed in sealed areas due to contamination with mercury. Mr Hickling deposed that soft soils under the main fills are being drained with wick drains, not excavated, and he estimated the volume of material to be cut at about 185,000 cubic metres.

[760] Mr Hickling responded to Mr Brand's opinion that removal of more than 500,000 cubic metres of soil and subsoil to a depth of 8 metres would be required. Mr Hickling testified that it is not proposed, and gave his opinion that it would not be required, to remove volumes of greater than 500,000 cubic metres to form the site. He added that Mr Brand's evidence about a volume greater than 500,000 cubic metres appeared to have been based on a false assumption.

[761] We have already referred to the unchallenged evidence of Mr Copeland, who gave reasons for rejecting opposition based on loss of agricultural production, and claims that the cost of the prison would bring better benefits if diverted to market gardening, or health and education infrastructure improvements. This witness gave the opinions that the proposal would bring substantial economic benefits to the Far North District in increased employment, incomes and economic activity; a broader economic base; and more efficient utilisation of infrastructure.

Findings

[762] Although the opponents' case was overstated, we accept that the site will be expensive to develop for the proposed prison, particularly because of the subsurface conditions. We accept that it is likely that another site could have been found that would have been less expensive to develop.



[763] However to the extent that relates to the monetary cost of development on the site, we hold that this is part of the overall judgement made by the Minister as promoter; and that other factors would also have been part of that judgement, including his assessment of locational advantages, community and tangata whenua support, and operational costs. On the understanding we have reached of the law, whether the monetary cost is uneconomical is not an appropriate matter to influence the Court's decision in these proceedings. Accordingly we do not need to analyse the conflicting opinions of the witnesses in detail. We reject the opponents' contentions in that respect, and make no finding on that question.

[764] The other aspect of this topic was the claim that the proposal represents an extravagant and wasteful use of the natural resources involved, by which we took counsel to mean the land of the site, and the stream.

[765] The land has been used for a dairy farm. We have no evidence on the performance of the farm, but we infer that it produced food, and a return to the owners for their investment in time and capital. However there can be no assurance that it would have continued to be used as a dairy farm in the future.

[766] The corrections facility would replace the dairy farm, using land that has been used for food production. The facility would meet a pressing public need. It is a question of judgement whether sustainable management of the natural and physical resources would be better served by the land being used for food production than for the facility. In the absence of evidence contradicting Mr Copeland, we do not accept that the use of the land for a dairy farm, or market gardening, or health or educational infrastructure would serve that purpose better than its use for the corrections facility.

[767] Our conclusion is that the opponents' challenge on the basis of inefficient use of natural and physical resources has not been made out.

Heritage Values

[768] The appellants also claimed that the designation would fail to recognise and protect the heritage value of the area. Counsel advanced that claim with particulars related to Ngawha having been a historic destination for its natural mineral pools and spa facilities, as a place of historic significance, and a place of healing, therapy peacefulness and restoration. It was asserted that placement of a prison in the centre

of Ngawha Springs, immediately adjacent to the two main spa sites would undermine attempts to redevelop the area as a tourist destination.

[769] The Minister responded that the proposal does not involve the placement of a prison in the centre of Ngawha Springs, and that the building site is physically separated from Ngawha Springs by a ridge and would not be visible from any of the springs. Counsel observed that the springs are not recognised in the district plan for any heritage value, and there is no evidence that the heritage value the two springs have extends to the prison site.

[770] Ms Chanel Clarke testified that important features of the site may exist under the ground, referring particularly to the possibility of evidence of early Maori occupation. Her testimony contained this passage–

> The proposed protocol which will address the issue of any unknown sites, and or related taonga or human remains uncovered during earthworks by conducting an appropriate blessing is offensive to the tupuna who may rest there and indicates a wanton destruction of not only possible burial sites, but also local and nationally important physical and cultural features.

[771] Dr R E Clough is a qualified and experienced archaeologist and cultural heritage consultant. He had made an archaeological assessment of the site, including historic research and a field inspection. He reported that no archaeological sites were identified within the development site, and gave reasons for his professional opinion that it is unlikely that any would be unearthed during development.

[772] Dr Clough added that in the unlikely event that any archaeological sites are unearthed during development, with the proposed conditions and protocols there would be no effect on archaeological values.

[773] Dr Clough's testimony was not challenged by cross-examination or by contradictory evidence, save by Ms Clarke's expression of concern. The conditions and protocol are standard and widely accepted. We do not understand any principled reason for Ms Clarke's reservations.

[774] We accept Dr Clough's testimony and opinions, and adopt them as our findings.

[775] We do not accept the appellants' submission that the site of the prison would place it in the centre of Ngawha Springs, immediately adjacent to the two main spa sites. The prison would be about a kilometre distant from the springs and pools at Ngawha Springs, and would not be visible from them.

[776] From Mr S Hamilton's evidence we do not accept that the proposed facility would undermine attempts to redevelop the area as a tourist destination. We do not accept the assertion that the proposal fails to recognise and protect the heritage value of the area.

Social effects

[777] Another part of the appellants' case was that the proposal fails to enable the people of the area to provide for their social well-being in that, as happened at Paremoremo and elsewhere, 'Ngawha' will become synonymous with 'prison' and would lose its identity as 'the place of healing'.

[778] That claim was not accepted by the Minister, whose counsel submitted that no compelling evidence had been provided to support it, and that it is not consistent with the expert evidence of Ms Barton and Mr S H S Hamilton.

[779] Mr S H S Hamilton is a chartered accountant with 15 years' consulting experience, particularly in the hospitality industry, and with professional knowledge of the tourism industry. He had visited Ngawha Springs village, and gave his opinion that the corrections facility would have no material effect on the pools complexes.

[780] Mr Hamilton had also considered whether the facility would detrimentally affect the perception or image of the area. He acknowledged that there is a possibility that it could cause negative perceptions in the minds of some existing visitors, but observed that there is little (if any) evidence of the kind at other tourism locations near corrections facility, citing Turangi as an example.

[781] We have already referred to Ms Barton's evidence. Her review of the social effects of the proposal addressed the preconstruction and construction phase separately from the operational phase. She reviewed likely demands on accommodation by the workforce, additional employment and economic activity,

apprehensions of property devaluation, and concerns for personal safety and property security. Ms Barton concluded that there would not be an adverse impact on social services and facilities during the construction phase.

[782] In respect of the operational phase, Ms Barton had considered the socio-economic impact of corrections facilities on Turangi, including attitudes about whether crime in the town was to be ascribed to inmates' families and associates, or to locals; attitudes to inmates' partners coming to live in the town; concerns about personal safety and property security related to escapees (including those breaching parole). Ms Barton gave the opinion, based on her research, that the risk to the community generally in New Zealand from escaped prisoners is low, and is not directly related to the proximity of a prison.

[783] The witness also described the investigations that had led her to the opinions that there would be sufficient accommodation for employees coming to the district, that the combined needs of inmates and employees would not place undue pressure on health services, and that there is considerable spare capacity in schools for their families.

[784] Ms Barton gave her opinion that the proposal would not have significant adverse social effects on the community, and that the net social impact would be positive.

[785] Although Ms Barton was cross-examined on her testimony about consultation, her evidence on social effects was not challenged by cross-examination or by contradictory evidence by a witness qualified to give opinion evidence on the topic.

[786] We accept Ms Barton's testimony and opinions, and adopt them as our findings.

[787] To the extent that this ground of appeal is based on anticipated perceptions by people, we adhere to the established practice in this jurisdiction that there is no place in the process for the Court to be influenced by mere perceptions of harm which are not shown to be well founded.[75]

[75] *Northern Wairoa Dairy Co v Dargaville Borough Council* Planning Tribunal Decision A181/82; *Affco v Hamilton City Council* Planning Tribunal Decision A3/84; *Purification Technologies v Taupo District Council* [1995] NZRMA 197; *Contact Energy v Waikato Regional Council* Environment Court Decision A04/2000.

[788] Overall, we conclude that the claims that the prison proposal would be inconsistent with enabling the people of Ngawha Springs to provide for their social well-being have not been shown to be well unfounded, and we do not accept them.

Fears of harm or damage caused by escaping prisoners

[789] Earlier in this decision we have referred to concerns expressed about harm or damage that might be caused in the Ngawha and Ngawha Springs locality by prisoners who may escape from custody at the prison.

[790] Ms Beadle reported that visitors had expressed such concerns to her, and gave the opinion that the perceived risk would discourage visits to Ngawha Springs. For herself, Ms Beadle testified that she feared the idea of a prison next door, and gave the opinion that altering the buildings to ensure absolute safety from possible outbreaks would be incredibly costly.

[791] We have already quoted Mrs Eileen Clarke's concern that many women will be frightened by the threat of the harm that may be inflicted on them by known violent offenders, claims of secure containment notwithstanding. We have also recorded Ms Chanel Clarke's understanding of a sense of anxiety that would be experienced by her grandmother about bathing in pools so close to the corrections facility. Others indicated similar concerns.

[792] However Ms Barton testified that she had not found evidence that prisons pose a significant adverse impact on security of property or personal safety in communities near them. She gave the opinion that the risk to the community from escaped prisoners is low, and is not directly related to the proximity of a prison.

[793] The Minister of Corrections would be responsible for ensuring that all reasonable measures are taken to preclude escapes from custody at all corrections institutions. Regrettably, experience indicates that inmates do escape from existing prisons. It would be unrealistic to suppose that nobody imprisoned in a regional corrections facility for Northland (wherever it is located) would escape from custody. Concern by residents of the Ngawha and Ngawha Springs locality about harm or damage that might be caused by fugitive inmates is understandable.

[794] However the independent evidence reported by Ms Barton does not provide support for those concerns. Understandable as they are, in reality they are not supported by an objective basis.

[795] Further, to the extent that there is any risk of harm or damage caused by escaped prisoners, the risk is not linked to the location of the prison. The risk (such as it is) would exist in whatever locality a prison is established. We do not accept that the people of any particular part of Northland are entitled to have the risk redirected to some other district, any more than the people of Northland would be entitled to have people from Northland who are sentenced to imprisonment sent to corrections facilities elsewhere in the country to transfer the risk.

[796] Ms Mangu testified that the Friends and Community of Ngawha had submitted a tender to lease land from the Department of Corrections, and that if successful the society had intended to use the land to establish a pilot scheme for rehabilitation of young criminal offenders in Northland, training facilities for prison officers and other Department of Corrections employees in tikanga Maori, the adoption of restorative justice practices for both inmates and staff, and the establishment of employment initiatives by organic gardening and other environmentally acceptable uses.

[797] In our opinion the offer by the Friends and Community of Ngawha to assist with young offenders, and restorative justice practices for inmates, was a commendable response that showed a realistic understanding of the needs of many who have the attention of the criminal justice system, and also an appropriate recognition of the low risks of having such people in the locality for rehabilitation.

[798] In summary, we do not accept that there is any significant risk of harm or damage caused by escaping prisoners, nor that this is a matter that should influence the outcome of these proceedings.

Effects on Ginn's Ngawha Spa

Effects on the business and its potential

[799] In Ms Beadle's notice of appeal, it was alleged (among other things) that the prison would destroy the business operation of Ginn's Ngawha Spa Limited at the

spa, would severely compromise plans to undertake restoration and expansion planned for the spa.

[800] The Minister joined issue with those claims, and contended that they were not supported by any compelling evidence.

[801] In her testimony Ms Beadle described in general terms the business undertaking of the spa and its history, and deposed that a prison on the adjacent Timperley property would have a direct effect on the current operation of the spa as a result of its visibility and because its location would be widely known. In particular, Ms Beadle claimed that visitors to the spa would, rightly or wrongly, either have their sense of peacefulness marred, and their stay disrupted, after learning of the existence of the prison next door; or they would simply stop coming to Ngawha.

[802] In cross-examination, Ms Beadle described recent improvements to the company's property, painting the exterior of the building containing backpacker accommodation facilities, upgrading the pools, and clearing in the Tiger Bath pool area and the mercury mine ruins.

[803] In cross-examination Ms Beadle also agreed that she had refused requests for information about the number of guests in the accommodation units, and had declined to provide financial information or business plans about the operation. She had also refused to meet a landscape consultant who had been engaged by the Department of Corrections to advise on siting the prison to mitigate visual effects.

[804] Ms Beadle did not provide in her evidence to the Court any detailed information about the occupancy of the accommodation, nor did she provide any detailed information about the financial performance of the business or about any business plans for its future operation.

[805] Mr S H S Hamilton had also visited the Ginn's business. He described the Ginn's property as very run-down and almost uninhabitable, reporting that both the hotel and pools buildings were in a very poor state of repair and did not give the appearance of trading. Having no information on visitor numbers or profitability of the current venture, he deposed that he would be surprised if the visitor facilities and activities were profitable after allowing for overheads, repairs and maintenance. The

witness gave the opinion that the proposed corrections facility would have no material detrimental effect (if any) on existing patronage levels.

[806] Mr Hamilton also referred to guided walking tours on the Ginn's Ngawha Spa Limited property conducted by a Mr Hansen, who advised him that $6 per head was paid to the Ginn's company as a concession for access to the property. Mr Hamilton was sceptical of Mr Hansen's advice that in the year ended December 2000 he had hosted approximately 5000 visitors on his tours, and considered very unrealistic Mr Hansen's expectation that in a few years there would be between 50,000 and 90,000 visitors annually doing the tour. Mr Hamilton stated that he did not believe that potential view of the prison from the property would be detrimental to the tour.

[807] Mr Hamilton also gave his opinion about the tourism potential of the Ginn's Ngawha Spa Limited's business. In summary, even assuming a major redevelopment he considered it unlikely that a redeveloped business could attract sufficient visitors to be financially viable. It would be very risky financially, and would struggle to earn a commercial return on investment.

[808] In cross-examination, Mr Hamilton agreed that the capital investment might be able to be spread over a period, and that it might be practical to provide bathing facilities without substantial accommodation facilities, or to provide relatively modest accommodation.

[809] We have already reported Mr Lawless's opinion that there is no potential for the project to adversely affect the Ginn's Ngawha Spa operation.

[810] We have no wish to state findings that might be seen by Ms Beadle as belittling the value of her company's business. However it was she who made the allegation in her notice of appeal, and in her testimony to the Court, that the prison would destroy the spa business, and compromise plans for restoration and expansion. Accordingly we are not able to avoid the duty of stating our findings on those allegations. Ms Beadle's own refusals to provide accommodation occupancy and financial information, and to meet with consultants investigating mitigation possibilities, deprived the Court of the possibility of more complete independent assessments of her allegations.

[811] We did take the opportunity to visit the company's premises, and were courteously conducted over much of the property by Ms Beadle's sister. We do not wish to add to Ms Beadle's feelings on reading adverse descriptions, so without stating details we record that our own observations were fully consistent with those reported by Mr Hamilton, whose expertise and professional objectivity we accept. In short, we find that at present the property is run-down, the buildings are in poor repair, and we share his doubt whether the income of the business exceeds its overheads.

[812] With regard to future restoration and expansion of the business, we find that considerable capital investment would be needed. Whether injected at once or by increments over a period, that investment would be very risky, and it is doubtful whether the business could yield a commercial return on investment.

[813] We also find that the proposed prison would have no significant adverse effect on the success of the business (such as it is) now, nor on the potential (such as it is) for restoration and expansion. These allegations by Ms Beadle have not been made out.

Consultation

[814] Ms Beadle made allegations of inadequate consultation with her. However there is no evidence that she is Maori, so the consultation principle of the Treaty of Waitangi cannot be invoked. It is not evident that the Minister had any legal duty of consultation with Ms Beadle.

[815] Mr J Hamilton deposed that he had endeavoured to meet with Ms Beadle, that it had been very difficult to arrange a meeting, and that a meeting had eventually occurred. He had endeavoured to ascertain whether the Beadles' concerns could be met, and had indicated that various concerns could be met by the Department giving undertakings, which were subsequently given in writing. He gave the opinion that the Beadles' concerns were based on misconceptions either about the project or about their own business plans, a context in which it had been difficult to have meaningful discussions.

[816] Mr Fraser also gave evidence of attempts at consultation with Ms Beadle.

[817] In the previous section of this decision we gave our finding that the proposed prison would have no significant adverse effect on the success of the business, nor on its potential for restoration and expansion. In the light of that finding, we hold that the Minister had no duty at law to consult with Ms Beadle, and her complaints about the adequacy of the attempts made by the Minister's officials and agents in that regard cannot provide a ground for opposition to the requirement.

STATUTORY CRITERIA

[818] The proceedings before the Court are two appeals under section 174 of the Resource Management Act, and one appeal under section 120 of that Act. The criteria to be considered on appeals under those sections are stated separately. Although many of them are common to both, we consider them in turn, as separate decisions have to be made on each class of appeal.

Section 171 considerations

[819] The jurisdiction of the Environment Court on an appeal arising from a requirement for a designation is conferred by section 174. Subsection (4) of that section directs that in determining an appeal, the Court is to have regard to the matters set out in section 171.

[820] Section 171(1) gives directions to territorial authorities considering requirements:[76]

> (1) Subject to Part II, 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 any national policy statement, New Zealand coastal policy statement, regional policy statement, proposed regional policy statement, regional plan, proposed regional plan, district plan, or proposed district plan.

The role of Part II

[821] The introductory part of section 171(1) is prefaced by the words "Subject to Part II". Placed there, at the start of a provision identifying matters to which regard

[76] Section 171(1) as amended by s 87 of the Resource Management Amendment Act 1993 and s 36 of the Resource Management Amendment Act 1997.

is to be had (not a provision about whether the requirement is to be confirmed, cancelled or modified), the subjection to Part II applies to the directions about what is to be had in regard. Its effect is to defeat the direction to have regard to the classes of matter listed, where to do so would conflict with anything in Part II.[77]

Relevance of land disturbance effects

[822] Counsel for the submitters referred to the direction in section 171(1) to have regard to the matters set out in the notice given under section 168 (and any further information supplied), and to all submissions. They contended that this has the effect of extending the matters that are to be taken into account into virtually a 'catch-all category' (relying on *Olsen's* case[78]), with the result that the Court is not confined to effects of the use of the site for a prison, but should also consider the proposed land disturbances, the cultural effects, and the potential safety issues. They argued that the designation requirement and the resource consent applications rely on each other for success of either, and the project as a whole.

[823] We do not accept those submissions, and we do not accept that this was what was held in *Olsen's* case.

[824] Each of the three appeals before the Court now is brought under specific authority. The appeals by Ms Beadle and the WiHongis were brought under section 174 of the Act and seek that the designation requirement be cancelled. The appeal by the Minister was brought under section 120 of the Act, and seeks that the Regional Council's decision refusing the resource consents be cancelled, and the consents granted.

[825] Because the three appeals are being heard together, the evidence adduced by a party in one of the appeals may be received as evidence in either of the other appeals, to the extent that it is relevant to an issue that arises in that appeal.

[826] But that does not mean that the issues in any one of the appeals are also issues in either of the others.

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[77] Cf *Minister of Conservation v Kapiti Coast District Council* Planning Tribunal Decision A024/94; *Paihia and District Citizens Assn v Northland Regional Council* Planning Tribunal Decision A77/95; *Russell Protection Society v Far North District Council* Environment Court Decision A125/98; *Bungalo Holdings v North Shore City Council* Environment Court Decision A025/01.

[78] *Olsen v Minister of Social Welfare* [1995] NZRMA 385.

[827] The issue in the Beadle and WiHongi appeals is whether the site should be designated for the corrections facility. If the requirement is upheld, the designation would authorise the use of the land for that purpose, whether or not it would otherwise be authorised by the district plan as a use of that land.

[828] The issue in the Minister's appeal is whether resource consents should be granted for the earthworks and streamworks proposed for development of the site for use as a corrections facility. If the appeal succeeds, the Minister would be authorised to carry out those works.

[829] So the subject-matter of each of the appeals differs from that of the others, and the criteria specified for deciding the appeals under section 120 differ (at least to some extent) from those specified for deciding appeals under section 174.

[830] But although the current proposal for the facility requires the earthworks and streamworks for which resource consents are sought, those works would not necessarily be required for any use of the land for a corrections facility. A different design of the facility would require development works that would differ at least in detail.

[831] So although the designation requirement and the resource consent applications are related, they are not necessarily critical to each other.

[832] *Olsen's* case concerned a designation requirement, but it did not involve related resource consent applications, so the issue raised by the submitters in these proceedings did not arise in *Olsen's* case. The Tribunal's observation in *Olsen* that was relied on by the submitters reads–[79]

> It would be difficult to visualise anything which could be excluded from consideration.

[833] We do not infer that this passage was intended to mean that parties to resource consent proceedings under section 271A, who had not lodged appeals under section 174 or given notice under section 271A or section 274 of their desire to be heard on someone else's appeal under section 174, could be entitled to have the Court consider matters they wished to raise about the designation.

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[79] Ibid, pg 393.

[834] In any event the scope of the challenge available to a party whose status depends on section 271A has now been authoritatively clarified by the High Court in *Transit New Zealand v Pearson*.[80] Such a party is confined to the issues raised in the original notice of appeal or reference on which he or she is heard.

[835] Counsel urged that it would be contrary to good resource management practice to confine the assessment of the resource consent applications to their subject matter without considering the effects of the designation. We do not accept that. Good resource management practice calls for people to identify carefully the proceedings in which they wish to take part, and to give the appropriate notice identifying them. It is not good resource management practice to give notice of a wish to be heard on an appeal against the resource consents, and without having given the requisite notice, expect to be permitted to pursue the effects of the designation.

[836] As we observed earlier in this decision in relation to the end-use point, it may make no difference to the outcome in this case. But as a matter of law, we hold that the submitters are not entitled, by a side-wind from their joining the appeal against the resource consents, to advance their own case about the effects of the designation.

Contents of requirement

[837] Section 168 prescribes procedure for giving notice to a territorial authority of a requirement for a designation. By section 171(1) and 174(4), the Court is directed to have regard to the matters set out in the notice. We therefore quote subsection (3) of section 168, which directs what is to be included in the notice–

> (3) A notice under subsection (1) or subsection (2) shall be in the prescribed form and shall include-
> (a) The reasons why the designation is needed; and
> (b) A description of the site in respect of which the requirement applies and the nature of the proposed public work, project or work, and any proposed restrictions; and
> (c) The effects that the public work or project or work will have on the environment, and the ways in which any adverse effects may be mitigated, and the extent to which alternative sites, routes, and methods have been considered; and
> (d) Any information required to be included in the notice by a plan or regulations; and
> (e) A statement of the consultation, if any, that the requiring authority has had with persons likely to be affected by the designation, public work, or project or work; and

[80] High Court, Dunedin, AP166/01; 18 December 2001, William Young, J.

> (f) A statement specifying all other resource consents that the requiring authority may need to obtain in respect of the activity to which the requirement relates, and whether or not the requiring authority has applied for such consents.

[838] The Minister's notice of requirement extends over twelve pages with three maps attached. We have regard to all its contents without quoting the document.

[839] The requirement was specifically for designation of the Timperley property in the Far North District Council's district plan for –

> The construction, operation, maintenance and upgrading of a comprehensive regional prison and associated facilities and the authorisation of all ancillary activities and facilities including, but not limited to:
> - Inmate accommodation ranging from low, through medium, to maximum security;
> - ...

[840] The notice contains a statement of the Minister's objectives;[81] a description of the site and the locality; a full description of the nature of the work and proposed restrictions; a five-page consideration of potential environmental effects and proposed mitigation measures; a summary of the consideration that had been given to alternative sites, routes and methods; a list of the resource consents required; and a description of the consultation undertaken with parties likely to be affected.

Necessity for achieving the objectives of the work

[841] The issue in section 171(1)(a) is whether the designation is reasonably necessary for achieving the objectives of the public work for which the designation is sought. That issue is not whether the technique of designation is reasonably necessary, but whether the project or work is reasonably necessary.[82]

[842] It was the appellants' case that the designation of the particular site is not reasonably necessary for achieving the objectives of the public work (the construction of a prison in central Northland) because a number of serious adverse effects are likely to be caused, other sites are available for the purpose, and the most serious adverse effects would be avoided of another site is chosen.

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[81] The objectives are quoted later in the decision.
[82] *Bungalo Holdings v North Shore City Council* Environment Court Decision A052/01.

[843] The objectives of the proposed regional corrections facility were identified in the notice of requirement, as follow–

- To establish a comprehensive regional prison to serve the population of Northland on a site which can accommodate foreseeable inmate needs and numbers;
- To establish that facility on a site which is economically and technically feasible and appropriately located in relation to service delivery and visitors;
- To locate the facility within easy travelling distance of one of the main service centres in Northland;
- To have this facility operational during the year 2002.

The evidence

[844] Mr Warren remarked that potentially the objectives could be met by locating the prison on any one of thousands of sites. In respect of the second objective, the witness observed that for the site to be technically feasible, an extraordinary amount of site modification and work is necessary, and gave the opinion that because of the extensive works and additional costs the site would not meet the objective of being economically feasible.

[845] On the fourth objective, Mr Warren gave the opinion that a failure in the process of identifying sites or inadequate allowance of time should not over-ride sound resource management practice.

[846] Mr J Hamilton deposed that the technique of designation is necessary to meet the objectives of the proposed work, in order to authorise the proposed uses of land, which is a non-complying activity in respect of which the Minister had been advised that consent would be difficult if not impossible to obtain.

[847] The witness also addressed the necessity of the project itself. He gave the opinion that proposed new prisons in South Auckland and Dunedin would not meet the objective of the Northland proposal of being within easy travelling distance of one of the main service centres in Northland, and would not serve the population of Northland or be conducive to rehabilitation of Northland inmates, being distant from family and whenua.

[848] Mr Hamilton explained why the designation is sought for the whole site, not just the main facility. It would enable the control of buffer areas and provision of mitigation, would enable use of some of the pasture for employment and training of

inmates, and would enable flexibility for future developments like the proposed self-care units outside the main compound. He observed that as the Department owns the whole site, designation of it all would not adversely impact on a private owner.

[849] The witness referred to the pools on the site, which are to be fenced and are not required for the corrections facility. He informed the Court that the Minister accepts that the ponds and their surrounds can be omitted from the area subject to the designation. In cross-examination about transferring ownership of the pools, Mr J Hamilton referred to provisions in the Maori Land Act that may cover the situation, and that Ngati Rangi would be involved in the decision-making.

Findings on reasonable necessity

[850] If Mr Warren's opinion that the objectives could be met by locating the prison on any one of thousands of sites is correct, it confirms that the objectives have correctly been cast in general terms so that they are "divorced from the method of attainment" [83] and not to pre-empt the issues referred to in paragraphs (a) to (d) of section 171(1).

[851] We refer to the appellants' claim that the particular site is not reasonably necessary for achieving the objectives because of serious adverse effects that would be caused, that could be avoided by using other sites. That claim overlaps with the content of paragraph (b), the adequacy of consideration of alternative sites. In any event, the outcome of our consideration of the evidence is that the opponents' case of serious adverse effects has not been made out.

[852] The only challenge to the designation meeting the second objective related to the cost of the earthworks for site development. Earlier in this decision we gave our reasons for holding that it is not for the territorial authority (or the Environment Court on appeal) to decide whether the cost of developing the site is economically feasible, that being a matter for which the Minister would be responsible to the electorate.

[853] On the evidence about the regional and national need for a prison in Northland, the last objective is understandable for the Department's executive responsibilities, although now unrealistic.

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[83] *STOP Action Group v Auckland Regional Authority* High Court Wellington M514/85; 31 July 1987, Chilwell J, page 29.

[854] However for the purpose of section 171(1)(a), a decision-maker could not allow a requiring authority to rely on an objective of that kind to be weighed against alternative sites in that the extra time involved in securing them would fail the time objective. That would preclude proper consideration of the issues raised by paragraphs (b) and (c).[84] Therefore we interpret the reference to objectives in paragraph (a) as being to objectives cast so as not to limit the scope of the issues to which regard is to be given under section 171(1).

[855] Accordingly we hold that necessity for achieving the objective of having the facility operational during 2002 should not influence our decision of the appeals by those opposed to the designation.

[856] In summary, we find that the designation is reasonably necessary for achieving the objectives of the public work.

Adequacy of consideration of alternatives

The issue

[857] The appellants contended that adequate consideration had not been given to alternative sites because there had not been adequate factual enquiry and consultation, so the process had been flawed.

[858] The Minister's response was that this argument confused consultation about the subject site with site selection and elimination of other sites. Counsel observed that the direction in paragraph (b) is not to have regard to the adequacy of consideration given to the subject site, but to whether adequate consideration had been given to alternative sites.

[859] The Minister also denied that the consideration of alternative sites had been flawed in respect of factual enquiries or consultation.

[860] We accept that the focus of paragraph (b) is whether adequate consideration has been given to alternative sites, routes and methods, not whether adequate consideration has been given to the subject site.

[84] Cf *Whangarei City v Northland Area Health Board* Planning Tribunal Decision A120/86.

Evidence of consideration of alternative sites

[861] Earlier in this decision we reviewed the evidence of the site selection process, in which a number of sites were considered and eliminated, leading to the selection of the subject site. We stated our findings that adequate consideration had been given to alternative sites.

[862] We have also rejected criticisms of consultation with Maori.

[863] Mr Brand described a site at Wakelins Road, in the relative proximity of Kaikohe and Kerikeri, as an example which he considered presented a much more suitable site from a geotechnical and hydrological perspective for a facility such as that proposed. He gave a comparison in a number of respects of the putative site at Wakelins Road with the Timperley Farm site. In cross-examination Mr Brand was not able to state who the relevant hapu are in relation to the Wakelins Road site.

[864] In this respect Mr Brand appears to have misunderstood the Court's role. The Court does not have the executive function of deciding the most suitable site. Although the proceedings include an appeal against the Minister's requirement for a designation, the executive responsibility for selecting the site, and for deciding to proceed with the project on it, remains that of the Minister, for which he may be accountable to Parliament or the electorate.

[865] In addition, as Mr Warren observed, there may be many possible sites for the public work. However many sites have been considered, it may always be possible for another to be identified. It has long been established that having regard to whether adequate consideration has been given to alternative sites does not require the appellate body to eliminate speculative alternatives or suppositious options.[85]

Alternative methods

[866] Mr Hamilton gave the opinion that there is no method other than a prison to meet the objectives, and that despite the best efforts of the Department to reduce re-offending, and introduction of home detention, there is unfortunately an urgent need for a regional prison in Northland.

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[85] *Adamson Taipa v Mangonui County Council* High Court Auckland M101/81; 23 October 1981, Speight J.

[867] Mr Whewell deposed that re-development of existing prison sites had been considered, but rejected for two reasons. The first was that the existing sites had already been expanded to the stage where further expansion would impact on the Department's capability to reduce re-offending. The second was that it would not meet the regional prisons policy.

[868] Those opinions were not challenged, and we accept them.

Alternative routes

[869] Alternative routes may be applicable where a route or line is proposed to be designated, as in the case of a road or an electricity line. Consideration of alternative routes is not appropriate in the case of the proposed prison the subject of these proceedings.

Finding on adequacy of consideration of alternatives

[870] For the reasons given, we find that adequate consideration has been given to alternative sites and methods, and that consideration of alternative routes was not required.

Reasonable expectation of use of alternatives

[871] It was the appellants' case that it would not be unreasonable to expect the Minister to use an alternative site because serious adverse effects are likely if the subject site is used, effects that would be avoided if another site is chosen.

[872] Mr Warren remarked that the technical issues related to a large new prison in Northland could be satisfied within a wide compass of sites, and that there is nothing technical about the proposal that would render it unreasonable to expect the requiring authority to use an alternative site.

[873] Counsel for the Minister observed that the appellants' case in this respect was premised on the Court accepting that designation of the subject site would lead to serious adverse effects that could be avoided at another site, and contended that the appellants had not established those points on the evidence. Counsel also submitted

that paragraph (c) only becomes relevant if consideration of alternative sites had been inadequate.

[874] We accept the Minister's submissions in both respects. We have found that adequate consideration was given to alternative sites and methods; and that implementing the designation on the subject site would not have the serious adverse effects alleged. In those circumstances, it would be unreasonable to expect the requiring authority to use an alternative site or method.

Relevant provisions of statutory instruments

[875] Paragraph (d) of section 171(1) directs that particular regard be had to all relevant provisions of various instruments made under the Act. In this case regard has to be paid to no fewer than six instruments: the Northland Regional Policy Statement, the proposed Northland Water and Soil Plan, the transitional regional plan, the proposed Northland Air Quality Plan, the proposed Far North District Plan, and the transitional Far North District Plan (Bay of Islands section). Each of them is a substantial document.

[876] The effect of paragraphs (c) to (f) of section 104(1) is that in considering the resource consent applications we have also to have regard to all those instruments.

[877] To limit the task as far as we are able, we will give consideration to each of the instruments once for both purposes.

[878] However the directions in section 104(1) are limited to the objectives, policies and rules which are relevant to the actual and potential effects of allowing the activity identified following the inquiry directed by section 104(1)(a).[86] Accordingly we defer considering the statutory instruments until we have had regard to the environmental effects of allowing the resource consents, as directed by section 104(1)(a).

Section 104 considerations

[879] Section 104(1) prescribes matters to which a consent authority is to have regard in considering a resource-consent application. The subsection is prefaced by

[86] *Smith Chilcott v Auckland City Council* [2001] 3 NZLR 473; 7 ELRNZ 126; paragraph [31].

the words "Subject to Part II ..." In the context, as in section 171(1), that phrase has the effect of defeating the direction to have regard to the matters listed, where to do so would conflict with anything in Part II.

Environmental effects

[880] The first item in the list of matters to which a consent authority is to have regard is–

> (a) Any actual and potential effects on the environment of allowing the activity.

[881] In this case, it was not suggested that having regard to any actual or potential effects on the environment would conflict with anything in Part II.

[882] As the resource-consent applications before the Court in these proceedings relate to the earthworks and streamworks, not to the use of the land for the proposed prison, in carrying out the direction we have regard to the effects of allowing the earthworks and streamworks for which resource consents are sought, not to the effects of allowing the prison as a land use (being a matter the subject of the designation requirement, to which section 171 applies).

[883] The term 'effect' is defined in section 3. However that definition does not apply to the use of the term in section 104(1)(a).[87] Potential effects are effects which may happen, or they may not.[88]

[884] The term 'environment' is defined in section 2(1)–

> Environment" includes–
> (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 which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

[885] The submitters contended that regard must be had both to the physical disturbances to the landform, the groundwater, streams, and the receiving environment; and also to the cultural impact of those disturbances on Maori people

[87] *Dye v Auckland Regional Council* [2001] NZRMA 513; 7 ELRNZ 209; paragraph [41].
[88] Ibid, paragraph [39].

and communities. They urged that the potential effects include potential for geological and geothermal repercussions as a result of the proposed land disturbances, and the effect of the ultimate use of the site as a prison, including cultural impact, risks from escaping inmates, and risks to inmates and the neighbouring community due to location of the prison in an active geothermal system.

[886] We have already given our reasons for holding that the submitters, who were heard on the Minister's appeal against refusal of the resource consents, are not entitled to make a separate case in respect of the use of the land as a prison (for which authority is sought not by resource consent but by designation). In any event, we have considered the evidence about cultural impacts, risks from escaping inmates, and risk of eruptions, and have rejected them.

[887] Earlier in this decision we considered the evidence on claims of actual and potential effects of the disturbances to the landform, groundwater, streams and receiving environment; and the potential for the proposed works to cause geothermal activity. We have not accepted any of those claims.

[888] In summary we find that there would not be actual or potential effects on the environment of allowing the activities the subject of the resource-consent applications.

Statutory instruments

[889] As already mentioned, the effect of paragraphs (c) to (f) of section 104(1) is that in considering the resource consent applications we have to have regard to various instruments made under the Act. Because in considering the designation requirement we have to have particular regard to the same instruments, we address them later in a separate section of the decision.

Other relevant and necessary matters

[890] Section 104(1)(i) provides that in considering the resource consent application, the consent authority is to have regard to any other matters it considers relevant and reasonably necessary to determine the application.

[891] In this decision we have already addressed in detail the several matters raised in issue by the parties. We have also to have particular regard to no fewer than six instruments made under the Act. Even though we fully recognise the importance of the decision in these proceedings, we consider that such an abundance of evidence and instruments will provide a fully sufficient basis for making the judgements called for. We are not aware of any other matters that are relevant and reasonably necessary to determine the application.

Discharge considerations

[892] Section 104(3) provides–

> (3) Where an application is for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or 15B (relating to discharge of contaminants), the consent authority shall, in having regard to the actual and potential effects on the environment of allowing the activity, have regard to–
> (a) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects and the applicant's reasons for making the proposed choice; and
> (b) Any possible alternative methods of discharge, including discharge into any other receiving environment.

[893] That provision is applicable to our consideration of the applications for discharge to the Ngawha Stream of stormwater runoff, both from the construction sites, and from the roofed and paved areas of the facility post-construction.

[894] The nature of the discharges is that they will have been treated by detention ponds in accordance with the accepted Auckland Regional Council standard. The sensitivity of the receiving environment is not great, being a stream in a farming area that receives runoff from dairy farming. The Minister's advisers considered discharge to soakpits instead of discharge to the stream direct, but concluded that this would not be a practicable alternative. The effect of the project on the quality of the water in the stream would be that the quality would be better than if the property continued to be a dairy farm.

[895] For those reasons, we find that section 104(3) does not indicate that the discharge applications should be declined.

[896] Parts of section 107 relevant to discharge of contaminants prescribe–

> **107. Restriction on grant of certain discharge permits–** (1) Except as provided in subsection (2), a consent authority shall not grant a discharge

> permit ... to do something that would otherwise contravene section 15 ... 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
> ...
> (d) Any conspicuous change in the colour or visual clarity:
> ...
> (g) Any significant adverse effects on aquatic life.
> (2) A consent authority may grant a discharge permit ... to do something that would otherwise contravene section 15 ... 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.
> (3) In addition to any other conditions imposed under this Act, a discharge permit ... may include conditions requiring the holder of the permit to undertake such works in such stages throughout the term of the permit as will ensure that upon the expiry of the permit the holder can meet the requirements of subsection (1) and of any relevant regional rules.

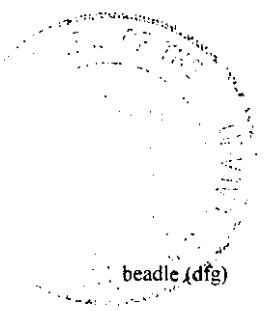
[897] The prospect of discharge of contaminants into water arises from runoff of stormwater from disturbed ground during the construction works. Although the runoff is to be diverted to detention ponds and treated before discharge in accordance with sound practice, during the construction phase, it may not be practicable to remove all contaminants at all times prior to discharge. The contaminant content of the discharge may be capable of being noticed, but on the evidence it would not cause a conspicuous change in colour or visual clarity, nor have any significant adverse effect on aquatic life. Conditions can be imposed requiring the consent holder to undertake and maintain diversion and treatment works specified in the appropriate Auckland Regional Council technical standard.

[898] The prohibition imposed by subsection (1) is subject to subsection (2), which allows the grant of a discharge permit authorising discharge of contaminants into water if the discharge is of a temporary nature, and it is consistent with the purpose of the Act to do so.

[899] The works for developing the prison site are to be temporary, and the stormwater runoff from the earth disturbed for those works will also be temporary.

[900] We find that granting consent would be consistent with the statutory purpose because the design of the development, and the conditions of consent, would avoid, remedy or mitigate the adverse environmental effects by requiring diversion, detention and discharge of the runoff in accordance with sound practice.

[901] Accordingly we hold that that the stormwater discharge consent for the construction phase is not prohibited by section 107.



STATUTORY INSTRUMENTS

[902] As already mentioned, section 104(1) directs that when considering a resource-consent application, a consent authority is to have regard to various instruments made under the Act. In deciding the Minister's appeal, the Court has the same duty.[89]

[903] The scope of the Court's duty under section 171(1)(d) to have particular regard to the statutory instruments is similar to that imposed by section 104(1). To avoid repetition, we have particular regard to relevant provisions of them in respect of the required designation for the purpose of section 171(1)(d), and in respect of the resource-consent applications for the purpose of section 104(1)(c) to (f).

[904] Of the instruments to which we are to have particular regard, two are transitional plans that were prepared under earlier legislation. For that reason the duty to have particular regard to them might be defeated by conflict with Part II of the 1991 Act. In respect of the other instruments, prepared specifically for the Resource Management Act regime, we are not aware of any potential conflict with Part II that might defeat the duty to have particular regard to them.

Northland Regional Policy Statement

[905] Relevant provisions of the Northland Regional Policy Statement were identified in Mr Bhana's evidence. We have considered them all, but mention only those that bear significantly or specifically on issues in these proceedings.

[906] The description of the Ngawha Geothermal Field identifies "the considerable cultural and spiritual value to tangata whenua" of the hot water seepages and springs, "used for bathing by local residents and visitors for some therapeutic purposes".

[907] The description of partnership principles of the Treaty of Waitangi recognises tangata whenua as a Treaty partner, and states that tangata whenua are expected to have a key role in resource management through consultation, education, monitoring and investigations, and that their involvement respects them as kaitiaki o nga taonga tuku iho. A policy of consultation with tangata whenua is elaborated, as are policies of identification and protection of waahi tapu and other heritage features.

[89] Resource Management Act 1991, s 290(1).

[908] Cultural purposes are among the purposes of the objectives for maintenance and enhancement of water quality in all classes of water body, including groundwater and streams. Similarly in respect of discharges of contaminants, traditional Maori cultural values are among those identified for consideration. Policies for controlling the quantity and flow of water bodies also recognise that some water bodies may be identified as taonga.

[909] There is a policy of promoting soil conservation as an integral part of all land use and development activities, particularly to minimise erosion and avoid off-site sedimentation.

[910] There is an important section on natural hazards, although it does not identify geothermal or seismic hazards. There is another section on hazardous substances, which does not identify natural concentrations of mercury or other hydrothermal products, but a section on energy mentions Ngawha geothermal field as a potential energy source.

[911] The transitional regional and district plans to which we have particular regard, having originally been prepared under the previous regimes, may not fully accord with the purpose of the Resource Management Act 1991, or the regional policy statement prepared under it. However the proposed regional and district plans prepared under the 1991 Act are all required not to be inconsistent with the regional policy statement.[90] In addition, the proposed district plan is not to be inconsistent with any regional plan in regard to any matter of regional significance or for which the Regional Council has primary responsibility.[91]

[912] Referring to the findings stated earlier in this decision on Treaty principles, Maori cultural and traditional relationships, and kaitiakitanga, we find that the proposed designation and resource consents would not offend the provisions of the regional policy statement in those respects.

[913] The regional policies against erosion and sedimentation are to be implemented by the more detailed and particular provisions of the proposed regional water and soil plan; and we consider the proposed earthworks and streamworks in that context.

[90] Ibid, s 67(2) and s 75(2).
[91] Idem.

Proposed Northland Water & Soil Plan

[914] The proposed regional water and soil plan was publicly notified in 1995, and Variation No 1 on 30 August 1997. Submissions on the proposed plan and variation were heard and decided, and a revised version of the plan incorporating the amendments decided on was published on 7 November 1998. References have been lodged with the Environment Court in respect of a number of provisions, but have not yet been determined.

[915] Variation No 2 was publicly notified on 27 October 2001 (before the hearing of these proceedings could be completed). A number of submissions had been received by 14 December 2001 when the period for lodging submissions elapsed.

Objectives and Policies

[916] Consistent with Part II of the Act and the regional policy statement, the plan recognises tangata whenua as a partner to the Treaty of Waitangi. It acknowledges that tangata whenua take a holistic approach to the management of the environment and its resources. It contemplates that the Regional Council, in decision-making, requiring information on the application of Treaty principles to individual proposals, and weighing that information against other matters under consideration. Subject to the legislation, it also allows for each iwi to indicate its own customary, traditional and cultural preferences for water management in its tribal territory, and ensuring that the spiritual, social, and economic connections between tangata whenua as kaitaiki and water and land resources are protected. The plan also provides for protection of waahi tapu, urupa and other sites of cultural and spiritual significance.

[917] In general terms the plan has an objective of integrated and co-ordinated management of natural and physical resources; an objective for maintenance and enhancement of water quality for cultural (and other) purposes; and a policy of managing water bodies recognised (by an iwi or judicial authority) as taonga of special significance having particular regard to those cultural values.

[918] For groundwater management, the objectives are sustainable use and management of the resources, to avoid land subsidence, saltwater intrusion, and similar effects and (specifically in respect of geothermal waters) lowering the temperature in aquifers and springs.

[919] In respect of land management there are policies of maintaining soil quality, (including depth) as far as practicable, of avoiding or reducing discharge of sediment and minimise soil losses particularly on erosion-prone land. There are also policies of promoting stream-side management recognising the benefits, protecting or enhancing stream-side vegetation, particularly indigenous vegetation; and having regard to cultural and spiritual values held by tangata whenua when considering applications for land-disturbance activities.

[920] There is a map identified as Schedule C of the appendixes of the plan (as revised) that shows the approximate boundary of the geothermal field as defined by resistivity survey. Mr Lawless agreed that the boundary shown on the map is approximately the same as is accepted in many scientific publications representing the results of a resistivity survey at a particular depth. At a shallower or greater depth one would draw a slightly different boundary. The purpose of the resistivity survey was to define the high temperature reservoir at the depth that could be economically drilled, that is 500 metres depth to possibly twice that.

Status of works

[921] The proposed plan contains elaborate rules about the status of runoff and discharge of stormwater, diverting surface water, and land disturbance activity (in general and in streamside management areas). The Minister accepted that resource consents are required in respect of land disturbance (including cut and fill), damming and realigning the Ngawha Stream, stream-bed works, discharge of treated stormwater and treated runoff from land disturbance to the Ngawha Stream or tributaries, and incidental discharges from the stormwater collection systems on the site. Initially the Regional Council had suggested that resource consent may be required for the wick drains. However an effect of Variation No 2 (in respect of which no submissions were received) is to make them a permitted activity.

[922] The earthworks for site development involve about 440,000 cubic metres of cut and fill excavations for buildings platforms and other structures. The rule applicable is Rule 33.2–

> The following land disturbance activities are controlled activities:
> 1. Any *earthworks* which:
> (i) Is not located on *erosion prone land*, and is not in the streamside management area.
> (ii) the volume moved or disturbed is greater than 5000 m3 in any 12 month period.
> Is a controlled activity provided that the following conditions are met:

(a) There are no more than minor adverse effects on soil conservation beyond the property boundary.
(b) The Environmental Standards in Section 32 are complied with.
Matters subject to control
The matters over which the Northland Regional Council will exercise control are:
(a) The adequacy of sediment and runoff control measures.
(b) The location of any borrow and fill areas.
(c) The adequacy of site rehabilitation and revegetation measures to control sediment discharge and adverse effects on soil conservation.
(d) Information and monitoring requirements.

[923] The site of the proposed earthworks is not erosion-prone land, and to the extent that it is not in the streamside management area (a strip of land varying between 3 metres and 20 metres in width from the bank edge of a watercourse) the works qualify as a controlled activity if conditions (a) and (b) are met.

[924] In respect of Condition (a), there was no issue. That condition would be met.

[925] Turning to Condition (b), Section 32 of the plan contains a set of environmental standards for land disturbance works, to avoid or minimise erosion and contamination of surface waters, and interference with waahi tapu, urupa, and other sites of spiritual or cultural significance to Maori. Revegetation is required and batters and side castings are to be stabilised to avoid slumping. Earthworks are to incorporate stormwater controls to prevent scour and sediment discharge. Traditional and cultural relationships of tangata whenua with the land and water are to be recognised and provided for.

[926] There was no issue that the proposed works would be carried out in a way that meets the standards for protection of natural and physical resources.

[927] The text of the particular standard to protect waahi tapu and other cultural sites is in paragraph 32.1.5–[92]

The activity shall not interfere with or destroy any waahi tapu, as defined in the definitions, urupa or any other sites known to the local iwi which are of spiritual or cultural significance to Maori, which have been identified to the Regional Council.

[928] There are pools on the property that have cultural significance to Maori. They are the Waitotara and Waiapawa pools, and the Minister has proposed that they be fenced off and protected.

[92] As amended by decisions on submissions.

[929] Mr Warren stated that–

> ... the considerable evidence by tangata whenua concerning the spiritual and cultural significance of the area to them raises a real concern as to whether this standard can be met.

[930] For ourselves we do not find that a general statement that evidence raises a real concern as to whether the standard can be met assists us. We consider that compliance with the standard requires identification of the issue, consideration of the evidence, and making a finding on the issue from the evidence.

[931] The issue is whether or not the activities the subject of the resource consent applications would interfere with or destroy any waahi tapu (as defined), urupa, or other sites that fulfil the conditions in the standard. We have reviewed the evidence in that regard earlier in this decision. Neither Mr Warren nor any other witness provided probative evidence (as distinct from bald and general assertions) of the existence of any waahi tapu (however defined), urupa or other site which had been identified to the Regional Council and that would be interfered with or destroyed by the proposed activities.

[932] Without repeating the details set out earlier in this decision, we find that the proposed earthworks would not interfere with or destroy any waahi tapu, urupa, or other sites of spiritual or cultural significance to Maori, which have been identified to the Regional Council. We have also reviewed the evidence about relationships of Maori, and their culture and traditions, with the land and water of the site, and have found none that would be adversely affected by the works.

[933] Consequently we hold that the proposed earthworks outside the streamside management area are a restricted controlled activity, the discretion being restricted to the four matters listed in Rule 33.2.1.

[934] The proposed earthworks within the streamside management area are discretionary activities. Variation No 2 makes no practical difference in that respect. Culverts are permitted activities if they do not obstruct the free flow of water. However two of the proposed culverts do not meet that condition (requiring gratings to prevent escapes) and are controlled activities.

[935] Water pipelines crossing watercourses are permitted activities, but those carrying sewage from the prison crossing watercourses are discretionary activities. The proposed damming of the stream is a discretionary activity, as are the diversions

and realignment of the stream, and the bank protection works and other stream improvement and drainage works.

[936] The Regional Council informed the Court of its understanding that the effect of Variation No 2 would be that post-construction stormwater discharges would comply with the conditions for a permitted activity; and that the wick drains would also qualify for that status. Without rehearsing the detail of the reasoning, we understand that neither of those submissions was challenged, and we accept them.

[937] However, diversion and discharge of stormwater associated with the land disturbance activities is a controlled activity outside the streamside management area, and a discretionary activity where the runoff passes to a streamside management area. The post-construction diversion and discharge of stormwater, draining an area exceeding 4 hectares, is a discretionary activity.

Assessment

[938] The plan prescribes assessment criteria for various classes of consent. These are expressed in general terms, and have some contents in common. In the light of the findings we have already made on the opponents' claims of adverse environmental effects, we do not quote or summarise them all. We note that assessment of discharge permit applications is to include the sensitivity of the receiving environment including its cultural values; that the assessment of damming and diversion is to include the extent to which the natural character of the environment is maintained, and the extent to which cultural values are adversely affected, and maintenance of fish movement; and assessment of land disturbance is to include the scale of the activity, proximity to any identified significant natural feature, waahi tapu or urupa and effects on them.

[939] The proposal involves specific soil conservation measures to minimise erosion and avoid off-site sedimentation, and revegetation of exposed areas in accordance with an erosion and sediment management plan. Diversion channels and sediment detention ponds would be included. The flow of the Ngawha Stream is to be diverted from the site during the works to maintain the quality of the water.

[940] Native orchid habitats are to be protected by fencing. Unsuitable exotic riparian vegetation is to be replaced by more suitable species, and proposed fencing and planting of the riparian margins would result in an overall improvement of fish habitat. Culverts have been designed to allow for passage of fish.

[941] Although the streambed works would interrupt flow in the Ngawha Stream for a short period, the flow in the tributaries would ensure that there would still be downstream flow at all times, and no adverse effects are likely. Otherwise no structures are proposed that would inhibit passage of fish, and no undesirable erosion of the streambed is likely. The proposed works would not create any increased flooding upstream or downstream, nor any increased restrictions on drainage of flood waters or other significant effects beyond the property.

[942] The stormwater collection system would direct runoff from hard surfaces and roofs to settlement ponds (designed in accordance with the standard Auckland Regional Council TP10) and from there to the Ngawha Stream. The system is to be designed to accommodate 1-in-50-year 15-minute storm events. The rate and volume of stormwater would not noticeably increase the volume or velocity of flows beyond the property, and the quality of the water is likely to improve compared with the present uncontrolled runoff from the dairy farm.

[943] The Regional Council expects to carry out monitoring at regular intervals to ensure ongoing compliance, especially during or after heavy rain.

[944] Evidence was given by Mr G E Heaps, a qualified soil conservator and Regional Council consents officer. This witness gave the opinion that the proposed earthworks and associated stormwater discharges, works in the beds of watercourses and ongoing stormwater discharges from the site, if carried out in compliance with the recommended conditions, would have no more than minor adverse effect on the environment. Any short-term effects on water quality would be no more than minor and in the longer term the water quality is likely to be better than it is at present. In summary, this officer gave the opinion that the proposals would be consistent with the objectives and policies of the regional policy statement and revised proposed regional water and soil plan.

[945] Mr Warren expressed doubt about compliance with the environmental standard limiting reduction in clarity of the stream water from sedimentation. Asked in cross-examination the witness stated that he was aware of the silt protection measures proposed by the Minister's engineers, and that he would have no objection to the fixing of a condition directed at securing compliance with the standard, in terms of a detailed erosion and sediment management plan.

[946] We have already given our findings about the limits of the holistic approach in making decisions under the Resource Management Act, and about the design of the proposal to respond to that view of the environment. We have not found that Maori have a cultural or traditional relationship with the site that would be adversely affected by giving effect to the designation or by exercising the resource consents. The only taonga on the property, the Waiapawa and Waitotara pools, are to be protected.

[947] The proposal was put before the Court in an integrated way, co-ordinating the designation requirement and the resource consent applications, and although the geothermal activities are a taonga of cultural significance, they would not be affected by the prison that would be authorised by the designation, nor by the development works that would be authorised by the resource consents. Those works are to be carried out so as to avoid, remedy and mitigate any adverse effects on the natural and physical resources affected, including in particular sediment and runoff control and revegetation.

[948] In summary, it is our judgement that the works that would be authorised by the resource consents (whether controlled activities or discretionary activities), and (to the extent relevant) the prison land-use that would be authorised by the designation, considered by the assessment criteria of the proposed Regional Water and Soil Plan, would serve the objectives and policies of that plan, and indirectly those of the regional policy statement.

Transitional Regional Plan

[949] The transitional regional plan consists principally of a general authorisation under the Water and Soil Conservation Act 1967 and a set of bylaws. The Regional Council announced that the transitional regional plan rules are largely superseded by

provisions of the proposed Regional Water and Soil Plan and they are no longer in contention.

[950] The only rules of the transitional plan that are relevant to the proposed works were originally in the general authorisation under the 1967 Act. The discharge of post-construction stormwater, being from a roofed and paved area exceeding 2500 square metres, is not permitted by the general authorisation incorporated in the transitional regional plan, and a discharge permit is required in that regard. The proposed streambed works are not authorised either, so resource consent is also required for them.

[951] The transitional district plan does not provide assessment criteria for deciding the applications in those respects. In our judgement because the stormwater system includes silt detention ponds to the appropriate technical standard, and would not have flooding or significant water quality effects, the consent required by reference to the transitional regional plan deserves to be granted on appropriate conditions. Likewise the proposed streambed works would be sufficiently controlled by the proposed conditions as to avoid, remedy or mitigate adverse effects on the environment, and on that basis should be granted.

[952] Although the relevant provisions of this transitional plan were prepared in terms of the Water and Soil Conservation Act 1967, which was repealed by the Resource Management Act 1991, we are not aware of any reason why having particular regard to this instrument would conflict with anything in Part II.

Proposed Northland Air Quality Plan

[953] Rule 10.1.2 of the proposed plan prescribes that discharge of dust is not to result in any dust nuisance that is offensive or objectionable to neighbouring landowners and occupiers or their properties.

[954] The Minister having been advised that compliance with that rule would be achieved did not apply for resource consent in respect of the proposed air quality plan. The Regional Council did not take issue with that, and there was no evidence providing a basis for doubting that advice.

Proposed Far North District Plan

[955] The Far North District Council publicly notified its current proposed district plan on 27 April 2000. The District Council is now at the stage of hearing submissions on the proposed instrument.

[956] There is a section of the proposed district plan setting out tangata whenua values and perspectives, with reference to the holistic approach to the management of the environment and its resources, echoing the content of the regional policy statement in that regard. Related objectives and policies are to be implemented by identification of sites of value to Maori, and by various rules governing development.

[957] The proposed district plan identifies the Waiariki pool as a site of Maori cultural significance. No other special provisions in the plan affect the subject property.

[958] By the proposed district plan, the site is in the General Rural zone. The objectives and policies are based on sustainable management of the natural and physical resources found in rural areas. Rural and agricultural activities and the need to accommodate change are recognised along with maintaining the life-supporting capacity of soils and protecting significant vegetation, habitats, outstanding landscapes and natural features.

[959] The rules for the zone classify activities by reference to standards for permitted activities. Rule 8.6.5.1.2 restricts the intensity of residential development to one residential unit per 4 hectares of available land. The definition of 'residential unit' does not apply to the accommodation proposed for the corrections facility.

[960] Rule 8.6.5.1.4 limits the maximum area of impermeable surfaces to 15 % of the site area or 5000 square metres, whichever is the less. Rule 8.6.5.2.2 limits the maximum site coverage for controlled activities to 20 % or 8000 square metres, whichever is the less.

[961] Rule 8.6.5.1.6 limits traffic intensity for new activities to 100 one-way movements. Rule 8.6.5.3.1 limits traffic intensity for new activities as a restricted discretionary activity to 200 one-way movements.

[962] Prisons are not specifically provided for. However Rule 8.6.5.4 defines an activity in the Rural General zone as a discretionary activity if it is an integrated development.

[963] Mr Bhana gave the opinions that the rules for integrated development encompass activities of a similar kind (in terms of their effects on the physical environment) to those proposed for the prison development; and that the proposed buildings could comply with the standards in the plan. Those opinions were not challenged, and we accept them.

[964] The district plan classifies excavation and filling in excess of 2000 square metres on sites in the Rural General zone as a discretionary activity. The assessment criteria encompass similar issues to those in the proposed regional water and soil plan.

[965] The standards for permitted activities include a requirement that buildings and impermeable surfaces are set back from the edge of rivers. The setback for rivers less than 3 metres in width is equal to 10 times the average width of the river where it passes through the site. An activity that does not meet that standard becomes a discretionary activity.

[966] Mr Bhana relied on Mr Boffa's evidence and gave the opinion that the prison buildings would not be visible to a wide audience and where they would be particularly visible, proposed planting would mitigate any visual effects so that they would be compatible with other buildings in the area. Mr Bhana also gave the opinion that the prison would not result in visual domination, loss of privacy or sunlight to adjacent properties.

[967] The witness acknowledged that development of the prison would have some effect on the life-supporting capacity of soils immediately and directly affected by buildings and impermeable surfaces, and observed that this is a minimal area of the site and a natural consequence of any building development of the proposed scale. He concluded that an activity which had the potential for similar effects on the environment as the proposed prison would be in accordance with the assessment criteria for discretionary activities in the General Rural zone provided it is designed in similar fashion to avoid, remedy or mitigate the effects on the environment.

[968] We refer (without repeating) to our findings about the holistic approach, to the protection of the Waitotara and Waiapawa pools, and to there being no other site of value to Maori that would be affected.

[969] We find that the proposed prison would not be incompatible with the rural activities that the proposed district plan contemplates and provides for in the General Rural zone. The size of the site is such that intensity of development is not in issue. The proposals for runoff, treatment and discharge of stormwater are such that the extent of impermeable surfaces are not an issue. The unchallenged evidence shows that traffic safety and efficiency is not an issue. The proposed riparian planting serves the purpose of the setback provisions.

[970] In summary, it is our judgement that the designation of the site for the prison, and the detailed plans for its development, would be compatible with the proposed district plan.

Transitional District Plan

[971] The relevant section of the transitional district plan is the former Bay of Islands County District Scheme. The district scheme was prepared under the Town and Country Planning Act 1977 commencing in 1987. It was made operative on 21 December 1992. By section 373 of the Act, it was deemed to be the district plan for the part of the Far North District to which it related.

[972] Mr Warren observed that the transitional district plan had been prepared under the Town and Country Planning Act 1977, and advised that he had not accorded it any weight.

[973] The transitional plan contains objectives and policies recognising and providing for traditional, cultural, spiritual and ancestral links between tangata whenua and any land or water bodies.

[974] The plan records that tourism proposals for Ngawha Springs not having come to fruition, the area set aside for tourist accommodation there had been significantly reduced, but retaining provision for redevelopment of the site previously occupied by the Ngawha Springs Hotel.

[975] By the transitional district plan, the site is zoned Rural 1C (Catchment Protection), a zone to protect areas within water supply catchments.

[976] A wide range of activities are permitted in the Rural 1C zone, including kokiri centres, marae development, outdoor recreation and entertainment activities excluding motorsports and firearms sports. However educational institutions, licensed premises, rural industries, timber processing facilities and wineries are discretionary activities.

[977] The development standards require internal yards of 10 metres for packhouses and coolstores, and 3 metres for others. There is no height limit and the maximum building coverage is 25% of the site area.

[978] Mr Bhana adopted Mr Boffa's opinion that the prison would not adversely affect the visual qualities of the neighbourhood; Mr Gibson's opinion that lighting of the prison would have minimal effects; Mr Oh's opinion that it would not have adverse noise effects; and the opinions of Bishop Te Haara and other witnesses that there would be no adverse impact on cultural values and that the net effect is likely to be beneficial. Mr Bhana also adopted Mr McCoy's opinion that any potential adverse traffic safety effects would be satisfactorily avoided, remedied or mitigated by the proposed intersection works on State Highway 12. He further adopted the evidence of Messrs Alderton and Hickling that adverse effects on water quality and quantity would be avoided, remedied or mitigated by the proposed construction methods, stream protection and stormwater control measures, and as required by the proposed conditions of the resource consents.

[979] We accept the review of that evidence. We have already given our findings that the proposal would not limit any potential that may exist for tourism development at Ngawha Springs. There is no evidence of any current need for water catchment protection that would limit the use of the Timperley land. In our judgement the proposed prison on the site would be compatible with the rural activities contemplated by the transitional district plan for the Rural 1C zone, and nothing in the transitional district plan would preclude giving effect to the designation, or granting the resource consents, on the proposed conditions.

[980] Although this instrument was prepared under previous legislation, we are not aware of any reason why having particular regard to it would conflict with anything in Part II.

CONDITIONS

Designation

[981] Counsel for the Minister presented a revised set of conditions to be attached to the designation in the event that the requirement is confirmed. The Far North District Council has indicated its agreement to the revised conditions, and the opponents have not signified any opposition, or any wish to be heard in respect of them.

[982] Having reviewed the revised conditions, we are satisfied that they would be appropriate to protect the public and private interests likely to be affected by the designation, and would be effective in avoiding, remedying and mitigating any adverse environmental effects arising from the exercise of the designation.

[983] The revised conditions intended for the designation are set out in Appendix 1 to this decision.

Resource consents

[984] The Regional Council refused the resource consents applied for by the Minister on what may be summarised as Maori cultural grounds. Its commissioners stated that but for those matters the resource consents would have been granted in accordance with good resource management practice, they attached to their decision a set of conditions that they would have imposed had the applications been granted.

[985] In his evidence to the Court Mr G E Heaps, a Regional Council consents officer, proposed some amendments to the conditions attached to the commissioner's decision. Subsequently, a further revised version of those proposed conditions was prepared and agreed to by the Minister and the Regional Council. The opponents have not signified any opposition to the revised conditions, or any wish to be heard in respect of them.

[986] We have considered the revised conditions, and are satisfied that they would be appropriate and effective in avoiding, remedying and mitigating any adverse environmental effects arising from the exercise of the resource consents.

[987] The revised conditions are contained in Appendix 2 to this decision.

PERMITTED BASELINE COMPARISONS

Does the duty apply to regional consents and designation requirements?

[988] We have attended to the various duties expressly stated in the Resource Management Act for the consideration of the designation requirement and the resource consent applications. We have now to consider whether the law obliges us also to make permitted baseline comparisons in respect of any of them.

[989] There are three different aspects of permitted baseline comparisons. The first is to compare the environmental effects of the activity the subject of consideration with the environmental effects of activity actually being carried out lawfully on the land. The second is to compare them with the environmental effects of hypothetical activity that (not being fanciful) could occur on the land as a permitted activity under the relevant plan. The third is to compare the environmental effects of the subject activity with those of an earlier resource consent that has not been implemented.[93]

[990] At least in the case of applications for land-use consent,[94] and for subdivision consent,[95] the first two comparisons are obligatory; and it is for the consent authority to decide whether or not the third is appropriate in the circumstances.[96]

[991] However as far as we were aware, neither the Act nor the case-law states whether the obligation to make permitted baseline comparisons extends to designation requirements or to applications for regional resource consents (those required by sections 12-15). Therefore we invited counsel to offer submissions on those questions.

[992] Mr Littlejohn submitted that there is no legal or policy basis to restrict the obligation to make permitted baseline comparisons to land-use consents under section 9(1). He offered three reasons.

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[93] *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA); *Smith Chilcott v Auckland City Council* [2001] 3 NZLR 473; 7 ELRNZ 126 (CA); *Arrigato v Auckland Regional* [2001] NZRMA 481 (CA).
[94] *Bayley* supra, and *Smith Chilcott* supra.
[95] *Arrigato* supra.
[96] *Arrigato*, supra.

[993] The first reason was that the practice of permitted baseline comparison arose out of notification duties under section 94, which apply to all consent authorities, and are driven by the status of the activity, not by its nature.

[994] The second reason was that there is no implicit restriction of the duty to land-use activities in the reasoning of the Courts in developing the obligation.

[995] The third reason was that the statements of the restriction on activities in sections 9(1), 13, 14 and 15 all envisage a baseline or level of permitted effects (expressly provided for in regional plans), below which resource consent would not be required. Counsel submitted that activities having effects for which resource consent is not required could be seen as being "as of right".

[996] Mr Littlejohn also submitted that the public policy reasons for the permitted baseline approach in relation to section 9(1) referred to in *Barrett v Wellington City Council*[97] apply equally to activities requiring regional consents; and that in this case the Court would be entitled to disregard adverse effects of activities expressly authorised by the regional plans.

[997] Mr Bell also submitted that the obligation to make permitted baseline comparisons applies to applications for regional consents. He asserted that in any particular case an assessment of effect on the environment of an activity for which consent is sought may involve enquiry into a wide range of environmental matters, and evaluation of the effects (even with regard to what is permitted under the rules of the plan) is one of evaluation based on particular facts. Mr Bell also submitted that application of the permitted baseline test is not necessarily determinative, observing that some activities are classified as permitted because they have particular social utility despite their adverse effects, citing taking of water for firefighting, and coastal structures for navigational safety, as examples.

[998] Mr Bell submitted that the structure of duties in Part III, in which some activities are prima facie allowed unless controlled by rule, and others are prima facie prohibited, does not make any difference for this purpose. In *Arrigato* the permitted baseline obligation was applied to a subdivision application although section 11(1) makes subdivision prima facie prohibited.

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[97] [2000] NZRMA 481 (HC).

[999] Mr Milne also submitted that there is no clear reason why the permitted baseline practice should not be extended to applications for regional consents and to designation requirements, and agreed with other counsel that it should apply to applications under sections 12 to 15. He suggested that the 'permitted' part of the baseline should be treated as applying to all activities for which a certificate of compliance would have to be issued (if applied for). Mr Milne cited *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council and Glendon Trust* [98] in which Justice Chisholm held that in evaluating the cultural and spiritual effects of proposed activity (in terms of Part II) the Environment Court had been entitled to take into account activities that could be undertaken as of right.

[1000] In respect of designation requirements, Mr Milne observed that unlike section 104, section 171 does not expressly require that regard is to be had to environmental effects of the proposed activity (though he acknowledged that consideration of environmental effects is required in terms of Part II, and particularly section 5(2)(c)).

[1001] Mr Milne suggested that in practice the permitted baseline will have little applicability in the context of an activity that might be designated. That may be so, but it does not affect the principle.

[1002] As there was no submission to the contrary, for the present case we accept that the obligation to apply the permitted baseline comparisons extends to the applications for regional consents and to the designation requirement.

Application of the permitted baseline comparisons

[1003] In the present case there was no evidence of any unimplemented resource consent affecting the subject land, so we are relieved of the duty of considering whether the third baseline comparison is appropriate in the circumstances of the case. We make comparisons of the effects of the regional consents, and of the designation, separately.

[1004] The purpose of the comparison is to consider whether the environmental effects of the proposal exceed a putative baseline of acceptable environmental effects that are inferred from the existing lawful activities and hypothetical permitted

[98] High Court, Wellington, AP6/01; 25 June 2001, Chisholm J.

activities, as explained in this passage from the judgment of the Court of Appeal in *Arrigato v Auckland Regional Council*[99]–

> Thus the permitted baseline in terms of Bayley, as supplemented by Smith Chilcott, is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the sections 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[1005] The first aspect of the baseline is the environmental effects of existing lawful activities on the site. They are the environmental effects of a working dairy farm, particularly diffuse discharges to the Ngawha Stream and tributaries of runoff contaminated by cattle, and impact of stock on riparian and other vegetation.

[1006] The second aspect is to identify the environmental effects of non-fanciful hypothetical activity permitted by the applicable plans. The wick drains are permitted, so we treat their effects (if any) as being within the baseline. So is drain-clearing and maintenance. In addition 2000 cubic metres per year of earthworks can be carried out anywhere on the land except in the stream-side management areas.

[1007] Turning to land-use activities, those permitted by the transitional district plan are readily identified, so the baseline includes the effects of kokiri centres, marae development, outdoor recreation and entertainment activities excluding motor sports and firearms sports. By the proposed district plan permitted activities are limited by the performance standards (detailed earlier in this decision) stipulating intensity of residential development, maximum area of impermeable surfaces, maximum site coverage, and traffic intensity.

[1008] So the environmental effects that make up the permitted baseline are those of depasturing by dairy cows and of milking operations; diffuse discharges of contaminants from that activity to the stream and its tributaries; drainage by wick drains; and 2000 cubic metres per year of earthworks (except in the stream-side area). In land use, they are the environmental effects (such as they may be) of kokiri centres, marae development, outdoor recreation and entertainment activities excluding motor sports and firearms sports, residential development up to one unit per 4 hectares, and other undefined activities, limited to impermeable surfaces not

[99] [2001] NZRMA 481 para [29].

exceeding 15% of site area or 5000 square metres, site coverage not exceeding 20% or 8000 square metres, and traffic up to 100 vehicle movements per day.

[1009] Now we have to compare the environmental effects of the prison proposal with those of the permitted baseline, to assess whether there are "other or further" adverse effects of the proposal that are to be taken into account in making the judgements under section 174(4) whether the designation requirement should be confirmed, modified or cancelled; and under section 105(1)(b) whether the resource consents should be granted or refused.

[1010] The proposal involves discharges of potentially contaminated stormwater runoff to the stream and its tributaries. We find that the environmental effects of those discharges would be considerably less than the existing diffuse discharges, because of the elaborate proposals for diversions and detention ponds in accordance with the appropriate technical standard. Also, the proposed stream works on the eastern tributary would have less adverse effect on the environment than normal drain-clearing and maintenance operations.

[1011] However the scale of the land disturbance proposed considerably exceeds the extent permitted, even outside the stream-side management area (2000 cubic metres per year), and has "other or further" adverse effects beyond the baseline. The environmental effects of *using* the land for the proposed prison fall outside the permitted baseline, because a prison is neither existing nor permitted on the site, and the extent of the impermeable surfaces and site coverage exceed the standards.

[1012] We find therefore that in making the judgements referred to, we are not to take into account the effects of discharge of contaminants or of the wick drains, as they are not "other or further adverse effects" than the adverse effects included in the permitted baseline. However the effects of the other earthworks and streamworks proposed, and those of the scale and intensity of the accommodation, the extent of impermeable surfaces, and site coverage (being "other or further adverse effects" beyond the baseline), are to be taken into account in making those judgements, to which we now proceed.

JUDGEMENTS

[1013] In preceding sections of this decision we have made our findings about the affirmative case for the proposal; about the claimed physical effects on the environment; the Maori cultural and traditional issues raised; and the other non-

physical effects claimed. We have considered the application of important provisions of Part II to which our attention was drawn, and have found that elements relied on have been appropriately recognised and provided for, paid particular regard, and appropriately taken into account. We have attended to the considerations prescribed by the Act for the designation appeal and the resource consent applications; and we have made the permitted baseline comparisons required by case-law. We have considered the conditions that might be imposed on the designation and the resource consents, if confirmed and granted, to avoid, remedy or mitigate any adverse effects on the environment.

[1014] Having done those things, we have now to make judgements to confirm, cancel or modify the designation requirement,[100] and to grant or refuse the resource consents sought.[101] Those judgements are to be informed by the purpose of the Act stated and described in section 5, which reads–

> **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.

[1015] Those judgements are to be made independent of the parties' attitudes, by standing back and viewing the designation and resource consents from that perspective.

[1016] We have found that there is a public need for a regional prison in Northland. We have also found that the proposed prison would bring substantial economic benefits to the Far North district, and that the net social effect would be positive. Moreover, the proposed prison is capable of providing, and is intended to provide, opportunities for the rehabilitation of inmates. In that regard, we accept that its location near a place highly reputed for healing is appropriate.

[100] Resource Management Act 1991, s 174(4).
[101] Ibid, s 105(1).

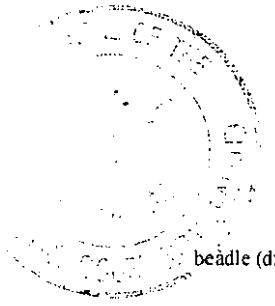
[1017] Although the opponents questioned it, we find that the proposal would enable people and communities to provide for their cultural well-being, as well as their social and economic and social well-being, and for the health and safety of the inmates as well as the people and communities of the region.

[1018] We do not seek to belittle the opposition. Many Maori expressed the belief that the proposed prison would adversely affect their taonga of the Ngawha geothermal field, and we respect their attitudes. However the proposal involves active protection of the only significant geothermal manifestations on the site. The works would not affect the geothermal field in any physical way. The prison would be a kilometre distant from the mineral springs and pools that are the focus of the taonga and the activity around it, and would not be visible from them. In our judgement it would be out of perspective and disproportionate to allow the opponents' attitudes to prevail over the need for the prison, and the extent to which it would enable people and communities to provide for their social, economic and cultural well-being, and for their health and safety.

[1019] Our consideration of subsection (2)(a) was focused on the potential of the soils of the site, and the potential of the geothermal system. Both are appropriately sustained to meet foreseeable needs of future generations. Subsection (2)(b) calls for particular consideration of the Ngawha Stream. The quality of the stream water and the ecosystems of it and of the land would be improved.

[1020] The goal of subsection (2)(c) is avoiding, remedying, or mitigating any adverse effects of activities on the environment. That has also been a goal of the design of the proposed facility, and of the conditions both of the designation and of the resource consents. From a full examination of both, we are satisfied that this goal would be appropriately attained.

[1021] The result is that in the judgement of each of us, the purpose of the Act would be better served by confirming the requirement for the designation, and by granting the resource consent applications, in each case subject to the proposed conditions, rather than by cancelling the requirement or by refusing any of the consents.



DETERMINATIONS

[1022] For the reasons given in this decision, the Court makes the following determinations:

[1023] **Appeal RMA408/00** by **SHAYRON LEE BEADLE** and **Appeal RMA429/00** by **RONALD WIHONGI** and **RIANA WIHONGI** are both disallowed;

[1024] The requirement by the Minister of Corrections for designation of the site for a regional prison is confirmed;

[1025] The conditions set out in Appendix 1 to this decision are imposed on that requirement and designation.

[1026] The question of costs is reserved.

[1027] **Appeal RMA306/01** by **THE MINISTER OF CORRECTIONS** is allowed, and the decisions on behalf of **THE NORTHLAND REGIONAL COUNCIL** refusing the Minister's resource consent applications are cancelled.

[1028] Each of the resource consent applications by the Minister of Corrections described in Appendix 2 to this decision is granted, for the terms, and subject to the conditions set out in that Appendix in respect of each.

[1029] The question of costs is reserved.

DATED at **WELLINGTON** on 8th April 2002.

For the Court:

D F G Sheppard
Environment Judge

Appendix 1

NORTHLAND REGIONAL PRISON

Designation Conditions

This designation is for a Regional Corrections Facility for Northland and relates to the following:

The construction, operation, maintenance and upgrading of a comprehensive regional prison and associated facilities and the authorisation of all ancillary activities and facilities including, but not limited to.

- *Inmate accommodation ranging from low, through medium, to maximum security;*
- *Staff facilities;*
- *Administration;*
- *Rehabilitative programmes;*
- *Inmate employment;*
- *Vocational training;*
- *Recreation and exercise facilities;*
- *Horticultural areas;*
- *Visitors centre;*
- *Staff and visitor car parking;*
- *Internal roading;*
- *Security fences, lights and towers;*
- *All other associated or ancillary land-use activities and all structures and facilities normally associated with a comprehensive regional prison.*

The designation shall extend to all land included in Certificate of Title 46D/1389, being Lot 2 DP 89625 owned by the Minister (as shown on plan ASK-100E) but shall exclude the Waitotara and Waipawa Ponds and land in the vicinity of those ponds as more particularly shown on plan ASK-100G (to be prepared).

Site Development

1. All custodial, industry and office buildings shall be generally located in the building area shown on plan ASK100E.

   Screening trees shall be planted so as to soften the visual impact of any buildings located on the southern ridge of the area shown as the building

area, when viewed from Ngawha Springs Village or the adjoining Beadle property.

2. No buildings are to be erected within 450 metres of State Highway 12, being the area which has a common boundary with the property owned by J M and M A Anderson. In the event that the property comes under the Minister's ownership or control, this condition shall cease to have effect.

3. No building (excluding farm, storage or accessory buildings) shall be constructed or excavation works exceeding five metres in net depth (after cut and fill) shall be undertaken, within the geothermal buffer areas shown on plan ASK100E, and shall be in accordance with the conditions of the resource consents granted by the Northland Regional Council.

4. The entrance to Site D2 from State Highway 12 is to be formed to Transit New Zealand guidelines and standards. Transit New Zealand should be invited to review the access engineering proposals in the light of current traffic densities and average speeds past the proposed access point. As a minimum, there shall be a right turn bay constructed prior to any building-related earthworks being undertaken on the site.

Landscaping

5. A landscaping and planting plan for the designated site shall be submitted to the Far North District Council. The plan is to be prepared following consultation with those landowners with a boundary in common with the designated site. The plan shall be developed with the objectives of:

- Enhancing existing landscape features such as significant vegetation and remaining lengths of unculverted watercourses;
- Utilising native species in key areas such as riparian margins;
- Mitigating visual impact, particularly from the Ngawha Village and adjoining properties.

The landscaping plan is to contain a programme for monitoring new plantings in order to ensure their initial establishment and long term success.

Lighting

6. A lighting plan shall be submitted to the Far North District Council. The plan shall show and describe the location, type, and intensity of lighting for all facilities planned on the site. Light spill shall be directed into the perimeter "sterile" areas or in similar manner to mitigate any impact on Ngawha Village.

Noise Emissions

7. Activities on the site shall not exceed the following noise levels as measured within the boundary of any site zoned residential or within the notional boundary of any dwelling on any other site zoned rural:

0700 to 2200 hours – 50 dBA L10
2200 to 0700 hours – 45 dBA L10 and
(the following day) – 75 dBA Lmax

Sound levels shall be measured in accordance with New Zealand Standard NZS 6801:1991 Measurement of Sound, and assessed in accordance with NZS 6802:1991 Assessment of Environmental Sound.

Construction noise shall meet the limit recommended in, and shall be measured and assessed, in accordance with NZS 6803P:1984 The Measurement and Assessment of Noise from Construction, Maintenance and Demolition work.

The monitoring of these levels shall be an agenda item for regular discussion with the proposed Community Liaison Group.

Discovery of Archaeological or Cultural Artefacts

8. Prior to commencement of site works and building construction, tangata whenua shall be consulted and a management plan developed setting out the protocols to be observed in the event of discovery of koiwi (human remains).

9. An appointed archaeologist shall be on call during excavation works. If archaeological evidence is uncovered during the development of the site, the archaeologist will advise on appropriate mitigation measures.

10. In the event that any archaeological materials are discovered during site works or building construction, Schedule 1 of the Memorandum of Partnership between the Ngati Rangi Development Committee and the Department of Corrections (dated 2 March 2001) and conditions 18 and 19 of the Northland Regional Council land use consent shall apply.

Ecological Protection and Enhancement

11. A Conservation Management Plan for the designated site, identifying areas recommended for protection and actions and procedures to maintain or enhance these areas, shall be submitted to the Far North District Council. This plan is to include indigenous flora areas around the Waiatotara Pond, Waiapawa Pond, the shrub land area to the east of this pond and riparian areas adjacent to streams. The plan is to be prepared in consultation with Ngati Rangi representatives and the Department of Conservation. The plan shall include:

- Details of proposed fencing to exclude stock from areas recommended for protection, areas of existing shrub land, remnant indigenous habitat and linkage areas, with the proposed stock fencing being suitable for the free movement of indigenous wildlife.

- Details of the need for any culverts or stream works to provide for fish passage and where necessary any culverting or diversion of any

stream shall be of sufficient size and design so that water velocities do not preclude fish passage at normal flows, and no physical barriers preclude fish passage.

- Details of the presence of indigenous orchids on the designated site, including the sun orchid *Thelymitra malvinie* and the need for associated protective measures.

- Details of the fencing of areas recommended for protection and an associated programme for achieving this fencing.

The Conservation Management Plan shall contain an implementation programme relating to all of the above and a mechanism for ensuring ongoing consultation with interested parties and review provisions.

The Plan shall also provide for the removal or ongoing control of environmental pest plants from the property and for effective pest control within riparian strips and shrub lands.

Community Liaison

12. The requiring authority shall establish a Community Liaison Group as a forum for informing the local community of, and receiving feedback on, the activities undertaken in accordance with the designation. It will be an ongoing point of contact between the requiring authority and the community. The Community Liaison Group shall be formed within two months of a designation being included in the district plan pursuant to section 175 of the Act and shall have its first meeting at that time.

The Community Liaison Group shall comprise, as a minimum, one representative from each of the following:

- Far North District Council;
- Ngati Rangi;

- Ngapuhi
- other Ngawha hapu;
- Ngawha Springs township land owners;
- adjacent rural landowners;
- Kaikohe business community;
- prison management;
- New Zealand Police.

It shall be the responsibility of the requiring authority to convene the meetings and to cover the direct costs of running the meetings.

The requiring authority shall provide an opportunity for the Community Liaison Group to meet at least twice during the course of each year, and subject to agreement by prison management, which will not be unreasonably withheld, when otherwise sought by any of its members.

The requiring authority shall not be in breach of this condition if any one or more of the named groups do not wish to be members of the Community Liaison Group or to attend any meetings.

It is anticipated that the Community Liaison Group will formulate its own protocols in respect of its role. Its functions may include, but not be limited to:

(i) appointment of new committee members;

(ii) giving advice on appropriate protocols that may carried out during the construction or operation of the prison to address cultural and spiritual issues;

(iii) having input in to the landscaping plan for the prison development;

(iv) providing feedback to the requiring authority on any issues that may arise from the community as being of concern during the construction and operation of the prison;

(v) providing input to the implementation and/or effectiveness of any of the conditions on the requirement.

Cultural

13. The requiring authority shall formalise a Memorandum of Understanding with appropriate representatives of the local Maori community. The Memorandum shall set out the parameters for the establishment of an ongoing relationship between the authority and the Maori community. One objective of the Memorandum shall be to provide a forum for discussion and, if needed resolution, of existing and future cultural issues. (The Minister shall not be in breach of this condition if any of the relevant hapu or other representatives of the local community choose not to enter into or adhere to such an agreement/understanding.)

Appendix 2

CONDITIONS AND CONSENTS – NORTHLAND REGIONAL CORRECTIONS FACILITY

Consent is hereby granted by the Northland Regional Council for the listed consents.

To undertake the following activities on Lot 2 DP 89625 (CT 46D/389) Blk XVI Omapere SD and Road Reserve Blks XV and XVI Omapere SD, Map References P05:887-445 and P05:875-453 to P05:841-437 in the catchment of Ngawha Stream:

A: EARTHWORKS AND STREAMBED CONSTRUCTION WORKS AND ASSOCIATED LAND USE CONSENTS AND WATER AND DISCHARGE PERMITS

01 Land Use Consent: Land disturbance, including:

- *cut and fill excavations for site formation works for building platforms and for fill borrow or dump areas, and access formation;*
- *works associated with the construction, maintenance and alteration of wick drains overlying the aquifer listed in Schedule C of the Regional Water and Soil Plan for the purpose of facilitating ground consolidation;*
- *land disturbance within the streamside management area of waterbodies; and*
- *all other incidental land disturbance associated with earthworks for the project.*

02 Land Use Consent: Land disturbance including:

- *land disturbance within the beds of waterbodies on the site associated with damming, diversion, bank protection or construction access;*
- *the placement of structures and the carrying out of works in the bed of the Ngawha Stream and/or its tributaries, including construction of an earth embankment dam on Ngawha Stream;*
- *bank protection works on Ngawha Stream and its tributaries; and*
- *all other land disturbance within the beds of waterbodies on the site incidental to the works.*

03 Water Permit:

- *taking, use or diversion of groundwater from wick drains;*
- *temporary damming and diversion of the entire flow of Ngawha Stream to facilitate the permanent realignment of its bed;*
- *any damming or diversion associated with the carrying out of works and placement of structures in the bed of Ngawha Stream and/or its tributaries, incidental to the works;*

- *temporary damming and diversion of water associated with runoff from earthworks;*
- *diversion of stormwater and/or runoff to and from the stormwater collection systems on site;*
- *diversion of runoff from land disturbance in general; and*
- *all other taking, use, damming and diversion of water incidental to the works.*

04 Discharge Permit: Discharge of runoff to water and/or to land from land disturbance. In particular:

- *the discharge of runoff associated with site formation works;*
- *discharges of sediment and/or other contaminants associated with the realignment of streams; and*
- *all other discharges of water or sediment to water and/or to land incidental to the works.*

These consents shall be exercised in accordance with the following conditions:

1 Subject to any changes required to meet the conditions of these consents, the Consent Holder shall ensure that the works are constructed generally in accordance with Department of Corrections, Northland Regional Corrections Facility Plan numbers ASK-100; EC26-1.01, 1.02, 1.03 and 1.04; EC27-1.01; ECIM-3; ECOO-1.01, 1.02, 1.03, 1.04, 1.05 and 1.07; EC23-1.01, 1.02, 1.03 and 1.04 (attached) and with the erosion and sediment control plan ("ESCP") referred to below. (In the event of conflict the approved ESCP shall prevail.)

2 The Consent Holder shall notify the Regional Council in writing at least two weeks before earthworks are to commence, of the intended commencement date of those works.

3 The Consent Holder shall, prior to any discharges into the new diversion channel, notify the Regional Council at least 48 hours beforehand.

4 To minimise the risk of erosion, no bulk earthworks shall be carried out between 31 May and 30 September in any year without the prior written approval of the Regional Council.

5 The Consent Holder shall, at least 10 days prior to the commencement of earthworks, lodge with the Regional Council an Erosion and Sediment Control Plan ("ESCP") which sets out the practices and procedures to be adopted in order that compliance with the conditions of these consents is achieved. The ESCP shall (as a minimum) include the following:

(a) The expected duration (timing and staging) of the major cut and fill operations, disposal sites for unsuitable materials, stream diversions and major culvert installations;

(b) Erosion and sediment controls including specific pond design, including calculations;

(c) Catchment boundaries for the sediment control structures;

(d) The commencement and completion dates for the implementation of the proposed erosion and sediment controls;

(e) Diagrams and/or plans, of a scale suitable for on-site reference, showing the locations of the major cut and fill operations, disposal sites for unsuitable materials, erosion and silt control structures/measures, and water quality sampling sites;

(f) The name and contact telephone number of the person responsible for monitoring and maintaining all silt detention structures; and

(g) Contingency provisions for the potential effects of large/high intensity rain storm events.

6 The ESCP shall be prepared and maintained in consultation with the Regional Council.

7 The Consent Holder may review and amend the ESCP in consultation with the Regional Council, at any time, during the term of the consent. The Consent Holder shall undertake the activities authorised by this consent in accordance with the ESCP.

8 To minimise contamination, any silt detention structures shall be constructed to such dimensions, and maintained to such standards to ensure that the discharge of sediment (suspended solids) from disturbed areas does not cause suspended solids levels measured 10 metres downstream of any sediment detention system discharge to the stream, to be more than 100 grams per cubic metre above levels at a control site established upstream of all earthworks areas. Such structures shall be maintained for the duration of all earthworks and until vegetation has been successfully established to the satisfaction of the Regional Council.

9 Discharges from the works shall not cause either of the following effects on adjacent receiving water bodies at the point of entry of the discharges to the diversion channel, when compared with measurements at a point 10 metres upstream of the southern tributary:

(a) The production of any conspicuous oil or grease films, scums or foams, or floatable materials; and

(b) A reduction in visual clarity by more than 40%.

10 The Consent Holder shall remove accumulated sediment from each sediment/ stormwater detention structure before the sediment level reaches one third of its volume (holding capacity). All sediment removed from the sediment detention structures shall be placed in a stable position where it will not enter any waterbody nor re-enter any sediment detention structure.

11 Water quality (suspended solids, visual clarity) shall be monitored by the Consent Holder not less than once during all heavy rainfall events and weekly during the period of earthworks. This frequency may be reduced to monthly when sediment management procedures are found to be effective in maintaining existing water quality conditions.

12 Total mercury in the Ngawha Stream shall be analysed by the Consent Holder at least once per month during the period of earthworks from a point between 100 metres-150 metres downstream of the spoil disposal area. Should water in the Ngawha Stream have a mercury content greater than the New Zealand Drinking Water Standards (2 ppb), and greater than at the point of entry to the diversion channel, the use of peat beds, or such practices as recommended by a suitably qualified geochemist, shall be employed. If the above criteria cannot be met with the above methods, then the spoil disposal area containing mercuric soils shall be permanently sealed with an impermeable membrane.

13 The results of all water quality monitoring required by Conditions 11 and 12 shall be forwarded to the Regional Council no later than 31 May each year, and include where necessary an interpretation of the results. All samples taken are to be analysed at a laboratory with registered quality assurance procedures, and all analyses are to be undertaken using standard methods. [Registered Quality Assurance Procedures are procedures which ensures that the laboratory meets good management practices and would include registrations such as ISO 9000, ISO Guide 25, Ministry of Health Accreditation, amongst others.]

14 The Consent Holder shall minimise contamination of surface water by ensuring that slash, soil, debris and detritus is not placed in a position where it may enter any waterbody. Prior to the discharge of flows into the new diversion channel, all loose and erodible material shall be removed, and areas stabilised to prevent scouring and downstream sedimentation in excess of those levels specified in Condition 8 above.

15 All areas of bare land (including batters) shall be established with suitable vegetation or other suitable groundcover within three months of the completion of earthworks in each area, to, so far as is practicable achieve an 80% ground cover within six months following completion of works in that area. Temporary mulching shall be carried out to achieve total ground cover of any areas of ground left bare or unprotected for more than one month.

16 The Consent Holder shall ensure a copy of these consents, including the plans referred to in Condition 1 are held on site and are provided to each contractor carrying out works under these consents.

17 Refuelling and servicing of machinery shall be carried out in such a way that soil or water at the site is not contaminated. If any accidental spillage of oil or fuel to land occurs, all contaminated soil shall be collected and removed to a disposal site approved by the Regional Council.

18 The Consent Holder's operations shall not give rise to any discharge of contaminants, which in the opinion of an Enforcement Officer of the Regional Council is noxious, dangerous, offensive or objectionable at or beyond the property boundary. Dust mitigation measures shall be adopted to ensure compliance with this condition.

19 The Consent Holder shall, immediately following the temporary cessation of water flows into the Ngawha Stream, check the bed of the stream for fish and koura/kewai (crayfish), and where practicable remove these to a suitable upstream habitat.

20 Notwithstanding the other conditions of this consent, earthworks which have the potential to impact upon sites of significance to local iwi shall be carried out in accordance with the **attached** Ngati Rangi Hapu Protocol and Procedures document.

21 In the event of archaeological sites or koiwi being uncovered, activities in the vicinity of the discovery shall cease. The Consent Holder shall then consult with the Ngati Rangi Hapu and the New Zealand Historic Places Trust, and shall not recommence works in the area of the discovery until and unless the relevant Historic Places Trust approvals have been obtained.

22 The Consent Holder may apply at any time to the Regional Council under Section 127(1)(a) of the Act to change or cancel any condition of the consent which relates to:

(a) Methods of controlling environment effects;

(b) The location, methods or frequency of monitoring environment effects; or

(c) The method or frequency of reporting information.

23 The Regional Council may, in accordance with Section 128 of the Act, serve notice on the Consent Holder of its intention to review the conditions of these consents. Such notice may be served during April after the commencement of the consents, and thereafter at yearly intervals. The review may be initiated for any one or more of the following purposes:

(a) To deal with any adverse effects on the environment that may arise from the exercise of the consent and which it is appropriate to deal with at a later stage, or to deal with any such effects following assessment of the results of the monitoring of the consents and/or as a result of the Regional Council's monitoring of the state of the environment in the area;

(b) To require the adoption of the best practicable option to remove or reduce any adverse effect on the environment;

(c) To deal with any inadequacies or inconsistencies the Regional Council considers there to be in the conditions of the consents, following the establishment of the activity the subject of the consents;

(d) To deal with any material inaccuracies that may in future be found in the information made available with the application (notice may be served at any time for this reason); and

(e) To change existing, or impose new limits on suspended solids.

The Consent Holder shall meet all reasonable costs of any such review.

24 These consents shall lapse on the expiry of five years after the date of commencement of the consents, unless they are given effect to before the expiry of

this period, or such longer period as may be granted in accordance with the provisions of Section 125 of the Act.

EXPIRY DATE: **30 APRIL 2010, or five years after the date of commencement of earthworks, whichever is the sooner.**

B: STORMWATER RUNOFF AND LONG TERM USE OF THE BED OF WATERCOURSES

05 Land Use Consent:

- *The placement of structures and the carrying out of works in the bed of Ngawha Stream and/or its tributaries, including permanent realignment of the bed of Ngawha Stream and its eastern tributary;*
- *A single sewer pipeline crossing of Ngawha Stream within the secure compound;*
- *Sewer pipeline crossings of drains and other watercourses;*
- *Land disturbance arising from activities in the streambed incidental to the activities listed above;*
- *Culverts in the bed of Ngawha Stream;*
- *The placement, use and repair of an earth embankment dam in the bed of Ngawha Stream; and*
- *All other land disturbance within the beds or the streamside management area of waterbodies on the site incidental to the works or structures;*

06 Water Permit:

- *Permanent diversion of Ngawha Stream and its eastern tributary through a realigned bed;*
- *Intermittent damming of Ngawha Stream on an ongoing basis by way of restricted capacity culvert beneath an earth embankment dam;*
- *Intermittent diversion of dammed water via a diversion channel and the eastern tributary of Ngawha Stream; and*
- *Any other taking, use, damming or diversion of water incidental to the works covered by consents 05, 06 and 07;*

07 Discharge Permit:

The permanent discharge of stormwater to Ngawha Stream and/or its tributaries, and all discharges to and from the stormwater collection systems over the life of the facility.

These consents shall be exercised in accordance with the following conditions:

25. *Subject to any changes required to meet the conditions of these consents, the Consent Holder shall ensure that the works are constructed generally in accordance with the Department of Corrections, Northland Regional Corrections Facility Plan numbers ASK-100; EC26-1.01, 1.02, 1.03 and 1.04; EC27-1.01; ECIM-3; ECOO-1.01, 1.02, 1.03, 1.04, 1.05 and 1.07; EC23-1.01, 1.02, 1.03 and 1.04 (attached)*

26 After construction has ceased, any discharges of stormwater shall not cause any of the following effects on adjacent receiving water bodies immediately downstream of the earth embankment dam when compared with measurements immediately upstream of the earth embankment dam:

(a) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials; and

(b) A reduction in visual clarity by more than 40%.

27 The Consent Holder may apply at any time to the Regional Council under Section 127(1)(a) of the Act to change or cancel any condition of the consents which relates to:

(a) Methods of controlling environment effects;

(b) The location, methods or frequency of monitoring environment effects; or

(c) The method or frequency of reporting information.

28 The Regional Council may, in accordance with Section 128 of the Act, serve notice on the Consent Holder of its intention to review the conditions of these consents. Such notice may be served during April after the commencement of the consents, and thereafter at yearly intervals. The review may be initiated for any one or more of the following purposes:

(a) To deal with any adverse effects on the environment that may arise from the exercise of the consents and which it is appropriate to deal with at a later stage, or to deal with any such effects following assessment of the results of the monitoring of the consent and/or as a result of the Regional Council's monitoring of the state of the environment in the area;

(b) To require the adoption of the best practicable option to remove or reduce any adverse effect on the environment;

(c) To deal with any inadequacies or inconsistencies the Regional Council considers there to be in the conditions of the consents, following the establishment of the activity the subject of the consents;

(d) To deal with any material inaccuracies that may in future be found in the information made available with the application (notice may be served at any time for this reason); and

(e) To change existing, or impose new limits on suspended solids.

The Consent Holder shall meet all reasonable costs of any such review.

29 These consents shall lapse on the expiry of five years after the date of commencement of the consents, unless the consents are given effect to before the expiry of this period or such longer period as may be granted in accordance with the provisions of Section 125 of the Act.

EXPIRY DATE: **31 MARCH 2037**

ORIGINAL

Decision No. A139 / 2004

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of appeals pursuant to section 174 of the Act, regarding notices of requirement for the Hamilton Bypass
BETWEEN	**BEDA FAMILY TRUST**
	(RMA 825/02)
AND	**EASTERN BYPASS ACTION COMMITTEE INCORPORATED**
	(RMA 826/02)
AND	**ANDREW & CHRISTINE GORE**
	(RMA 829/02)
AND	**TREVOR & LENORA SHELLEY**
	(RMA 830/02)
AND	**ERIC GERALD & JEANETTE ETHEL CLARK**
	(RMA 831/02)
AND	**KRISTOF KRZTON**
	(RMA 832/02)
AND	**CHARLES & MARION CRAWFORD FLETCHER**
	(RMA 833/02)
AND	**WAIKATO DISTRICT COUNCIL**
	(RMA 835/02 & 836/02)
AND	**HAMILTON CITY COUNCIL**
	(RMA 841/02)
AND	**R N DUNCAN TRUST**
	(RMA 850/02)

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

AND	**R N & R C DUNCAN**
	(RMA 851/02)
	Appellants
AND	**TRANSIT NEW ZEALAND**
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)
Environment Commissioner J Rowan
Environment Commissioner K Prime

HEARING at **Hamilton** on 27 to 30 July; and 2 to 4 August 2004

APPEARANCES

Mr P Cavanagh QC & Ms J Cuellar for Beda Family Trust, Eastern Bypass Action Committee Inc., Trevor & Lenora Shelley, Eric Gerald & Jeanette Ethel Clark, Kristof Krzton, Charles & Marion Crawford Fletcher
Mr P Lang for Hamilton City Council
Ms S Janissen & Ms H Andrews for Transit New Zealand
Mr J Milne for Waikato District Council
Mr A & Ms C Gore for themselves
Mr R Clark for Duncan Family Trust & R N & R C Duncan

DECISION

Introduction

The proceedings

[1] Transit's long-term strategy for State Highway 1 is to establish an expressway facility between Pokeno and Cambridge. This facility is known as the "Waikato Expressway". South of Rangiriri its key elements will be the bypasses of the following townships/Cities: Ohinewai, Huntly, Ngaruawahia, Hamilton and Cambridge.

[2] These proceedings concern the Hamilton Bypass. For that purpose Transit gave three notices of requirement under the Resource Management Act 1991. Three notices were required, because the proposed alignment is bisected by an area which lies within the Hamilton City Council area. The balance of the area on either side is within the Waikato District Council area.

[3] The three notices of requirement were heard by Independent Commissioners at a joint Waikato District Council and Hamilton City Council hearing in July and August 2002. In September 2002, the Commissioners recommended that the notices of requirement be confirmed, subject to conditions, for a period of 20 years.

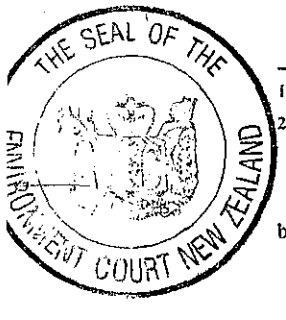
[4] Transit's decision on the recommendations was publicly notified on 11 November 2002. Transit's decision to confirm the notices of requirement attracted 18 appeals to the Environment Court. Seven appeals have subsequently been resolved and withdrawn.

[5] Consent documents have been lodged with the Court (in the form of memoranda of the parties and draft consent orders) in relation to three appeals[1]. The parties to these appeals seek that various conditions attached to the notices of requirement for the project (relating to construction and operational noise, landscaping and lighting) be amended, subject to the Court's approval. Two appeals were withdrawn on 3 August 2004[2].

[6] There are seven remaining appellants who made representations before us. They can simply be divided into two groups:

(i) The Eastern Bypass Action Committee Incorporated and its associated appellants being the Beda Family Trust, Trevor and Lenora Shelley, Eric and Jeanette Clark, Kristof Krzton, and Charles and Marion Fletcher; and

(ii) Andrew and Christine Gore.



[1] Waikato District Council (RMA 835/02 and RMA 836/02), Hamilton City Council (RMA 841/02).
[2] R N Duncan Trust (RMA 850/02) and R N & R C Duncan (RMA 851/02).

The participants

[7] Transit New Zealand is a network utility operator under section 166(f) of the Resource Management Act 1991 and is approved as a requiring authority under section 167 of the Act. Transit issued the notices of requirement for the Hamilton Bypass Project on 15 November 2001.

[8] At the Environment Court hearing, Transit was represented by counsel and sought changes: first, to various conditions from those included in Transit's decision, as altered in the draft consent orders lodged with the Court in respect of the appeals lodged by the Hamilton City Council[3] and the Waikato District Council[4]; and second, some minor amendments sought for consistency purposes.

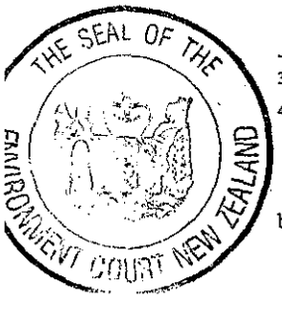
[9] Counsel for Transit presented a full case in support of the amended designations, called ten witnesses, and cross-examined a number of the witnesses called by the appellants.

Eastern Bypass Action Committee Inc

[10] The Action Committee was represented by counsel and presented a full case on behalf of that committee and the individual appellants who were members of it. The committee supported the principle of a bypass to the east of Hamilton City and supported Transit's proposed alignment for approximately the northern half from Lake Road to Ruakura Road.

[11] The committee contended that Transit's preferred route south of Hamilton, from Ruakura Road through Tamahere to near Discombe Road (the "Tamahere Route") does not meet the requirements of the Act and that this Court should recommend that the requirements be cancelled.

[12] Counsel for the committee presented a full case in support of its appeals, cross-examined Transit's witnesses and called, or presented by consent written briefs, the evidence of eleven witnesses.



[3] RMA 841/02.
[4] RMA 835/02 and RMA 836/02.

Mr and Mrs Gore

[13] Mr and Mrs Gore reside with their family on a lifestyle block at 239 Osbourne Road, Horsham Downs. Their whole property is affected by the designation. They represented themselves, made submissions, cross-examined some of Transit's witnesses and gave evidence. While they were concerned about Transit's proposed alignment of the expressway, they were particularly concerned about the 20 year time period specified in the designation.

The proposal

[14] The project will constitute the section of Transit's proposed Waikato Expressway that links the proposed Ngaruawahia Bypass with the proposed Cambridge Bypass. A map of the project is attached as Appendix 1.

[15] The project was described to us by Mr D G Heine, transportation engineer and team leader for the team charged with the route location and planning. The bypass commences at a junction with the proposed Ngaruawahia Bypass where it crosses Lake Road. It proceeds in a south-easterly direction to the junction of Borman Road and Gordonton Road before swinging on to a more southerly direction towards its junction with Morrinsville Road (State Highway 26), about 2km to the east of the State Highway 1 and State Highway 26 junction. South of Morrinsville Road it turns south and rejoins the existing State Highway 1 at the northern end of the Tamahere deviation in the vicinity of Bollard Road. On the south end of the Tamahere deviation, near Pickering Road, the Hamilton Bypass follows the line of the existing State Highway through to the northern end of the proposed Cambridge Bypass at Discombe Road.

[16] The proposed bypass will provide no direct access to adjacent properties and all junctions will be constructed to full interchange standards. Between Lake Road and Tamahere all roads that are crossed by the Hamilton Bypass, with the exception of Percival Road, will remain connected by means of grade separation structures. In most cases the Hamilton Bypass will pass under the local road. The severed section of Percival Road will be serviced by a new connection to Ryburn Road.

[17] South of Tamahere, all local road connections and direct property access to State Highway 1 will be severed. The project therefore includes the construction of new access roads to re-establish the integrity of the local road network. The project

includes the construction of a bridge over the Hamilton Bypass to link Pickering Road with the existing Tamahere interchange, via Tamahere Drive.

Basis for decision - statutory criteria

[18] The Environment Court's powers in determining appeals from a requirement for a designation are prescribed by section 174. The Court may:

(i) confirm the requirement;

(ii) cancel the requirement; or

(iii) modify the requirement, or impose such conditions, as the Court thinks fit.

[19] Subsection (4) of section 174 directs that in determining an appeal, the Court is to have regard to the matters set out in section 171 of the Act. Subsection (1) gives directions to territorial authorities considering a requirement:

> 1. Subject to Part II, 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;
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work, or project or work;
>
> (c) whether the nature of the public work or project or work means that it would unreasonable to expect the requiring authority to use an alternative site, route, or method;
>
> (d) all relevant provisions of any National Policy Statement, New Zealand Coastal Policy Statement, Regional Policy Statement, Proposed Regional Policy Statement, Regional Plan, Proposed Regional Plan, District Plan, or Proposed District Plan.[5]

[5] Section 171(1) as amended by section 87 of the Resource Management Amendment Act 1993 and section 36 of the Resource Management Amendment Act 1997.

The role of Part II

[20] The introductory part of section 171(1) is prefaced by the words *"subject to Part II"*. Placed there, at the start of the provision identifying matters to which regard is to be had, its effect is to defeat the direction to have regard to the matters listed, where to do so would conflict with anything in Part II.[6]

[21] More recently, the Privy Council in the decision of ***McGuire v Hastings District Council***[7] had this to say of the words *"subject to Part II"*:

> Note that section 171 is expressly made subject to Part II, which includes sections 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in section 171 and indeed override them in the event of conflict.[8]

[22] The proper application of section 5 involves an overall broad judgement of whether or not a proposal promotes the sustainable management of natural and physical resources.[9]

[23] In ***North Shore City Council v Auckland Regional Council***[10] the Environment Court held that where, on some issues, a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to attain fully, one or more of the aspects described in subsections 5(a), (b) or (c) it will be wrong to conclude that the latter overrides the former with no judgment of scale or proportion.[11]

[24] The remaining sections in Part II, subsequent to section 5, inform and assist the purpose of the Act. We may accord such weight as we think fit to any competing considerations under Part II, bearing in mind the purpose of the Act. Those subsequent sections must not be allowed to obscure the sustainable management

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[6] *Minister of Conservation v Kapiti Coast District Council* Planning Tribunal Decision A024/1994; *Paihia District Citizens Association v Northland Regional Council* Planning Tribunal Decision A77/1995; *Russell Protection Society v Far North District Council* Environment Court Decision A125/1998; *Bungalo Holdings v North Shore City Council* Environment Court Decision A025/2001; and *Beadle and ors v The Minister of Corrections and the Northland Regional Council* Environment Court Decision A074/2002.

[7] [2001] 12 NZRMA 557.

[8] Ibid, at paragraph 22, page 567.

[9] *Aquamarine Limited v Southland Regional Council*, Environment Court Decision C126/1997 at 141; endorsed in *Independent News v Manukau City Council* (2003) 10 ELRNZ 16; and more recently endorsed in *Ngati Rangi Trust and ors v The Manawatu-Wanganui Regional Council* Environment Court Decision A067/2004.

[10] [1997] NZRMA 59.

[11] *Aquamarine Limited* at 141.

purpose of the Act. Rather, they should be approached as factors in the overall balancing exercise to be conducted by the Court[12].

[25] Where Part II matters compete among themselves, we must have regard to the statutory hierarchy as between sections 6, 7 and 8 as part of the balancing exercise. However, notwithstanding their importance, all of those sections are subordinate to the primary purpose of the Act. The High Court laid down this principle in ***New Zealand Rail Limited v Marlborough District Council***[13] in relation to section 6(a). The Court stated:

> A recognition and provision for the preservation of the natural character of the coastal environment in the words of section 6(a) is to achieve the purpose of the Act, that is to say, to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principle purpose.[14]
>
> The Court went on to state that:
>
> It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.[15]

[26] The High Court recently reiterated this principle in ***Auckland Volcanic Cones Society Incorporated v Transit New Zealand***[16]. In that case, the Court held that, while section 6 matters are to be recognised and provided for, this is in the context of achieving the purpose of the Act as set out in section 5.

[27] The Environment Court stated in ***Minister of Conservation v Western Bay of Plenty District Council***[17], in a passage cited with approval in ***Mighty River Power v Waikato Regional Council***[18]:

> In weighing the evidence of the witnesses on all sides, we have borne constantly in mind the Act's single purpose of promoting the sustainable management of natural and physical resources. Section 6 matters, nationally important by prescription as they are, plainly need to be recognised and provided for in conjunction with the many other considerations contemplated by the legislation in the district planning

[12] See *Ngati Rangi*, paragraph 67.
[13] [1994] NZRMA 70 at 85.
[14] Ibid, at page 85.
[15] *New Zealand Limited* at 86.
[16] [2003] 7 NZRMA 316, at para 27.
[17] Environment Court Decision A71/2001.
[18] Environment Court Decision A146/2001 at pages 20-21.

> process... . The sections subsequent to section 5 are designed more fully to inform and assist a body such as the Council in following through and applying Parliament's intents in achieving the Act's purpose for its district. Expressed in the reverse context, those sections are not intended to be applied as a series of competing considerations liable to undermine the achievement of the purpose laid down in section 5.

[28] As will become clear during the course of this decision, Part II matters play an important role, as they are the basis for the Action Committee's case as finally argued. We thus propose to consider the relevant evidential matters, make decisions on the facts, and then apply a balancing and weighing process to determine what best achieves the single purpose of the Act. In so doing, we are mindful of the fact that while adverse effects may involve Part II matters, it is still nonetheless proper for such effects to be mitigated, as opposed to being avoided or remedied under section 5(2)(c). The Environment Court said in ***Kemp v Queenstown Lakes District Council***[19]:

> Some of the possible adverse effects relating to national importance can be avoided or perhaps mitigated under section 5(2)(c). For example, the effects on the significant habitat of wrybills, bandit dottorrel and black fronted turn is only a potential effect and may be controlled by application of a monitoring condition with a review of the resource consent if the risk of harm is shown to exist and be significant.

The issues

Issues raised by Action Committee

[29] Mr Paul Cavanagh QC, counsel for the Action Committee, particularised the issues contested by that Committee at the hearing. The Committee accepts that State Highway 1 requires upgrading and that a bypass to the east of Hamilton is the most appropriate route. As mentioned, the Committee's concern was with that part of the alignment south from Ruakura Road – the Tamahere route.

[30] Mr Cavanagh submitted in his opening submissions that:

(i) The designation is not reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought;

[19] [2000] 7 NZRMA 289, at 323.

(ii) The proposed work is not sustainable in the long-term and consequently is an inefficient use of natural and physical resources;

(iii) Inadequate consideration has been given to alternative routes or methods of achieving the public work;

(iv) The designation is premature;

(v) The 20-year designation lapse period is excessive;

(vi) It is questionable whether Transit New Zealand should have requiring authority status at all, given the amendments to the Transit New Zealand Act by the Land Transport Management Act 2003.

[31] Mr Cavanagh, in his closing submission, further refined the Action Committee's case. He submitted:

> **...that part of the route south of Hamilton which connects up with the proposed Cambridge Bypass does not meet the requirements of the Act, in particular Part II of the Act and should not be confirmed. An alternative** suggested by EBACI, the power corridor, requires further consideration by TNZ.
>
> If this submission is accepted, then the Court has two alternatives:
>
> (a) cancel the whole of the requirement, or
>
> (b) issue an interim decision requiring TNZ to undertake a proper and independent investigation of the power corridor route.
>
> It is EBACI's view that in this case, it will be more appropriate for this Court to issue an interim decision, rather than cancelling the requirement.[20] [highlighting ours]

The essence of the Committee's case is encapsulated in the highlighted words.

Mr and Mrs Gore

[32] As we said, the whole of the Gore family's lifestyle block is required by the relevant notice of requirement. They are the only appellants to the northern end of the proposal. They have lived in the area for 14 years, and since 1997, when they first received news of the expressway, they have found the situation "extremely

[20] Mr Cavanagh's closing submissions, paragraphs 2, 3 and 4.

stressful" as a family. They do not oppose the need for an expressway, but feel that Transit New Zealand should demonstrate a commitment to building the expressway "in the quickest possible manner in order to minimise any more stress".

[33] While Mr and Mrs Gore also addressed in their submissions matters arising under Part II of the Act, such as effects on amenity values, they did not adduce any substantive evidence in support. Large projects, such as this four lane expressway, will always have some adverse effects on those affected. We limit our discussions to the issues raised by Mr and Mrs Gore to the 20-year time period of the designation, it being the only matter capable of influencing the outcome.

Defining of issues

[34] Mr Cavanagh's succinctness in reducing the Action Committee's issues reflected both his experience and the now well established legal principles. We are grateful to him for that. It means we can now focus on the essential issues.

[35] At the end of the day we have to exercise our judgment by balancing all of the relevant factors including the positive effects of the proposal. We therefore propose to also discuss the positive effects. Other matters were raised in the evidence to lay the evidential foundation for the legal principles to be derived from the provisions of the Act and as determined by Court decisions. We do not propose to discuss those that are not disputed as they are not capable of significantly influencing the outcome of this decision.

The main issues

[36] We thus define the main issues to discuss as:

(i) the positive effects of the proposal;

(ii) Whether the Tamahere route meets the requirements of the Act, in particular Part II;

(iii) whether the 20-year designation lapse period is excessive.

Positive effects

[37] We are satisfied, on the evidence, that the Hamilton Bypass, which forms an integral part of the Waikato Expressway, is needed and widely supported both by the local councils and by the general public. As Mr Phillips explained, State Highway 1 is the most important and truly national route in the State Highway network, and is the key inter-regional transport link between Auckland and the Waikato[21].

[38] State Highway 1 is becoming increasingly congested between Auckland and Cambridge, resulting in significant delays for motorists, particularly where the present route travels through the urban areas of Huntly, Ngaruawahia and Hamilton.

[39] Transit has therefore had a long-term strategy to develop State Highway 1 to Expressway standards between Mercer, just south of Auckland, and Cambridge, just south of Hamilton. This strategy was originally conceived in the 1960s. The Waikato Expressway is designed to address the capacity and safety concerns on the existing route, and ensure that State Highway 1 can continue to effectively provide for the inter-regional transport of people and goods for the foreseeable future.

[40] The political and public support for the project was succinctly summarised by Mr Phillips during cross-examination, where he stated:

> Of recent past few years we have seen a tremendous political support from Auckland as well as our own Mayors to get that State Highway finished, this Expressway built. There has been very strong political support. There is also a huge amount of public support and I mention that in my evidence. That sort of groundswell just seems unstoppable to me at the moment.[22]

[41] Several of Transit's witnesses but particularly Messrs Phillips and Heine emphasised the key benefits of the project. These include:

(i) It will provide a strategic link between the Ngaruawahia and Cambridge Bypass sections of the Waikato Expressway;

(ii) It effectively enables Transit to achieve its current objective under the Land Transport Management Act 2003. That includes operating the State Highway system in a way that contributes to an integrated, safe, responsive and sustainable land transport system, and in particular,

[21] Phillips, EiC, paragraphs 11 and 15.
[22] Transcript, page 41. The unanimous political support for the project was also confirmed by Mr Heine (transcript, page 91).

allows Transit to make strategic provision for the anticipated growth in State Highway traffic;

(iii) It will provide significant safety improvements, through the designed speed of the alignment, the divided lanes and the access control measures that will be incorporated into the project, as well as reducing the level of accidents on the existing State Highway;

(iv) It will virtually eliminate the "rat-run" routes that have become established as a result of the capacity constraints of the existing State Highway, particularly where this travels through Hamilton City; and

(v) It will provide significant road user benefits through reduced travel times and operating costs, for both traffic and local traffic within Hamilton City.

[42] We find that it has been established that the project is an appropriate and effective means of meeting the identified need for an improved roading link to service Hamilton, the Waikato Region, and its connection with Auckland. Of this there was no dispute.

Does the Tamahere route meet the requirements of Part II?

The power corridor route

[43] Of particular relevance to this important issue is consideration of an alternative route put forward by the Action Committee through its expert witness Mr Green. This route was referred to as the power corridor route.

[44] The power corridor route formed the basis of Mr Green's evidence. An indication of a suggested route is shown in Appendix 1 by the broken purple line. As Mr Green explained, the route would follow one of the power corridors, crossing Tauwhare Road near Lee Martin Road and then continue south to join the railway corridor before connecting to the Cambridge Bypass route.

[45] Mr Green recognised that *"with the limited time and resources available, I have only been able to provide a broad concept of this route. Details would need to be investigated further"*[23].

[46] Mr Heine commented to the effect, that the power corridor route was only seriously pursued by the Action Committee from the time of the exchange of Mr Green's evidence a short time before the hearing[24]. He noted that Mr Green's power corridor route was not the same as a suggested route made by the Committee in August 1998[25]. For this reason Transit had not been able to carry out an indepth study of the proposed route and for reasons that we will discuss, nor do they consider such a study is warranted.

[47] Mr Green's route needs to be seen in context. Mr Heine and Mr Meister, told us that Transit investigated a wide range of options for the bypass[26]. These included:

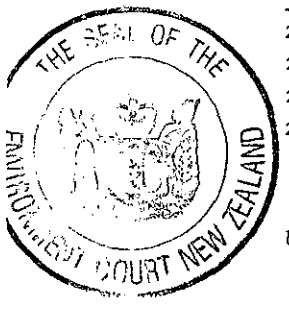
(i) Five alternative routes for the section of the Waikato Expressway from Taupere to Cambridge;

(ii) Five different junctional alternatives for connecting the project with the local roading network north of State Highway 26;

(iii) Four alternative routes for the section of the project from Lake Road to Gordonton Road, and 8 alternatives for the section from Ruakura Road and Discombe Road;

(iv) Five alternative options for the local road connections in the Pickering Road area;

(v) Detailed considerations of a route known as the "Railway Route" option suggested by the Action Committee and the Waikato District Council in 1998 (which also forms the part of the new "power corridor route", proposed by Mr Green.



[23] Green, EiC, paragraph 8.3.
[24] Transcript, page 125.
[25] Heine, rebuttal, paragraph 127.
[26] Heine, EiC, paragraphs 64-72.

[48] Mr Heine and to a lesser extent Mr Meister, discussed these options at some length and they have compelling reasons for rejecting them in favour of the proposed option. None of the appellants took issue with their conclusions.

[49] It was the Committee's case, as submitted by Mr Cavanagh, that Mr Green's power corridor route should be considered as an alternative because the "Tamahere Route" chosen does not adequately meet the provisions of Part II of the Act[27].

[50] Mr Cavanagh drew support for his submission from a decision of the Environment Court ***Nelson Intermediate School and ors v Transit New Zealand Limited***[28] and in particular paragraphs 67-69 where the Court was discussing the application of efficiency under section 4(b) of the Act:

> We conclude that to examine efficiency in this case it is necessary to examine alternatives. Efficiency must bring into question the effect of the change compared with the existing situation. Because section 7(b) is concerned in part with the efficient development of resources, one assumes that it must be open to consider, in appropriate cases, a comparison with other developments. In our view the discussion of the Privy Council in *McGuire* is relevant when it stated at paragraph 21:
>
> > So, too, if there were no pressing need for a new route to link with the motorway because other access was reasonably available.
>
> As we shall discuss in due course, it is conceded that a consideration of alternative routes can be undertaken under section 171(1)(b). We conclude that, in any event, such a consideration can be undertaken in examining questions of efficiency under section 7(b) of the Act.
>
> Surprisingly in this case there was little evidence given to us as to the comparative efficiency of this route with any alternative.

[51] The Environment Court in ***Nelson Intermediate School*** was considering the matter of efficiency in relation to section 7(b) of the Act. It was also considering the effect of a change to an existing situation. Here we are concerned with what could be called a "green fields" proposal.

Mr Cavanagh accepted:

> That it is not the Court's role to decide the most suitable site for a public work, that is the function of the requiring authority seeking the public work. The Court's role is to consider whether adequate consideration has been given to alternative sites, routes or methods of achieving the public work or project or work (see section 171(1)(b) prior to the Resource Management Amendment Act (2003).

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[27] Cavanagh, closing submissions, paragraph 7.
[28] Environment Court Decision C35/2004.

[52] Such a submission reflects the following passage of the Planning Tribunal in ***Waimairi District Council v Christchurch City Council***[29]:

> We think the purpose of that part of the subsection is to enable the Tribunal to be satisfied that a requiring authority has not acted arbitrarily in selecting its site, its route or its method of achieving its objective. Assuming that there are alternatives, the decision as to which one is selected involves a consideration of matters of policy which are outside the Tribunal's ability to adjudicate upon. That is not to say that the Tribunal should not give close attention to these matters where they are relevant. But Parliament has stopped short of giving this Tribunal the jurisdiction to direct that any other alternative must be selected. In the absence of that power, we think that in the end it would become an exercise in futility if a Tribunal were required to examine, in detail, and adjudicate upon, in detail, the merits of various alternatives... We repeat and stress that the wording of this part of the subsection requires us to have regard to the extent to which adequate consideration has been given. It does not require us to be satisfied that there are no alternative sites, routes or methods [highlighting as per the decision, pages 24-25].

[53] This approach has been upheld by the High Court in ***Kett v Minister for Land Information***[30] in relation to an assessment of whether adequate consideration was given to alternatives under the Public Works Act 1981. At page 10 the High Court summarised the Environment Court's approach as follows:

> The test applied by the Court was that its function was to consider the adequacy of consideration given by the Minister to alternative routes and methods of achieving the Minister's objective. It was not for the Court to substitute its own judgment about which of the alternatives it considered preferable. It found helpful the test applied in *Waimairi District Council v Christchurch City Council and ors*...

[54] The High Court considered that the Environment Court had not erred in law in its consideration of the adequacy of alternatives, and that the test as set out in ***Waimairi*** was correctly applied by the Environment Court, stating that:

> The Court was not itself required to determine whether the route was the most suitable of all the available alternatives. Its role was to ensure that the Minister had carefully considered the possibilities, taken into account relevant matters and come to a reasoned decision. In my view, the Court did not err in applying the *Waimairi* principle.[31]

[55] Mr Cavanagh was, by the constraints of the recognised principles established by case law, forced into making the following submission on this issue:

> It is EBACI's submission that the effect of these decisions is that if the route chosen by the requiring authority does not adequately meet the provisions

[29] Environment Court Decision C30/1982.
[30] AP404/151/00, M404/1974/00, High Court, 28 June 2001.
[31] Page 12.

> of Part II of the Act, and there is an alternative which may, then the proposed route should not be confirmed under section 171 of the Act.[32]

[56] Such a submission does not, and nor does the legal principles described above, require or allow us to make a comparative assessment of the relative efficiency of the alternatives. There may be some cases where the relative efficiency in terms of Part II are so daringly disparate that the purpose of the Act would not be achieved by allowing the less efficient alternative. But that is not the case here. The evidence does not address such an issue – it can't because only a broad concept of the Tamahere route has been undertaken.

[57] Furthermore, we agree with Ms Janissen that the words "subject to Part II" in section 171(d) do not entitle the Court to ask whether some other project alignment or design better meets the requirements of Part II. The Act does not direct particular uses or require the best use of resources. Further, a requiring authority does not have to demonstrate that it has selected the best of all available alternatives, as this would be straying into matters of policy which are outside the Court's ability to adjudicate on.

[58] What is required is a careful assessment of the relevant proposal in and of itself to determine whether it achieves the Act's purpose.

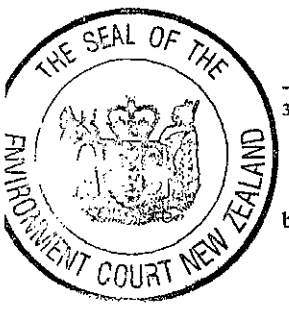
[59] We now turn to consider whether the Tamahere route is consistent with the provisions of Part II.

Consideration of Part II

[60] Mr Cavanagh, on behalf of the Action Committee, submitted that the Tamahere route does not meet the provisions of Part II for two reasons:

(i) The route was pre-determined because it linked neatly into existing designations; and

(ii) No consideration was given by Transit to potential urban growth and the consequential traffic implications of this urban growth on the Tamahere route.



[32] Mr Cavanagh's closing submissions, paragraph 7.

Pre-conceived route

[61] The Action Committee case on this issue was based on the acceptance by Transit's witnesses of two constraints:

(i) A concession by Mr Heine in cross-examination that the first priority for the route is an expressway facility between Auckland and Hamilton;[33] and

(ii) An acknowledgement by Mr Meister that 50% of the traffic on the road between Hamilton and Cambridge currently originates from Cambridge.[34]

[62] Based on these concessions, and the suggestion that in order to obtain funding for the project south of Hamilton, Transit was required to accommodate commuter traffic between Hamilton and Cambridge, the Action Committee alleged the route had been pre-determined. Consequently Transit's consideration of alternatives had been compromised.

[63] The Committee's allegation reflected the evidence of a number of witnesses for the Committee who claimed that the examination of the Railway Route in particular had been cursory as the proposed route was pre-determined. For example, Mr Fletcher said:

> Any consideration of the rail route as an alternative has been a window dressing exercise only...[35]

And Mr Fraser-Jones said:

> It appears that the proposed eastern route was pre-determined from the outset by TNZ.[36]

[64] Mr Heine addressed this criticism in both his evidence in chief and rebuttal evidence. In his rebuttal evidence he said:

> I strongly disagree with these statements, and note this issue was dealt with in detail at paragraphs 156-186 of my EiC. It is true that the original project brief specified the southern limit as the beginning of the designated

[33] Transcript, page 95.
[34] Transcript, pages 168-169.
[35] Fletcher, EiC, paragraph 19.22.
[36] Fraser-Jones, EiC, paragraph 5.6.1.

> Cambridge Bypass at Discombe Road. However, when EBACI asked that the Railway Route be investigated at a meeting with Transit in 1998, Transit agreed to investigate the route and the investigations proceeded as described in my EiC (paragraphs 112-115). This meant that the project's scope was then extended to the southern end of the designated Cambridge Bypass – instead of the northern end.
>
> The investigations of the Railway Route by the project team were extensive, taking nearly two years to complete. In the meantime, preparation of the NOR's for the bypass was put on hold. The whole multi-disciplinary project team was involved in the investigation and at no time was the team directed by Transit to recommend one option or the other.[37]

[65] Mr Heine also stressed, that Transit arranged for an independent peer review of the transportation model, as applied by Transit to route selection, to be carried out by an independent expert Mr John Bolland.

[66] We are satisfied on the evidence, that a wide range of alternative routes were investigated by Transit. Some in considerable detail[38]. Those alternatives ranged from a route through the western suburbs of Hamilton to routes well to the east of the City.

[67] The evidence establishes that, not only were a wide range of alternatives considered, there was also an extensive investigation and evaluation of the alternatives. The investigations were multi-disciplinary.

[68] We thus reject the allegation that the Tamahere route was pre-determined and compromised Transit's consideration of alternative routes. We accept the evidence of Mr Heine, that the route investigations were *"approached with an open mind"*[39].

Urban growth

[69] The Action Committee's allegation that Transit failed to consider potential urban growth and its consequential traffic implications was based on the evidence of Mr Green and Mr Hartley.

[37] Heine, rebuttal evidence, paragraphs 74 and 75.
[38] Heine, EiC, paragraphs 156-186.
[39] Heine, EiC, paragraph 159.

Mr Green

[70] Mr Green maintained that the Tamahere route is not really a bypass as it mixes commuter and future urban traffic. He called it a *"single spine route"*[40].

[71] According to Mr Green a single spine system can function efficiently in areas of low growth. It was his view, that population and traffic statistics show a tendency that Cambridge is fast becoming a dormitory suburb of Hamilton. If the tendency continues, the Hamilton to Cambridge road could, in his opinion, become, in effect, a part of the greater Hamilton road network.

[72] In the long-term, Mr Green considered that commuter traffic, and induced traffic from further development, will eventually choke the single spine route.

[73] Mr Green criticised the modelling carried out by Transit's consultants which was based on an assumed average "linear" rate of traffic growth. The assumed rate corresponded to 3% of the year 2000 modelled traffic flow being added each year. The growth rate was based on an average from several sites throughout the region.

[74] Of Transit's use of the 3% linear growth rate, Mr Green said:

> ...it does not allow for relating traffic generation to the growth of a growing urban area and for longer term growth studies involving changes in land use and the demographic data.[41]

And:

> However, for this particular project, the establishment of the new long term route for the State Highway in an area subject to significant future growth and land use activity warrants longer term vision than linear projection of 3%.[42]

[75] Mr Green considered that a compound growth rate of 4.3% is a more realistic assumption for testing the long term future road network. However, in cross-examination he conceded that when extrapolated over the agreed planning horizon, out to 2045, which he had not done, his 4.3% compound growth rate *"certainly looks rather extreme"*. He then reconsidered his position and proposed a 3% compound growth rate and said:

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[40] See section 4 of Green, EiC, paragraphs 4.1-4.8.
[41] Green, EiC, paragraph 5.5.
[42] Green, EiC, paragraph 5.7.

...I thought I would see where that came to.

Mr Hartley

[76] Mr Hartley, a consultant planner, believed that Transit's studies and evidence had shortcomings in the Hamilton/Cambridge section in that they failed to sufficiently address the settlement and land use development issues in the Tamahere area. These shortcomings included a failure to:

(i) adequately consider the extent of land use development already proposed;

(ii) adequately consider future developments in the policy arena which are not yet formally announced;

(iii) adequately consider the likely impact on development of the improved access which the proposed bypass will afford to the subject area.[43]

[77] He referred to such matters as:

(i) the coloration and population growth of Cambridge and Hamilton which reflects Cambridge's growing role as a "dormitory" or "satellite" suburb of Hamilton;[44]

(ii) proposed Change 19, which allows for smaller sites within the Tamahere area evidencing pressure for further and smaller subdivision;[45]

(iii) current planning initiatives including the Waipa Urban Growth Strategy, the Cambridge North Structure Plan, the Proposed Waikato District Plan and the formulation of development around the airport;[46] and

[43] Hartley, EiC, paragraph 3.3.
[44] Hartley, EiC, paragraphs 4.1 and 4.2.
[45] Hartley, EiC, paragraph 4.3.
[46] Hartley, EiC, paragraphs 5.1-5.6.

(iv) future development trends which ultimately in his view would put pressure on the Tamahere area being required for future urban growth.[47]

[78] He concluded that:

> ...I believe that the likely settlement and land use implications I have described above of utilising the Tamahere section of State Highway 1 for the proposed expressway should be considered in finally determining a sustainable expressway/motorway route intended to achieve Transit New Zealand's state of objectives.[48]

Transit's response

Mr Meister

[79] Mr Meister, a transportation engineer called by Transit, refuted Mr Green's claim that the Tamahere route would become choked. In his rebuttal evidence he:[49]

(i) pointed out that the traffic forecasts, based on the origin and destination surveys and linear projections using long term regional historic data, accurately reflect changes in demographics and land uses.[50]

(ii) demonstrated the effect of using Mr Green's "compound" trend line, and the 3% linear line. The difference in traffic flow projections between Cambridge and Hamilton by 2045 is nearly threefold – 42,000 vehicles per day against 120,000 vehicles per day. A situation Mr Green conceded in cross-examination looked extreme.

(iii) by using Statistics New Zealand Demographic Data he illustrated the population growth projections for the period 2001-2051. He opined that the 3% linear growth rate sufficiently accommodated the 1.7% and 1.3% projected population growth rate for Hamilton and Cambridge respectively, as indicated by the Statistics New Zealand Demographic Data.[51].

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[47] Hartley, EiC, paragraphs 6.1-6.4.
[48] Hartley, EiC, paragraph 7.8.
[49] See Meister, rebuttal evidence, paragraphs 6-38.
[50] Meister, rebuttal evidence, paragraph 9.
[51] Meister, EiC, paragraphs 17-19.

(iv) estimated a maximum traffic flow by 2045 of 47,000 vehicles per day on the Tamahere section of the project derived from the 3% linear growth rate. By comparison he estimated a traffic flow of 48,000 vehicles per day based on projected land use changes and demographic trends for Cambridge and Tamahere as outlined in Mr Hartley's evidence. This, he said, provides 16,000 vehicles per day spare capacity in the year 2045 in relation to the busiest section of the project.

[80] He thus maintained that the project will have sufficient capacity to:

- Meet projected traffic demand and maintain an appropriate level of service until at least 2045, the planning horizon;
- Handle the combined demand of through and commuter traffic; and
- Provide reserve or spare capacity (which will be increased even more if the southern links study network connections are constructed by the year 2031. He stated:

> I believe the expressway has sufficient capacity to absorb additional traffic flows beyond that that we may have projected.[52]

Ms Alderton

[81] Ms Alderton, a planning consultant was called by Transit. In rebuttal she gave quite detailed evidence as to why, in her opinion, the future growth and urbanisation of the Tamahere area would not compromise the role of the proposed expressway. She said:

> In my opinion, land use issues have been properly considered by the project team along with a range of other issues, in determining a preferred route for the project. Mr Hartley refers to population projections and land use plans (such as the Waipa Urban Growth Strategy November 2003) that were produced following lodgment of the NORs for the project. Due to the length of time it has taken from initial consideration of route options (from 1998) to the hearing of the current appeals (July 2004), there has obviously been some land use development within the project area.
>
> Nevertheless, the future growth was considered at the time the project was developed and the implications of such growth were explored. In preparing my rebuttal evidence, I have revisited this issue and discussed future growth issues with strategic planners of Hamilton City Council, Waikato District

[52] Transcript, page 163.

> Council and Waipa District Council. Mr Meister has also reconsidered projected population statistics (including Mr Hartley's population scenario, stated in 5.3 of his evidence) with respect to future traffic growth and confirms (in his rebuttal evidence) that the project can accommodate future growth speculated.
>
> In my opinion, it is therefore unnecessary to review Transit's proposed route under these NORs as Mr Hartley suggests, and for further reasons which are outlined below.[53]

[82] Ms Alderton then analysed the high growth rate currently being experienced by Cambridge. She then discussed the Waipa Urban Growth Strategy 2003 and the Cambridge North Structure Plan which had been prepared by the Waipa District Council to address the high growth rate.

[83] Ms Alderton then analysed the growth of Hamilton City and the likely pressures on the Tamahere district. She concluded that:

> I accept that there are indicators to suggest further growth and development may continue within the Tamahere and Cambridge areas. However, in my opinion, there is nothing to suggest the bulk of the rural area between Hamilton and Cambridge will be changed to the extent that Mr Hartley predicts. As a result of the current policy intentions of Hamilton City Council and Waikato District Council, Tamahere is likely to remain in the foreseeable future, a rural-residential enclave.[54]

[84] Importantly she said:

> In my opinion, it is also pertinent to note that the three territorial authorities have not challenged the bypass route with respect to future growth issues (refer to Hamilton City Council letter, Attachment B of my EiC). One can reasonably make the assumption they feel comfortable that they can plan for future land use development around the expressway.[55]

[85] She did not agree that future growth is an issue for this route[56]. When challenged as to why growth issues had allegedly not been included in her evidence in chief, she noted that she did address that issue in terms of development. She also stated:

> ...it was never seen as a great issue. Waipa district fully supported the current alignment and made submissions in support of that. None of the district councils have challenged the route or shown any concerns in terms of future growth issues. And so when issues were raised in Mr Hartley's and Mr Green's evidence I re-examined that and arrived at the same

[53] Alderton, rebuttal evidence, paragraphs 33, 34 and 35.
[54] Alderton, rebuttal evidence, paragraph 45.
[55] Alderton, rebuttal evidence, paragraph 48.
[56] Transcript, page 288.

conclusion. Future growth has been considered and to my mind that consideration has been adequate.[57]

[86] Under cross-examination, Ms Alderton firmly rejected the claim that only a *"once over lightly discussion with several district local authority planners"* occurred. She said:

> They spent years investigating multiple routes through here and there has been extensive consultation with territorial authorities, both political and technical consultative committees, and through our planning team who have consulted with planning teams and territorial authorities over a number of years.[58]

[87] Ms Alderton also gave evidence about her understanding that:

> The territorial authorities have a very clear view on their future growth sales and have identified those growth sales.[59] That there have been many discussions with councils in terms of their future areas and how Transit's alignment options may affect those areas, and that while some development will continue, both the Waikato and Waipa District Councils have strong policies to protect the rural resource in high quality soils.[60]

Determination

[88] As we understand Mr Green's evidence, his two main concerns were:

(i) that the Hamilton/Cambridge corridor will develop at such a pace as to compromise the role of the expressway, which will increasingly become an inter urban arterial road; and

(ii) the future growth and land use development will compromise the ability to establish a more direct and efficient route for the bypass in the longer term, such as the new power corridor route suggested by Mr Green.

[89] Mr Green's concerns were based on the future growth and land use patterns as detailed in Mr Hartley's evidence and the use by Transit of the 3% linear growth rate in their modelling predictions.

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[57] Transcript, page 291.
[58] Transcript, page 290.
[59] Transcript, page 276.
[60] See Transcript, page 277 and page 284.

[90] As to the latter, we are satisfied from the evidence of Mr Meister, that the 3% linear growth rate adequately reflects the maximum daily traffic flow in the year 2045. The modelled predictions of 47,000 motor vehicles per day closely reflect his calculations of 48,000 vehicles per day on the Tamahere section, derived from the projected land use changes and demographic trends for Cambridge.

[91] Further we preferred the evidence of Ms Alderton to the evidence of Mr Hartley. Ms Alderton has been working on the project for some years. She has been, during that time, in frequent consultation with the relevant territorial authorities over future land use and population trends.

[92] We also consider it pertinent that the three territorial authorities have not challenged the proposed bypass route with respect to future growth issues.

[93] Accordingly we find that Transit has not failed to consider potential urban growth and its consequential traffic implications. We are satisfied on the evidence, particularly of Mr Meister and Ms Alderton, that such issues were taken account of and that Transit's traffic predictions based on its modelling adequately reflect, as best as can be, consequential traffic effects arising from future land use and demographic changes.

[94] Mr Heine in his rebuttal,[61] considered that the proposed route will provide an efficient network, and ensure that the maximum possible road user benefit is gained from the roading improvement. He said, that a parallel network as proposed by Mr Green is not necessary and would be a rather expensive luxury[62]. We tend to agree.

Other matters relevant to Part II

[95] The evidence and appeals on behalf of a number of individual appellants raised concerns with respect to the environmental effects of the project particularly in relation to:

(i) ecology;

(ii) landscape and visual effects;

[61] Heine, rebuttal evidence, paragraph 16.
[62] Transcript, page 97.

(iii) noise and vibration;

(iv) arbourcultural effects; and

(v) property and business effects.

[96] All of the individual appellants, with the exception of Mr and Mrs Gore, put themselves under the umbrella of the Action Committee. Those matters were not addressed or pursued by the Action Committee's counsel. Nevertheless, as they have been retained in the evidence presented and read to the Court we mention them for completeness.

[97] Unfortunately, in any major public work of this nature there will be consequential effects of the manner referred to. Sometimes these effects are quite severe. They have to be weighed and balanced against the positive effects of any proposal.

[98] We have already referred to the positive effects of the proposal. In our view the positive effects of the proposal far outweigh the negative effects identified.

[99] We find that the project is sustainable in the long-term and is in accord with the single purpose of the Act.

Lapse period of 20 years for the designation

[100] All appellants raised concerns as to the 20-year lapse date being sought for the Notices of Requirement. They maintained that a 20-year lapse period is too long. Rather, they submit, that if the Notices of Requirement are approved then the lapse period should be for 10 years.

[101] The appellants maintained that a lapse period of 20 years was too long for a number of reasons including:

(i) Section 184(1) of the Act anticipates that generally, a period of 5 years is appropriate. Mr Cavanagh submitted, that this was a deliberate amendment to the legislation to overcome wide public concern about the unrestricted period in which designations could remain affecting property, with no evidence of any intention by the requiring authority to proceed with the work;

(ii) The "blighting effect" on the properties affected; and

(iii) The Notices of Requirement are premature.

[102] Of the reasons raised by the appellants for reducing the term of 20 years to 10 years, and the one that was emphasised the most in evidence was the blighting effect. An effect which generally arises from the operation of sections 176 and 178 of the Act, which restricts the use of land subject to a Notice of Requirement or designation.

[103] As an example Mr and Mrs Gore will lose all of their property if the designation is allowed. Mrs Gore pointed out, that their property had been subject to the blighting restrictions for 7 years already. She could not see how adding another 20 years was reasonable. Mr and Mrs Gore's property is not the only one that is totally affected.

[104] Transit's counsel, Mrs Janissen, argued that designations are a planning tool designed to identify in a plan, a proposed project, thus assisting in planning for the sustained and integrated management of resources. She quoted the well-known passage from the decision of the Environment Court in ***Quay Property Management Limited v Transit New Zealand***[63]:

> Currently designations as they exist for major projects are a planning tool. Transit's motorway designation encompasses a very wide area and interfaces with a large number of uses - ... We consider that if the proposed route is identified now in the plan then this assists in planning for the sustained and integrated management of the natural and physical resources along the route for the foreseeable future. If such tools are not available for major projects such as state highways and motorways, an industry would not know for commercial reasons when and where a major transport route might be available for planning and freighting purposes. And residents would be unable to plan – either to avoid a reduction in amenity by not locating in proximity to the motorway in the first place or by planning for remedying or mitigating measures.[64]

[105] Mrs Janissen further argued that:

[63] Environment Court Decision W28/2000.
[64] Paragraph 123.

(i) similar lapse periods have recently been approved for other section of the Waikato Expressway, and State Highway projects in other parts of New Zealand;[65]

(ii) the restrictions arising out of the provisions of sections 176 and 178 of the Act need to be balanced by:

(a) other statutory provisions such as section 185 of the Act, which in certain circumstances, allows affected landowners to apply for an order that the relevant requiring authority purchase land affected by a Notice of Requirement or designation; and

(b) by Transit voluntarily proceeding to an advanced purchase of land affected by a project. Mr Phillips gave evidence which outlined the situations in which Transit will consider such an advanced purchase. They include situations such as the present, where it is not intended that the project will be constructed for some time.

(iii) the need for Transit to designate the project now, in order to safeguard the chosen alignment from inappropriate use and development in the period before the project becomes fundable;

(iv) designating the route now will provide:

(a) certainty for affected landowners and the local community as to Transit's future intentions of the route; and

(b) Transit with the certainty that it will be able to fully implement the project as and when it becomes fundable.

[65] For example, Waikato District Council has recommended that Transit's notices of authority for the Huntly Bypass be confirmed with a 20-year lapse date in July 2004. Waipa District Council extended Transit's designation for the Cambridge Bypass (which has been in place since 1976) for a further 10 years in 2002. Transit's designation for Ngaruawahia Bypass has also recently been confirmed with a 15-year lapse period. Further, Transit's designation for State Highway 20 Dowse to Petone upgrade project was confirmed with a 20-year lapse date in 2003, and its designations for the Waiouru Project in Auckland were confirmed with a lapse date of 15 years in 2002.

[106] Mr Heine told us that the timing of roading projects such as this in New Zealand, is largely in the hands of the funding agency Transfund. He then discussed the criteria for establishing funding presently for roads. He then referred to the Regional Road Transport Strategy 2002 which has the construction of the Waikato Expressway at the top of its list of roading projects for the Waikato region.

[107] Having noted the uncertainty of timing for the project he said:

> In spite of the uncertainty of the timing of the project construction, it is important that the route of the project be designated now, and be granted a 20-year lapse period. The project will be a key element in the infrastructure of Hamilton and the Waikato region. Landowners, developers and local government planners need to know the intended location of the project with some certainty now, so that their long-term plans can be developed with confidence.
>
> Without the designation in place, the ultimate location of the project will be a matter of speculation and a larger area of the countryside will tend to be "blighted". Prospective property owners will be uncertain about where they can safely settle and current owners will have difficulty selling their properties or deciding how much they should invest in improvements.[66]

[108] Mr Phillips discussed in some detail, Transit's statutory and strategic objectives[67]. He reiterated that the timing of the project is dependent on when Transit receives funding by Transfund. He then referred to the various factors that influence the order of priority, including consideration of national, regional and local matters of importance. He said:

> Accordingly, the lapsing period for the designation needs to be of sufficient length to allow for these uncertainties. The requested 20-year timeframe before the designation lapses is reasonable and Transit is reasonably confident that it will be able to obtain sufficient priority for funding, and fully intends to construct the project, within the timeframe.[68]

[109] Mr Phillips (as did Mr Heine) acknowledged the blighting effects that properties affected by the designation will suffer. He stressed that the rationale for restrictions in sections 176 and 178 of the Act is to:

> ...enable the providers of essential public services to plan for the community and its welfare in a manner that does not expose the public to inordinate costs or inconvenience. In the case of state highways, it ensures that identified routes are kept available and protected against developments that would hinder or prevent the project or require a greater expenditure of public funds to achieve them. It also ensures a minimum disruption to landowners

[66] Heine, EiC, paragraphs 203 and 204.
[67] Phillips, EiC, paragraphs 54-74.
[68] Phillips, EiC, paragraph 79.

who could otherwise make significant investment in the land, only to find that it cannot be realised.[69]

[110] Mr Phillips then outlined three ways in which the impact of those restrictions can be alleviated:

(i) First, the relevant requiring authority can give consent for works to be undertaken on the affected land, under sections 176 and 178 of the Act;

(ii) Secondly, owners of properties directly affected by a Notice of Requirement or designation who meet the criteria in section 185(3) of the Act are entitled to apply for an order obliging the requiring authority to acquire or lease all or part of that land; and

(iii) Thirdly, Transit will consider advance purchase, in cases of genuine hardship or for compassionate grounds.

Determination of lapse period

[111] Section 184(1) of the Act states:

Lapsing of designation which have not been given effect to-

(1) A designation lapses on the expiry of 5 years after the date on which it is included in the district plan unless-

(a) It is given effect to before the end of that period; or

(b) The territorial authority determines, on an application made within 3 months before the expiry of that period, that substantial progress or effort has been made towards giving effect to the designation and is continuing to be made and fixes a longer period for the purposes of this subsection; or

(c) The designation specified a different period when incorporated in the plan.

[112] No guidance is given as to the principles that are to be applied in determining a period different to the 5-year period mentioned in the Statute. To extend the period beyond 5 years a territorial authority, and this Court, is thus given a wide discretion.

[69] Phillips, rebuttal evidence, paragraph 20.

[113] The discretion has to be exercised in a principled manner, after considering all of the circumstances of a particular case. There may be circumstances where a longer period than the statutory 5 years is required to secure the route for a major roading project. Such circumstances need to be balanced against the prejudicial effects to directly affected property owners who are required to endure the blighting effects on their properties for an indeterminate period. The exercise of the discretion needs to be underlain by fairness.

[114] As Mr Cavanagh pointed out the blighting effect can:

(i) artificially impact on the value of properties in the wider area affected by the designation;

(b) preclude directly affected owners from carrying out any improvements on their properties and in the case of business activities this can be significant.

[115] We also accept that the effect of the restrictions need to be balanced by the other statutory provisions such as section 185 of the Act. However Mr Cavanagh pointed out that it cannot be assumed that an application to this Court for an application that the land be taken on hardship grounds will necessarily be successful.

[116] We recognise that designations are a planning tool that enable a proposed route to be identified in the plan and that this assists in achieving the purpose of the Act – the sustainable management of natural and physical resources.

[117] Bearing the above in mind we balance the competing considerations for and against the 20-year term. Those matters advanced for a 20-year term include:

(i) the 20-year lapse time reflects Transit's present expectation as to the timeframe within which the project is likely to be constructed. A timeframe that is circumscribed by funding priorities which are the responsibility of Transfund;

(ii) designating the project now will safeguard the chosen alignment from inappropriate use and development in the period before the project becomes fundable;

(iii) designating the project will provide certainty for affected landowners and the local community as to Transit's future intentions;

(iv) the designations will provide Transit with the certainty that it will be able to fully implement the project when it becomes fundable.

[118] Those matters advanced for a 10-year term include:

(i) a 20-year lapse period is too long a period to subject effective parties to the blighting restrictions which are an inevitable consequence of the designations;

(ii) the practical difficulties of landowners directly affected bringing proceedings under section 185 of the Act.

[119] Having regard to all of the above matters, we find that an appropriate lapse time in the present circumstances is 10 years. We are mindful that the Statute provides for 5 years, unless a different period is specified.

[120] The evidence relating to blighting effects on those properties directly affected by the project was not really disputed by Transit's witnesses. Transit's answer to the severe blighting effect on affected properties, was section 185 of the Act, and in some cases the voluntary acquisition of land affected.

[121] In our view a term of 10 years will assist in giving Transit a focus and commitment, not only to complete the project, but more importantly for the owners of affected properties, to ensure that Transit is focussed and committed to dealing with them in an appropriate and fair manner.

Final determination

[122] On the basis of the comprehensive evidence presented, we are satisfied that the project adequately meets the relevant requirements of sections 169, 171 and 181 of the Act, and Part II of the Act, in that:

(i) the correct procedural steps were taken with respect to the issuing of the Notices of Requirement;

(ii) the designations sought are necessary to achieve the objectives of the project, as set out in the Notices of Requirement and evidence of Messrs Phillips and Heine;

(iii) Transit has given sufficient consideration to alternatives with respect to the project, and has not acted arbitrarily or given them only cursory consideration. Further, Transit's evidence (in particular that of Mr Heine) has established that the adequacy of Transit's consideration in this regard is in no way diminished by the late emergence of the Power Corridor Route now being promoted by the Action Committee;

(iv) it would be unreasonable to expect Transit to use an alternative route for the project, given that its consideration of alternatives to date has been more than adequate, and that there is no guarantee that the Action Committee's new Power Corridor Route could ever be viable;

(v) overall, the project is consistent with the provisions of all relevant statutory planning instruments;

(vi) on balance, the project will promote the sustainable management of natural and physical resources as required by section 5 of the Act, taking appropriate account of the matters in sections 6-8. In particular, the adverse effects of the project can be avoided, remedied, or mitigated, through both the design and mitigation measures already included in the Notices of Requirement, and appropriate designation conditions;

(vii) those adverse effects which cannot be appropriately avoided, remedied or mitigated need to be balanced against the positive effects of the proposal and as we have already found, the positive effects of the proposal outweigh the negative effects.

[123] The three designations sought by Transit are confirmed for a period of 10 years, subject to the specific conditions attached as Annexure "A" to the closing submissions of counsel for Transit but, as amended by this decision.

[124] We accordingly dismiss the appeal save that the time period for the designations is reduced from 20 years to 10 years.

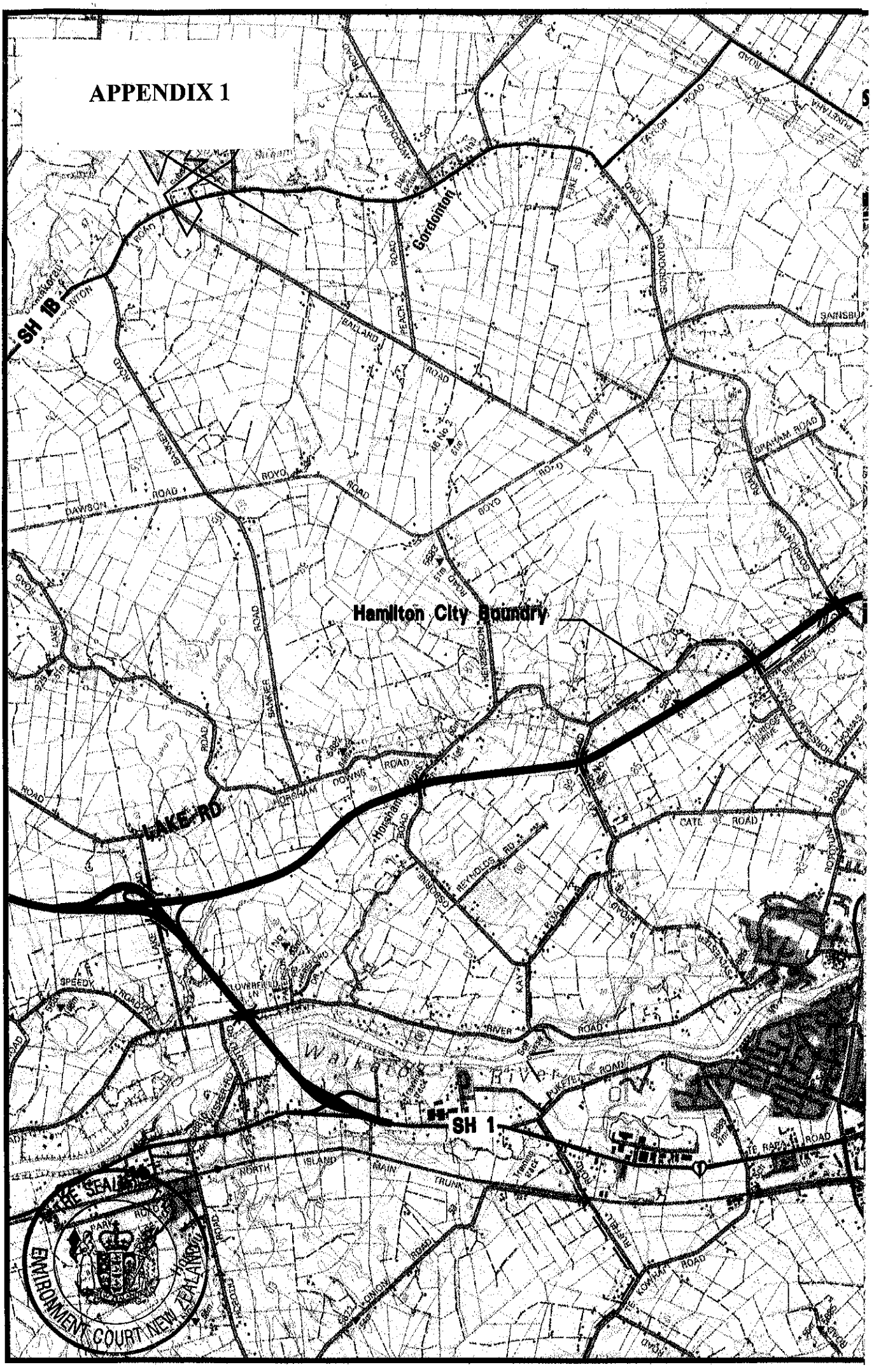
[125] The draft consent orders filed in Court are approved and shall issue in terms of those draft orders, save for the time period of the designation, which is fixed at 10 years. Counsel for Transit New Zealand is to lodge orders for sealing and issue.

[126] Costs are reserved. However it is our tentative view that costs should lie where they fall.

DATED at **AUCKLAND** this 10th day of November 2004.

R Gordon Whiting
Environment Judge

APPENDIX 1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SH 1
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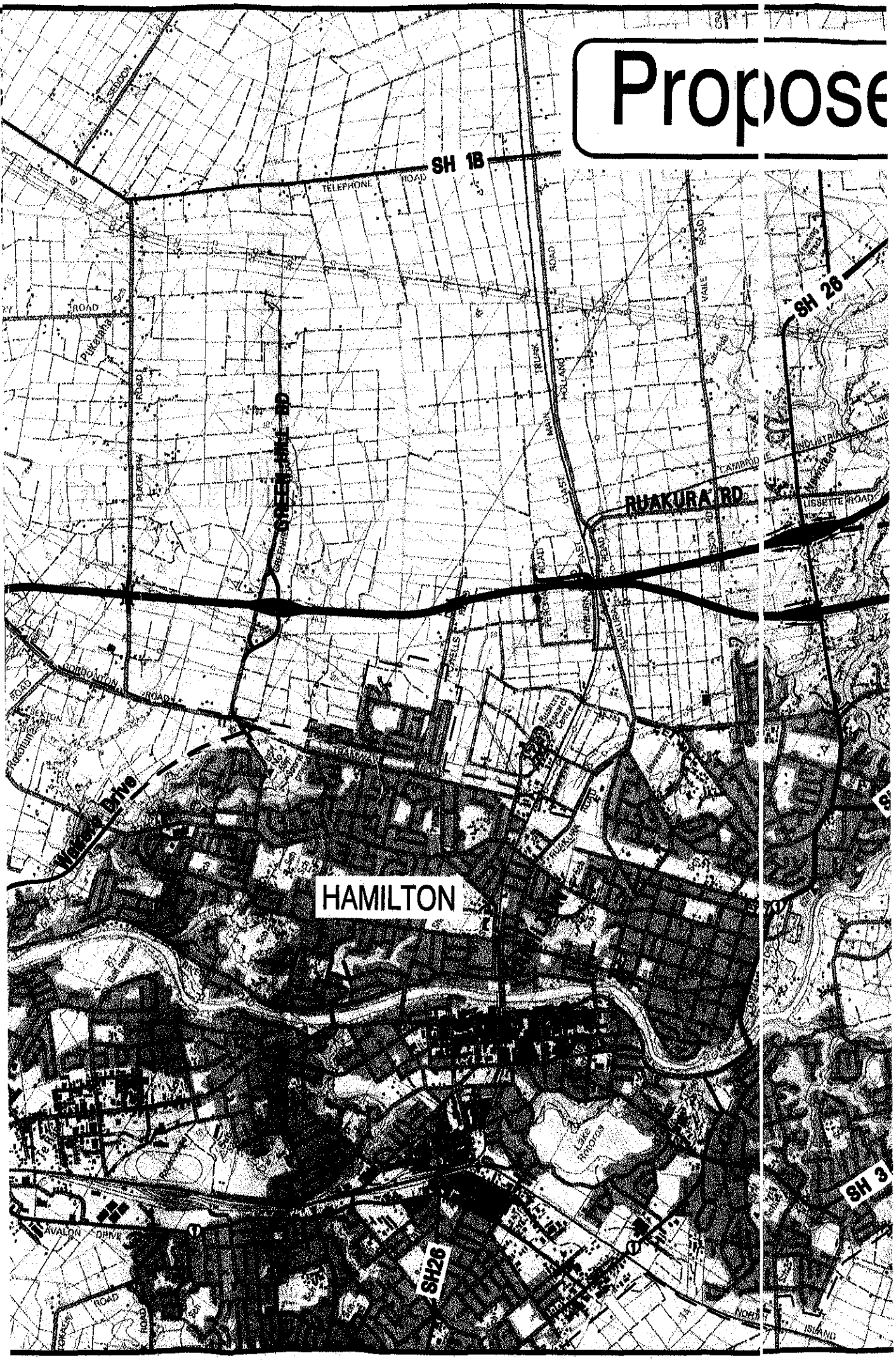
Cordelton
BALLARD ROAD
DAWSON ROAD
BOYD ROAD
PEACHGROVE ROAD
GORDONTON ROAD
DURHAM ROAD
BAKER ROAD
HENDERSON ROAD
DOWNS ROAD
HORSHAM DOWNS ROAD
CATE ROAD
REYNOLDS RD
KAY ROAD
RIVER ROAD
PUKETE ROAD
TE RAPA ROAD
KOMAPA ROAD
NORTH ISLAND MAIN TRUNK
SPEEDY ROAD
LOWER NORTH
Waikato River
THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND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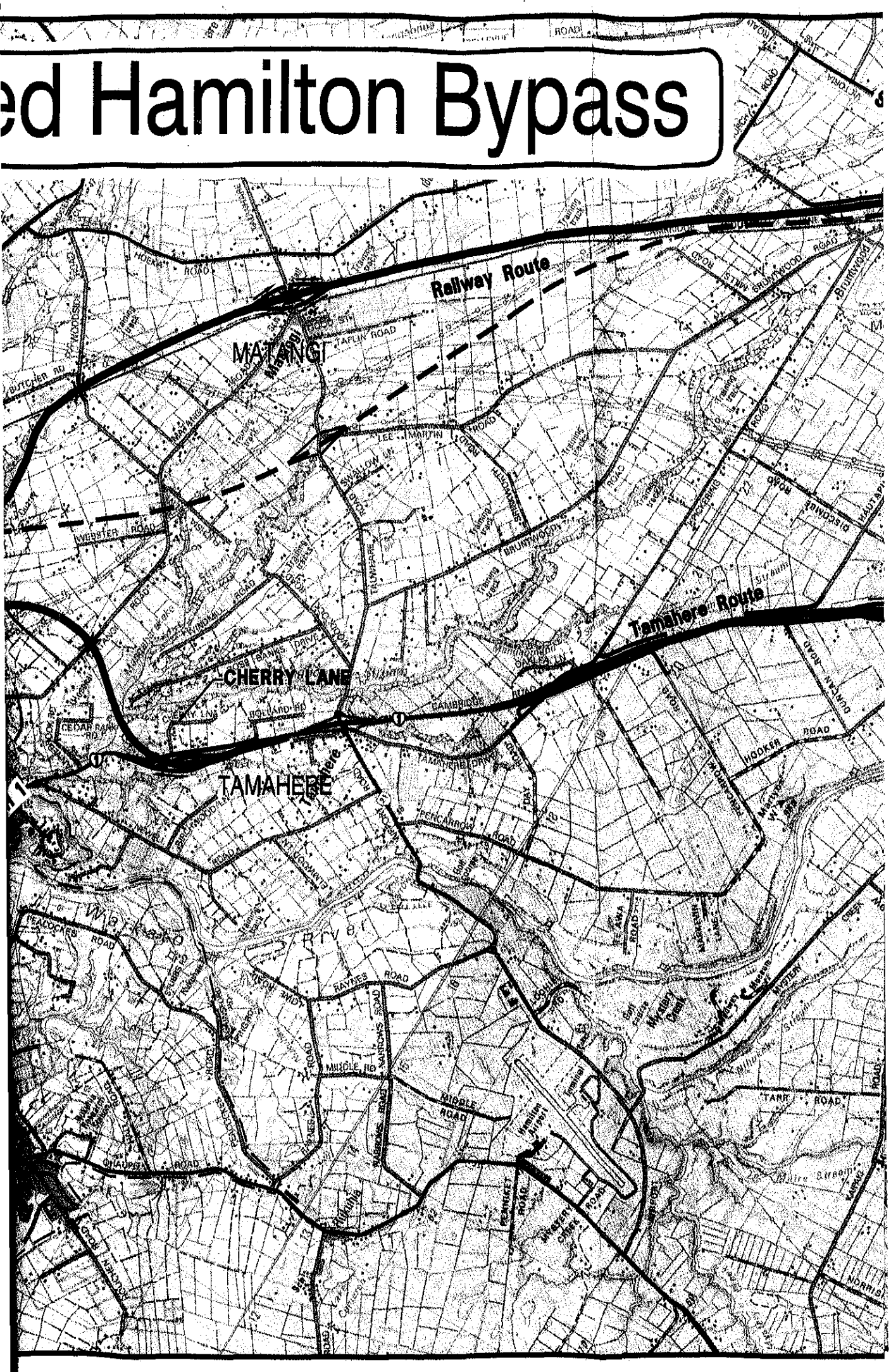
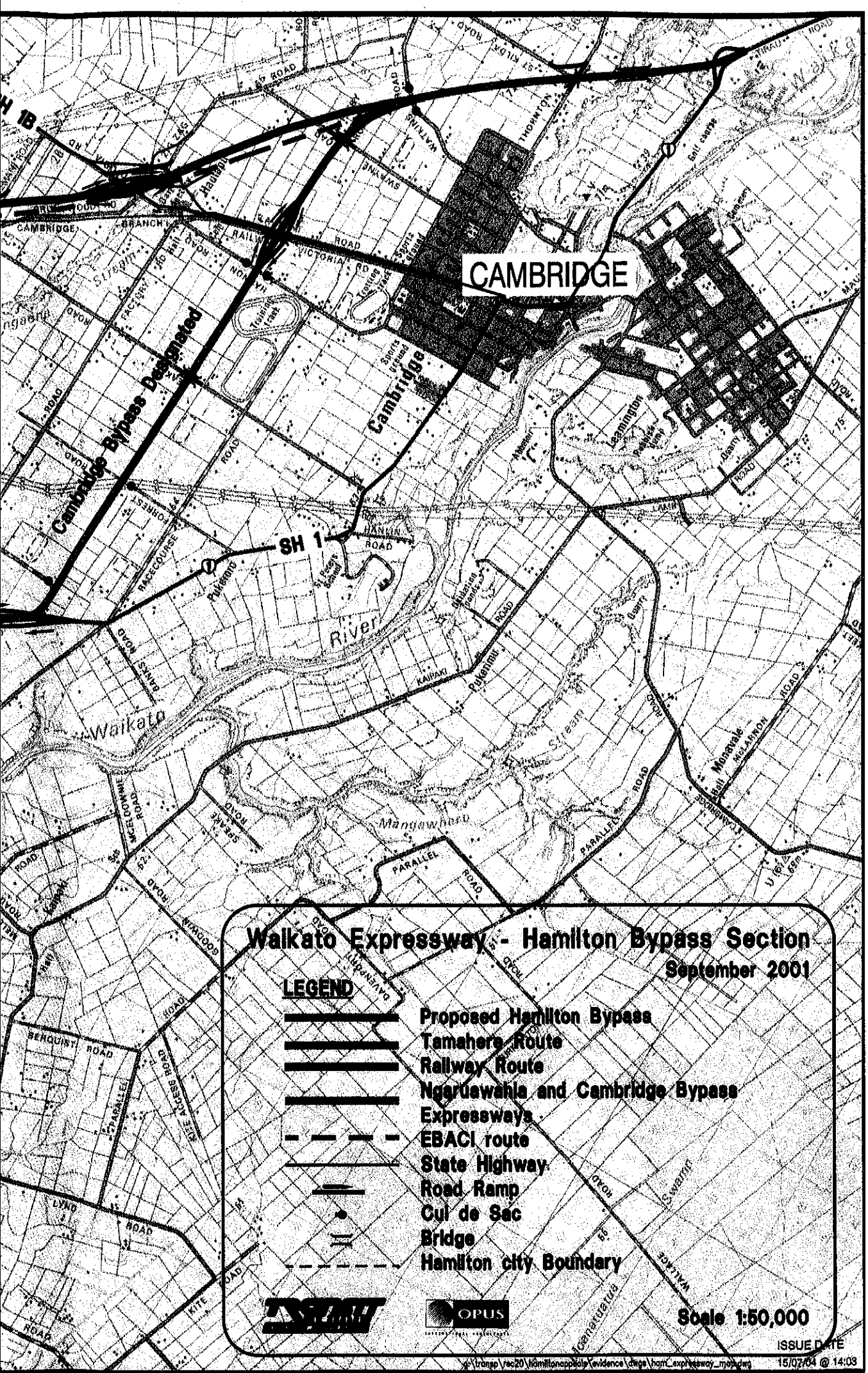
SH 26
RUAKURA RD
HAMILTON
SH26
SH 3

ed Hamilton Bypass




CAMBRIDGE
Cambridge Bypass Designated
SH 1
Cambridge
Waikato River
Maungawharo Stream
Pukeroma Stream
Swamp
Waikato Expressway - Hamilton Bypass Section
September 2001
LEGEND
Proposed Hamilton Bypass
Tamahere Route
Railway Route
Ngaruawahia and Cambridge Bypass Expressways
EBACI route
State Highway
Road Ramp
Cul de Sac
Bridge
Hamilton city Boundary
OPUS
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15/02/04 @ 14:03

BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 204

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to s 198E of the Act
BETWEEN	CITY RAIL LINK LIMITED ('CRLL') (SUCCESSOR TO AUCKLAND TRANSPORT)
	KIWIRAIL HOLDINGS LIMITED
	(ENV-2017-AKL- 000059)
	Requiring Authorities
AND	AUCKLAND COUNCIL
	Territorial Unitary Authority

Court:	Principal Environment Judge Newhook Environment Commissioner RM Dunlop Environment Commissioner DJ Bunting
Hearing:	6, 7, 8 & 9 November 2017
Appearances:	A Beatson and N Garvan for CRLL A Arthur-Young and A Cameron for KiwiRail Holdings Limited V Evitt and Ms L Ziegler for Auckland Council D Allan and D Sadlier for CB Trustees 2012 Limited M van Zonneveld for himself R Bartlett QC for Qambi Properties Limited (to announce no participation in the hearing by that party)
Date of Decision:	15 December 2017
Date of Issue:	15 December 2017

DECISION OF THE ENVIRONMENT COURT APPROVING REQUIREMENTS FOR DESIGNATION (ALTERATIONS)

REASONS

Introduction

[1] On 23 May 2017 Auckland Transport (now succeeded by CRLL) and Kiwirail Holdings Limited applied to the Court under s 198E RMA for alterations to the City Rail Link designation 1714 (in particular Designations parts 3 and 6) and Kiwirail

Designation North Auckland Line 6300, seeking to have it confirm those requirements at first instance in the place of Auckland Council.

[2] The requisite procedural steps under ss 198B, 198C, and 198D RMA had been taken on various dates in March and May in 2017.

[3] Under s198E the Applicants expressed their desire that the proceedings continue before the Environment Court instead of the Council.

[4] The Application was supported by an affidavit of GE Edmonds and accompanied by a list of names and addresses of persons to be served with the notice.

[5] While the application was on the books of the Auckland Council, 79 submissions were lodged either in favour of or in opposition.

[6] Process was forthwith commenced by the Court under s 274 RMA gaining notices from parties expressing interest in the proceedings. Notices were received from the following persons and entities:

- CB Trustees 2012 Limited
- Qambi Properties Limited
- Mr Brian MacCormack
- Mr Martin van Zonneveld

Nature of the relief sought by the requiring authorities

[7] The City Rail Link ('CRL') is a significant 3.4 kilometre-long passenger railway line being constructed largely underground from Britomart Station in Central Auckland to the North Auckland Line ('NAL') where it cuts through Mount Eden. It was the subject of confirmed designations (1–6), construction having now commenced at the northern end of the line.[1]

[8] It was the largely unchallenged claim of CRLL (and previously AT) that the CRL will almost double the capacity of the existing rail networks servicing Auckland's CBD, and provide significant connectivity and improvements in the public transport

[1] The designation was confirmed by the Environment Court by consent order except in relation to designation 5 which was the subject of the *Tram Lease Ltd v Auckland Council* [2015] NZEnvC 191 decision.

infrastructure system in Auckland.

[9] Subsequent to the confirmation of the designations, considerable further design work has been done resulting in changes said by the requiring authorities to be desirable, indeed necessary, to both the CRL and the NAL in the general vicinity of where they intersect in the suburb of Mount Eden.

[10] The prime focus of the parties in the case before us was an element of the proposed changes that includes the removal of the vehicular component of the over-bridge that had been required above the railway tracks on the alignment of Porters Avenue and Wynyard Road in part of CRL existing Designation 6.

[11] The issues in dispute in the case narrowed considerably during the course of the conferencing of groups of expert witnesses, and subsequently in response to procedural direction by the Court. The narrowed issues are described below.

Issues in dispute

[12] In the week preceding the hearing members of the Court read the enormous collection of statements of evidence lodged by the parties in preparation for the hearing, together with the joint witness statements from the conferencing of several groups of experts. The Court perceived that the issues should have narrowed considerably from those at large prior to evidence exchange. The parties were directed to confer and to produce by the end of Friday 3 November a succinct statement of the issues remaining to be resolved in the case, focussing on the "true theory of the case". Reference was made to an earlier minute from the Court about the requirements of the Evidence Act 2006 as to relevance and evidence being likely to provide substantial help to the Court. Counsel were also required to provide to the Court a list of witnesses they agreed would not be needed for cross-examination.

[13] A further direction was made that after the opening submissions by the requiring authorities at the commencement of the hearing, counsel for the other parties were required to address certain matters of law, in particular as to whether the Court could lawfully direct acquisition of land not included in the NoRs as notified, and as to whether it could direct demolition of certain buildings described in evidence.

[14] A memorandum was filed in answer to those directions, by counsel for CRLL, Kiwirail, Auckland Council and CB Trustees 2012 Limited advising that the issues to be resolved in the case were:

(a) What is the extent, and significance, of connectivity effects arising from the proposed alterations?

(b) Should the proposal to remove the vehicular component of the overbridge at Porters Avenue be confirmed, refused, or should it be confirmed subject to modification to include appropriate mitigation?

(c) Of the potential mitigation options that have been identified, what are the benefits and costs of these and are they able to be implemented?

(d) What potential mitigation options exist?[2]

[15] Counsel indicated that there were two residual issues relating to the adequacy of the alternatives assessment undertaken by AT/CRLL, and the necessity for a condition about vibration raised by the acoustic expert for Auckland Council.

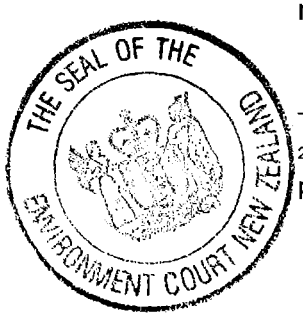
[16] After consulting Mr van Zonneveld, counsel advised that he identified two further issues as follows:

(a) A third and most easily achievable mitigation measure, utilising certain streets in Edenvale, which had been rejected by the traffic experts.

(b) The Porters Avenue overbridge should be removed entirely despite the agreement by the traffic experts that there would be pedestrian and cycling benefits from the retention of two bridges servicing those requirements, across the railway line in the vicinity.

[17] The parties confirmed that only three of the witnesses in the extensive list would not be needed for cross-examination.

[18] They confirmed that the lack of a need for cross-examination of those 3 witnesses had arisen from a notice suddenly issued by Mr Bartlett on behalf of Qambi Properties the same day (the last working day before the hearing) that, having taken part in mediation, having provided expert evidence, and having participated in expert conferencing, it did not propose to take any further part in the proceedings. (It nevertheless maintained its status as a submitter).



[2] For ourselves we place issue (d) after issue (a), and counsel issue (b) becomes issue (d), in order to place consideration of them in an appropriate order.

[19] Qambi submitted that its primary issue of concern remained the lack of mitigation proposals by CRLL concerning removal of the Porters Avenue vehicular connection. It expressed some amazement at the fact that a full vehicular overbridge had been a feature of the earlier designation, but that the requiring authority had not only resiled from that position, but was now asserting that no mitigation was required.

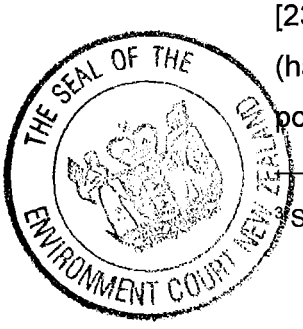
[20] A few weeks before the hearing, Qambi had sought from the Court and obtained a subpoena for an urban design expert Mr Ian Munro, on what it asserted was the "critical urban design/connectivity issue". Qambi now passed that witness over to CB Trustees 2012 Limited. Qambi joined with CRLL in its memorandum filed immediately prior to the hearing, that if the Court was persuaded by the evidence of Mr Munro and/or others that CRLL was not offering adequate mitigation, the Court might direct the requiring authority to further consider matters and initiate any processes that might flow from it. Mr Bartlett agreed that it could not be contended that the Court has powers to direct, in the present proceedings, actions that could interfere with the rights of third parties who would have entitlements of notification and hearing.

[21] Of some importance, Qambi accepted that it was bound by agreements its advisors made during expert conferencing.

[22] An consequence of Mr Bartlett's announcements was that Qambi's expert witnesses would not be available for questioning by other parties, or by the Court. The Court needed to consider whether it should take any account of the pre-circulated statements by Qambi's witnesses. After short deliberation, we held that because the direct referral procedure requires us to have regard to all submissions[3], whether or not the makers of those submissions proceeded to obtain party status under s 274 RMA, let alone participated in the hearing; and because the Qambi expert witnesses had participated in expert conferencing and reached numerous agreements with experts called by other parties, that we would take their evidence into account. We nevertheless held, and confirm, that the weight that can be attached to their pre-circulated evidence must be low, except in relation to the agreements just mentioned.

Matters of jurisdiction

[23] In its minute issued on 2 November, the Court asked the parties to comment (having regard to pre-circulated evidence which we had read) whether it would be possible to use the designation of 6 Porters Avenue and 3 Ngahura Street, to demolish



[3] Section 171(1) RMA.

existing apartments at these locations to enable construction of an alternative Porters Avenue vehicle overbridge suggested by traffic engineer Mr D McKenzie called by CB Trustees 2012 Limited, and enable reinstatement of access to 1A Porters Avenue.

[24] We also recorded that we wished to be addressed as to whether the existing designation condition that requires the designation of 6 Porters Avenue and 3 Ngahura Street is to be uplifted on completion of the CRL construction, including any proposed reinstatement work on the apartments.

[25] We also recorded that if the requiring authorities were not intending to use the designation in that way, we required to be advised what relief the parties were seeking in respect of that part of the NoR proposing deletion of the requirement for a Porters Avenue vehicle overbridge.

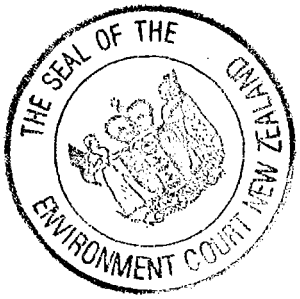
[26] We identified subsidiary questions as to what parties saw as the legal and practical consequences of the answers to those questions, and what their clients were actually seeking in the proceedings at this juncture, whether refusal of the NoR, modification of it within jurisdiction, conditions to be imposed, and consequences of any alleged inadequacy of consideration of alternatives, or whatever course.

[27] CRLL, Kiwirail and Auckland Council responded that the effects of removal of the vehicular component of the Porters Avenue overbridge were not such as to require further mitigation. They recorded that if the Court disagreed with that assessment and was to find that the requirements should be cancelled in the absence of further mitigation, then there would be 3 theoretically available options:

(a) Modify the requirements to include the overbridge as per the existing designation but with the benefits of the alterations which required a lowered rail alignment, as assessed in the evidence in chief of Stephen Knight,[4] at a cost of approximately $168m; an option that had been discounted in conferencing by all engineering experts.[5]

(b) Indicate the overbridge referred to as "Alternative 2" in the evidence in chief of Mr McKenzie (or some variant thereof) might be necessary, which would require the following additional processes:

i. Further notices of requirement to alter the existing



[4] At para [16].
[5] JWS: Engineering at para [11].

designation;

ii. Private property acquisition processes under the Public Works Act 1981.

(c) Indicate that the Fenton/Akiraho link road proposed by Qambi might be necessary at a cost of approximately $7.2m to $8.5m, requiring additional processes to be undertaken being application for restricted discretionary resource consent to construct the road, and private property acquisition processes under the Public Works Act 1981.

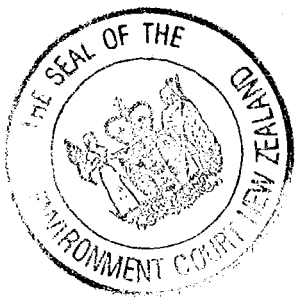
[28] These parties submitted that the Court did not presently have jurisdiction to modify the requirement to include "Alternative 2" or the link road as part of the present processes. They considered that the Court could contemplate obtaining a "best endeavours" undertaking from the requiring authorities if it held that these options should be pursued.

[29] By memorandum counsel for CB Trustees 2012 Limited accepted that the Court could not lawfully direct acquisition of land not included in the NoR as notified; and neither could it direct the demolition of buildings within or outside the designation footprint. It sought direction by the Court of consideration by the requiring authorities of further processes.

[30] CB Trustees 2012 Limited in its memorandum accepted that the Court could not direct requiring authorities to use a PWA process to acquire and demolish such.

[31] As to the Court's question about whether there was a designation condition requiring uplifting of the designation of 6 Porters Avenue and 3 Ngahura Street on completion of construction works, CB Trustees 2012 Limited advised that it could not identify any such condition. It accepted that it seemed likely that the intentions of the requiring authorities in this regard had been confirmed in the second engineering joint witness statement.

[32] As a consequence, CB Trustees 2012 Limited indicated that if the Court found that appropriate mitigation of the loss of the vehicular function of the overbridge would not to be achieved, it should decline the NoR. It acknowledged that if this was not the Court's finding, the Court might be in the position of confirming the NoR as sought by the requiring authorities in the context of the wider first instance enquiry to be undertaken by the Court in the present proceedings.



[33] The requiring authorities and the Council in answer, maintained that no further mitigation was required. They requested the Court to press CB Trustees 2012 Limited to either confirm that it was seeking relief along the lines of Mr McKenzie's suggested "Alternative 2" bridge, or was taking that option out of the mix in the proceedings. After quite considerable discussion of the issue between counsel and members of the Court, Mr Allan confirmed on behalf of CB Trustees 2012 Limited that the McKenzie proposal was now "off the table".

[34] The consequence of that confirmation was that the issues in the case finally narrowed further, such that if we were to find that mitigation would be required, CB Trustees 2012 Limited would adopt and pursue the Qambi link-road suggestion to the extent that the Court might consider it as coming within jurisdiction, or if not, by way of directing further processes as an alternative to refusing the requirements for designation.

Statutory framework

[35] Section 181 RMA enables requiring authorities to give notice of requirements to alter existing designations. Sections 168 – 179 apply as though for a new requirement.

[36] Section 198E RMA provides for direct referral to the Environment Court, as has happened here, and that in making its decision the Court must have regard to the matters set out in s 171 and may either cancel, confirm or modify or impose conditions as the Court thinks fit.

[37] Section 171(1) provides as follows:

> **Recommendation by territorial authority**
>
> (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.

Relevant statutory instrument provisions

[38] We are satisfied that S 7 and Appendix J of the Assessment of Effects on the Environment ("AEE") offer a detailed analysis of the relevant statutory provisions. The CRL is expressly referenced in a number of them including the partly operative Unitary Plan, the Auckland Long Term Plan, the Auckland Regional Land Transport Strategy and the Auckland Regional Land Transport Programme.[6] Of some note, the Unitary Plan expressly identifies the CRL as "the foremost transport ... project in the next decade", and as "providing the most significant place-shaping opportunity".[7] The present proceedings did not of course entail a fundamental attack on the CRL, being limited to a preference for some parties to retain originally designated features, or in the alternative that there be some other mitigation for the loss of vehicular connectivity at Porters Avenue. Nevertheless we note fundamental support for the CRL in relevant statutory instruments on the following bases:

- An efficient transport system that will enable economic growth.
- Ongoing consultation with mana whenua to ensure that potential adverse effects on cultural values are addressed.
- Some benefits for other infrastructure in the vicinity such as the Mount Eden corrections facility.
- Improvements in safety and operation of the CRL and integration into the existing upgraded section of the NAL.
- Appropriate management of noise and vibration effects to acceptable levels.[8]
- Would enable the frequent safe and efficient movement of people and support the type of built development enabled in the surrounding mixed land use and light industry zones.

[39] Having regard to the evidence of the planners, and in particular the agreements

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[6] Evidence in chief of D McGahan at [87].
[7] Unitary Plan in Box 13.2.
[8] The vibration aspect had been the subject of considerable negotiation between experts, finally resolved between them at the end of the hearing.

reached by them in expert conferencing, we are satisfied that when regard is had to the applicable provisions of the relevant policy instruments, the Requirements align satisfactorily. We have also had regard to the provisions of the Unitary Plan in relation to the mixed-use zone and other relevant provisions. The planning experts in conference appeared to take a stance somewhere between positive and neutral concerning alignment of the notices of requirement with Unitary Plan objectives and policies. They focussed on those that had been referred to in the s 198D report, and also considered a number of other objectives and policies as set out by the s 274 parties' evidence.[9] Any areas of disagreement amongst the experts on this score were largely referable to differences concerning effects on the environment, so these matters will be considered in that section of this decision, which follows next.

Effects on the environment

[40] Effects on the environment arise in two ways under s 171(1); first in the introductory words to that sub-section where we are, amongst other things, to consider the effects on the environment of allowing the requirement; having particular regard to – sub-subsection (b) as to whether adequate consideration has been given to alternative sites, routes or method of undertaking the work if either the requiring authority does not have an interest in the land sufficient for undertaking the work or is it likely the work will have significant adverse effects on the environment.

[41] This case was significantly about effects on the environment, which we shall discuss shortly. We start by noting however that the requiring authorities own all the land needed for undertaking the work (construction and operation), so it is potentially only the second part of subsection (b) that would trigger an enquiry as to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work. That is, as to whether there would be <u>significant</u> adverse effects on the environment.

[42] To assist a reading of what follows, we record that after consideration of all evidence we have reached the conclusion that not only are there no <u>significant</u> adverse effects on the environment, but that adverse effects on the environment overall are no more than minor. We can also find that in any event there was more than adequate consideration given to alternatives by the requiring authorities, the detail of which we record later in the decision.

[9] Paragraph [35] of the planners' joint witness statement.

Existing environment

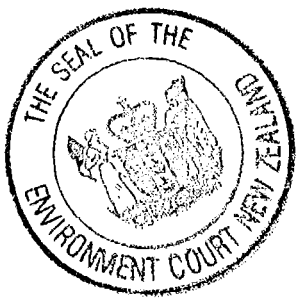
[43] Assessment of effects on the environment from the proposed alterations must take into account the existing environment. We agree with submissions on behalf of the requiring authorities that the existing environment in this case is the physical environment inclusive of the current designation, and that the appropriate comparison is between the existing designation and the new Designations. That is an important starting point.

[44] Absent the proposed alterations to the designations, closure of the Porters Avenue overbridge would occur during construction of the works authorised in the existing designation for a period of between 2-3 years. For the purposes of assessing effects on the environment, the existing environment therefore includes a 2-3-year closure of the access, and effects of permanent closure need to be considered in this context.

Effects of Alteration

[45] Remembering that s 171(1) requires consideration of effects on the environment of allowing a requirement, it is relevant to consider positive effects. Probably of greatest importance would be that the alteration would facilitate grade separation of the CRL from the NAL, with many operational and safety benefits arising. We will summarise[10] these, they not being greatly contested by the parties. Grade separations remove problems commonly found with flat junctions, shortening journey times, preventing reduction in numbers of carriages and frequencies of trains available in peak times, and limit the potential for disruption to the network because less maintenance is required. The grade separated junction would also remove the risk of collision and risk to maintenance staff. We were told as well that grade separation would eliminate the need for freight trains to be stopped on an uphill grade which in turn would reduce the noise emitted from braking and acceleration of large diesel engines.

[46] CRLL's Operations Planning Manager Mr M R Jones also advised that alterations to the platform and station building of Mount Eden would result in operational benefits, particularly the addition of a four-platform station assisting to decongest the network and enabling CRL trains to pass through the station. There would be an improvement in journey times of those travelling in and out of the CBD, with improvements in service and safety for over 30,000 people per hour at peak times.



[10] Taken largely from the evidence in chief of Mr M R Jones.

[47] The alterations would also result in substantial construction cost savings compared to the currently designated design, including potential savings to the construction programme due to the lower alignment and a significant reduction in the scale of construction works to be undertaken on private properties on Normanby Road.[11]

[48] Much evidence focussed on potential adverse traffic effects (together with disruption of connectivity and consequent business impacts; noise and vibration; and visual amenity and urban design effects).

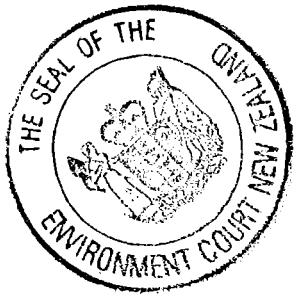
Traffic and connectivity effects; also, effects on property values and economic effects

[49] The conference of traffic experts achieved a considerable narrowing of the disputes in this area. The experts agreed in their joint witness statement that the combined flow to and from Fenton Street and Haultain Street would be approximately 1,000 vehicles per day, with approximately two thirds of those vehicles (660) projected to use the Porters Avenue overbridge planned for in the existing designation. They agreed that the impacts of closure would largely be limited to local traffic as there are a range of alternative travel routes within the wider road network for other traffic. Importantly, they agreed that the increase in travel times for these 660 vehicles per day would be between 1 and 4 minutes, and typically 2 minutes.[12]

[50] They further agreed that the increases in travel times are modest, by which they meant the increases are noticeable but in the context of the general and local traffic environment, are not unreasonable.[13]

[51] There were claims by the s 274 parties and their experts that the loss of vehicular connectivity would have a significant impact which would justify mitigation.

[52] The requiring authorities not only pointed to the modest increases in traffic times, but through evidence which we accept, primarily from Mr E L Jolly consultant urban designer called by CRLL, pointed to connectivity improvements offered by the NAL and CRL alterations. The existing Mount Eden station is located approximately 150m from the primary street network, with the closest street connections being from dead-end streets with no vehicular through movement, as a result of which passenger connectivity and access to the station is presently poor. The proposed redeveloped



[11] Evidence of Damian McGahan.
[12] Joint witness statement: traffic at [16].
[13] Joint witness statement: traffic at [17].

station would be accessed via an extension to Ruru Street which would allow the station to have an entry on a key road to provide increased pedestrian, cycle and vehicular movement thereby improving connectivity to the station.[14] In answering questions by the Court, Mr Jolly confirmed the following:[15]

> **QUESTIONS FROM COMMISSIONER DUNLOP**
> Q. Mr Jolly, evidence-in-chief, figure 5, page 9.
> A. Yes.
> Q. There's an illuminated triangle there.
> A. Yes.
> Q. Does that depict the proposed extension of Nikau Street on its existing alignment, through to Ngahura? Is that what we're looking at by the Fenton Street overbridge?
> A. I'm just taking a look. I believe so, as much as I know. I wasn't involved specifically with the development of this image.
> Q. Okay, well I'll put it a different way, is it your understanding that Nikau Street is proposed to be extended on its existing alignment, across Ruru, to Ngahura?
> A. Yes I do.

[53] The improved station would encourage public transport use, on account of its improved amenity, legibility,safety and efficiencies. It was the evidence of Mr C A Jack a consultant architect called by CRLL[16] that the station would become a significant nodal point for the local community. It was the evidence in rebuttal of Mr I D Clark[17], a transportation planner called by CRLL that there would be improved frequency of services which would improve travel choices for the local community and businesses.

[54] While CB Trustees 2012 Limited had focussed in preparation for the hearing on retention of the full Porters Avenue overbridge or Mr McKenzie's suggested "Alternative 2", Qambi Properties exchanged evidence suggesting another mitigation option of creating a vehicular link between Fenton and Akiraho Streets which would require formation works and land purchases and possible separate statutory processes outside the scope of the present NoR at a significantly lower order of cost (than Alternative 2) of about $7.5m – 8.5m. There appeared to be a relatively high order of agreement amongst the relevant expert witnesses that the option was technically feasible, noted particularly from the evidence of Mr Clark and Mr Nixon[18], and the Traffic Joint Witness Statement.[19] In addition, CRL Project Director Mr Meale confirmed in cross-examination by Mr Allan that there would be no funding constraint on the work if the Court concluded

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[14] Evidence of Ed Jolly at [15], [16] and [24].
[15] Transcript, pages 118-119. Outcome confirmed by proffered Urban Design Principles Condition 47.2(b)(xiii) in Memorandum of counsel for Auckland Council 14 November 2017.
[16] Jack, paragraph [50].
[17] Jack, rebuttal paragraph [10].
[18] Rebuttal evidence of traffic engineer Mr MI Nixon called by CRLL
[19] Joint witness statement: Traffic at [5] and [23]-[31]

that adverse effects would justify such mitigation.[20]

[55] CB Trustees 2012 Limited having adopted the Qambi option in presenting its case at the hearing, put forward argument through counsel that while the Fenton/Akiraho link option would not retain all of the connectivity inherent in the Porters Avenue crossing, it would provide significant and very desirable mitigation, particularly for vehicles travelling to and from the east and north, and represent "appropriate and acceptable" mitigation for the loss of the Porters Avenue vehicular crossing.[21]

[56] Counsel elaborated on this theme in discussing the first and second engineering joint witness statements.[22] Close examination of their statements reveals emphasis on feasibility of the Fenton/Akiraho option, benefits that would flow from it, and absence of "fatal flaws from a social, urban design or other relevant perspective".

[57] We return later in this decision to the issue about whether mitigation is necessary. That is where the focus must be under s 171 RMA. The case law is clear that requiring authorities do not need to choose a particular, let alone "the best", or a desirable alternative.[23]

[58] We accept the submission on behalf of CRL that given the evidence about the shift within the Central Auckland environment towards public transport use, the upgraded station would be of significant benefit for the Mount Eden area in the future. We also agree that this needs to be assessed alongside the significance of travel time increase as being modest and not unreasonable for vehicular traffic servicing local commercial businesses.

[59] In the context of the existing environment as we have found it to be, and whether viewing the traffic connectivity issue in isolation, or in the overall context of accessibility and connectivity in the Edenvale locality and beyond at least as far as the CBD, we hold that the adverse traffic and connectivity effects from the deletion of the Porter's Avenue vehicular overbridge will be no greater than minor. We noted from the cross-examination of Mr Clark that in assessing the adverse effects of the closure of Porters Avenue and determining whether mitigation was needed, he had offset those

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[20] Transcript, pages 53-54.
[21] Submissions of Mr Allan and Mr Sadlier, dated 8 November 2017, paragraph [11].
[22] In paragraph [25] of their submission.
[23] Decision of the High Court in *Meridian Energy Limited v Central Otago District Council* [2010] NZRMA 477 at [81], cited with approval of the Board of Inquiry in its Draft Report and Decision in to the NZTA Waterview Connection Proposal, published by the EPA in May 2011, at [996]; and the Board of Inquiry into the Basin Bridge Proposal, Final Report and Decision, August 2014 at [1090]; and affirmed by the High Court once again in *NZTA v Architectural Centre Inc and others* [2015] NZHC 1191 at [154].

effects against positive effects arising from the NoR as a whole. Similar answers were given by Mr McGahan under cross-examination; we also note that all planning witnesses relied on the assessment of Mr Clark. We note the criticism by Mr Allan and Mr Sadlier that this did not amount to a focussed assessment, and could result in a very large project being found when examined in a holistic fashion, not to warrant mitigation of localised adverse effects because they would be dwarfed in the bigger picture.[24] As already noted, we will deal with the issue of need for mitigation in a later section of this decision.

[60] Section 274 parties (except for Mr van Zonneveld) offered evidence that there would be a loss in value to properties and that tenants would demand reduced rent or even end their tenancies to move to other premises. We found their evidence rather speculative and unpersuasive[25]. In some contrast the requiring authorities called the evidence of Peter Churchill, experienced in commercial real estate matters in the area, to the effect that there is currently a shortage of commercial land close to the CBD, and that vacancies are at historically low levels.[26] We were satisfied by his evidence that there is indeed high demand for commercial premises of the type described by the s 274 parties.[27] It was his advice to the Court, and that of Mr Galli, that the loss of tenants and reduced rentals would be unlikely; and that if tenants did leave, replacements would readily be found.

[61] We also heard rebuttal evidence from Mr PM Osborne, Economic Consultant called by CRLL that given the likelihood of significant redevelopment in this city fringe area and its proximity to the redeveloped station, the area will be subject to dynamic positive change. In this context the removal of the vehicular component of the Porters Avenue overbridge would be minor. The witness considered that from an economic viewpoint the area would improve in economic efficiency terms, resulting in increased land values, productivity and rental returns.[28]

[62] The legal context for these considerations is as follows. Adverse effects on land and property values are not in themselves a relevant consideration, but if they occur,

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[24] Paragraph [29](d) of their submissions.
[25] Evidence of Kerry Titchener at [14]; also evidence of Fraser Powrie at [10]-[14]; Edgar Smithies at [15]; Hadi Younan at [7], [13]-[16]; James Hook at [41]; and Peter Phillips at [34]-[36].
[26] Evidence of Peter Churchill at [16] and [18]; also statement of rebuttal evidence by Rick Galli at [11].
[27] Rebuttal evidence of Peter Churchill at [20]; also rebuttal evidence of CRL Land Acquisition Manager Rick Galli [18].
[28] Rebuttal evidence of Phil Osborne at [26] to [33].

they are simply a measure of adverse effects on amenity values.[29]

[63] If property values are reduced as a result of activities on adjoining land, the devaluation would reflect the effects of that activity on the environment. The correct approach is to consider those effects directly rather than market responses because the latter can be an imperfect measure of environmental effects.[30] We were not persuaded that the s274 parties' witnesses paid sufficient regard to the likely positive economic effects that would result from CRLL's proposed investment in the Mt Eden Station and its environs, or the redevelopment and economic activity likely to be stimulated by such in adjoining areas.

[64] It is also relevant to re-state that decisions in cases like this should not be made based on people's fears that might never be realised. In *Shirley Primary School v Christchurch City Council* the Court held that "*whether it is expert evidence or direct evidence of such fears, we have found that such fears can only be given weight if they are reasonably based on real risk.*"[31]

Visual amenity and urban design effects

[65] The case for the s 274 parties was that there would be significant adverse visual amenity and urban design effects, necessitating mitigation involving acquisition of a property not presently designated, and the creation of a new vehicular access link.

[66] In addition to denying there would be adverse visual amenity and urban design effects, the requiring authorities pointed to significant improvements in the locality from the redevelopment of the Mount Eden station as proposed by the alterations, particularly in comparison to the present visual amenity and general quality of the urban realm in the vicinity of the station.[32] The placement of the Mount Eden station on a street frontage would provide improved access and visibility, a substantial forecourt with opportunities for retail, landscaping, and artworks.[33] Also improvements in surrounding streets including footpath widths, tree plantings, new open spaces and shared areas for vehicles, pedestrians and cyclists.[34] There would also be redevelopment of the construction yard after completion of the CRL, providing opportunities for urban renewal

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[29] *Foot v Wellington City Council* Environment Court decision number W73/98 at [256].
[30] Bunnik v Waikato District Council Environment Court decision A42/96 at page 6.
[31] *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 at [193].
[32] Evidence of Mr Jolly at [16] and [17].
[33] Evidence of Mr Jack at [29].
[34] Evidence of Mr Jolly at [25]-[26].

and a more vibrant and visually attractive neighbourhood.[35]

[67] While obviously detailed design of these features has not been carried out, conceptual graphic illustration was provided by Mr Jolly who offered his opinion, not seriously challenged by others, that there would be a significant uplift in the desirability, safety and quality of the urban environment in the general location.

[68] Several weeks before the hearing, the s 274 party Qambi Properties Limited arranged for the Court to issue a subpoena to Mr I C Munro, an urban planner and designer.

[69] Given Qambi's last minute decision not to participate in the hearing, the opportunity to call the pre-circulated evidence of Mr Munro was handed to C B Trustees 2012 Limited, and he was in fact called to give evidence by Mr Allan.

[70] Mr Munro holds qualifications in planning, architecture and engineering and environmental legal studies. Of relevance to the present case, he is familiar with the CRL project because in 2009/10 he led a small project for Auckland City Council seeking to inform the Council's preferred number and location of stations, including in the vicinity of what is now proposed. Since 2014 he has chaired an ongoing special urban design panel for Auckland Council dedicated to the CRL project. The reason for his needing to be subpoenaed can be seen from these appointments.

[71] In preparing his evidence Mr Munro received a briefing from Mr Bartlett QC on behalf of Qambi, which he acknowledged was limited in scope, and attended meetings with Mr Jolly and Mr Jack.

[72] Of some importance, Mr Munro commenced evidence by acknowledging the prospect for substantial positive urban design outcomes for Auckland from the overall CRL project, and in particular that the Mt Eden station and various improvements proposed would also on balance result in numerous positive urban design effects.

[73] Mr Munro was however strongly opposed to the removal of the vehicular link at Porters Avenue, which he considered would result in inappropriate adverse urban design effects. A problem for his rather belated involvement with the case however was that by the time of the hearing, at least one iteration of same was "off the table", being Mr McKenzie's "Alternative 2" version.

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[35] Evidence of Mr Jolly at [27].

[74] Mr Munro was critical of lack of calculation of additional vehicle kilometres to be travelled and vehicle emissions resulting, in the approach by the requiring authorities to the alterations. He offered the interesting opinion that if we were not dealing with the CRL, but instead a proposal by a developer wishing to cut off the Porters Avenue link to place a building over it, he would perceive a serious defect with what he considered to be a resultant very inefficient urban structure within the affected area. This was on the basis of the quality compact urban form sought by the Auckland Unitary Plan and its expectations for efficient and convenient blocks and road networks. He was worried about the existing poorly integrated and mostly disconnected road structure of the affected area, which with or without a closing of the vehicular link would not in his view be deemed acceptable in a new subdivision based on the provisions of Chapter E38 of the Unitary Plan.

[75] Mr Munro proceeded to consider and rank four options from the urban design point of view. Option (a) was the existing approved designation; his second most optimum outcome would be a new road connection between Fenton and Akiraho Streets; the third most optimum outcome would be to establish a new overbridge in a very similar alignment as Porters Avenue as proposed by some s 274 parties; with the least preferable solution, distantly trailing, being that favoured by the requiring authorities.

[76] Mr Munro took into consideration the objectives of the CRL as follows (he called them "options"):[36]

a. The existing approved designation providing for a lowered railway line and grade-separated Porters Avenue road over-bridge.

b. The current Requiring Authority proposal, being to remove the road link, replace it with a pedestrian over-bridge, and route vehicles through the local road network via Wynyard and View Roads. This is best described in the evidence of the Requiring Authority's witnesses.

c. A replacement road over-bridge in an alignment similar to Porters Avenue and associated access roads (to transition between the relative road levels) proposed by a group of s.274 parties.

d. An alternative at-grade road connection linking Fenton Street and Akiraho Street to allow vehicle access north via Mount Eden Road, proposed by Qambi Ltd.

[77] He also considered the Urban Design Principles for CRL which he acknowledged did not have the same statutory significance as the CRL objectives, and

[36] Statement of evidence, pages 6 and 7.

proceeded to analyse his four identified options against each of these.

[78] Mr Munro's overall analysis of these matters was quite detailed and precise, but undertaken in something of a vacuum. As noted already there is clear authoritative law that requiring authorities do not need to choose a particular, let alone "the best" alternative, but rather the Court should be satisfied that the requiring authorities have adequately considered alternative options to the extent needed under the legislation.[37]

[79] The legal position is that the meaning of "adequate" is not "meticulous" or "exhaustive" but "sufficient", or "satisfactory".[38] We note from the same High Court decision, that a more careful consideration of alternatives might be required where there are more significant effects of allowing the requirement.[39] It will be seen from our decision overall that the present case is not one of those situations. Nevertheless our reading of the AEE at [4.2], and consideration of much of the expert evidence called by the requiring authorities, demonstrates to us that considerable attention was paid to a at least 7 alternatives, three of which involved road bridges in the vicinity, and four of which involved various permutations of a link near Porters Avenue. We find that the consideration of alternatives by the requiring authorities on this occasion has been little short of exhaustive. Importantly, it has been multi-disciplined, unlike Mr Munro's approach from which he seems to have had an expectation that we will place a major emphasis on urban design matters and identify a "best" alternative.

[80] We comment further on Mr Munro's approach to the objectives for the CRL in the separate part of this decision addressing that topic to which we are to have particular regard under s 171(1).

[81] We are critical of an apparent major plank in Mr Munro's evidence, a comparison of the current proposal with a hypothetical "greenfields" subdivision proposal. Without being too unkind to it, the commercial and mixed-use part of the locality around Mt Eden Station is very "brownfields". The roading pattern and current run down appearance of much of it are the result of many unrelated infrastructural and development decisions made by many people over a considerable period of the history of this area of Auckland.

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[37] Refer to the decision of the High Court in *Meridian Energy Limited v Central Otago District Council* [2010] NZRMA 477 at [81], cited with approval of the Board of Inquiry in its Draft Report and Decision into the NZTA Waterview Connection proposal, published by the EPA in May 2011, at [996]; and the Board of Inquiry into the Basin Bridge Proposal, Final Report and Decision, August 2014 at [1090]; and affirmed by the High Court once again in *NZTA v Architectural Centre Inc and others* [2015] NZHC 1191 at [154].
[38] High Court decision in *NZTA v Architectural Centre Inc and others* [2015] NZHC 1191 at [137].
[39] *Architectural* decision at [142].

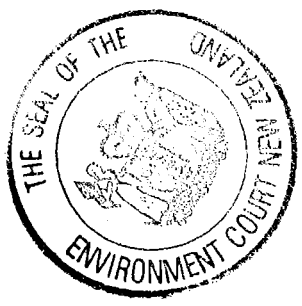
[82] A significant limitation occasioned by Mr Munro's very narrow focus, was that he preferred options that no party was now seeking, and which the engineering experts had not supported in their joint witness conferencing.

[83] Mr van Zonneveld raised matters which went significantly beyond the authority that we have on the present proceedings, particularly some highly detailed suggestions about the potential benefits of reconfiguring a significant part of the local roading network. Those matters are beyond our purview. However, Mr van Zonneveld raised concerns about the juxtaposition of the now proposed pedestrian and cycling bridge on the Porters Avenue alignment in relation to his commercial building at 5 Porters Avenue. These concerns could in part be characterised as urban design concerns. Question marks arose as to just how far from the face of the building it is proposed to place the new bridge, and we agree that care is necessary in that regard. We shall return to that topic later in this decision.

Adequacy of consideration of alternatives

[84] We have already set out the relevant part of s 171(1) RMA, and indicated findings based on the evidence before us, that the requiring authorities can pass through the two alternative gateways in s 171(1)(b). First, we have found that they own all the land needed for undertaking the work, including properties that will be needed only during the construction phase, the designation on which should cease at the conclusion of construction works. Also that it is not possible to find that the proposed works will have significant adverse effects on the environment.

[85] Nevertheless, out of care, and reiterating our findings of law earlier in this decision about what it is meant about adequacy of consideration of alternatives, we reiterate that such consideration in the present case has not been far short of exhaustive, a test higher than must be met. Such consideration has even extended to the benefits and cost of both principal options ultimately put forward as possible mitigation, the construction of a road bridge at Porters Avenue after the construction works are completed, being cost at approximately $180m but not being supported by the engineers and traffic experts; and the cheaper option of providing a road connection through a yet to be acquired property between the eastern end of Fenton Street through to Akiraho Street, at a lesser cost of approximately $7.5m – $8.5m.



[86] On the evidence before us, and even before the urgings of the various s 274 parties and other submitters, we hold that consideration of alternatives by the requiring

authorities has been more than adequate.

Reasonably necessary for achieving the project objectives?

[87] Subsection (c) of s 171(1) requires us to have particular regard to whether the work and Designations are reasonably necessary for achieving the objectives of the requiring authorities for which the designations are sought.

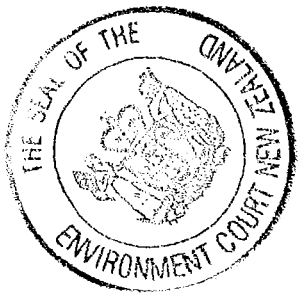
[88] We remind ourselves that the present proceedings are not an enquiry into the overall designation for the CRL. That has been the subject of an approved designation for some time. It is an enquiry concerning proposed alterations to both the CRL and NAL designations, a much more confined enquiry.

[89] We have already mentioned projected objectives for the CRL when discussing the urban design evidence of Mr Munro. It is interesting to note that under cross examination by Mr Beatson, Mr Munro acknowledged that the project objectives are not bottom lines, although he advised that he nevertheless considered them to be a significant part of the assessment.

[90] Objectives not met in Mr Munro's view include objectives 2(a) ("improved journey time, frequency and reliability of all transport modes"); 3(a) ("support economic development opportunities"); 4(a) ("limit visual, air quality and noise effects"); 4(b) ("contribute to the country's carbon emission targets"); and 5(a) ("enhance the attractiveness of the city as a place to live, work and visit").

[91] We do not favour a piecemeal approach to the assessment of the proposal against project objectives. Some objectives will be relevant for present purposes, others not; those that are relevant may be of greater or lesser importance in the overall assessment. An holistic approach to whether the work and designation are reasonably necessary for achieving the objectives, is what is required. Referring primarily to the largely unchallenged evidence in chief and supplementary rebuttal evidence of MrJolly called by CRLL, we consider that the objectives identified by Mr Munro are in fact met to a sufficient extent.

[92] Concerning objective 2(a) we agree with Mr Jolly and his supplementary rebuttal evidence that Mr Munro does not identify or balance the loss of vehicle connectivity against improvements to the operation and safety of the CRL and NAL, including through grade separation near Mount Eden junction. Further, we note with approval the evidence that journey times from Mount Eden to the city would be improved for



pedestrians, cyclists and rail users. We have already made our findings about minor adverse effects for vehicle movements, and positive effects for pedestrians and rail users. We agree with the statement of supplementary rebuttal evidence by Mr Clark on behalf of CRLL that improvements in public transport in the area will be beneficial as the numbers of people living and working in the area increase, the converse of that being that the road network might otherwise become more congested in the absence of reliable alternative public transport.

[93] Regarding objective 3(a), the alterations would, we accept, be likely to assist in encouraging urban renewal in Mount Eden, which would support opportunity for economic growth in the area.

[94] As to objective 4(a), while the alterations might to a degree limit visual air quality and noise effects from vehicles, they have the potential to assist with enhancement of the amenity of the area by reducing the bulk of the bridge structure on the Porters Avenue alignment.

[95] As to objective 4(b), while those travelling to and from Haultain Street and Fenton Street will have slightly longer journey times, and therefore slightly increased carbon emissions, the alterations will have beneficial effects on these aspects as well. We heard no compelling evidence about net emissions but expect the longer vehicle journeys necessitated for some would be more than offset by the significantly increased number of journeys shifted to public transport means. In any event the objective is not about seizing upon individual impacts, whether positive or negative, and basing a decision around individual findings.

[96] Objective 5(a) will potentially be strongly supported by the alterations for reasons already discussed.

[97] We find that in the overall sense, the proposed alterations are reasonably necessary to achieve the objectives in the round, because:

(a) They will improve the transport mode choice in Mount Eden by providing a safer, more resilient and efficient service to the CBD and other benefits for the Auckland train network including the CRL and NAL;

(b) Result in significant operational benefits with consequent minimising of negative environmental impacts;

(c) Result in significant capital and operational cost savings for the public purse;

(d) Improve the amenity of Mount Eden Station and potentially improve that of surrounding streets by way of urban renewal thus encouraged;

(e) Encourage opportunities for business and economic growth in the area.

Application of Part 2 RMA

[98] All consideration under s 171(1) is, as noted, subject to Part 2.

[99] The long-standing judicial approach to an "overall broad judgment" approach to assessing applications for resource consent against Part 2, was, as it is well known, rejected for at least some purposes by the decision of the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Limited*[40].

[100] There have been subsequent decisions exhibiting some uncertainty about the application of that finding, particularly in relation in notices of requirement. (Also in relation to resource consenting).

[101] The Board of Inquiry concerning the Puhoi to Warkworth road of national significance held that there remains a need to carry out an overall balancing test and questioned wide spread applicability of the "environmental bottom lines" approach to the New Zealand Coastal Policy Statement.[41]

[102] The High Court in what is colloquially known as the Basin Bridge decision[42] also distinguished *King Salmon* on the basis that s 171(1) RMA provides for specific statutory authority to consider Part 2, which is different from the statutory wording in the Plan Change context.[43] The High Court held:[44]

> 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.

[103] The Environment Court took the same approach in *KPF Investments v*

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[40] [2014] NZSC 38.
[41] Final Report and Decision of the Board of Inquiry into Ara Tuhono-Puhoi to Wellsford road of national significance: Puhoi to Warkwath section, 2 September 2014 at [133]-[134].
[42] *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991.
[43] *New Zealand Transport Agency* at [118].
[44] At [399].

Marlborough District Council.[45]

[104] Question marks remain however because of the decision of the Environment Court, upheld in the High Court in *R J Davidson Family Trust v Marlborough District Council.*[46] (The latter decision concerned a resource consent application measured against s 104 RMA).

[105] We are aware that the *Davidson* decision has recently been the subject of a hearing in the Court of Appeal, and a reserved decision is awaited.

[106] For completeness in this rather uncertain area, we mention *Envirofume v Bay of Plenty Regional Council.*[47]

[107] We hold that the debate is (perhaps fortunately) academic in the present case. We consider that a Part 2 analysis would be satisfied in this case on the evidence before us. Noting that the essence of the present case is about effects on the environment, we hold that it passes muster in relation to s 5 RMA; further that the proposed alterations do not run counter to any of the Section 6 matters, provide for appropriate and efficient use of resources subject to appropriate conditions, enhance amenity values and the quality of the environment, and support sustainable management. We can find little fault with the detailed analysis of the alterations against Part 2 set out in Section 7 and Appendix J of the AEE.

Is mitigation needed?

[108] We were offered considerable amounts of evidence about possible mitigation of loss of connectivity in the street system, with the focus ultimately being on a proposed joining of the dead end of Fenton Street with nearby Akiraho Street, through a property at 13 Akiraho Street. That property was not included in the original designation, is not included within the proposed alterations to the designation, and has not been acquired.

[109] If we were to have found that mitigation was necessary, separate processes outside of those presently before us, might have been necessitated. The parties debated how such might be undertaken.

[110] In the event the effects on the environment are so minor as not to warrant imposition of any further mitigation. Not only is there no significant adverse effect

[45] [2014] NZEnvC 152 at [202].
[46] [2016] NZEnvC 81. High Court decision at [2017] NZHC 52, particularly at [76].
[47] [2017] NZEnvC 12, which appears to take a broad approach to assessments under Part 2.

sufficient to trigger the gateway in s 171(1)(b)(ii), but our overall findings about effects on the environment for the purposes of s 171(1), are such that the suggested mitigation is not required.

Consideration of the cases of the parties

[111] Pursuant to 198E RMA we believe we are required to consider the content of the submissions lodged with the Council, inclusive of those that did not become subject of notices under s 274. We have done so, assisted in part by the council's s198D report[48]. Nothing in those materials causes us to change our views about any of the matters on which we heard evidence and have made decisions.

[112] As indicated early in the hearing, we have not disregarded the case brought by Qambi Properties Limited or the issues on which its witnesses prepared evidence. We have taken those matters into account, albeit that we can apply somewhat less weight to them than to matters that were the subject of evidence tested in the hearing. We also note that Qambi's experts participated in the conferences of groups of experts that reached significant levels of agreement with experts called by other parties. We also note that ultimately Qambi's proposal for mitigation was adopted by CB Trustees 2012 Limited in preference to its own, after the Court required precise advice from parties as to relief being sought and issues in contention in the case.

[113] Mr van Zonneveld's situation was different from the other s 274 parties. He did not want there to be a bridge of any sort crossing the railway tracks on the Porters Avenue alignment.

[114] As earlier recorded, we cannot assist Mr van Zonneveld with his extremely detailed request for intervention in traffic patterns on Mount Eden streets. As to a bridge on the Porters Avenue alignment, we hold that a pedestrian and cycle bridge as more or less proposed by the requiring authorities, is appropriate, and that the existing designation can be altered to delete the vehicular component.

[115] One matter raised by Mr van Zonneveld however requires to be handled with care in the conditions of approval. We felt that Mr van Zonneveld was justified in expressing concern about how close the pedestrian and cycling bridge might come to the Porters Avenue façade of his property on the corner of Porter's Avenue and Haultain Street, where current plans and graphic exhibits show a lift tower associated

[48] Section 198D report by Auckland Council, 10 May 2017, Section 3: Submissions.

with the bridge being very close.

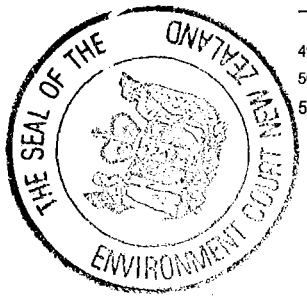
[116] Mr van Zonneveld said that the façade of his building was set back 2 metres from its boundary. He asked Mr Ryder questions about the separation distance and was told that it would be of the order of 3 metres from the boundary of the property. Mr Ryder also said that the bridge might have to be moved in the order of half to one metre to accommodate turning movements underneath the bridge.[49] Mr van Zonneveld asked Mr Jack the same question and was told that the separation distance was 3 – 3.5 metres.[50]

[117] With the façade of the building being set back 2 metres from the boundary, the separation distance from the lift would be of the order of 5 – 5.5 metres.

[118] The finally condition 47.2(b)(xi) records that the pedestrian/cycle bridge is to be located no closer than 3.5 metres from the property boundary of 5 Porters Avenue excluding any below-ground foundation support. That would mean a separation distance of 2 metres from the existing building façade plus 3.5m in the road reserve for a total separation distance of 5.5m. The dimension of 3.5m from the property boundary proffered by CRLL and agreed by the council is unqualified except as to foundations. We expect that it allows for any widening for turning movements underneath the bridge of the type mentioned by Mr Ryder as possibly being required[51]. We understand Mr Nixon's rebuttal drawing 1046 rev 2.0 3/10/17 "road layout Fenton Street extension to Akiraho Street" to allow for "intersection widening for rigid 8m truck" making the Wynyard – Fenton turn.

[119] We confirm that Condition 47(b)(xi) is to provide that no part of the pedestrian/cycle bridge including the lift tower element, but excluding below-ground foundations, is to be located any closer than 3.5m from the boundary of 5 Porters Avenue.

[120] Condition 47.2(b)(xii)(a) provides that the design of the bridge shall minimise loss of privacy on adjacent residential sites. The most potentially affected existing residential development is at 6 Porters Avenue. A large utilitarian business premise is opposite on the western side of Porters Avenue. We have found nothing in the materials that fixes the location of the proposed pedestrian/cycle bridge in the road



[49] Transcript, p 94.
[50] Transcript, p 98.
[51] Transcript p94.

reserve with certainty (other than its proximity to 5 Porters Avenue). Minimising loss of privacy is an imprecise term and we find the intended outcome would be secured with greater certainty if Condition 47.2(b)(xii)(a) were amended to read "Minimise loss of privacy on adjacent Porters Avenue residential sites, including by locating the pedestrian/cycle bridge in the western half of the Avenue". This would align with and secure the outcome given in evidence. We direct accordingly.

Other conditions

[121] Counsel for the council advised in a memorandum dated 14 November 2017 that it supported amended conditions circulate by CRLL on 13 November subject to a handful of minor editorial changes highlighted in that version. We comment on the latter and make the following directions in respect of them:

(a) The highlighted minor changes sought by the council are confirmed;

(b) The proposed Explanatory Note applicable to the operative CRL designation and NoR is confirmed subject to references in the figures being to Designations not NoRs and the figures being reproduced in more legible form;

(c) The proposed change to Condition 1.2(b) is not confirmed. The condition wording will revert to that supported by MediaWorks in the operative Designation conditions;

(d) The change to Condition 47.2(b)(xiii) for Ruru Street and Nikau Street extensions is confirmed.

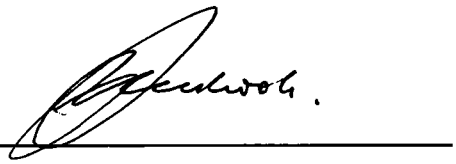
Conclusion

[122] We confirm the alterations to the designations in terms of s 198E(6) in the place of the territorial authority, subject to the changes outlined above.

[123] The conditions of the approval are attached to this decision, modified in the manner set out above.

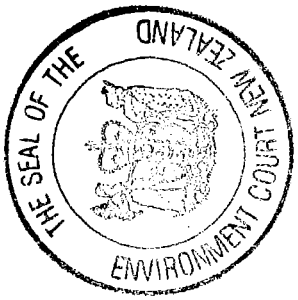
[124] Costs are reserved. Any application is to be made within 15 working days of the date of this decision.

For the Court:



LJ Newhook

Principal Environment Judge



ANNEX A: CRL Designation Conditions

Conditions as determined by Environment Court as at 15 December 2017

Explanatory Note:

The following explanatory note does not form part of the conditions.

It is a non-statutory way finding explanation of how the conditions are structured, what they cover in broad terms and where referenced documents can be found.

This note does not alter legal obligations and rights created by the conditions.

The conditions attach to six different designations. The designations are:

1714-1	A ***surface*** designation extending from Britomart Transport Centre to Albert Street/Mayoral Drive (in the vicinity of the Aotea car park entrance on Mayoral Drive) for the construction, operation and maintenance of the CRL – including two rail tunnels and Aotea Station.
1714-2	A ***sub-strata*** designation of land below the ground surface (within road reserve and private property) for the construction, operation and maintenance of the CRL – including two rail tunnels and ancillary activities. This designation sits underneath the strata (protection) designation 1714-3 and extends from Mayoral Drive to New North Road.
1714-3	A ***strata (protection)*** designation that acts as a buffer between activities on the ground surface and the sub-strata designation (1714-2) that provides for the two rail tunnels. This designation sits above designation 1714-2, starting from 5 metres below the ground surface, and extends from Mayoral Drive to New North Road.
1714-4	A ***surface and sub-strata*** designation for the construction, operation and maintenance of Karangahape Station, and encompassing land within road reserve and private property in the vicinity of Pitt Street, Beresford Square, Karangahape Road, and Mercury Lane.
1714-5	A ***surface and sub-strata*** designation for the construction, operation and maintenance of Newton Station, and encompassing land within road reserve and private property in the vicinity of Symonds Street, Dundonald Street, and New North Road.
1714-6	A ***surface*** designation for the construction, operation and maintenance of the CRL – including the rail tunnels and connections required to join the CRL to the North Auckland Railway Line (NAL). This designation is located generally between New North Road, Mt Eden Road and Boston Road in the north and the NAL in the south. It also includes land located on the southern side and adjacent to the NAL between Normanby Road and Mt Eden Road, and to the immediate east and west of Porters Avenue.

Hereafter for the purpose of this condition set the designations are referred to as 1, 2, 3, 4, 5 and 6.

The table of contents for the conditions provides a broad overview of the subject matter. It commences with definitions and abbreviations and progresses to general conditions applicable to all designations followed by the conditions for pre-construction, construction, and operation. Under each of these headings may be found sub-headings dealing with specific aspects of the work. There follow advice notes and appendices for:

- buildings for consideration as to building condition surveys; and
- heritage buildings for consideration as to building condition surveys

The conditions for designation 3 conclude the suite of conditions.

Set out below are a series of figures illustrating and explaining the location, extent and nature of designations 1 – 6. For precise details, please refer to the relevant designation overlays within the planning maps.

Figure 1: Designations Overview Map

The map below is not to scale and is intended as a visual tool only to show the location of each NoR. The Land Requirement Plans and the associated Schedule of Directly Affected Parties (attached to each NoR) should be referred to for the actual area of land required.

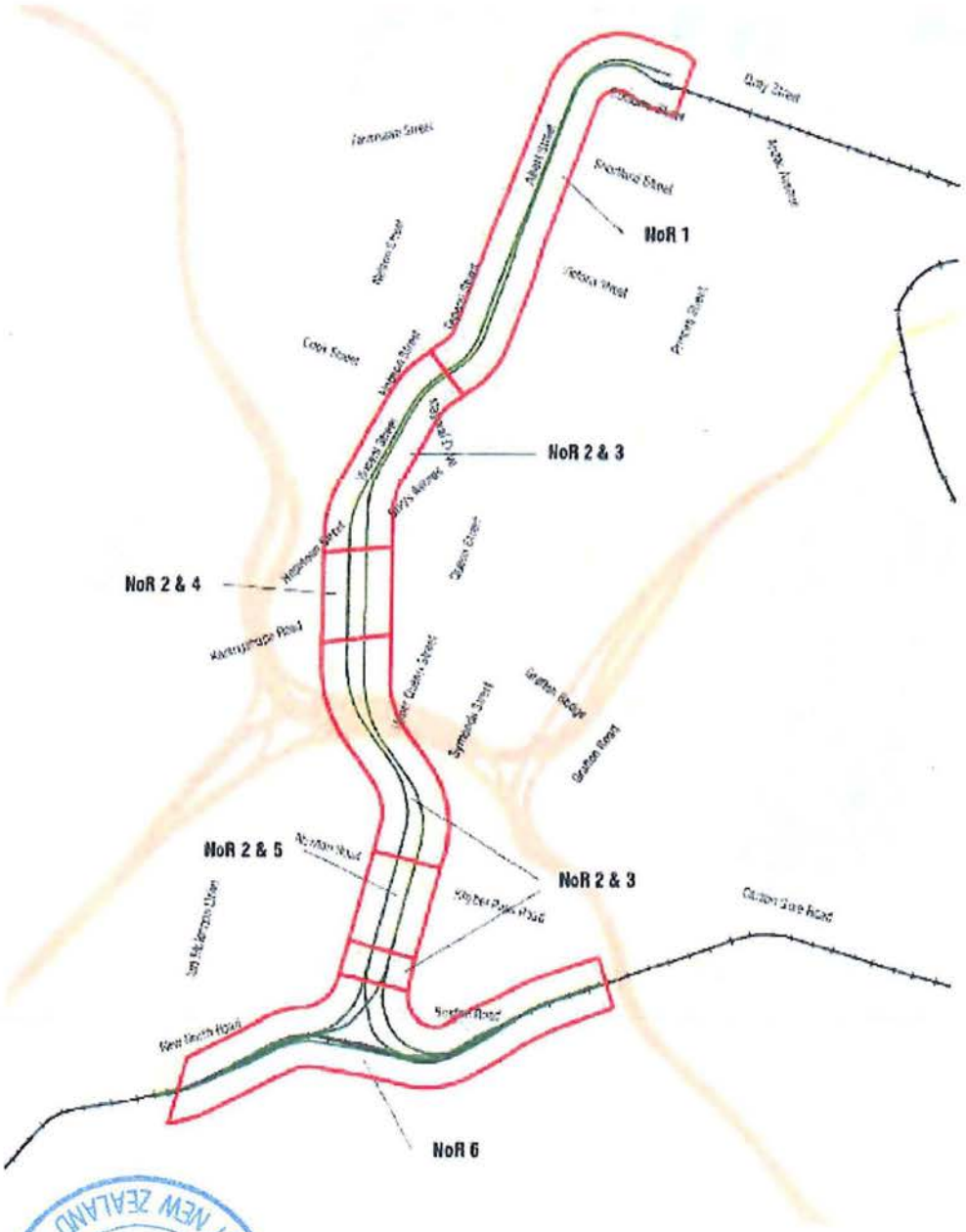
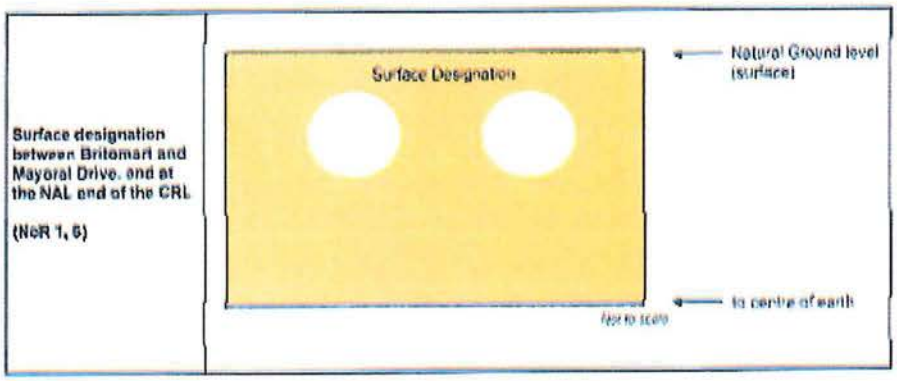
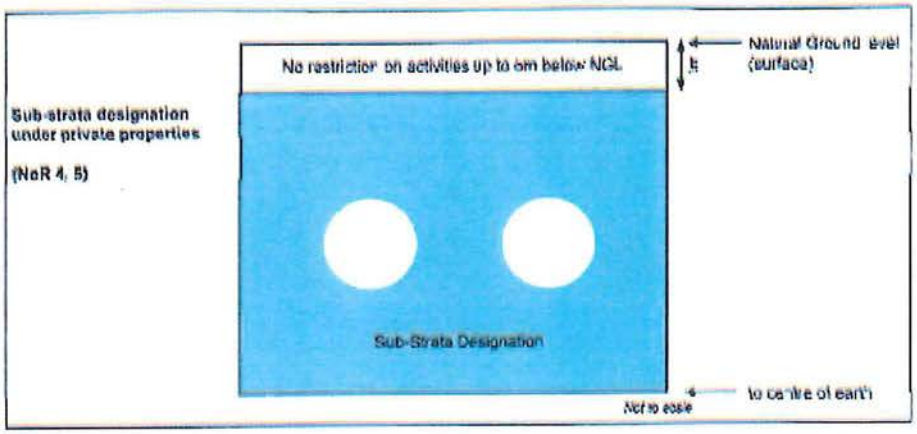


Figure 2: Visual explanation of the designation types

Surface designations



Sub-strata Designations



Strata Designation with Sub-strata Designation below

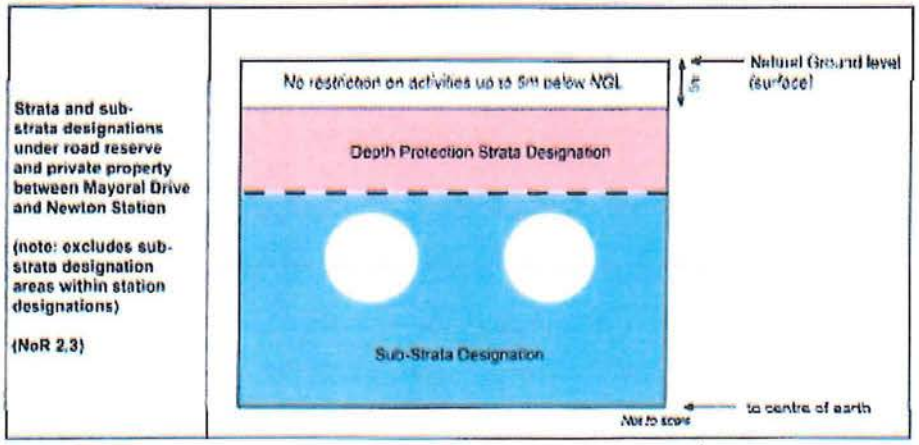
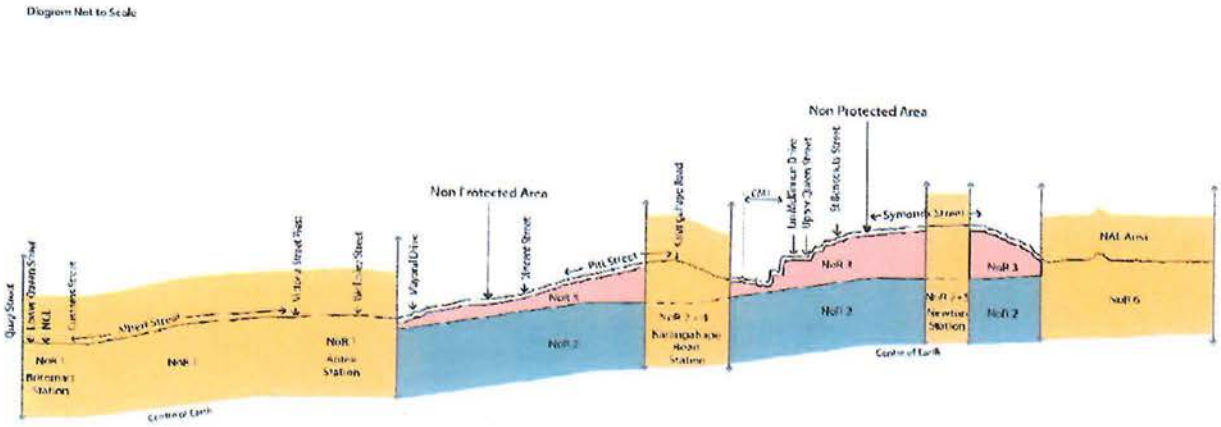
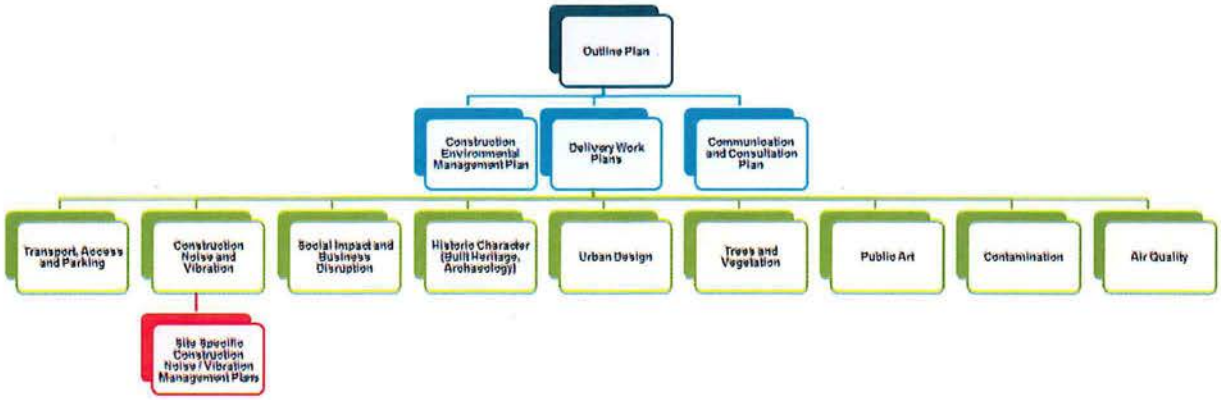


Figure 3: Indicative long-section of the designations across the length of the CRL



The relationship between the various plans required by designation conditions is illustrated in the diagram below:

City Rail Link (CRL) Designation Conditions – Plan Framework



The documents referred to in the designation conditions can be found at [insert]

Contents

Condition 23 – Update of CEMP and DWPs following review

Condition 24 – Network Utilities

Transport, Access and Parking

Condition 25 – General Transport, Access and Parking

Condition 26 – Monitoring of Transport Network Congestion

Condition 27 – Transport, Access and Parking: Specific Requirements (Britomart to Mayoral Drive)

Condition 28 – Transport, Access and Parking: Specific Requirements (Karangahape Station Area)

Condition 29 – Transport, Access and Parking: Specific Requirements (Newton Station Area)

Condition 30 – Transport, Access and Parking: Specific Requirements (NAL Area)

Noise and Vibration

Condition 31 – Project Standards – Construction Noise

Condition 32 – Project Standards – Blasting Noise

Condition 33 – Project Standards – Construction Vibration

Condition 34 – Project Standards – Construction Vibration (Amenity)

Condition 35 – Project Standards – MediaWorks

Condition 36 – Construction Noise and Vibration DWP

Condition 37 – Site Specific Construction Noise Management Plan (SSCNMP)

Condition 38 – Site Specific Construction Vibration Management Plan (SSCVMP)

Condition 39 – Notable Noise and Vibration Receivers

Condition 40 – Construct ion Noise and Vibration Management Plan – MediaWorks

Built Heritage/Archaeology

Condition 41 – Historic Character – Built Heritage

Condition 42– Historic Character – Archaeology

Condition 43 – Heritage Advisory Group and Composition

Condition 44 – Heritage Advisory Group Function

Condition 45 – Bluestone Wall Management Plan

Building Condition Surveys

Condition 46 – Process for Building Condition Surveys

Urban Design

Condition 47 – Urban Design Principles

Requiring Authority Designation Conditions – Designation 3

Condition 1

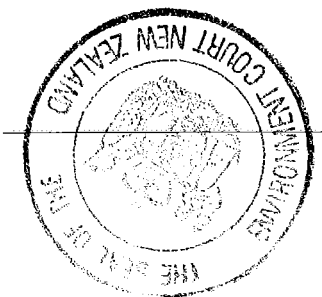
Condition 2

Condition 3

Condition 4

Condition 5

ADVICE NOTES



Requiring Authority Designation Conditions – for Designations 1, 2, 4, 5 and 6

Condition Number	Designation Applies to		Condition
DEFINITIONS			
	1 2 4 5 6	Consult Consulting Consultation	The process of providing information about the construction works, and receiving for consideration, information from stakeholders, directly affected and affected in proximity parties, regarding those effects and proposals for the management and mitigation of them.
	1 4 5 6	Fully operational traffic lane	May include a traffic lane that is subject to a reduced speed limit, or one which may have a temporary reduction in the lane width, due to construction activity.
	1 4 5 6	Two way access	Access into and out from a site or a road. This access may include restrictions (eg. left in, left out) where these are specified within the relevant conditions.
	1 2 4 5 6	Notable Noise and Vibration Receivers	Receivers that undertake activities within spaces that rely on a particularly low noise and vibration environment. For these designations these spaces are defined as: • Public Performance Theatres; • Recording Studios, both sound and television (including Mediaworks, except the specific spaces addressed by Condition 35); • In relation to sensitive equipment - Medical Facilities and Scientific Laboratories; • In relation to the requirement to record witness statements - The Auckland District Court in Albert Street
	1 2 4 5 6	Sensitive Noise and Vibration Receivers	Receivers that may be disturbed during rest, concentration, communication or prayer. For these designations these include (but are not limited to): • Dwellings • Offices • Schools, including Child Care Centres and tertiary facilities • Libraries • Hospitals • Rest Homes • Marae and other Cultural Centres • Churches • Hotels or other accommodation facilities
	1 2 4	Site Specific Construction Noise and	These include site specific construction noise management plans (SSCNMP), site specific construction vibration plans (SSCVMP), or a combination of both noise and vibration in one plan (SSCNVMP) to

Condition Number	Designation Applies to		Condition
	5 6	Vibration Management Plans	address the effects from the construction activity on notable or sensitive receivers.
	1 2 4 5 6	Best practicable option	Has the meaning under the Resource Management Act 1991 and, for the purpose of these conditions, comprises the best practicable option for minimising the effects of any construction activity (including effects on the transport network or heritage values) on the receiver.
	1 2 4 5 6	Historic Character	This includes heritage buildings, sites and places identified in the New Zealand Historic Places Trust register or in the Auckland Council District Plan (Isthmus or Central Area Sections) or as specifically identified in conditions.
	1 2 4 5 6	Mana Whenua	Mana whenua for the purpose of this designation are considered to be the following (in no particular order), who at the time of Notice of Requirement expressed a desire to be involved in the City Rail Link Project: • Ngati Maru • Ngati Paoa • Ngai Tai ki Tamaki • Ngati Te Ata • Ngati Whatua o Orakei • Te Akitai • Te Kawerau o maki • Ngati Tamaoho
	1 2 4 5 6	Material change	Material change will include amendment to any base information informing the CEMP or other Plan or any process, procedure or method of the CEMP or other Plan which has the potential to materially increase adverse effects on a particular receiver. For clarity, changes to personnel and contact schedules do not constitute a material change.
	1 2 4 5 6	Delivery Work Plans	Delivery Work Plans will contain specific objectives and methods for avoiding, remedying or mitigating effects and address the following topics: (a) Transport, Access and Parking; (b) Construction noise and vibration; (c) Historic Character (including Archaeology); (d) Urban Design (including landscape and station plans); (e) Trees and vegetation; (f) Social Impact and Business Disruption; (g) Air quality; (h) Public Art; and (i) Contamination.

Condition Number	Designation Applies to		Condition
	1 2 4 5 6	Peak Particle Velocity	The maximum component peak vibration level (in mm/s) measured in any of three orthogonal axes (vertical, transverse, longitudinal).
	6	MediaWorks	MediaWorks means any television, radio and/or interactive media facilities which broadcast from the MediaWorks site (including any successor which conducts the same activities).
	6	MediaWorks site	MediaWorks site means the properties at 2-3 Flower Street and 44-52 New North Road included within the following: Lot 1 DP 84213 — NA40B/1323 Lot 2 DP 49561 — NA2063/54 Lot 4 Section 3 Deeds Plan 45(blue) — NA557/190 Part Lot 5 Section 3 Deeds Plan 45 Blue — NA557/144 Lot 1 DP 60771 — NA15C/727
	6	MediaWorks building	MediaWorks building means the building located at 3 Flower Street, directly adjacent to Nikau Street.
	6	Studio 1	Studio 1 means the main broadcasting studio at the MediaWorks building as shown on Diagram 1.

ABBREVIATIONS

CEMP	Construction Environmental Management Plan
DWP	Delivery Work Plan
NoR	Notice of Requirement
ONVMP	Operational Noise and Vibration Management Plan
PPV	Peak Particle Velocity
SSCNVMP	Site Specific Noise and Vibration Management Plan

GENERAL CONDITIONS

1	1 2 4 5 6	1.1 The City Rail Link Project (Designations 1, 2, 4, 5 and 6) shall be undertaken in general accordance with the following, subject to final detailed design; (a) the information provided by the Requiring Authority in the Notice of Requirement dated 23 August 2012 and supporting documents (as updated by information provided by the Requiring Authority up until the close of the Hearing and during the course of Environment Court proceedings) being: (i) Assessment of Environmental Effects report (contained in Volume 2 of the

Condition Number	Designation Applies to	Condition
		Notice of Requirement suite of documents, dated 15 August 2012 Rev B); (ii) Supporting environmental assessment reports (contained in Volume 3 of the Notice of Requirement suite of documents, dated August 2012); (iii) The Concept Design Report (contained in Volume 2 of the Notice of Requirement suite of documents, dated 13 August 2012 Rev 3); (iv) Plan sets: • Land requirement plans (contained in Volume 1 of the Notice of Requirement suite of documents, dated 15 August 2012 and GIS-4214293-100-10 Rev 5 as amended for 32 Normanby Road, dated 14 September 2015); • Plans contained in the Concept Design Report Appendices (contained in Volume 3 of the Notice of Requirement suite of documents, dated 13 August 2012 Rev 3); • Plan CIV-000-DRG-0001 attached at Appendix 1 to these Conditions. (v) Information provided in response to the Section 92 requests and/or in advance of the Council's section 42A report, including the following: • "City Rail Link Notice of Requirement: Social Impact Assessment" prepared by Beca Carter Hollings & Ferner Ltd (Beca), dated 19 April 2011 (approved for release 19 April 2013); • "City Rail Link – Supplementary Report: Traffic Modelling of Alternative Construction Scenarios" prepared by Flow Transportation Specialists Ltd, dated 22 May 2013. (vi) Evidence (including supplementary evidence) provided prior to and at the Council hearing, including but not limited to: • Statement of Evidence by Ian Clark (Transport) dated 2 July 2013; • "Drawing 0220, Revision B" dated 20 August 2013, being part of the City Rail Link Project: Mt Eden Worksite set by Aurecon, submitted as part of the Second Supplementary Statement of Evidence of William (Bill) Russell Newns for Auckland Transport; • "City Rail Link Notice of Requirement: Outline Plan Process and Environmental Management Plan System (Indicative)" prepared by Beca Carter Hollings & Ferner Ltd, dated 27 September 2013; • "City Rail Link: Indicative Communication and Consultation Plan" prepared by Auckland Transport, dated September 2013; • "Outline Social Impact and Business Disruption Delivery Work Plan" submitted as Attachment A to the Statement of Evidence of Amelia Joan Linzey (Beca Carter Hollings & Ferner Ltd), dated 26 September 2013. (vii) All material and evidence (including rebuttal evidence) provided by the Requiring Authority in the Environment Court proceedings (ENV-2014-AKL-000057). (b) Except as modified by the following alterations: (i) Assessment of Environmental Effects (Reference CRL-AOT-RME-000-0057), Design and Construction Report (Reference CRL-AOT-RME-000-0059 and Drawings CRL¬ SYW-RME-000- DWG-0025-0030 ('Aotea Alteration' - CRL Designation 1); and (ii) Assessment of Environmental Effects (Reference CRL-SYWRME-000-RPT-0065,

Condition Number	Designation Applies to	Condition
		Design and Construction Memorandum (Reference CRL-SYW- RME-000-MEM-0002) and Drawings CRL-SYW- RME-000-DRG-0120 to 0124 and 0128 to 0132 'Strata / Sub-Strata Alteration (CRL Designation 2); and (iii) Assessment of Environmental Effects (Reference CRL-MTE-RME- 000-RPT-0060, Revision 7 dated 9/11/16), Design and Construction Memorandum (Reference CRL-MTE-RME-000-MEM-0001, dated 9/11/16) and Drawings CRL-SYW-RME-000-DRG-0101 Revision 1 dated 26/7/16, 0102 Revision 1 dated 26/7/16, 0110 Revision 1 dated 26/7/16 and 0133 Revision 1 dated 26/7/16 and CRL-EFC-ROA-000-DRG-1027 Revision 4 dated 30/6/16, 1028 Revision 4 dated 30/6/16 and 1127 Revision 2 dated 30/6/16 and CRL-EFC-CON-000-DRG- 0060 Revision 1 dated 20/6/16, 0061 Revision 1 dated 20/6/16, 0062 Revision 1 dated 20/6/16, 0063 Revision 1 dated 20/6/16 and 0064 Revision 1 dated 8/7/16)('Mt Eden Station Alteration' - CRL Designation 6), Section 92 responses dated 20/12/16, 17/2/17 and 27/4/17. 1.2 Where there is inconsistency between: (a) The documents listed above and these conditions, these conditions shall prevail; (b) The information and plans set out in conditions 1.1(a) and 1.1(b) lodged with the requirements and presented at the Council Hearing and during the course of Environment Court proceedings, the most recent information and plans shall prevail; (c) The indicative management plans and evidence presented at the Council Hearing and the management plans (DWPs, CEMP, etc) required by the conditions of these designations and submitted through an Outline Plan, the requirements of the management plans shall prevail.
2	1 2 4 5 6	2.1 In accordance with section 184(1) of the Resource Management Act 1991 (the RMA), these designations shall lapse if not given effect to within 10 years from the date on which they are confirmed.
3	1 2 4 5 6	3.1 As soon as reasonably practicable, and no later than the point at which any part or parts of the City Rail Link become operational, the Requiring Authority shall: (a) Review the area and volume of land designated for the City Rail Link; (b) Identify any areas of designated land that are either no longer necessary for construction of the City Rail Link (if the City Rail Link has been constructed in part), or no longer necessary for the on-going operation and/or maintenance of the City Rail Link or for on-going mitigation measures; and (c) Give notice in accordance with Section 182 of the RMA for the removal of those parts of the designation identified in (b) above. (d) Give notice in accordance with s182 of the RMA for the drawback of the CRL designation post construction where the CRL overlaps the North Auckland Line designation (Auckland Unitary Plan reference 6300) as follows: (i) Between 4 Haultain Street and 5 Fenton Street north and south (Identification reference 7 on drawing CRL-SYW-RME-000-DRG-0104 Revision 1 dated 26/7/16); (ii) Between 49-51 Boston Road and Severn Street (Identification references 1, 2 and 3 on drawing CRL-SYW-RME-000-DRG-0101 Revision 1 dated 26/7/16; (iii) At 14-22 Boston Road (Identification references 5 on drawing CRL-SYW-RME-

Condition Number	Designation Applies to	Condition
		000-DRG-0101 Revision 1 dated 26/7/16); (iv) At 11 Water Street (Identification reference 6 on drawing CRL-SYW-RME-000-DRG-0101 Revision 1 dated 26/7/16); (v) At 26 and 28 Mt Eden Road (Identification references 5 and 6 on drawing CRL-SYW-RME-000-DRG-0103 Revision 1 dated 26/7/16); (vi) Over road reserve at Normanby Road between Lauder Road and Boston Road to reflect the Normanby Road overbridge (Identification reference 2 on drawing CRL-SYW-RME-000-DRG-0103 Revision 1 dated 26/7/16); and (vii) At Porters Ave to reflect the location of signalling infrastructure (Identification reference 8 on drawing CRL-SYW-RME-000-DRG-0104 Revision 1 dated 26/7/16).
PRE-CONSTRUCTION CONDITIONS		
4	1 2 4 5 6	**Appointment of Communication and Consultation Manager** 4.1 Within three months of the confirmation of the designation the Requiring Authority shall appoint a Communication and Consultation Manager to implement the Pre-construction Communication and Consultation Plan (Condition 5). The Communication and Consultation Manager shall be the main and readily accessible point of contact for persons affected by or interested in the City Rail Link Project until the commencement of the construction phase of the Project, or the contact person under Condition 14 is appointed. 4.2 The Communication and Consultation Manager's contact details (or, if appointed under Condition 14, that contact persons details) shall be listed in the Pre-construction Communication and Consultation Plan and listed on the Requiring Authority website, the City Rail Link Website, and the Auckland Council website.
5	1 2 4 5 6	**Pre-Construction Communication and Consultation Plan** 5.1 The objective of the Pre-construction Communication and Consultation Plan is to set out a framework to ensure appropriate communication and consultation is undertaken with the community, stakeholders, affected parties and affected in proximity parties prior to the commencement of construction of the City Rail Link. 5.2 The Requiring Authority shall prepare a Pre-Construction Communication and Consultation Plan. This Plan shall be submitted to Auckland Councils Major Infrastructure Projects Team Manager, within 2 months of the Designation being confirmed, for confirmation that the Plan has been prepared in accordance with this condition. 5.3 The Plan shall be implemented and complied with within 3 months from the confirmation of the designations until the commencement of the construction of the City Rail Link. 5.4 This Plan shall set out recommendations and requirements (as applicable) that should be adopted by and/or inform the development of the CEMP and DWPs. 5.5 The Pre-construction Communication and Consultation Plan shall set out how the Requiring Authority will: (a) Inform the community of Project progress and likely commencement of construction works and programme; (b) Engage with the community in order to foster good relationships and to provide opportunities for learning about the Project; (c) Obtain (and specify reasonable timeframes for) feedback and input from

Condition Number	Designation Applies to	Condition
		Stakeholders, directly affected and affected in proximity parties regarding the development of the CEMP and DWPs; (d) Respond to queries and complaints. Information shall include but not be limited to: (i) Who is responsible for responding; (ii) How responses will be provided; (iii) The timeframes that the responses will be provided within. (e) Where feedback (in accordance with this condition) is provided, the Pre-construction Communication and Consultation Plan shall articulate how that feedback has informed the development of the CEMP and DWPs and where it has not, reasons why it hasn't; (f) Provide updates on the property acquisition process as well as the management strategy for properties acquired by the Requiring Authority for the construction of the City Rail Link. 5.6 The Pre-Construction Communication and Consultation Plan shall be prepared in consultation with Stakeholders, directly affected parties and affected in proximity parties including, but not limited to: (a) All property owners and occupiers (including, subject to Condition 61.5, sub lessees) identified within the designation footprint; (b) All property owners and occupiers adjacent to construction sites (Britomart and Albert Street (Designation 1), Karangahape Road (Designation 4), Newton Station (Designation 5), and the main construction site including grade separation works at Normanby Road and Porters Ave (Designation 6)); (c) New Zealand Historic Places Trust (NZHPT); (d) Department of Corrections; (e) Ministry of Justice; (f) MediaWorks; (g) Network Utility Operators; (h) Bear Park Early Childhood Centre; (i) Body Corporate 164980 & Tenham Investments Limited (j) Community Liaison Group(s) (refer Condition 7); 5.7 The Pre-construction Communication and Consultation Plan shall, as a minimum, include: (a) A communications framework that details the Requiring Authority's communication strategies, the accountabilities, frequency of communications and consultation, the range of communication and consultation tools to be used (including any modern and relevant communication methods, newsletters or similar, advertising etc.), and any other relevant communication matters; (b) Details of the Communication and Consultation Manager for the pre-construction period (Condition 4 of this designation) including their contact details (phone, email and postal address); (c) The methods for identifying, communicating and consulting with stakeholders, directly affected parties and affected in proximity parties and other interested parties. Such methods shall include but not be limited to: (i) Newsletters; (ii) Newspaper advertising; (iii) Notification and targeted consultation with stakeholders, affected parties and

Condition Number	Designation Applies to	Condition
		affected in proximity parties; and (iv) The use of the project website for public information. (d) The methods for identifying, communicating and consulting with the owners of 1 Queen Street (HSBC House) and 21 Queen Street (Zurich House) regarding the development of the City Rail Link design and construction methodology between Britomart Transport Centre and Customs Street (through the Downtown Shopping Centre site). (e) The methods for communicating and consulting with mana whenua for the implementation of mana whenua principles for the project (refer to condition 8 and 48); (f) The methods for communicating and consulting with the Community Liaison Group(s); (g) How communication and consultation activity will be recorded; and (h) Methods for recording reasonably foreseeable future planned network utility works so that these can be considered and incorporated, where appropriate, into the City Rail Link design. 5.8 The Pre-construction Communication and Consultation Plan will be publicly available once finalised and for the duration of construction.
6	1 2 4 5 6	**Network Utility Operators** 6.1 Under s 176(1)(b) of the Resource Management Act 1991 (RMA) no person may do anything in relation to the designated land that would prevent or hinder the City Rail Link, without the prior written consent of the Requiring Authority. 6.2 In the period before construction begins on the City Rail Link (or a section thereof), the following activities undertaken by Network Utility Operators will not prevent or hinder the City Rail Link, and can be undertaken without seeking the Requiring Authority's written approval under section 176(1)(b) of the RMA: (a) Maintenance and urgent repair works of existing Network Utilities; (b) Minor renewal works to existing Network Utilities necessary for the on-going provision or security of supply of Network Utility Operations; (c) Minor works such as new property service connections; (d) Upgrades to existing Network Utilities within the same or similar location with the same or similar effects on the City Rail Link designation. 6.3 For the avoidance of doubt, in this condition an "existing Network Utility" includes infrastructure operated by a Network Utility Operator which was: (a) In place at the time the notice of requirement for the City Rail Link was served on Auckland Council (23 August 2012); or (b) Undertaken in accordance with this condition or the section 176(1)(b) RMA process.
7	1 2 4 5 6	**Community Liaison Groups** 7.1 Within three months of the confirmation of the designations the Requiring Authority shall, in consultation with the Auckland Council, establish at least one Community Liaison Group in each of the following key construction areas: (a) Britomart and Albert Street (Designation 1) (b) Karangahape Road (Designation 4) (c) Newton Station (Designation 5) (d) Main Construction site (Designation 6)

Condition Number	Designation Applies to	Condition
		7.2 The number of Groups shall be confirmed with the Auckland Council. 7.3 The membership of the Community Liaison Group(s) shall include representative(s) of the Requiring Authority and be open to all directly affected and affected in proximity parties to the Project including, but not limited to the following: (a) Representative(s) for and/or directly affected and affected in proximity property owners and occupiers; (b) CBD Residents Advisory Group; (c) The Karangahape Road Business Association; (d) Eden Terrace Business Association; (e) Heart of the City; (f) Roman Catholic Diocese of Auckland; (g) St Patrick's Cathedral; and (h) St Benedict's Parish. 7.4 In addition to the requirements in Condition 5, the purpose of the Groups shall be to: (a) Provide a means for receiving regular updates on Project progress; (b) Monitor the effects of constructing the Project on the community by providing a regular forum through which information about the Project can be provided to the community. (c) Enable opportunities for concerns and issues to be reported to and responded by the Requiring Authority. (d) Provide feedback on the development of the CEMP and DWPS. (e) Proposed potential joint initiatives to the Requiring Authority for the Property Management Strategy regarding the interim use of properties including vacant land acquired for the construction of the City Rail Link. 7.5 The Requiring Authority will consult with the Groups in respect of the development of the CEMP and DWPs. 7.6 The Requiring Authority will appoint one or more persons appropriately qualified in community consultation as the Community Consultation Advisor(s) to: (a) Provide administrative assistance to the Groups; (b) Ensure the Groups are working effectively (including the development of a Code of Conduct) and appropriate procedures for each Group; and (c) Act as a community consultation advisor to the Group. 7.7 The Requiring Authority will use its best endeavours to ensure that the Groups meet at least annually until the commencement of construction and then at least once every three months or as otherwise required once construction commences. 7.8 Once construction has commenced the Requiring Authority will provide an update at least every three months (or as otherwise agreed) to the Groups on compliance with the designation conditions and the CEMP and DWP and any material changes to these plans. 7.9 The Requiring Authority shall provide reasonable administrative support for the Groups including organising meetings at a local venue, inviting all members of the Groups, as well as the taking and dissemination of meeting minutes. 7.10 The Groups shall continue for the duration of the construction phase of the Project and for six months following completion of the Project.
		Mana Whenua Consultation 8.1 Within three months of the confirmation of the designations the Requiring Authority

Condition Number	Designation Applies to	Condition
	4 5 6	shall establish a kaitiaki or mana whenua forum to provide for an on-going role in the design and construction of the CRL Project. 8.2 The frequency at which the forum meets shall be agreed between the Requiring Authority and mana whenua. 8.3 The role of the mana whenua forum may include the following: (a) Developing practical measures to give effect to the principles in the Urban Design DWP (refer to Condition 49); (b) Input into, where practicable, the design of the stations (refer to Condition 54); (c) Input into the preparation of the CEMP and DWPs; (d) Working collaboratively with the Requiring Authority around built heritage and archaeological matters; (e) Undertaking kaitiakitanga responsibilities associated with the City Rail Link Project, including monitoring, assisting with discovery procedures, and providing mātauranga Māori input in the relevant stages of the Project; and (f) Providing a forum for consultation with mana whenua regarding the names for the City Rail Link stations, noting that there may be formal statutory processes outside the project (such as the New Zealand Geographic Board) which may be involved in any decision making on station names. 8.4 The mana whenua forum may provide written advice to the Requiring Authority in relation to any of the above matters. The Requiring Authority must consider this advice and the means by which any suggestions may be incorporated in the City Rail Link project.
9	1 2 4 5 6	**Network Utility Operator Liaison** 9.1 The Requiring Authority and its contractor shall: (a) Work collaboratively with Network Utility Operators during the development of the further design for the City Rail Link to provide for the ongoing operation and access to network Utility operations; (b) Undertake communication and consultation with Network Utility Operators as soon as reasonably practicable, and at least once prior to construction timing being confirmed and construction methodology, and duration being known; and (c) Work collaboratively with Network Utility Operators during the preparation and implementation of the CEMP (Condition 24) and DWPs in relation to management of adverse effects on Network Utility Operations. 9.2 A summary of the communication and consultation undertaken between the Requiring Authority and Network Utility Operators prior to construction commencing shall be provided as part of the Outline Plan. 9.3 The Requiring Authority shall undertake on-going communication and consultation with Network Utility operators throughout the duration of construction, including in relation to changes envisaged by Conditions 22 and 23 affecting Network Utility Operations to ascertain whether or not any changes or updates to the CEMP Network Utilities section are required to address unforeseen effects.
CONSTRUCTION CONDITIONS		
10	1 2 4	**Outline Plan Requirements** 10.1 The Requiring Authority shall submit an Outline Plan to the Auckland Council for the construction of the City Rail Link in accordance with section 176A of the RMA. The

Condition Number	Designation Applies to	Condition
	5 6	Outline Plan shall include: (a) The Communication and Consultation Plan (Condition 15); (b) The Construction Environmental Management Plan (CEMP); (c) Delivery Work Plans (DWPs); (d) Site Specific Construction Noise/Vibration Management Plans (SSCNVMPs) and Notable Receiver Management Plans; and (e) Any other information required by the conditions of this designation associated with the construction of the City Rail Link. 10.2 The plans listed in Condition 10.1 above must clearly document the comments and inputs received by the Requiring Authority during its consultation with stakeholders, affected parties and affected in proximity parties, and any recommendations received as part of the Independent Peer Review Panel process (where applicable), along with a clear explanation of where any affected party comments or peer review recommendations have not been incorporated, and the reasons why not. 10.3 The Requiring Authority may choose to give effect to the designation conditions associated with the construction of the City Rail Link: (a) Either at the same time or in parts; (b) By submitting one or more: (i) Communication and Consultation Plans; (ii) CEMP; (iii) DWPs; and (iv) SSCNVMPs, SSCNMPs and SSCVMPs 10.4 These plans should clearly show how the part integrates with adjacent City Rail Link construction works and interrelated activities. This particularly applies where the Urban Design DWP is submitted as a number of plans. 10.5 Early engagement will be undertaken with Auckland Council in relation to preparation and submission of the Outline Plan to establish a programme for the Outline Plan process to ensure achievable timeframes for both parties. 10.6 All works shall be carried out in accordance with the Outline Plan(s) required by this condition.
11	1 2 4 5 6	**Independent Peer Review of CEMP and DWPs** 11.1 Prior to submitting the CEMP, DWPs, SSCNMPs and SSCVMPs (other than those prepared in accordance with Condition 39) to Auckland Council for the construction of the City Rail Link, the Requiring Authority shall engage suitably qualified independent specialists agreed to by Auckland Council to form an Independent Peer Review Panel. The purpose of the Independent Peer Review Panel is to undertake a peer review of the CEMP, DWPs, SSCNMPs and SSCVMPs (other than those prepared in accordance with Condition 39), and provide recommendations on whether changes are required to those plans in order to meet the objective and other requirements of these conditions. 11.2 The CEMP, DWPs, SSCNMPs and SSCVMPs (other than those prepared in accordance with Condition 39) must clearly document the comments and inputs received by the Requiring Authority during its consultation with stakeholders, affected parties and affected in proximity parties, along with a clear explanation of where any comments have not been incorporated, and the reasons why not. This information must be included in the CEMP, DWPs, SSCNMPs and SSCVMPs (other than those prepared in accordance with Condition 39) provided to both the independent peer reviewer and

Condition Number	Designation Applies to	Condition
		Auckland Council as part of this condition. 11.3The CEMP, DWPs, SSCNMPs and SSCVMPs (other than those prepared in accordance with Condition 39) submitted to Auckland Council shall demonstrate how the recommendations from the independent peer reviewers have been incorporated, and, where they have not, the reasons why not. 11.4In reviewing an Outline Plan submitted in accordance with these designation conditions, Auckland Council shall take into consideration the independent specialist peer review undertaken in accordance with this condition and any additional information provided to Auckland Council by affected parties.
12	1 2 4 5 6	**Availability of Outline Plan(s)** 12.1For the duration of construction the following plans and any material changes to these plans shall be made available for public viewing on the Project web site: (a) CEMP; (b) DWPs (including SSCNVMPs, SSCNMPs and SSCVMPs); and (c) Communication and Consultation Plan. 12.2A copy of these Plans will also be held and made available for viewing at each construction site.
13	1 2 4 5 6	**Monitoring of Construction Conditions** 13.1The Requiring Authority, its contractor team, and the Auckland Council Consent Monitoring officer(s) shall establish and implement a collaborative working process for dealing with day to day construction processes, including monitoring compliance with the designation conditions and with the CEMP and DWPs (including SSCNVMPs, SSCNMPs and SSCVMPs) and any material changes to these plans associated with construction of the City Rail Link. 13.2This collaborative working process shall: (a) Operate for the duration of the construction works and for 6 months following completion of construction works where monitoring of designation conditions is still required, unless a different timeframe is mutually agreed between the Requiring Authority and the Auckland Council; (b) Have a "key contact" person representing the Requiring Authority and a "key contact" person representing the contractor team to work with the Auckland Council Consent Monitoring officer(s); (c) The "key contacts" shall be identified in the CEMP and shall meet at least monthly unless a different timeframe is agreed with the Auckland Council Consent Monitoring officer(s). The purpose of the meeting is to report on compliance with the designation conditions and with the CEMP, DWPs and material changes to these plans and on any matters of non-compliance and how they have been addressed; (d) Once construction has commenced, the Requiring Authority and / or the contractor shall provide an update to the Community Liaison Groups (Condition 7 of this designation) at least once every 3 months, or if in accordance with Condition 7 these groups meet more regularly, at least once every two months. 13.3The purpose and function of the collaborative working process is to: (a) Assist as necessary the Auckland Council Consent Monitoring officer(s) to confirm that: (i) The works authorised under these designations are being carried out in compliance with the designation conditions, the CEMP, DWPs (including

Condition Number	Designation Applies to	Condition
		SSCNVMPs, SSCNMPs and SSCVMPs) and any material changes to these plans; (ii) The Requiring Authority and its contractor are undertaking all monitoring and the recording of monitoring results in compliance with the requirements of the CEMP and DWPs (including SSCNVMPs, SSCNMPs and SSCVMPs) and any material changes to these plans; (b) Subsequent to a confirmed Outline Plan, provide a mechanism through which any changes to the design, CEMP or DWPs, which are not material changes requiring approval under Condition 10 triggering the requirement for a new Outline Plan, can be required, reviewed and confirmed; (c) Advise where changes to construction works following a confirmed Outline Plan require a new CEMP or DWP (including SSCNVMPs, SSCNMPs and SSCVMPs); (d) Review and identify any concerns or complaints received from, or related to, the construction works monthly (unless a different timeframe is mutually agreed with the Auckland Council Consent Monitoring officer) and adequacy of the measures adopted to respond to these.
Communication and Consultation		
14	1 2 4 5 6	**Contact Person** 14.1The Requiring Authority shall make a contact person available 24 hours seven days a week for the duration of construction for public enquiries on the construction works.
15	1 2 4 5 6	**Communication and Consultation Plan** 15.1The objective of the Communication and Consultation Plan is to set out a framework to ensure appropriate communication and consultation is undertaken with the community, stakeholders, affected parties and affected in proximity parties during the construction of the City Rail Link. 15.2The Requiring Authority shall prepare a Communication and Consultation Plan which shall be implemented and complied with for the duration of the construction of the City Rail Link. 15.3The Communication and Consultation Plan shall set out how the Requiring Authority will: (a) Inform the community of construction progress and future construction activities and constraints that could affect them; (b) Provide early information on key Project milestones; (c) Obtain and specify a reasonable timeframe (being not less than 10 working days), for feedback and inputs from directly affected and affected in proximity parties regarding the development (as part of the review process provided by Condition 22) and implementation of the CEMP or DWPs (including SSCNVMPs, SSNMPs and SSCVMPs); and (d) Respond to queries and complaints including but not limited to: (i) Who is responsible for responding; (ii) How responses will be provided; (iii) The timeframes that responses will be provided within. 15.4The Communication and Consultation Plan shall as a minimum include: (a) A communications framework that details the Requiring Authority's communication strategies, the accountabilities, frequency of communications and consultation, the range of communication and consultation tools to be used

Condition Number	Designation Applies to	Condition
		(including any modern and relevant communication methods, newsletters or similar, advertising etc), and any other relevant communication matters; (b) The Communication and Consultation Manager for the Project including their contact details (phone, email and postal address); (c) The methods for identifying, communicating and consulting with persons affected by the project including but not limited to: (i) All property owners and occupiers within the designation footprint (ii) All property owners and occupiers adjacent to construction sites (Britomart and Albert Street (Designation 1), Karangahape Road (Designation 4), Newton Station (Designation 5), Main Construction site and the works at Normanby Road and Porters Ave (Designation 6)) (iii) New Zealand Historic Places Trust (NZHPT) (iv) Department of Corrections (including the entity contracted by Department of Corrections to administer and run the Mt Eden Corrections facility at 1 Lauder Road) (v) Ministry of Justice (including but not limited to) confirming the details of the contact person required under Condition 14 of this designation, and to provide appropriate details (including but not restricted to timing, duration, scale, noise effects, vibration effects, access restrictions, and disruption to utilities) in respect to any works impacting the operation of the Auckland District Court at 65-71 Albert Street, Auckland. Communication and consultation of such details should be provided to the Ministry of Justice Auckland Property Programme Manager at least 9 months prior to the commencement of such works. (vi) Media Works (vii) Community Liaison Group(s) (refer Condition 7); (viii) Bear Park Early Childhood Centre; (ix) Body Corporate 164980 and Tenham Investments Ltd; (x) Network Utility Operators, including the process: • To be implemented to capture and trigger where communication and consultation is required in relation to any material changes affecting the Network Utilities; • For the Requiring Authority to give approval (where appropriate) to Network Utility Operators as required by section 176(1)(b) of the RMA during the construction period; • For obtaining any supplementary authorisations (including but not limited to resource consents (including those required under a National Environmental Standard) and easements); • For inspection and final approval of works by Network Utility Operators; and • For implementing conditions 9, 22, 23, and 24 of this designation in so far as they affect Network Utility Operations. (xi) The owner of 4 Kingston Street (xii) The owner of 6-12 Kingston Street (xiii) The owner of 83 Albert Street (xiv) The owner(s) of 5 Porters Avenue (ALLOT 236 SEC 10 Suburbs AUCKLAND) (d) How stakeholders and persons affected by the project will be notified of the

Condition Number	Designation Applies to	Condition
		commencement of construction activities and works, the expected duration of the activities and works, and who to contact for any queries, concerns and complaints; (e) How stakeholders and persons affected by the project will be consulted in the development and review of the CEMP and DWPs (including SSCNVMPs, SSCNMPs and SSCVMPs), including specifying reasonable timeframes for feedback; (f) Methods for communicating in advance temporary traffic management measures and permanent changes to road networks and layouts to directly affected and in proximity parties, bus (public and private) operators, taxi operators, bus users, and the general public; (g) Methods for communicating in advance to surrounding communities (including sensitive noise and vibration receivers) which must be notified at least 24 hours in advance where construction activities are predicted to: (i) Exceed the noise limits (refer Condition 31); or (ii) Exceed a vibration limit (refer Conditions 33 and 34); or (iii) Be within 200m of a blast site (refer Condition 32). Further provisions for Notable Noise and Vibration Receivers are contained in Condition 16. (h) Methods for communicating in advance proposed hours of construction activities outside of normal working hours and on weekends and public holidays, to surrounding communities, and methods to record and deal with concerns raised about such hours; (i) Methods for communicating and consulting with mana whenua for the duration of construction and implementation of mana whenua principles for the project (refer to Conditions 8 and 49); (j) Methods for communicating and consulting with the Auckland Council Parks Department regarding works to be undertaken to any trees on public land (streets, squares, etc.) located within the City Rail Link surface designation footprint, including how trees not being removed, or in close proximity to the surface designation footprint where works are occurring, will be protected; (k) Methods for communicating and consulting in advance of construction works with emergency services (Police, Fire, Ambulance) on the location, timing and duration of construction works, and particularly in relation to temporary road lane reductions and/or closures and the alternative routes or detours to be used, with specific detail around the management of the Fire and Ambulance from their central stations on Pitt Street; (l) A list of Stakeholders, directly affected and affected in proximity parties to the construction works who will be communicated with; (m) How communication and consultation activity relating to construction activities and monitoring requirements will be recorded; and (n) Methods for communicating and consulting with the Department of Corrections (including the entity contracted by Department of Corrections to administer and run the Mt Eden Corrections facility at 1 Lauder Road), to confirm the details of the contact person required under Condition 14 of this designation, and in respect of any works impacting on access or works in proximity to the Mt Eden Corrections Facility and the Boston Road Community Corrections site; including temporary traffic management measures and permanent changes to road networks and layouts which may impact on access to and from the Facility and the motorway network.

Condition Number	Designation Applies to	Condition
		15.5The Communication and Consultation Plan shall also include (as relevant) linkages and cross-references to the CEMP and DWPs (including SSCNVMPs, SSCNMPs and SSCVMPs). 15.6The Communication and Consultation Plan shall include a summary of the communication and consultation undertaken between the Requiring Authority and parties as required by the Pre-construction Communication and Consultation Plan. The summary shall include any outstanding issues or disputes raised by parties. The Communication and Consultation Plan shall be reviewed six monthly for the duration of construction and updated if required. Any updated Communication and Consultation Plan shall be provided to the "key contacts" (see Condition 13) and the Auckland Council Consent Monitoring officer for review and agreement on any further action to be undertaken. Any further action recommended as a result of this review shall be undertaken by the Communication and Consultation Manager for the City Rail Link and confirmation of completion provided back to the Auckland Council Consent Monitoring officer. 15.7If, in the course of amendments undertaken as part of the review process, a material change to the Communication and Consultation Plan is made, those parties affected by the change shall be notified within 1 month of the material change occurring.
16	1 4 5 6	**Communications – Notable Noise and Vibration Receivers** 16.1A SSCNVMP shall be prepared for all Notable Noise and Vibration Receivers (refer Condition 39). As part of the SSCNVMP (and further to Condition 15 of this designation), the Requiring Authority shall undertake communication and consultation, as soon as reasonably practicable (and at least once following confirmation of construction timing and methodology), with any Notable Noise and Vibration Receivers located within 200 metres of blasting, or within 100 metres (either horizontally or vertically) of the designation footprint for other construction activities. Communication and consultation with these parties should focus on a collaborative approach to manage the adverse effects from construction noise and vibration while works are undertaken in the vicinity. 16.2The Requiring Authority shall undertake on-going communication and consultation with notable noise and vibration receivers throughout the duration of construction occurring in the vicinity. This communication shall be reported back to the "key contacts" (see Condition 13) and the Auckland Council Consent Monitoring officer for their review and confirmation of any further action to be undertaken. The Auckland Council Consent Monitoring Officer shall advise the Requiring Authority of its recommendation within 10 working days of receiving this information from the Requiring Authority.
17	1 2 4 5 6	**Concerns and Complaints Management** 17.1Upon receiving a concern or complaint during construction, the Requiring Authority shall instigate a process to address concerns or complaints received about adverse effects. This shall: (a) Identify of the nature of the concern or complaint, and the location, date and time of the alleged event(s); (b) Acknowledge receipt of the concern or complaint within 24 hours of receipt; (c) Respond to the concern or complaint in accordance with the relevant management plan , which may include monitoring of the activity by a suitably qualified expert, implementation of mitigation measures, and, in the case of noise and / or vibration, preparation of a site specific noise and / or vibration management plan (in accordance with Conditions 37 and 38);

Condition Number	Designation Applies to	Condition
		17.2A record of all concerns and / or complaints received shall be kept by the Requiring Authority. This record shall include: (a) The name and address of the person(s) who raised the concern or complaint (unless they elect not to provide this) and details of the concern or complaint; (b) Where practicable, weather conditions at the time of the concern or complaint, including wind direction and cloud cover if the complaint relates to noise or air quality; (c) Known City Rail Link construction activities at the time and in the vicinity of the concern or complaint; (d) Any other activities in the area unrelated to the City Rail Link construction that may have contributed to the concern or complaint such as non-City Rail Link construction, fires, traffic accidents or unusually dusty conditions generally; (e) Remedial actions undertaken (if any) and the outcome of these, including monitoring of the activity. 17.3This record shall be maintained on site, be available for inspection upon request, and shall be provided every two months (or as otherwise agreed) to the Auckland Council Consent Monitoring officer, and to the "key contacts" (see Condition 13). 17.4Where a complaint remains unresolved or a dispute arises, the Auckland Council Compliance Monitoring Officer will be provided with all records of the complaint and how it has been dealt with and addressed and whether the Requiring Authority considers that any other steps to resolve the complaint are required. Upon receiving records of the complaint the Auckland Council Compliance Monitoring Officer must determine whether a review of the CEMP and/or DWPs is required under Condition 22 to address this complaint. The Auckland Council Compliance Monitoring Officer shall advise the Requiring Authority of its recommendation within 10 working days of receiving the records of complaint.
18	1 4 5 6	**"One Network" Consultation** 18.1The Requiring Authority and its contractor shall work collaboratively with the New Zealand Transport Agency (NZTA) during the preparation of the Traffic, Access and Parking DWP (Conditions 25, 27, 28, 29, and 30) in relation to confirming the management of adverse transport effects on the road network. A record of this consultation and outcomes shall be included in the Traffic, Access and Parking DWP. The Requiring Authority shall consult with the NZTA throughout the duration of construction on any changes or updates to the Traffic, Access and Parking DWP which relate to the management of the road network.
Construction Environmental Management Plan (CEMP) and Delivery Work Plans (DWPs)		
19	1 2 4 5 6	**Preparation, Compliance and Monitoring** 19.1The objective of the CEMP and DWPs is to so far as is reasonably practicable, avoid, remedy or mitigate any adverse effects (including cumulative effects) associated with the City Rail Link construction. 19.2All works must be carried out in accordance with the CEMP, the DWPs required by these conditions and in accordance with any changes to plans made under Condition 23. 19.3The CEMP and DWPs shall be prepared, complied with and monitored by the Requiring Authority throughout the duration of construction of the City Rail Link. 19.4The DWPs shall give effect to the specific requirements and objectives set out in these designation conditions. 19.5The CEMP shall include measures to give effect to any specific requirements and

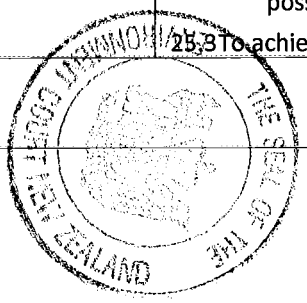
Condition Number	Designation Applies to	Condition
		objectives set out in these designation conditions that are not addressed by the DWPs. 19.6 Where mitigation measures are required to be implemented by the Requiring Authority in relation to the construction of City Rail Link, it shall meet reasonable and direct costs of implementing such mitigation measures.
20	1 2 4 5 6	**CEMP Requirements** 20.1 In order to give effect to the objective in Condition 19.1, the CEMP must provide for the following: (a) In relation to Designation 2, the use of one Tunnel Boring Machine (unless the effects of using more than one Tunnel Boring Machine are not materially different from those associated with the use of one Tunnel Boring Machine); (b) Notice boards that clearly identify the Requiring Authority and the Project name, together with the name, telephone number and email address of the Site or Project Manager and the Communication and Consultation Manager; (c) Training requirements for employees, sub-contractors and visitors on construction procedures, environment management and monitoring; (d) A Travel Management Plan for each construction site outlining onsite car parking management and methods for encouraging travel to the site using forms of transport other than private vehicle to assist in mitigating localised traffic effects; and (e) Where a complaint is received, the complaint must be recorded and responded to as provided for in Conditions 13, 15 and 17. 20.2 The CEMP shall include details of: (a) The site or Project Manager and the Communication and Consultation Manager (who will implement and monitor the Communication and Consultation Plan), including their contact details (phone, email and physical address); (b) The Document management system for administering the CEMP, including review and Requiring Authority / Constructor / Auckland Council requirements; (c) Environmental incident and emergency management procedures; (d) Environmental complaint's management procedures (see also Condition 17); (e) An outline of the construction programme of the work, including construction hours of operation, indicating linkages to the DWPs which address the management of adverse effects during construction; (f) Specific details on demolition to be undertaken during the construction period; (g) Means of ensuring the safety of the general public; and (h) Methods to assess and monitor potential cumulative adverse effects. 20.3 Subject to any alternative agreement with the landowner(s) of HSBC House and Zurich House, the Requiring Authority shall prepare specific construction methodologies for the works adjacent to 1 Queen Street and 21 Queen Street detailing how they will be undertaken to avoid compromising the structural integrity of the existing structures on the site including their foundation systems. The specific construction methodologies shall be prepared in consultation with the owner(s) of these properties. A record of this liaison and outcomes shall be included in the CEMP as part of the Outline Plan. This summary must provide a clear explanation of where any comments have not been incorporated into the CEMP, and the reasons why not. This summary must be provided to both the Independent Peer Review Panel and Auckland Council as part of the Outline Plan process.
21		**CEMP Construction Works Requirements**

Condition Number	Designation Applies to	Condition
	4 5 6	21.1 In order to give effect to the objective in Condition 19.1, the CEMP shall include the following details and requirements in relation to all areas within the surface designation footprint where construction works are to occur, and / or where materials and construction machinery are to be used or stored: (a) Where access points are to be located and procedures for managing construction vehicle ingress and egress to construction support and storage areas; (b) Methods for managing the control of silt and sediment within the construction area; (c) Methods for earthworks management (including depth and extent of earthworks and temporary, permanent stabilisation measures and monitoring of ground movement) for earthworks adjacent to buildings and structures; (d) Measures to adopt to keep the construction area in a tidy condition in terms of disposal / storage of rubbish and storage unloading of construction materials (including equipment). All storage of materials and equipment associated with the construction works shall take place within the boundaries of the designation; (e) Measures to ensure all temporary boundary / security fences associated with the construction of the City Rail Link are maintained in good order with any graffiti removed as soon as possible; (f) For the duration of construction affecting Lower Queen Street or Queen Elizabeth II Square, construction fences and / or hoardings shall be placed no closer than 3 metres from the north frontage (building frontage onto Queen Elizabeth II Square) of 21 Queen Street in the vicinity of the entrance to the ground level retail space and the main pedestrian entrance to the building. (g) The location and specification of any temporary acoustic fences and visual barriers, and where practicable, opportunities for mana whenua (see Condition 8) and community art or other decorative measures along with viewing screens to be incorporated into these without compromising the purpose for which these are erected; (h) How the construction areas are to be fenced and kept secure from the public and, where practicable and without compromising their purpose how opportunities for public viewing, including provision of viewing screens and display of information about the project and opportunities for mana whenua and community art or other decorative measures can be incorporated to enhance public amenity and connection to the project; (i) The location of any temporary buildings (including workers offices and portaloos) and vehicle parking (which should be located within the construction area and not on adjacent streets); (j) Methods to control the intensity, location and direction of artificial construction lighting to avoid light spill and glare onto sites adjacent construction areas; (k) Methods to ensure the prevention and mitigation of adverse effects associated with the storage, use, disposal, or transportation of hazardous substances; (l) That onsite stockpiling of spoil or fill at Downtown and Lower Albert Street construction yards be minimised where practicable; (m) That site offices and less noisy construction activities be located at the edge of the construction yards where practicable; and (n) Methods for management of vacant areas once construction is completed in accordance with the Urban Design DWP. 21.2 Unless expressly agreed in writing with the landowner of the Downtown Shopping Centre (at 7 Queen Street):

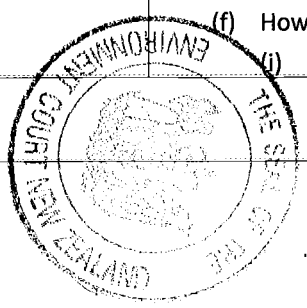
Condition Number	Designation Applies to	Condition
		(a) the Downtown construction yard (including QEII Square, Downtown Shopping Centre and Lower Albert Street), shall be progressively released from occupation for construction purposes where the area or any part of the area is no longer required for construction of the section of CRL between Britomart and Wyndham Street; and (b) following completion of the section of the CRL between the Downtown Shopping Centre and Wyndham Street and reinstatement of Albert Street, Lower Albert Street shall not be occupied for construction purposes for any section of CRL south of Wyndham Street.
22	1 2 4 5 6	**Review Process for CEMP and DWPs** 22.1The CEMP and DWPs shall be reviewed at least annually or as a result of a material change to the City Rail Link project or to address unforeseen adverse effects arising from construction or unresolved complaints. Such a review may be initiated by either Auckland Council or the Requiring Authority. The review shall take into consideration: (a) Compliance with designation conditions, the CEMP, DWPs (including SSCNVMPs, SSCNMPs and SSCVMPs) and material changes to these plans; (b) Any changes to construction methods; (c) Key changes to roles and responsibilities within the City Rail Link project; (d) Changes in industry best practice standards; (e) Changes in legal or other requirements; (f) Results of monitoring and reporting procedures associated with the management of adverse effects during construction; (g) Any comments or recommendations received from Auckland Council regarding the CEMP and DWPs (including SSCNVMPs, SSCNMPs and SSCVMPs); and (h) Any unresolved complaints and any response to the complaints and remedial action taken to address the complaint as required under Condition 17. 22.2A summary of the review process shall be kept by the Requiring Authority, provided annually to the Auckland Council, and made available to the Auckland Council upon request.
23	1 2 4 5 6	**Update of CEMP and DWPs following Review** 23.1Following the CEMP and DWPs review process described in Condition 22, the CEMP may require updating. 23.2Any material change to the CEMP and DWP must be consistent with the purpose and objective of the relevant condition. 23.3 Affected parties will be notified of the review and any material change proposed to the CEMP and DWPs (including SSCNVMPs, SSCNMPs and SSCVMPs). 23.4The CEMP and DWPs must clearly document the comments and inputs received by the Requiring Authority from affected parties about the material change, along with a clear explanation of where any comments have not been incorporated, and the reasons why not. 23.5Any material change proposed to the CEMP and DWPs shall be subject to an independent peer review as required by Condition 11. 23.6Following that review any material change proposed to the CEMP and DWPs relating to an adverse effect shall be submitted for approval to Auckland Council Compliance and Monitoring Officer, at least 10 working days prior to the proposed changes taking effect. If any changes are not agreed, the relevant provisions of the RMA relating to approval of outline plans shall apply.

Condition Number	Designation Applies to	Condition
24	1 4 5 6	**Network Utilities** 24.1To manage the adverse effects on Network Utilities Operations during the construction of the City Rail Link, the following shall be included in the CEMP. 24.2The purpose of this section of the CEMP shall be to ensure that the enabling works and construction of the City Rail Link adequately take account of, and include measures to address the safety, integrity, protection or, where necessary, relocation of existing network utilities that traverse, or are in close proximity to, the designation during the construction of the City Rail Link. 24.3For the avoidance of doubt and for the purposes of this condition an "existing Network Utility" includes infrastructure operated by a Network Utility Operator which was: (a) In place at the time the notice of requirement for the City Rail Link was served on Auckland Council (23 August 2012); or (b) Undertaken in accordance with condition 6 of this designation or the section 176(1)(b) RMA process. 24.4The CEMP shall be prepared in consultation with Network Utility Operators who have existing Network Utilities that traverse, or are in close proximity to, the designation and shall be adhered to and implemented during the construction of the City Rail Link. The CEMP shall include as a minimum: (a) Cross references to the Communication and Consultation Plan for the methods that will be used to liaise with all Network Utility Operators who have existing network utilities that traverse, or are in close proximity to, the designation; (b) Measures to be used to accurately identify the location of existing Network Utilities, and the measures for the protection, support, relocation and/or reinstatement of existing Network Utilities; (c) Methods to be used to ensure that all construction personnel, including contractors, are aware of the presence and location of the various existing Network Utilities (and their priority designations) which traverse, or are in close proximity to, the designation, and the restrictions in place in relation to those existing Network Utilities. This shall include: (i) Measures to provide for the safe operation of plant and equipment, and the safety of workers, in proximity to existing Network Utilities; (ii) Plans identifying the locations of the existing Network Utilities (and their designations) and appropriate physical indicators on the ground showing specific surveyed locations; (d) Measures to be used to ensure the continued operation of Network Utility Operations and the security of supply of the services by Network Utility Operators at all times; (e) Measures to be used to enable Network Utility Operators to access existing Network Utilities for maintenance at all reasonable times on an ongoing basis during construction, and to access existing Network Utilities for emergency and urgent repair works at all times during the construction of the City Rail Link; (f) Contingency management plans for reasonably foreseeable circumstances in respect of the relocation and rebuild of existing Network Utilities during the construction of the City Rail Link; (g) A risk analysis for the relocation and rebuild of existing Network Utilities during the construction of the City Rail Link; (h) Earthworks management (including depth and extent of earthworks and temporary and permanent stabilisation measures), for earthworks in close

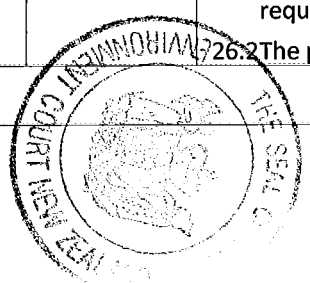
Condition Number	Designation Applies to	Condition
		proximity to existing Network Utilities; (i) Vibration management and monitoring for works in close proximity to existing Network Utilities; (j) Emergency management procedures in the event of any emergency involving existing Network Utilities; (k) The process for providing as-built drawings showing the relationship of the relocated Network Utilities to the City Rail Link to Network Utility Operators and the timing for providing these drawings; (l) Measures to ensure that network utility services are not interrupted to the Mt Eden Corrections Facility as a result of City Rail Link works. The requiring authority shall advise the Department of Corrections and the entity contracted by Department of Corrections to administer and run the Mt Eden Corrections facility at 1 Lauder Road, of any works on network utilities in the vicinity of the Mt Eden Corrections Facility which may impact on utility service provision to the Mt Eden Corrections Facility at least 14 days prior to those works occurring to allow the Department of Corrections (and the entity contracted to administer and run the facility at 1 Lauder Road) to arrange suitable contingencies. Communication and consultation with the Department of Corrections, and the entity contracted to administer and run the facility at 1 Lauder Road, shall be recorded in accordance with condition 15) of this designation. The Requiring Authority shall be responsible for ensuring that construction works do not interrupt network utility services to the Mt Eden Corrections Facility, unless by prior arrangement with Department of Corrections and the entity contracted by Department of Corrections to administer and run the Mt Eden Corrections facility at 1 Lauder Road. (m) A summary of the consultation (including any methods or measures in dispute and the Requiring Authorities response to them) undertaken between the Requiring Authority and any Network Utility Operators during the preparation of the CEMP. 24.5 If the Requiring Authority and a Network Utility Operator cannot agree on the methods proposed under the CEMP to manage the construction effects on the Operator's network utility operation, unless otherwise agreed, each party will appoint a suitably qualified and independent expert, who shall jointly appoint a third such expert to advise the parties and make a recommendation. That recommendation will be provided by the Requiring Authority as part of the CEMP along with reasons if the recommendation is not accepted.
Transport, Access and Parking		
25	1 4 5 6	**General Transport, Access and Parking** 25.1 A Transport, Access and Parking DWP shall be prepared to manage the adverse effects of construction of the City Rail Link, or any part of it, on the transport network. 25.2 The objective of the Transport, Access and Parking DWP is to so far as is reasonably practicable, avoid, remedy or mitigate the adverse effects of construction on transport, parking and property access. This is to be achieved by: (a) Managing the road transport network for the duration of construction by adopting the best practicable option to manage congestion; (b) Maintaining pedestrian access to private property at all times; and (c) Providing on-going vehicle access to private property to the greatest extent possible. 25.3 To achieve the above objective, the following shall be included in the Transport,



Condition Number	Designation Applies to	Condition
		Access and Parking DWP: (a) The road routes which are to be used by construction related vehicles, particularly trucks to transport construction related materials, equipment, spoil, including how the use of these routes by these vehicles will be managed to mitigate congestion, and to the greatest extent possible, avoid adverse effects on residential zoned land and education facilities; (b) Transport route options for the movement of construction vehicles carrying spoil, bulk construction materials or machinery shall be identified and details provided as to why these routes are considered appropriate routes. In determining appropriate routes, construction vehicles carrying spoil, bulk construction materials or machinery shall as far as practicably possible only use roads that: (i) Form part of the regional arterial network; (ii) Are overweight / over dimensioned routes; (iii) Or other routes (specified below) where no other practical option is available. (c) For the purposes of this condition the following routes (that at the time this designation was confirmed were not part of the regional arterial network and / or overweight / over dimensioned) shall be used where practicable for the movement of construction vehicles carrying spoil, bulk construction materials or machinery: (i) Ngahura Road, for trucks heading to/from Eden Terrace construction site; (ii) Dundonald Street and Basque Road, for trucks heading to/from the Newton Station construction sites; (iii) Pitt Street (between Hobson Street and Hopetoun Street), Beresford Square, Mercury Lane, Canada Street and Upper Queen Street (between Canada Street and Karangahape Road), for trucks heading to/from Karangahape Station construction sites; (iv) Wellesley Street (between Nelson Street and east of Albert Street), Cook Street (between Mayoral Drive and Hobson Street) and Mayoral Drive (between Wellesley Street and Cook Street) for trucks heading to/from Aotea Station construction sites; (v) Nelson Street (north of Wellesley Street), Hobson Street (north of Cook Street) and Lower Albert Street, for trucks heading to/from the Albert Street and Downtown construction sites. (d) Where other routes are necessary (other than those routes identified above), the Transport, Access and Parking DWP shall identify any residential zoned land and education facilities and shall provide details on how adverse effects from these vehicle movements are to be mitigated through such measures as: (i) Communication and consultation (in accordance with Condition 15 of this designation) with these properties in advance of the vehicle movements occurring; (ii) Restricting vehicle movements on Monday to Friday to between 9.30am and 4pm, and on Saturday to between 9am and 2pm. (e) Proposed temporary road lane reductions and / or closures, alternative routes and temporary detours, including how these have been selected and will be managed to mitigate congestion as far as practicably possible and how advance notice will be provided; (f) How disruption to the use of private property will be mitigated through: (i) Ensuring pedestrian and cycle access to private property is retained at all



Condition Number	Designation Applies to	Condition
		times; (ii) Providing vehicle access to private property as far as practicably possible at all times, except for temporary closures where landowners and occupiers have been communicated and consulted with in reasonable advance of the closure; and (iii) How the loss of any private car parking will be mitigated through alternative car parking arrangements. (g) Where an affected party unexpectedly finds their vehicle blocked in as a result of a temporary closure, the Requiring Authority shall (within reasonable limits) offer alternative transport such as a taxi, rental car, or other alternative. *Note: For the purposes of designation Conditions 25, 27, 28, 29 and 30 "temporary closure" is defined as the following:* *(i) In place for less than six hours, the Requiring Authority shall communicate and consult on the closure at least 24 hours in advance, but is not required to offer or provide alternative parking arrangements, though it may choose to offer this on a case by case basis in consultation with the affected party; and* *(ii) In place for between six and 72 hours, the Requiring Authority shall communicate and consult on the closure at least 72 hours in advance, and will offer and provide where agreed with the affected party alternative parking arrangements. The alternative parking arrangement should be as close to the site affected as is reasonably practicable.* (h) How disruption to use of the road network will be mitigated for emergency services, public transport, bus users, taxi operators, freight and other related vehicles, pedestrians and cyclists through: (i) Prioritising, as far as practicably possible, pedestrian and public transport at intersections where construction works are occurring; (ii) Relocating bus stops and taxi stands to locations which, as far as practicably possible, minimise disruption; and (iii) Identifying alternate heavy haul routes where these are affected by construction works. (i) Cross references to the specific sections in the Communication and Consultation Plan that detail how emergency services, landowners, occupiers, public transport users, bus and taxi operators, and the general public are to be consulted with in relation to the management of the adverse effects on the transport network. (j) The alternative (to road) transport options that are available (including the option of rail use at the main construction site adjacent the North Auckland Rail Line) and that have been considered and assessed for the transportation of spoil. This will include as applicable: (i) Benefits that could be provided by alternative options; (ii) Potential adverse effects associated with alternative options; (iii) Where an alternative option is proposed, methods for managing potential adverse effects; and (iv) Reasons for either adopting or not adopting alternative transport options.
26	1	**Monitoring of Transport Network Congestion** 26.1To achieve the objective of Condition 25.2(a), the Requiring Authority will undertake monitoring of the transport network and implement additional mitigation measures as required to manage congestion to achieve the best practicable option. 26.2The purpose of the monitoring is to monitor congestion on the transport network by



Condition Number	Designation Applies to	Condition

measuring average delays for traffic travelling along specified routes. The evaluation times will be:

(a) The average travel times over the weekday two hour morning peak period; and

(b) The average travel times over the weekday two hour evening peak period; and

(c) The average weekday inter-peak travel times between 9am to noon, noon to 2pm and 2 to 4pm.

26.3 The Requiring Authority shall carry out continuous monitoring for the duration that construction of the City Rail Link is occurring. The intention is that this monitoring is to be continuous, although it is acknowledged that there may be occasional malfunctions.

26.4 If a congestion incident occurs (such as an accident), the monitoring during the affected period will be considered unrepresentative.

26.5 Monitoring shall commence six months prior to construction of the City Rail Link to establish a baseline of existing transport congestion.

26.6 The monitoring will establish whether the City Rail Link construction works have increased traffic delays as follows:

(a) Either by more than 10 minutes (from the monitoring previously undertaken in accordance with this condition)

(b) Or if the travel times are more than three minutes or 30% greater than the forecast modelled increases along that route (according to the most recent traffic model test of that scenario, undertaken prior to the start of construction. The modelled time is to be based on the Auckland City Centre SATURN traffic model or a different traffic model approved by the Requiring Authority).

(c) The 30% above shall only apply for an increase predicted to be over four minutes.

26.7 If the travel times exceed the above criteria on any one of the specified routes, then additional mitigation shall be implemented by the Requiring Authority in its role as the Road Controlling Authority (under its statutory obligation). The additional mitigation could include but is not limited to advertising alternative routes, removing on street car parking or implementing operational measures, such as lane reconfigurations or signal phasing, to increase capacity on the surrounding network where reasonably possible at that time.

26.8 The purpose of additional mitigation measures is to mitigate the increases in traffic delays, reducing these to below the levels identified in Condition 26.6 as far as is reasonably achievable.

26.9 For the purposes of this condition, the following are the specified routes:

(a) Wellesley Street (between Victoria Street and Princes Street)

(b) Victoria Street (between Wellesley Street and Princes Street)

(c) Customs Street/Fanshawe Street (between Nelson Street and Tangihua Street)

(d) Quay Street/Lower Hobson Street (between Fanshawe Street/Hobson Street and Tangihua Street)

(e) Nelson Street/Hobson Street (between Pitt Street and Fanshawe Street)

(f) Queen Street (between Mayoral Drive and Customs Street)

(g) New North Road/Symonds Street (between Dominion Road and Newton Road)

(h) Mount Eden Road (between Normanby Road and Symonds Street)

(i) Khyber Pass Road between the southern motorway ramps and Symonds Street if this route is to be used by construction related trucks

(j) Newton Road between the northwestern motorway ramps and Symonds Street

Condition Number	Designation Applies to	Condition
		26.10 The specified routes shall exclude whichever east-west route has its intersection with Albert Street closed at the time of the surveys.
27	1	**Transport, Access and Parking: Specific Requirements (Britomart to Mayoral Drive)** 27.1To achieve the objective in Condition 25, the following measures shall be implemented: (a) A vehicle access lane at least 3m wide shall be provided along the eastern side of Albert Street between Customs Street and Victoria Street to provide access to properties (except that while the Albert Street/Victoria Street intersection is closed, this access lane is only to be provided between Customs Street and Durham Street); (b) A vehicle access lane at least 3m wide shall be provided along the western side of Albert Street between Customs Street and Victoria Street to provide access to properties, except that: (i) While the Albert Street/Customs Street intersection is closed, this access lane is only to be provided between Victoria Street and Wolfe Street; (ii) While the Albert Street/Victoria Street intersection is closed, this access lane is only to be provided between Kingston Street and Customs Street. If Kingston Street is also to be closed to Albert Street during this construction stage, this access lane shall be provided between Wyndham Street and Customs Street; and (iii) For a single period of up to 3 months while the cut and cover trench structure establishment works are carried out along Albert Street between Swanson Street and Customs Street, this access land is only required to be provided between Victoria Street and Swanson Street if northbound traffic is otherwise diverted via Swanson Street West and Federal Street. (c) The east-west / west-east connection (two fully operational traffic lanes in each direction) is to be maintained in each direction at two of the Customs Street, Victoria Street and Wellesley Street intersections with Albert Street during the period when the third of those intersections is otherwise fully closed; (d) The left turn movement from Customs Street (from the east) into Albert Street, and the left turn from Customs Street (from the west) into Albert Street, shall be retained while the Albert Street / Customs Street intersection is fully closed; (e) The left turn from Durham Street into Queen Street shall be reopened while the Albert Street/Victoria Street intersection is fully closed; (f) Two way access shall be provided on the single service lane along the western side of Albert Street between 87 Albert Street and Kingston Street while the Albert Street/Victoria Street intersection is fully closed. If Kingston Street is also to be closed to Albert Street during this construction stage, this access shall be provided to Wyndham Street; (g) Vehicular access into and egress from: (i) Mills Lane to and from either Albert Street or Swanson Street; and (ii) The Stamford Plaza Auckland main entrance and forecourt area is to be provided at all times and for the avoidance of doubt cannot be temporarily closed during construction. (h) Providing pedestrian and cycle access to private property at all times; (i) Providing footpaths of at least 1.5m in width along either side of Albert Street; (j) At a minimum two safe crossing passageways (which are "fully accessible" with a minimum width of 1.5m wide and well lit), need to be provided in the vicinity of

Condition Number	Designation Applies to	Condition
		Swanson Street and Wyndham Street, in addition to pedestrian crossings at the intersections of Victoria Street and Customs Street; (k) Ensuring that construction traffic does not use Swanson Street, Wolf Street or Federal Street north of Swanson Street; (l) During the Kingston Street closure, pedestrian access to and from the Auckland District Court's fire escape on the north side of Kingston Street shall be maintained at all times; and (m) 18 metres of on street parking within Kingston Street shall be reversed for police at the nearest practicable location. 27.2The Traffic, Access and Parking DWP shall demonstrate how these measures will be implemented and shall also include the following: (a) How construction works will be undertaken to mitigate congestion on Albert Street, Wellesley Street, Victoria Street, Customs Street, and Quay Street including retaining east-west traffic movements across Albert Street on Customs Street, Victoria Street and Wellesley Street; (b) The timing and sequencing of temporary road lane reductions and / or closures, and the alternative routes and temporary detours to be used, including: (i) How these have been selected and will be managed to, where practicable, mitigate congestion on the surrounding road network; (ii) How the Albert Street/Wyndham Street intersection will be reopened as soon as practically possible; (c) How disruption to the use of private property located immediately adjacent the designation with access onto Galway Street, Tyler Street, Queen Elizabeth Square, Customs Street, Albert Street, Kingston Street, will be mitigated through: (i) Providing vehicle access to private property as practicably possible at all times; (ii) Retaining local vehicle access to properties located along Albert Street (which may include only left in, left out access); (iii) Retaining access for loading and unloading of goods located along the service lane on the eastern side of Albert Street, between Victoria Street and Wellesley Street; and; (iv) Providing an on street loading bay on Customs Street, Lower Albert Street or Lower Queen Street to provide servicing to 21 Queen Street if access during construction cannot be provided to the existing loading bay area for 21 Queen Street, accessed from Lower Albert Street; and; (v) Providing access for loading and unloading of goods between Wyndham Street and Victoria Street West. (d) How disruption to the use of the local road network will be mitigated for private bus users, pedestrians and cyclists through: (i) Providing, where practicable, for the continued operation of private bus operators from hotels and other pick up / drop off locations in the city centre area (cross references to the Communication and Consultation Plan for consulting with private bus operators shall be included in the CEMP and Traffic, Access and Parking DWP); and (ii) Retaining pedestrian and cycle access through Lower Queen Street and / or Queen Elizabeth Square to provide access to and from the Ferry terminal and Customs Street; and (e) How disruption to pedestrians and cyclists requiring the ability to cross from east

Condition Number	Designation Applies to	Condition
		to west (and vice versa) across Albert Street between Victoria Street and Customs Street can be mitigated through providing, where practicable, safe pedestrian and cyclist passageways across the construction works on Albert Street.
28	4	**Transport Access and Parking: Specific Requirements (Karangahape Station Area)** 28.1To achieve the objective in Condition 25, the following measure shall be implemented: (a) Retaining one lane of traffic in each direction on Pitt Street (unless otherwise agreed with the Auckland Council Consent Monitoring officer); and (b) Spoil trucks shall not use East Street where practicable and on-street parking at the Southern end of East Street will be retained. 28.2 The Traffic, Access and Parking DWP shall demonstrate how these measures will be implemented and shall also include the following: (a) How construction of the shafts providing access to the Station can be undertaken to mitigate congestion on Pitt Street, Karangahape Road, and Mercury Lane; (b) The timing and sequencing of temporary road lane reductions and / or closures on Pitt Street, Mercury Lane, and the western end of Beresford Street, and the alternative routes and temporary detours to be used, including how these have been selected and will be managed to, where practicable, mitigate congestion on the surrounding road network; . (c) How disruption to the use of private property located immediately adjacent the surface designation with access onto Beresford Street, Pitt Street, Mercury Lane, and East Street will be mitigated through: (i) Providing pedestrian and cycle access to private property at all times, particularly those businesses located at the eastern end of Beresford Street and the northern end of Mercury Lane; (ii) Providing vehicle access to private property, which may include only a turn in and a turn out in the same direction), as practicably possible at all times, except for temporary closures where landowners and occupiers have been communicated and consulted with in reasonable advance of the closure; (iii) Providing local vehicle access to properties located along Beresford Street and Samoa House Lane (which may include only a turn in and a turn out in the same direction); (iv) Alternative parking arrangements or other offers for resolving the temporary loss of car parking during construction for the Hopetoun Alpha Building.
29	5	**Transport, Access and Parking: Specific Requirements (Newton Station Area)** 29.1To achieve the objective in Condition 25, the Traffic, Access and Parking DWP shall include the following: (a) How construction of the shafts providing access to the Newton Station, although constructed wholly on private land, can be undertaken to mitigate construction related congestion on Symonds St, the Symonds Street / Mt Eden Road / New North Road intersection, Dundonald Street, and the western end of Basque Road; (b) The timing and sequencing of temporary road lane reductions and / or closures on Symonds St in the vicinity of the intersection of Symonds Street / Mt Eden Road and New North Road , Dundonald Street, and the western end of Basque Road, and the alternative routes and temporary detours to be used, including how these have been selected and will be managed to, where practicable, mitigate congestion on the surrounding road network; (c) How disruption to the use of private property located immediately adjacent the surface designation with access onto Symonds Street, Dundonald Street, and the

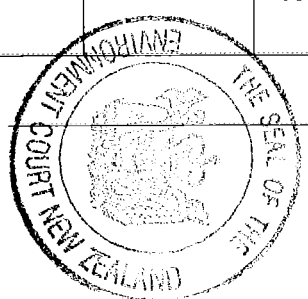
Condition Number	Designation Applies to	Condition
		western end of Basque Road will be mitigated through: (i) Providing pedestrian and cycle access to private property at all times, particularly for those businesses and residences located along Symonds Street and Dundonald Street; (ii) Providing vehicle access to private property, which may include only a turn in and a turn out in the same direction), as practicably possible at all times, except for temporary closures where landowners and occupiers have been communicated and consulted with in reasonable advance of the closure. How the loss of public pay and display parking located at the Auckland Transport Symonds Street Public Car Park will be mitigated through alternative parking arrangements. The Requiring Authority may be able to arrange such alternative car parking at the Burleigh Street car park. (d) The effects of the temporary use of the Symonds Street car park as a construction site are to be mitigated by the Requiring Authority by active parking management and enforcement, within 400m of the car park, to maximise short term parking within this area
30	6	**Transport and Property Access: Additional Requirements (NAL Area)** 30.1To achieve the objective in Condition 25, the following measures shall be implemented: (a) The retention of at least two traffic lanes (one in either direction) on Mt Eden Road during the construction of the replacement Mt Eden Road Bridge; (b) During the closure of the Normanby Road level crossing to construct the grade separated crossing, the Mt Eden Road and Normanby Road intersection shall be signalised and a second traffic lane shall be provided on the Boston Road approach to its intersection with Mt Eden Road intersection. Additionally, the no parking restrictions on Boston Road shall be extended along the length of Boston Road and considered for any adjacent local roads to facilitate through traffic; (c) A temporary pedestrian crossing (over the rail line) at Normanby Road is to be provided for the period of the temporary closure of the Normanby Road connection; (d) Access will be maintained to Nikau Street at all times by at least one lane (minimum 3m), and two lanes on Nikau St between Flower and Korari Streets. Access to sites within Flower Street and Korari Street is to be retained, from Nikau Street or New North Road, at all times; (e) Construction works will be undertaken to ensure two-way access is maintained at all times for vehicles to all accessways to the MediaWorks site including staff and visitors cars, trucks and service vehicles; (f) Providing for traffic to turn right out of Ruru Street to reduce any congestion (particularly at peak times) resulting from not being able to travel via Nikau Street to the traffic lights at Flower Street and New North Road; (g) Providing accessibility along Mt Eden and Normanby Roads as a priority for, where practicable: public transport (buses), emergency services, access to properties for pedestrians, and cyclists; (h) Construction works will be undertaken to ensure two-way access is maintained at all times for all vehicles accessing the Mt Eden Corrections Facility at Lauder Road (including staff and visitors' cars, service vehicles, prison vans, emergency vehicles and buses), communication and consultation with the Department of Corrections, and the entity contracted by Department of Corrections to administer and run the Mt Eden Corrections facility at 1 Lauder Road, on this matter shall be recorded in

Condition Number	Designation Applies to	Condition
		accordance with Condition 15) of this designation. The Requiring Authority shall be responsible for ensuring that the construction works do not restrict 24-hour two-way access for all vehicles accessing the Mt Eden Corrections Facility at Lauder Road; (i) Construction works will be undertaken to ensure two-way access is maintained at all times for vehicles accessing the premises at 51-63 Normanby Road, including staff and visitors cars, trucks and service vehicles. The measures shall: (i) Ensure safe and reasonable access to and from the site, to Austroads standards; (ii) Not result in the loss of any on site parking; (iii) Incorporate a crossing width sufficient not to reduce the range of vehicles required to access the site, relative to the existing situation; (iv) It is noted that the site is used occasionally by large trucks of up to 18m. These vehicles are to be provided for in the design of the access (i.e. the vehicle crossing and the access onto the site); (v) Following completion of the grade separation of Normanby Road safe and reasonable access will be provided to and from the property at 51-63 Normanby Road to meet the relevant Austroads and NZS2890.1 standards or the applicable standard required by the road controlling authority. (j) Construction works will be undertaken to ensure pedestrian and two-way vehicle access is maintained at all times to access the premises at 32 Normanby Road, including staff and visitors cars, trucks and service vehicles. The measures shall: (i) Ensure safe and reasonable access to and from the site, to Austroads standards; (ii) Incorporate a crossing width sufficient not to reduce the range of vehicles required to access the site, relative to the existing situation; (iii) Should the Requiring Authority require part of the site at 32 Normanby Road that is currently used for 40 car parking spaces for the construction of the City Rail Link 34 alternative car parking spaces will be provided at 14-22 Boston Road (in accordance with Plans CRL-EFC-CON-000-DRG-0064 Revision 1 dated 8/7/16 and CRL-EFC-ROA-000-DRG-1027 Revision 4 dated 30/6/16, 1028 Revision 4 dated 30/6/16 and 1127 Revision 2 dated 30/6/16). The Requiring Authority shall provide safe pedestrian access across the North Auckland Line and into the site for customers and staff, visiting or employed at the site in accordance with Condition 30.1(c) until the grade separation works are completed and permanent access is reinstated to the site. (k) At completion of the grade separation of Normanby Road safe and reasonable pedestrian and vehicle access to and from the site and 34 on site car parking spaces will be provided for the property at 32 Normanby Road. In the case of pedestrian and vehicle access and parking arrangements, this will be in accordance with Plans CRL-EFC-ROA-000-DRG-1027 Revision 4 dated 30/6/16, 1028 Revision 4 dated 30/6/16 and 1127 Revision 2 dated 30/6/16, and the following requirements: (i) The access will meet relevant Austroads, NZS2890.2 and the Auckland Council District Plan: Isthmus Section design standards; (ii) The design, structures and barriers associated with the pedestrian access to the site will be subject to the urban design process of Condition 47; and (iii) Provision for landscape planting shown on CRL-EFC-ROA-000-DRG-1127 Revision 2 dated 30/6/16

Condition Number	Designation Applies to	Condition
		(m) Construction of the grade separation works at Normanby Road on the parcels of land identified on the CRL NOR6 Sheet 2 as parcels 242, 243, 244, 245, 246, 393, 394, shall not commence until the KiwiRail land is available and written confirmation of this has been provided by the Requiring Authority to Auckland Council. (n) Access to Water Street to and from Mt Eden Road for CRL construction related heavy commercial vehicles shall be limited to left-in and left-out movements only. (o) Access to 14-22 Boston Road from Normanby Road shall be restricted to left-in and left-out movements only; the exception to this will be when Normanby Road is closed; and (p) During the temporary works along Boston Road, a 1.8m wide footpath on the north side of the street, in addition to two 3.0m wide traffic lances shall be provided on Boston Road between Normanby Road and Khyber Pass. A safe temporary pedestrian crossing facility shall be provided at the western extent of Active Construction Zone M1. 30.2The Traffic, Access and Parking DWP shall demonstrate how these measures will be implemented and shall also include the following: (a) How construction works can be undertaken to mitigate congestion on New North Road, Ruru Street, Korari Street, Flower Street, Nikau Street, Ngahura Street, Porters Avenue, Mt Eden Road, Normanby Road, Boston Road, Nugent Street, and the road network in general in this area including: (b) Which routes are to be used by construction trucks to remove spoil from the construction yard including how the use of these routes by these vehicles will be managed to mitigate congestion; (c) Which routes are to be used by construction related traffic (especially trucks) to deliver construction materials and other related goods and services to the construction yard including how the use of these routes by these vehicles will be managed to mitigate congestion; (d) The grade separation of Normanby Road so that it is undertaken at a time when vehicles, pedestrians, and cyclists can be managed and accommodated on Dominion Road, Mt Eden Road and Porters Avenue, to an extent which mitigates where practicable, delays to travel journeys from congestion on these roads resulting from City Rail Link construction works; (e) Any reduction in the number of fully operational traffic lanes associated with the closure of Normanby Road, and the reduction in the number of vehicle lanes on the Mount Eden Road bridge, is to be undertaken on only one of these two routes at a time; (f) The timing and sequencing of temporary road lane reductions and / or closures at the Symonds Street / New North Road / Mt Eden Road intersection , Ruru Street, Korari Street, Flower Street, Nikau Street, Ngahura Street, Porters Avenue, Mt Eden Road in the vicinity of the bridge over the rail line, Normanby Road, Boston Road, Nugent Street in the vicinity of the rail crossing, and the alternative routes and temporary detours to be used, including how these have been selected and will be managed to, where practicable, mitigate congestion on the surrounding road network; (g) How disruption to the use of property located immediately adjacent to the surface designation with access onto New North Road, Ruru Street, Korari Street, Flower Street, Nikau Street, Ngahura Street, Porters Avenue, Mt Eden Road, Normanby Road, Boston Road, Nugent Street will be mitigated through:

<table>
<tr><th>Condition Number</th><th>Designation Applies to</th><th>Condition</th></tr>
<tr><td></td><td></td><td>(i) Providing pedestrian and cycle access to private property at all times;
(ii) Providing local vehicle access and pedestrian access at all times to properties located along Flower Street (between Nikau Street and Shaddock Street) and Shaddock Street (between Flower Street and its dead end to the east), which are not located within the designation footprint, except for temporary closures where landowners and occupiers have been communicated and consulted with in reasonable advance of the closure;
(iii) Retaining local vehicle and pedestrian access to properties located outside the designation footprint along Haultain Street, Fenton Street, Porters Avenue, Ngahura Street, Ruru Street, Korari Street, Flower Street, Nikau Street, Mt Eden Road, Boston Road, Nugent Street, and Normanby Road at all times except for temporary closures where landowners and occupiers have been communicated and consulted with in reasonable advance of the closure; and
(iv) Full accessibility to those parts of Porters Avenue not affected by, but in the vicinity of, the construction works; and
(h) How disruption to the use of Mt Eden Rail Station will be mitigated through providing, where practicable, access during construction works associated with the replacement of Mt Eden Road Bridge.</td></tr>
<tr><td colspan="3">Noise and Vibration</td></tr>
<tr><td>31</td><td>1
4
5
6</td><td>Project Standards - Construction Noise
31.1Construction noise shall comply with the following Project Standards (unless otherwise provided for in a SSCNMP which is approved under Condition 37, 39 or 40):
<table>
<tr><th>Receiver Type</th><th>Monday to Saturday
0700 – 2200</th><th>Sundays and Public Holidays
0700 – 2200</th><th>At all other times
2200 – 0700</th></tr>
<tr><td>Occupied commercial and industrial buildings (including offices)</td><td>75 dB L_{Aeq}</td><td>75 dB L_{Aeq}</td><td>75 dB L_{Aeq}</td></tr>
<tr><td>Sensitive Noise and Vibration Receivers (excluding offices)</td><td>75 dB L_{Aeq}
90 dB L_{AFmax}</td><td>65 dB L_{Aeq} [1]
80 dB L_{AFmax} [2]</td><td>60 dB L_{Aeq}
75 dB L_{AFmax}</td></tr>
<tr><td>Early Childhood Education Centres (whilst occupied during normal opening hours)</td><td colspan="3">35 dB L_{Aeq} in sleeping areas</td></tr>
<tr><td>Bear Park Early Childhood Education Centre at 32 Akiraho Street (whilst occupied during normal opening hours)</td><td colspan="3">35 dB LAeq in sleeping areas
65 dB LAeq in outdoor playing areas</td></tr>
</table></td></tr>
</table>

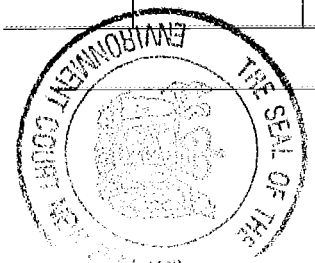
Condition Number	Designation Applies to	Condition
		Notes: 1. 60dB L_{Aeq} for Designation 5 and Designation 6; and 2. 75dB L_{AFmax} for Designation-5 and Designation 6. 31.2 Construction noise shall be measured and assessed in accordance with the provisions of NZS 6803:1999
32	6	**Project Standards - Blasting Overpressure and Vibration** *For the avoidance of doubt this condition only applies to NoR 6 where blasting is required.* 32.1 Prior to commencement of production blasts (ie. blasting that is undertaken as part of the construction process), trial blasts (ie. preliminary blasts that occur prior to production blasts for the purpose of data acquisition), shall be undertaken to demonstrate how adverse effects will be managed and how compliance with Conditions 32.2, 32.3 and 32.4 will be achieved in production blasting. Trial blasts will determine site-specific attenuation characteristics, air overpressure levels and maximum instantaneous charge weight (MIC) thresholds. Outcomes shall be documented in a Trial Blasting Report. This Trial Blasting Report shall be used for subsequent design of production blasting. 32.2 Air overpressure from the blast events shall not exceed 120 dB L_{Zpeak} at the facade of any occupied building measures and assessed in accordance with the provisions of the Australian Standard AS 2187.2-2006 *Explosives – Storage and use – Use of explosives.* 32.3 Air overpressure from blast events shall not exceed 133dB L_{Zpeak} at the facade of any unoccupied building measured and assessed in accordance with the provisions of Australian Standard AS 2187.2-2006 *Explosives – Storage and use – Use of explosives.* 32.4 Unless a SSCNVMP is approved under Conditions 38, 39 or 40 which includes an alternative blasting vibration standard: (a) Vibration from blast events shall not exceed 10mm/s PPV for 95% of blast events and 15mm/s for 100% blast events when measured at the foundation of any building that will be occupied during the blast event when measured and assessed in accordance with the provisions of DIN 4150-3:1999. (b) Vibration from blast events shall not in any case exceed the limits specified in Condition 33 when measured at the foundation of any building when measured and assessed in accordance with the provisions of Condition 33. 32.5 For the purposes of 32.2 and 32.3, a building is deemed to be occupied if there are persons inside only during the blast event (ie. if the occupants of a dwelling are out (eg. at work) during the blast event then the dwelling is deemed to be unoccupied). 32.6 Blasts must be performed at set times during the daytime only, between 9am and 5pm, Monday to Saturday only. 32.7 Comprehensive vibration and air overpressure level predictions must be performed prior to every blast event. 32.8 Blasting shall not be carried out where overpressure levels are predicted to be above the Project Standards in 32.1 and 32.2 at any building. Blasting shall not be carried out where vibration levels are predicted to be above the project standards in Condition 32.4 at any building. 32.9 These criteria may be varied only by a Site Specific Construction Noise Management Plan (SSCNMP) that has been approved under Condition 37.
		Project Standards - Construction Vibration 33.1 Construction vibration (including blasting) shall comply with the following Project Standards for building damage (unless otherwise provided for in a SSCVMP which is



<table>
<tr><th>Condition Number</th><th>Designation Applies to</th><th>Condition</th></tr>
<tr><td></td><td></td><td>approved under Condition 38, 39 or 40)

<table>
<tr><td>Type of Structure</td><td colspan="3">Short-term (transient) vibration[1]
PPV at the foundation at a frequency of</td><td>PPV at horizontal plane of highest floor (mm/s)</td><td>Long-term (continuous) vibration
PPV at horizontal plane of highest floor (mm/s)</td></tr>
<tr><td></td><td>1-10Hz (mm/s)</td><td>10-50 Hz (mm/s)</td><td>50-100 Hz (mm/s)</td><td></td><td></td></tr>
<tr><td>Commercial/ Industrial</td><td>20</td><td>20 – 40</td><td>40 – 50</td><td>40</td><td>10</td></tr>
<tr><td>Residential/ School</td><td>5</td><td>5 – 15</td><td>15 – 20</td><td>15</td><td>5</td></tr>
<tr><td>Historic or sensitive structures</td><td>3</td><td>3 – 8</td><td>8 – 10</td><td>8</td><td>2.5</td></tr>
</table></td></tr>
<tr><td>33</td><td>1
2
4
5
6</td><td></td></tr>
<tr><td>34</td><td>1
2
4
5
6</td><td>Project Standards - Construction Vibration (Amenity)
34.1 Between the hours of 10pm and 7am vibration generated by construction activities (excluding blasting) shall not exceed:
(a) a Peak Particle Velocity (PPV) of 0.3mm/s when measured at any part of the floor of any bedroom;
(b) a noise level of 35 dB $L_{Aeq(15min)}$ when measured in any bedroom.
34.2 Between the hours of 7am and 10pm vibration generated by construction activities (excluding blasting) shall not exceed:
(a) A Peak Particle Velocity (PPV) of 1mm/s as measured on the floor of the receiving room for residentially occupied habitable rooms, bedrooms in temporary accommodation and medical facilities; and
(b) A Peak Particle Velocity (PPV) of 2mm/s as measured on the floor of the receiving room for retail and office spaces (including work areas and meeting rooms);
34.3 The limits in 34.1 and 34.2 shall only be investigated and applied upon the receipt of a complaint from any building occupant. They shall not be applied where there is no concern from the occupant of the building.
34.4 Where the limits in 34.1 and 34.2 are found (through measurement) to be exceeded then a SSCVMP shall be prepared for that receiver (Condition 38).</td></tr>
<tr><td></td><td>6</td><td>Project Standards – MediaWorks
35.1 The noise and vibration limits set out in Conditions 35.2 and 35.3 shall apply only during Sensitive Times. For the purposes of MediaWorks, Sensitive Times are defined as follows:
(a) During scheduled live broadcasting
(b) During emergency/breaking news live broadcasting
(c) During scheduled recording sessions
If the limits are complied with in Studio 1, the noise and vibration levels in all other Studios will be acceptable.
For the avoidance of doubt, (a)-(c) above include sound checks as well as actual broadcast/recording time.
35.2 Noise Limits – Studios</td></tr>
</table>

Condition Number	Designation Applies to	Condition
35		The noise level (whether air borne or reradiated from ground vibration) from all construction sources as received inside Studio 1 shall not exceed 30dB $L_{Aeq\,(5\,min)}$ and 33 dB $L_{Aeq\,(1\,sec)}$. These limits apply to the construction component of the total noise. However for up to two periods of tunnelling, each no more than 15 consecutive days, the noise limits may be up to 5 decibels higher (ie. 35dB $L_{Aeq\,(5\,min)}$ and 38 dB $L_{Aeq\,(1\,sec)}$) during Sensitive Times, other than during the Live Broadcasting Periods as follows: (a) Weekdays: 0600-0900 hours 1200-1230 hours 1730-1930 hours 2230-2330 hours (b) Christmas holiday season (Saturday prior to Christmas Day to Sunday following New Years Day inclusive) and weekends: 1730-1900 hours The Requiring Authority must give MediaWorks at least 12 days notice of the commencement of each such period. 35.2A Rockbreaking shall not be used for tunnel excavation within 100m of the MediaWorks site during Sensitive Times unless compliance with the noise limits in Condition 35.2 can be demonstrated in accordance with the methodology set out in the SSCNVMP. 35.3 **Vibration Limits – Studios** For the protection of studio camera image quality, the construction vibration level (including blasting) as received inside Studio 1 shall not exceed 0.1mm/s PPV. This limit may be elevated by agreement of both the Requiring Authority and MediaWorks where image quality is found to be unaffected. 35.4 Noise level measurements inside Studio 1 shall be undertaken at a position that is representative to the level received within 2m from, and at a similar height to, the microphone of the main presenter(s). 35.5 Noise level measurements inside Studio 1 shall be undertaken with all doors to the studio closed. 35.6 For the protection of amenity, the construction vibration level as received in inside office areas, meeting rooms and technical suits shall not exceed 1mm/s PPV (as received on the floor of the receiving room) when those spaces are in use. 35.7 For the prevention of building damage, the construction vibration level shall not exceed the limits in Condition 33 at all times. 35.8 For the protection of sensitive equipment, the construction vibration (including blasting) level shall not exceed 200mg ($2m/s^2$) between 5-500Hz. Levels are to be measured on the floor supporting the Sensitive Equipment. 35.9 All attended noise and vibration measurements shall be undertaken by a suitably qualified and experienced expert. 35.10 For the avoidance of doubt, the MediaWorks conditions (Conditions 35, 40 and 66) only apply for so long as television, radio and/or interactive media facilities broadcast from the MediaWorks site. 35.11 Blasting shall not occur during MediaWorks Sensitive Times (as defined in Condition 35.1). Blasting shall occur at times to be agreed with MediaWorks and as documented in the SSCNVMP.
36	1 2	**Construction Noise and Vibration DWP** *For the avoidance of doubt, this condition is applicable to the management of construction noise and vibration on all receivers, including sensitive and notable receivers.*



Condition Number	Designation Applies to	Condition
	4 5 6	36.1A Construction Noise and Vibration DWP shall be prepared and implemented. The objective of the Construction Noise and Vibration DWP is to provide for the development and implementation of identified best practicable option to avoid, remedy or mitigate the adverse effects on receivers of noise and vibration resulting from construction. 36.2The Construction Noise and Vibration DWP shall: (a) Adopt the noise and vibration standards for construction set out in Conditions 31, 32, 33 and 34 of these designations; (b) Be generally consistent with the draft Construction Noise and Vibration management plan submitted as part of the Notice of Requirement documentation (dated 23 August 2013); and (c) Identify methods to achieve best practicable option for mitigating adverse effects. 36.3To achieve this objective, the Construction Noise and Vibration DWP shall include: (a) The roles and responsibilities of the noise and vibration personnel in the contractor team with regard to managing and monitoring adverse noise and vibration effects; (b) That piling and road cutting will be restricted to between the hours of 7am to 7pm, Monday to Saturday; (c) Construction machinery and equipment to be used and their operating noise and vibration levels; (d) Identification of construction activities that are likely to create adverse noise and vibration effects, the location of these in the construction site areas, and the distance to comply with the Project Criteria in Conditions 31, 32, 33 and 34; (e) The timing of construction activities that are likely to create an adverse noise and vibration effect; (f) The location of sensitive noise and vibration receivers; (g) A record of communication and consultation with sensitive noise and vibration receivers. The record must include a clear explanation of where any comments from sensitive receivers have not been incorporated in the Construction Noise and Vibration DWP, and the reasons why not. This information must be included in the Construction Noise and Vibration DWP provided to both the Independent Peer Review Panel and Auckland Council as part of the Outline Plan process specified in Condition 11; (h) Specific measures to address the concerns raised by those sensitive receivers; (i) Specific training procedures for construction personnel including: (i) The project noise and vibration performance standards for construction (conditions 31, 32, 33 and 34); (ii) Information about noise and vibration sources within the construction area and the locations of sensitive noise and vibration receivers; and (iii) Construction machinery operation instructions relating to mitigating noise and vibration; (j) Methods and measures to mitigate adverse noise and vibration effects including, but not limited to, structural mitigation such as barriers and enclosures, the scheduling of high noise and vibration construction, use of low noise and vibration machinery, temporary relocation of affected receivers or any other measures or offer agreed to by the Requiring Authority and the affected receiver; (k) The proposed methods for monitoring construction noise and vibration to be undertaken by a suitably qualified person for the duration of construction works

Condition Number	Designation Applies to	Condition
		including: (i) Updating the predicted noise and vibration contours based on the final design and construction activities; (ii) Confirm which buildings are to be subject to a pre and post building condition survey in accordance with Condition 46. This includes consideration of those buildings in Appendix One and Two to these conditions; (iii) The timing and location for monitoring of buildings during construction is required (Note that the flow charts contained in Appendices B and C of Appendix J of the technical noise and vibration report provided as part of the Notice of Requirement should be used as a guide); (iv) Identifying appropriate monitoring locations for receivers of construction noise and vibration; (v) Procedures for working with the Communication and Consultation Manager to respond to complaints received on construction noise and vibration, including methods to monitor and identify noise and vibration sources; (vi) Procedures for monitoring construction noise and vibration and reporting to the Auckland Council Consent Monitoring officer; and (vii) Procedures for how works will be undertaken should they be required as a result of the building condition surveys; (l) Cross references to the specific sections in the Communication and Consultation Plan which detail how landowners and occupiers are to be communicated with around noise and vibration effects.
37	1 2 4 5 6	**Site Specific Construction Noise Management Plan (SSCNMP)** *For the avoidance of doubt, this condition does not apply to MediaWorks.* 37.1 The objective of a SSCNMP is to detail the best practicable option to avoid, remedy or mitigate adverse effects on a receiver resulting from construction noise that does not comply with the Project Noise Standards. 37.2 Further to the Construction Noise and Vibration DWP in Condition 36, a SSCNMP shall be prepared for any receiver or activity for which air overpressure is either predicted or measured to exceed the limits in Condition 32, or where construction noise is either predicted or measured to exceed the Project Noise Standards in Condition 31, except where the exceedance of the standards in Condition 31 is less than 5 decibels and does not exceed : (a) 0700-2200: 1 period of up to 2 consecutive weeks in any 2 months (b) 2200-0700: 1 period of up to 2 consecutive nights in any 10 days 37.3 For predicted exceedances of less than 5 decibels (refer 37.2) monitoring shall be undertaken to confirm the actual noise levels. If exceedance is shown to be more than 5 decibels, or the period exceeds those detailed, then a SSCNMP will be prepared. 37.4 In addition to the SSCNMPs prepared in accordance with Condition 37.2, and notwithstanding Condition 37.1, the Requiring Authority shall prepare SSCNMPs specifying the best practicable option for management, methods and measures to mitigate all noise effects for the properties located at: (a) 1 Queen Street (Lot 1 DP 165403); (b) 21 Queen Street (Lot 1 DP 67723); (c) 29 Customs Street West (Lot 7 DP 77037) (d) 188 Quay Street (Lot 5 DP 63972 and Lot 1 DP 78340); and (e) 23-29 Albert Street (Lot 1 DP 116724).

Condition Number	Designation Applies to	Condition
		37.4 SSCNMPs will identify: (a) The extent to which noise may exceed the Project Noise Standards in Condition 31 or the overpressure limits in Condition 32; (b) The timing and duration of any exceedance; (c) Details of the type of activity causing any exceedance; (d) The summary of the communication and consultation undertaken with the receiver. The summary must include a clear explanation of where any comments have not been incorporated, and the reasons why not. This information must be included in the SSCNMP provided to both the Independent Peer Review Panel and Auckland Council as part of the Outline Plan process specified in Condition 11; (e) The methods and measures to mitigate noise effects, including but not limited to, potential to offer temporary relocation of affected receivers, alternative ventilation, façade sound insulation improvements, building condition surveys in the case of overpressure generated by blast events, or other offers made by the Requiring Authority and whether these have been agreed to by the affected receiver; (f) The reasons why the management and mitigation measures and methods reflect best practicable option. 37.6 The SSCNMP shall be submitted for the review of Auckland Council as part of the Outline Plan. The works shall then be undertaken in accordance with the SSCNMP confirmed by the Requiring Authority as part of the Outline Plan.
38	1 2 4 5 6	**Site Specific Construction Vibration Management Plan (SSCVMP)** *For the avoidance of doubt, this condition does not apply to MediaWorks.* 38.1The objective of a SSCVMP is to detail the best practicable option to avoid, remedy or mitigate adverse effects on a receiver resulting from vibration that does not comply with the Project Vibration Standards. 38.2Further to the Construction Noise and Vibration DWP in Condition 36, a SSCVMP shall be prepared: (a) For any unoccupied building, structure or infrastructure for which construction vibration is either predicted or measured to exceed the Project Vibration Standards in Condition 33; (b) Where a complaint or concern is raised and the vibration level exceeds the amenity levels of Condition 34.2(a) and 34.2(b); (c) In response to other concerns or complaints where required (refer Condition 17); (d) For the properties listed in Condition 37.4. 38.3Where the amenity limits in Conditions 34.2(a) and 34.2(b) are exceeded: (a) Best practicable management of vibration must be applied; and (b) The vibration activity shall be scheduled to avoid disturbance. If this is not practicable then reasonable respite periods shall be provided to reduce vibration exposure. 38.4The limits in condition 33 may be relaxed by a SSCVMP but only for a building, structure or infrastructure that has been assessed by a suitably qualified and experienced structural engineer and where it has been deemed to be capable of withstanding higher vibration levels without sustaining building or structural damage, and where appropriate vibration and building condition monitoring regimes are in place. 38.5SSCVMPs will identify:

Condition Number	Designation Applies to	Condition
		(a) The timing and duration of any exceedance; (b) Details of the type of activity giving rise to any exceedance; (c) Site Specific vibration criteria that addresses the issue(s) of concern (i.e. building damage, amenity and sensitive equipment). Site Specific criteria shall be determined by a suitably qualified independent vibration expert; (d) The summary of the communication and consultation undertaken with the receiver. The summary must include a clear explanation of where any comments have not been incorporated, and the reasons why not. This information must be included in the SSCVMP provided to both the Independent Peer Review Panel and Auckland Council as part of the Outline Plan process specified in Condition 11; (e) The methods and measures to mitigate vibration effects, including but not limited to, investigating alternative low-vibration construction methods, undertaking high-vibration works outside sensitive times, vibration barriers, building condition surveys, potential to offer temporary relocation of affected receivers, or other offers made by the Requiring Authority and agreed to by the affected receiver; (f) The reasons why the management and mitigation measures and methods reflect best practicable option. 38.6 The SSCVMP shall be submitted for the review of Auckland Council. The works shall then be undertaken in accordance with the SSCVMP confirmed by the Requiring Authority as part of the Outline Plan.
Notable Receivers		
39	1 2 4 5 6	**Notable Noise and Vibration Receivers** *For the avoidance of doubt, Conditions 39.5 and 39.6 do not apply to MediaWorks.* 39.1 Further to Condition 36, the Requiring Authority and its contractor, in conjunction with a suitably qualified expert, shall work collaboratively with each notable receiver during the preparation of a SSCNVMP to confirm the extent and management of adverse effects on each Notable Receiver. 39.2 In addition to the Construction Noise and Vibration DWP, a SSCNVMP shall be prepared for each identified Notable Receiver. The objective of the SSCNVMP is to detail the best practicable option to avoid, remedy or mitigate adverse noise and vibration effects on each Notable Receiver. 39.3 The Requiring Authority shall consult with the notable receiver throughout the duration of construction and update the SSCNVMP as required to achieve the objective in 39.2. 39.4 The SSCNVMP shall include: (a) The level at which noise and vibration effects on the notable receiver will unreasonably interfere with its operation. This will enable development of the site specific criteria. In the case of MediaWorks this is set out in Condition 40; (b) Construction activities and equipment which are likely to create adverse noise and vibration effects and the location and timing of these in relation to the notable receiver; (c) The methods and measures associated with the worksite including, but not limited to, structural mitigation such as barriers and enclosures, use of low noise and vibration machinery and the scheduling of high noise and vibration construction; (d) The methods and measures associated with the notable receiver building or operation including, but not limited to, potential for isolation of sensitive areas and equipment, dampening of reradiating surfaces and temporary relocation of

Condition Number	Designation Applies to	Condition
		affected receivers that are proposed to minimise adverse noise and vibration effects on the notable receiver; (e) Details about the methods to be adopted by the Requiring Authority to minimise construction noise and vibration effects on the notable receiver and the anticipated effectiveness of those methods; (f) A summary of the communication and consultation undertaken with the notable receiver. The summary must include a clear explanation of where any comments have not been incorporated, and the reasons why not; (g) Offers made by the Requiring Authority to the notable receiver to mitigate effects and the response by the operators, such as relocation, and whether those offers were accepted or not by the notable receiver; 39.5 If the parties cannot agree on any of the matters above they shall each appoint a suitably qualified and independent expert, who shall jointly appoint an independent and suitably qualified third expert who shall certify the following matters to be included in the SSCNVMP: (a) The level at which noise and vibration effects on the notable receiver unreasonably interfere with its operation (the certified noise and vibration limit); (b) The mitigation methods and measures within the worksite (at source) including, but not limited to, structural mitigation such as barriers and enclosures, use of low noise and vibration machinery and the scheduling of high noise and vibration construction; (c) The mitigation methods and measures at the notable receiver including but not limited to: isolation of sensitive areas and equipment; dampening of reradiating surfaces; any response to such offers; and temporary relocation of affected receivers; (d) Whether or not the mitigation methods and measures reflect best practicable management; and (e) Whether or not the residual effects are likely to cause significant disruption to the activities of the notable receiver. 39.6 Following the above process the SSCNVMP shall be submitted for the review of Auckland Council as part of the Outline Plan. For the avoidance of doubt, the Requiring Authority shall not be entitled to make any changes to the SSCNVMP through the Outline Plan process following any agreement reached with the notable receiver and/or through the above certification process without the consent of the notable receiver. The works shall then be undertaken in accordance with the SSCNVMP confirmed by the Requiring Authority as part of the Outline Plan process.
40	6	**Construction Noise and Vibration Management Plan – Mediaworks** *Further to Condition 36, a SSCNVMP shall be prepared for MediaWorks implementing the project standards in Condition 35.* 40.1 The MediaWorks SSCNVMP shall identify high noise or vibration plant and machinery, and list the relevant items that require testing in accordance with Condition 40.4 and 40.8. 40.2 Prior to any demolition or construction commencing, the Requiring Authority shall undertake a noise survey to determine the Transmission Loss (TL) performance of the MediaWorks building envelope. This testing shall only be undertaken outside of Sensitive Times. 40.3 Prior to any demolition or construction commencing, the Requiring Authority shall undertake a vibration survey to determine the transfer function of the MediaWorks building structure from ground vibration outside the building to reradiated noise in

Condition Number	Designation Applies to	Condition
		Studio 1. This testing shall only be undertaken outside of Sensitive Times.
		40.4 All high noise plant and machinery to be used at a location where it is predicted to generate noise levels in excess of 3 dB below the limits specified in Condition 35.2 shall be tested prior to use, to determine its Sound Power Level (L_w) at a sufficient distance from the MediaWorks building to ensure compliance. These measured L_ws shall be used to predict the noise level at the MediaWorks building façade(s) from proposed construction scenarios. The façade TL (refer Condition 40.2) shall then be applied to predict the noise levels in the relevant rooms.
		40.5 All high noise plant and machinery may not be used until Condition 40.4 is satisfied, taking into account the cumulative noise levels from active sources on the site.
		40.6 The Requiring Authority and its contractor, in conjunction with a suitably qualified expert, shall work collaboratively with MediaWorks during the preparation of a SSCNVMP to confirm the extent and management of adverse effects on MediaWorks.
		40.7 The SSCNVMP shall set out the requirements for monitoring, the number of monitors, the instrument location, any adjustments necessary if a proxy position is required and any other procedures or requirements that are necessary. The data shall be available in real time to the Requiring Authority, Auckland Council and MediaWorks.
		40.8 Prior to the use of any high vibration equipment to be used at a location where it is predicted to generate vibration levels greater than 75% of the PPV vibration limits in Condition 35.3, 35.6, 35.7 and 35.8, or reradiated noise within 3 decibels of the limits in Condition 35.2, the Requiring Authority shall undertake vibration measurements at a sufficient distance from the MediaWorks building to ensure compliance, applying the transfer function required by Condition 40.3 to assess reradiated noise. These measurements shall be used to determine minimum set-back distances from the building to avoid potential exceedances of the vibration limits in Conditions 35.2, 35.3, 35.6, 35.7 and 35.8. The results of the testing and the outcomes affecting construction operations shall be set out in the SSCNVMP.
		40.9 The noise and vibration levels from construction shall be monitored to determine compliance with conditions 35.2, 35.3, 35.6, 35.7 and 35.8 continuously by automated noise and vibration monitors located at positions that will represent the noise and vibration level in the relevant spaces and for the relevant noise and vibration limits. The SSCNVMP shall set out the requirements for monitoring, the instrument location, any adjustments necessary if a proxy position is required and any other procedures or requirements that are necessary including methods to exclude extraneous sources. The data shall be available in real time to the Requiring Authority, Auckland Council and MediaWorks.
		40.10 Monitoring to determine compliance or otherwise with Condition 35.~~6~~7 relating to office amenity shall only be undertaken in response to complaints from MediaWorks. The measurements must be attended by a suitably qualified person.
		40.11 The SSCNVMP shall set out corrective action measures that must be adopted in situations where any of the noise and vibration limits in Conditions 35.2, 35.3, 35.6, 35.7, and 35.8 are exceeded and where the noise and/or vibration levels are unacceptable to MediaWorks. The corrective action measures must include the following: (a) Immediate cessation of the work(s) that is giving rise to the exceedance; (b) A procedure to require the implementation of whatever measures are necessary to reduce the noise or vibration levels; (c) A monitoring procedure to determine compliance (once the remediation works are complete); (d) A requirement to ensure that the work(s) responsible for the exceedance are not

Condition Number	Designation Applies to	Condition
		recommenced during Sensitive Times; (e) A complaints procedure that is capable of effecting the immediate cessation of works including making a point of contact directly available 24 hours, seven days a week. 40.12 If there is a disagreement between the Requiring Authority and MediaWorks as to the content of the SSCNVMP, they shall each appoint a suitably qualified and independent expert, who shall jointly appoint an independent and suitably qualified third expert who shall certify the matters set out in Condition 40.11 and any other matters in dispute in the SSCNVMP. 40.13 Following the above process the SSCNVMP shall be submitted for the review of Auckland Council as part of the Outline Plan. For the avoidance of doubt, the Requiring Authority shall not be entitled to make any changes to the SSCNVMP through the Outline Plan process following any agreement reached with MediaWorks and/or through the above certification process without the consent of MediaWorks. The works shall then be undertaken in accordance with the SSCNVMP confirmed by the Requiring Authority as part of the Outline Plan process.
Built Heritage/Archaeology		
41	1 2 4 5 6	**Historic Character – Built Heritage** 41.1The Historic Character DWP shall be prepared to manage the adverse effects on built heritage and archaeology that may result from associated works prior to, during, and after the construction of the City Rail Link or any part of it. 41.2The objective of the Built Heritage section is to avoid, remedy or mitigate adverse effects on built heritage as far as reasonably practicable. To achieve the above objective, the following shall, as a minimum, be included in the built heritage section of the Historic Character DWP: (a) Preparation of a Building Record and Salvage Strategy that outlines a suitable set of procedures for the removal, storage and for later refitting and reuse of elements of heritage buildings and/or structures identified for demolition including the Griffiths Building, Beresford Toilets, Bluestone Toilets, and the rear annex to the building at 223-227 Symonds Street. (b) The proposed methods for monitoring building damage that is to be undertaken by a suitably qualified person for the duration of construction works. This includes confirming which Built Heritage buildings and structures are to be subject to a pre and post building condition survey through: (i) Using the updated predicted vibration contours undertaken in Condition 36; (ii) Reviewing those buildings in Appendix 2 to these conditions in accordance with Condition 46.1; (iii) Reviewing buildings within the designation footprint (including above sub-strata designation) or located in close proximity to identify buildings which have been recognised as having heritage value as a result of scheduling under the Historic Places Act 1993 or in the Auckland Unitary Plan. (c) Identification and methodology for recording of Built Heritage directly affected by the construction, or associated pre- and post-construction works (i.e. within the surface designation footprint), which cannot be retained and / or adaptively re-used / partially retained. For the avoidance of doubt, the following buildings and structures may be demolished: (i) Bluestone Toilets (SCDP Category B);

Condition Number	Designation Applies to	Condition
		(ii) Beresford Toilets; (iii) Rear annex to building at 229-231 Symonds Street; and (iv) Griffiths Building. (d) Identification and methodology for recording Built Heritage directly affected by the construction, or associated pre- and post-construction, which are to be: (i) Adaptively reused; (ii) Partially retained in design and construction; or (iii) Built heritage elements have been integrated into other elements of the City Rail. (iv) In particular, the Requiring Authority shall explore the adaptive re-use of the buildings at 51-53 Victoria Street West (known as Martha's Corner building) with complete demolition only considered as a last resort. As guidance, an appropriate level of adaptive re-use could include retention of the façade on all street frontages or the utilisation and incorporation of elements of the building into the design: (e) How Built Heritage Buildings and Structures will be protected during construction through the use of screening or other protective measures to mitigate adverse construction effects; (f) How mitigation or rectification of damage to Built Heritage Buildings and Structures will be addressed; and (g) Cross references to the specific sections in the Communication and Consultation Plan which detail how the Auckland Council Heritage Department, the New Zealand Historic Places Trust, and mana whenua (see condition 15) are consulted, and the communication with the general public on the management of the adverse effects relating to Built Heritage.
42	1 4 5 6	**Historic Character - Archaeology** 42.1A Historic Character DWP shall be prepared to manage the adverse effects on built heritage and archaeology that may result during construction of the City Rail Link or any part of it. 42.2The objective of the Archaeology section of the Historic Character DWP is to avoid, remedy or mitigate adverse effects on archaeological remains during construction, as far as reasonably practicable. 42.3To achieve the above objective the following matters shall be included in the Archaeology section of the Historic Character DWP: (a) Constructor roles and responsibilities, stand-down periods and reporting requirements are to be clearly identified; (b) How procedures for archaeological investigations and monitoring of preliminary earthworks are to be implemented in areas where there is potential for archaeological remains to be discovered; (c) Procedures for the discovery of, including accidental discovery of archaeological remains including: (i) The ceasing of all physical construction works in the immediate vicinity of the discovery; (ii) Practices for dealing with the uncovering of cultural or archaeological remains and the parties to be notified (including, but not limited to, appropriate iwi authorities, the Auckland Council Consents Monitoring officer, the New Zealand Historic Places Trust, and the New Zealand Police (if koiwi (human

Condition Number	Designation Applies to	Condition
		skeletal remains) are discovered); (iii) Procedures to be undertaken before physical works in the area of discovery can start again, including any iwi protocols, recording of sites and material, recovery of any artefacts, and consultation to be undertaken with iwi, Auckland Council Consent Monitoring officer and Heritage Unit, and with the New Zealand Historic Places Trust; and (iv) Procedures for recording any archaeological remains or evidence before it is modified or destroyed, including opportunities for the conservation and preservation of artefacts and ecofacts (biological material) that are discovered. Consideration shall be given to the incorporation of in-situ material or artefacts into the design of stations and / or public places associated with the City Rail Link project. Consideration shall also be given to the provision for 'post-excavation' assessment analysis and publication of material within 24 months of completion of construction. (v) Provision for 'post-excavation' archiving, assessment and analysis of the archaeological records and materials; publication of results of that work within 24 months of completion of construction assessment analysis and publication of material within 24 months of completion of construction. (d) Training procedures for all contractors are to be undertaken in advance of construction, regarding the possible presence of cultural or archaeological sites or material, what these sites or material may look like, and the relevant provisions of the Historic Places Act 1993 if any sites or material are discovered; (e) Cross references to the specific sections in the Communication and Consultation Plan which details how the Auckland Council Heritage Department, the New Zealand Historic Places Trust, mana whenua (see condition 8) are consulted, and the communication with the general public on the management of the adverse effects relating to archaeology.
43	1	**Heritage Advisory Group and Composition** 43.1The Requiring Authority must engage, at its expense, a panel of suitably qualified and experienced heritage experts to discharge the functions required by conditions 44 and 45. The Heritage Advisory Group will consist of three independent experts, whose members will not be directors or employees of the Requiring Authority, the New Zealand Historic Places Trust or the consent authority. The Heritage Advisory Group will comprise one nominee from the Requiring Authority, one nominee from the consent authority, and a third nominee appointed jointly by the Requiring Authority's and consent authority's nominees. 43.2Before establishing the Heritage Advisory Group the Requiring Authority shall seek the opinion of NZHPT on the appointment of the Heritage Advisory Group. 43.3The Heritage Advisory Group may determine its own processes and procedures for conducting its meetings and performing its functions as it sees fit, including methods for ensuring any disagreements between panel members are resolved, and must meet as necessary to fulfil its functions. All costs associated with the role and function of the Heritage Advisory Group and appropriate administrative support must be paid by the Requiring Authority. If any member of the Heritage Advisory Group is unable to continue in the role for whatever reason, then a replacement member must be appointed using the process set out in this condition.
44	1	**Heritage Advisory Group Function** 44.1The functions of the Heritage Advisory Group are to review the assessment of the

Condition Number	Designation Applies to	Condition
		alternatives and option selected by the Requiring Authority to manage the adverse effects on the heritage values of the Bluestone wall and the Martha's Corner building. 44.2In relation to Bluestone Wall, the Heritage Advisory Group will: (a) Certify that the method selected by the Requiring Authority under Condition 45 will have the least impact on the heritage value of the Bluestone wall compared to other reasonably practicable methods; or (b) Prepare a report as to why the method selected by the Requiring Authority under Condition 45 will not have the least impact on the heritage value of the Bluestone wall and set out details as to an alternative recommended reasonably practicable method. 44.3In relation to Martha's Corner, the Heritage Advisory Group will: (a) Certify that the heritage outcomes for Martha's Corner adhere to the intent of Condition 41; or (b) Prepare a report as to why the method selected by the Requiring Authority will not adhere to the intent of Condition 41 and set out details as to the recommended reasonably practicable method. 44.4The Requiring Authority must provide Auckland Council with the Heritage Advisory Group's certification or report, and if applicable the reasons the Requiring Authority has not selected the method recommended by the Heritage Advisory Group.
45	1	**Bluestone Wall Management Plan** 45.1A Bluestone Wall Management Plan shall be prepared to manage the adverse effects on the heritage values of the Bluestone wall during the construction of the City Rail Link. 45.2The objective of this Plan is to minimise adverse effects on the heritage values of the Bluestone wall during the construction of the City Rail Link by adopting the best practicable option. 45.3To achieve the above objective, the following shall be included in the Bluestone Wall Management Plan: (a) Identification of the key heritage values of the wall; (b) Assessment of the alternative construction methods to ensure that construction of the City Rail Link has the least impact on the heritage value of the Bluestone wall, within the practical constraints of constructing the project; and (c) The option selected by the Requiring Authority. 45.4The Bluestone Management Plan shall be prepared in consultation with the NZHPT and the Heritage Advisory Group (set out in Condition 43).
Building Condition Surveys		
46	1 2 4 5 6	**Process for Building Condition Surveys** 46.1Prior to construction, as a minimum those buildings listed in Appendix One and Appendix Two or identified pursuant to Condition 41.2(b) will be considered for a building condition survey. A building condition survey will be undertaken where it is assessed that there is potential for damage to buildings or structures arising from construction as determined by an independent suitably qualified person appointed by the Requiring Authority based on the criteria below unless the relevant industry criteria applied at the time or heightened building sensitivity or other inherent building vulnerability requires it. Building damage criteria will initially be assessed in accordance with Burland, J.B. (1997) "Assessment of Risk of Damage to Buildings due

Condition Number	Designation Applies to	Condition
		to Tunnelling and Excavation". Additional factors which may be considered in determining whether a building condition survey will be undertaken include: (a) Age of the building; (b) Construction types; (c) Foundation types; (d) General building condition; (e) Proximity to any excavation; (f) Whether the building is earthquake prone; and (g) Whether any basements are present in the building. 46.2 Where prior to construction it is determined that a Building Condition Survey is required in accordance with Condition 46.1, or if measurements exceed the criteria in Condition 33: (a) The Requiring Authority shall employ a suitably qualified person to undertake the building condition surveys and that person shall be identified in the CEMP; (b) The Requiring Authority shall provide the building condition survey report to the relevant property owner within 15 working days of the survey being undertaken, and additionally it shall notify and provide the Auckland Council Consent Monitoring officer a copy of the completed survey report; (c) The Requiring Authority shall contact owners of those buildings and structures where a Building Condition Survey is to be undertaken to confirm the timing and methodology for undertaking a pre-construction condition assessment; (d) The Requiring Authority shall record all contact, correspondence and communication with owners and this shall be available on request for the Auckland Council Consent Monitoring Officer; (e) Should agreement from owners to enter property and undertake a condition assessment not be obtained within 3 months from first contact, then the Requiring Authority shall not be required under these designation conditions to undertake these assessments; (f) The Requiring Authority shall undertake a visual inspection during "active construction" if requested by the building owner where a pre-construction condition assessment has been undertaken. (g) The Requiring Authority shall develop a system of monitoring the condition of existing buildings which is commensurate with the type of the existing building and the proximity of the CRL works. The purpose of monitoring is to assess whether or not active construction is compromising the structural integrity of the building. (h) The Requiring Authority shall, during the Building Condition Survey, determine whether the building is classified as Commercial / Industrial / School or a Historic or sensitive structure in terms of Condition 33. 46.3 During construction: (a) The Requiring Authority shall implement procedures that will appropriately respond to the information received from the monitoring system. Where necessary this may include the temporary cessation of works in close proximity to the relevant building until such time as measures are implemented to avoid further damage or compromise of the structural integrity of the building. (b) Any damage to buildings or structures shall be recorded and repaired by the Requiring Authority and costs associated with the repair will met by the Requiring Authority.

Condition Number	Designation Applies to	Condition
		46.4 Following construction: (a) The Requiring Authority shall, within 12 months of the commencement of operation of the City Rail Link, contact owners of those buildings and structures where a Building Condition Survey was undertaken to confirm the need for undertaking a post-construction condition assessment; (b) Where a post-construction building condition survey confirms that the building has deteriorated as the result of construction or operation works relating to the City Rail Link, the Requiring Authority shall, at its own cost, rectify the damage; and 46.5 Where the Requiring Authority is required to undertake building repairs in accordance with Conditions 46.3(b) or 46.4(b), such repairs shall be undertaken as soon as reasonably practicable and in consultation with the owner of the building.
Urban Design		
47	1 4 5 6	**Urban Design Principles** 47.1 The objective of the Urban Design DWP is to enable the integration of the CRL's permanent works into the surrounding landscape and urban design context. 47.2An Urban Design DWP shall be developed to ensure that the areas within the designation footprint used during the construction of the City Rail Link are to be restored and the permanent works associated with the CRL are developed in accordance with urban design principles. The following Principles from the Urban Design Framework submitted as part of the Notice of Requirement documents will be used to inform the Urban Design and Landscape Plan: (a) Mana Whenua Principles – see Condition 49; (b) Movement and Connections – (i) Existing Networks - Structures of the CRL should not interrupt or adversely change the function of existing public open space, street networks and infrastructure. (ii) Entrance Location - Station entrances should be clearly identifiable and conveniently located in relation to existing and anticipated main pedestrian routes and destinations. (iii) Intuitive Orientation - The location and nature of structures resulting from the CRL (station entrances in particular) should facilitate intuitive orientation and support a legible street network. (iv) Way Finding - Coherent signage should be utilised to aid intuitive orientation and way finding. (v) Mode Integration - Spatial integration with bus stops as well as kiss and ride should be facilitated where possible without imposing on the quality of public realm. (vi) Bicycle Parking – Appropriate numbers of safe bicycle storage or parking should be provided in each station environment. (vii) Street Crossings - Safe pedestrian street crossings shall be provided in the immediate vicinity of station entrances to the extent practicable. The provision of level street crossings is preferable over any grade separated solutions. (viii) Footpaths – Footpaths surrounding stations need to be adequate to provide for pedestrians entering and exiting the stations. (ix) Grade separated rail crossings – Structures associated with grade separated

Condition Number	Designation Applies to	Condition

rail crossings need to be carefully and sensitively designed and in accordance with crime prevention through environmental design principles to ensure appropriate amenity and safety are retained or achieved. Measures to achieve this may include:

a. Utilising permeable balustrades on overbridges;

b. Maximising the width of the footpath at grade in street reserves;

c. Orientating any steps parallel to overbridges;

d. Providing appropriate levels of lighting (in accordance with the Auckland Transport Street Lighting Policy (Appendix 1) for "Pathways in high risk, high brightness areas"); and

e. Treatment of the sides of ramps and footpaths to enhance visual amenity.

(x) Grade separated rail crossings – Permeable balustrades on overbridges should be required not only for crime prevention purposes but to enable views into the neighbouring sites. For clarity all balustrades comprised within Normanby Road grade separation works (as defined in condition 30.1(l) shall be permeable.

(xi) The Porters Avenue Bridge(lift and bridge structure above finished ground level) shall be located no closer than **3.5m** from the property boundary of 5 Porters Avenue (ALLOT 236 SEC 10 Suburbs AUCKLAND). Foundation support (i.e. below finished ground level) for the bridge may extend closer but shall not cross the property boundary.

(xii) The design of the Porters Avenue and Fenton Street pedestrian/cycle bridges shall:

a. Minimise loss of privacy on adjacent residential sites, including by locating the pedestrian/cycle bridge in the western half of the Avenue;

b. Ensure the lifts are through lifts to carry bicycles; and

c. Incorporate bicycle push ramps into the side of the pedestrian stairways.

(xiii) The extensions to Ruru Street and Nikau Street shall generally be undertaken in accordance with the indicative road layout shown on drawing CRL-SYW-RME-000-DRG-0110 Revision 1 dated 26/7/16.

(c) Public Realm and Landscape –

(i) Existing Streetscape – Structures of the CRL should be designed to respect and contribute positively to the form and function of existing public open space.

(i) Universal Access – Station environments should promote universal access (e.g. footpath ramps and smooth ground surfaces).

(ii) Safe Environments – Structures resulting from the CRL should promote safe environments. The station entrances should release patrons into safe public spaces that are well lit at night, overlooked by other users (e.g. residents or workers) and have sufficiently wide and unobstructed footpaths.

(iii) Reinstated Surfaces - The design and construction of reinstated streetscapes should be coherent with the wider area and/or recent public realm upgrades in the area.

(iv) Station Plazas - The design and construction of station plazas should be

Condition Number	Designation Applies to	Condition
		coherent with the wider area and/or recent public realm upgrades in the area. (v) Public Art - Integration of art and design should foster local identity and character and reflect and/or interpret local characteristics including natural heritage and Mana Whenua cultural narratives, history, art and particular traits of the local community. (vi) Landscape Planting – Plant species used in station environments and/or as part of landscape plantings should consider the opportunity to acknowledge the area's pre-human ecology as and where appropriate. This may include species which connect strongly with Mana Whenua cultural narratives. (vii) Entrances within the Road Reserve - Designs for station entrances within the road reserve should be designed to consider the impacts upon other modes of traffic, including the expected pedestrian patronage. (viii) Utility Structures - Above ground utility structures (e.g. vents, access services) should be designed to minimise any negative effect on public realm. Where possible these structures should be integrated with other buildings. (ix) Where landscape planting is affected by construction works on private properties, replanting and/or mitigation of any such landscaping shall be undertaken in consultation with those landowners, and in recognition of wider mitigation works required for those properties (e.g. vehicle parking and access requirements). 47.3 The Urban Design DWP shall show how these principles have been used to guide and influence the design of permanent works associated with the CRL, and how the design has responded or otherwise to these principles and initiatives. 47.4 The work to restore those areas within the designation footprint used during construction of the City Rail Link will occur as part of construction or within six months of the City Rail Link being operational. **Auckland Council Urban Design Panel** 47.5 The Requiring Authority shall request the Auckland Council to refer the Urban Design DWP to the Auckland Urban Design Panel (or other equivalent entity (if any) at that time) and invite the Auckland Urban Design Panel to comment on: (a) The degree to which the Urban Design DWP has appropriately responded to the principles listed in 47.2 and 49.1; (b) The degree to which station plans have appropriately responded to the principles listed in Condition 54.1. 47.6 As part of the Urban Design DWP submitted, the Requiring Authority shall: (a) Provide a record of feedback received from the Auckland Urban Design Panel (or equivalent entity at that time); (b) Provide detail of how the Urban Design DWP has responded to any feedback received from the Auckland Urban Design Panel (or equivalent entity at that time) and, where they have not, the reasons why; (c) Provide detail regarding the degree to which the community stakeholder, affected party and affected in proximity party feedback has been considered and where applicable incorporated into design. Where feedback has not been incorporated, the Requiring Authority shall provide comment as to reasons why the feedback has not been incorporated; (d) The information set out in (a), (b) and (c) above must be included in the Urban

Condition Number	Designation Applies to	Condition
		Design DWP submitted to both the independent peer reviewer and Auckland Council as part of the Outline Plan.
48	1 4 5 6	**Mitigation Planting Requirements** 48.1The Urban Design DWP shall include any replacement planting proposed to mitigate the adverse effects of tree and vegetation removal from within the designation footprint. It is acknowledged that the mitigation of effects of tree and vegetation removal will be considered in response to the urban design principles of Condition 47. 48.2Any landscaping included under the Urban Design DWP shall be implemented in accordance with this plan within the first planting season following the City Rail Link being operational. If the weather in that planting season is unsuitable for planting, as determined by the Auckland Council Consent Monitoring officer (in consultation with the Auckland Council Parks Department), the landscaping shall instead be implemented at the first practicable opportunity thereafter. The next practicable opportunity shall be agreed by the Auckland Council Consent Monitoring officer. 48.3The landscaping will be maintained by the Requiring Authority for a period of 5 years for specimen trees and 3 years for all other landscape planting.
49	1 4 5 6	**Engagement with Mana Whenua and the Mana Whenua Principles** 49.1The Urban Design DWP shall include: (a) How mana whenua (see Condition 8) have been engaged with during its development in relation to the implementation and interpretation of the Principles set out under Condition 47, and particularly in relation to the mana whenua principles set out below: (i) Mana / Rangatiratanga – As the original local authorities of Tamaki Makaurau, Iwi require high level Treaty based relationships with all key stakeholders including the Requiring Authority and Auckland Council which recognise their Tangata Whenua status in order to fulfil their roles as kaitiaki. Such partnership relationships can then inform engagement with AT / Council at all levels including direct involvement with design consortia. Relationships are required at governance and senior management levels. Such relationships are a precursor to actualising the other 6 principles. (ii) Whakapapa – Names and genealogical connections– reviving names revives mana through Iwi connections to specific ancestors and events / narratives associated with them. An Iwi inventory of names associated with a given site can be developed so that the most appropriate names are identified to develop design, interpretation and artistic responses. (iii) Tohu – Acknowledging the wider significant Iwi cultural land marks associated with the CRL route and their ability to inform the design of the station precincts, entrances and exits. In particular exploring opportunities to maximise view shafts to such tohu / landmarks as a way of both enhancing cultural landscape connections and as way finding / location devices. (iv) Taiao – Exploring opportunities to bring natural landscape elements back into urban /modified areas e.g. specific native trees, water / puna wai (springs) – promoting bird, insect and aquatic life to create meaningful urban eco systems which connect with former habitats, mahinga kai (food gathering areas) and living sites. (v) Mauri tu – Ensuring emphasis on maintaining or enhancing environmental health / life essence of the wider site – in particular focusing on the quality of wai / water (puna / springs), whenua / soil and air. In particular any puna or underground waterways encountered should be carefully treated with Mana

Condition Number	Designation Applies to	Condition
		Whenua assistance to ensure their mauri is respected and enhanced where possible. It is also important to minimise the disturbance to Papatuanuku through carefully planned ground works. (vi) Mahi toi – Harnessing the Creative dimension through drawing on names and local tohu to develop strategies to creatively re-inscribe iwi narratives into architecture, interior design, landscape, urban design and public art. (vii) Ahi kaa – need to explore opportunities to facilitate living presences for iwi / hapu to resume ahi-kaa and kaitiaki roles in and around the CRL route and new station precincts; and (b) A summary of the engagement with mana whenua (see Condition 15) and identification of where design has incorporated the mana whenua principles and other mana whenua aspirations. The summary must include a clear explanation of where any comments have not been incorporated and the reasons why not. The summary must be included in the Urban Design DWP submitted to both the Independent Peer Review Panel and Auckland Council as part of the Outline Plan.
50	1	**Specific Area Requirements: Britomart to Aotea Station** 50.1For this designation the Urban Design DWP shall include how the following are to be restored following completion of the City Rail Link construction works: (a) Queen Elizabeth Square and lower Queen Street between Quay Street and Customs Street; (b) Albert Street between Quay Street and Victoria Street; and (c) Albert Street between Victoria Street and Mayoral Drive including those part of Victoria and Wellesley Streets, the Council owned land on the southeast corner of Albert and Wellesley Streets which is to be used as a construction area, affected by surface construction works; and (d) Kingston Street. 50.2The restoration plan for this designation shall demonstrate how street upgrades and public realm improvements have been considered when Albert Street and Mayoral Drive are reinstated. This should include as a minimum how the design and construction utilises material palettes, planting schedules and street furniture that are coherent with the surrounding streetscape character.
51	4	**Specific Area Requirements: Karangahape Station area** 51.1For this designation the Urban Design DWP shall include restoration plans (showing how the following are to be restored following completion of the City Rail Link construction works): (a) Beresford Square and Street including where surface works have occurred within Pitt Street; and (b) Mercury Lane. 51.2The restoration plan for this designation shall demonstrate how street upgrades and public realm improvements have been considered when Beresford Street, Pitt Street and Mercury Lane are reinstated. This should include as a minimum: (a) How the design and construction utilises material palettes, planting schedules and street furniture that are coherent with the surrounding streetscape character. (b) Methods for street upgrades and public realm improvements.
52	5	**Specific Area Requirements: Newton Station area** 52.1For this designation the Urban Design DWP shall include restoration plans (showing how the following are to be restored following completion of the City Rail Link

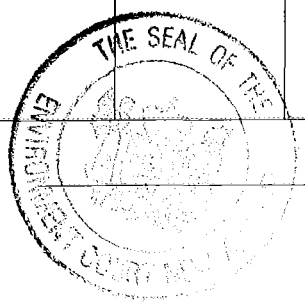
Condition Number	Designation Applies to	Condition
		construction works) for those areas used for surface construction works within the designation footprint, including the construction yard located on the northeast corner of Mt Eden Road and Symonds Street.
53	6	**Specific Area Requirements: North Auckland Line area** 53.1For this designation the Urban Design DWP shall include the following: (a) Restoration Plans showing how the worksite area will be maintained during the construction period. (b) Restoration Plans showing how the following are to be restored after construction completion: (i) The replacement of Mt Eden Road Bridge; (ii) The area used for the grade separation of Porters Avenue; (iii) The area used for the grade separation of Normanby Road; and (iv) The replacement of the pedestrian connection, to be provided over the railway, between Ngahura Street and Fenton Street, including a connection to the Mount Eden Station. (c) How the bulk, scale and massing of structures resulting from the City Rail Link at Mt Eden Station are integrated with the components of the Mt Eden Station located in the adjacent North Auckland Line designation.
54	1 4 5	**Station Plan Requirements** 54.1The Urban Design DWP shall include a Station Plan/s (report and design plan/s as required) and include the following: (a) The design details showing both the above ground and below ground elements of the station/s; (b) How the above ground and below ground design of the stations has taken into account the following principles: (i) Overarching - stations should achieve a successful and memorable transport experience. (ii) Function - stations will provide safe, functional and clear transport solutions. (iii) Performance - stations will provide a credible, sustainable design outcome that responds to climate, site and social economics. (iv) Personality - stations will provide an expression that contributes to their context and local identity and will respond to an appropriate network wide identity. (v) Existing and New Building Structures. (vi) Built Heritage: • Where built heritage is required for City Rail Link station requirements, adaptive reuse strategies should be considered to preserve the building's role in establishing the streetscape and urban character. • The development of new buildings and structures should minimise impact on, and disturbance of, Built heritage listed by the New Zealand Historic Places Trust or the Auckland Council District Plan that play a significant role in establishing the streetscape and urban character of the local area. (vii) Bulk, Scale and Massing: • Bulk, scale and massing of structures resulting from the City Rail Link (station buildings in particular) should be sympathetic with the

Condition Number	Designation Applies to	Condition
		surrounding built urban form. • Aotea Station building frontages should correspond with the road reserve boundary unless a specific station plaza area is intended. • Karangahape Road station building(s) should be sensitively designed so as to contribute positively and to complement the good public realm and urban form qualities that currently exist in this area of Karangahape Road, Pitt Street and the upper end of Beresford Street. • The redevelopment of land acquired for the Mt Eden Station provides the opportunity for a continuous active building frontage to correspond with the road reserve boundary, providing: ▪ This does not conflict with the operation requirements of the station; or ▪ Unless a specific station plaza area is intended. (viii) Active Frontage – Structures resulting from the City Rail Link should present an active frontage towards public spaces like streets, squares, pedestrian walkways or station plaza areas provided that this doesn't conflict with the operation requirements of the station: Where no active frontage is proposed, an explanation of the reasons shall be outlined in the Urban Design DWP. (ix) Weather Protection – Where practicable, station entrances should provide some weather protection along their frontage (e.g. verandahs, awnings, canopies etc.) and these should be considered as part of the design. (x) Adaptability – The design of structures resulting from the City Rail Link should be able to adapt to change over time (e.g. change of uses, innovations in technology etc.) where reasonably practicable and anticipate opportunities (e.g. additional entrances) that may become possible in the future. The station design should not inhibit wider development opportunities (e.g. above or around station entrances). (xi) Identity – The design of the station entrances should provide an expression that reflects their respective context and local cultural identity. They could reflect, respond and/or interpret local characteristics like natural or Mana Whenua heritage, history, art, particular traits of the local community and unique architectural and urban forms of the area. (xii) Construction Quality – The design and construction of structures resulting from the City Rail Link (station buildings in particular) should be of a quality that lasts over time. Materials should be selected that are highly durable, elegant and vandal resistant where they come into contact with patrons. (xiii) Mana Whenua Principles – see Condition 49. (c) How these principles have been used to guide and influence the design, and how the design has responded, or otherwise, to these principles and initiatives; and (d) A summary of the engagement with mana whenua (see Condition 15) and identification of where design has incorporated the mana whenua principles and other mana whenua aspirations into station design. The summary must include a clear explanation of where any comments have not been incorporated and the reasons why not. The summary must be included in the Urban Design DWP submitted to both the Independent Peer Review Panel and Auckland Council as part of the Outline Plan.
	Trees and Vegetation	

Condition Number	Designation Applies to	Condition
55	1 4 5 6	**Trees and Vegetation DWP** 55.1A Trees and Vegetation DWP shall be prepared to manage the adverse effects from the removal of trees and vegetation during the construction of the City Rail Link or any part of it. 55.2The objective of the Trees and Vegetation DWP is to avoid the removal of scheduled trees as far as practicable. Where trees are identified for removal in surface works the Requiring Authority will remedy or mitigate the adverse effects of construction on trees and vegetation. 55.3To achieve the above objective the following shall be included in the Trees and Vegetation DWP and implemented as required: (a) Confirmation of the trees to be removed due to surface construction works and whether it is appropriate and feasible to relocate or store these trees for replanting. The removal of schedule trees which form a significant group should only be undertaken as a last resort; (b) A list of trees, which due to being located in proximity to construction works, have root systems and / or foliage within and / or overhanging the surface designation footprint, and the methods to be used, where practicable, to protect these trees from construction works; (c) Cross references to the Urban Design DWP and the proposed mitigation of any tree / vegetation removal through replanting trees at a 1:1 ratio, re-instatement of the area, and other methods. In preparing the Trees and Vegetation DWP, the Requiring Authority shall seek input from the Auckland Council Parks Department with regard to tree species / vegetation selection, tree pit construction where deemed necessary, and the positioning of replacement trees and from directly affected land owners with regards to preferences for any replacement planting for vegetation / trees removed from private property or for any replacement planting on private property; (d) Other methods to be used to monitor and report on the management of the adverse effects from tree / vegetation removal; and (e) Cross references to the specific sections in the Communication and Consultation Plan which detail how the Auckland Council Parks Department, mana whenua (see condition 8) are consulted, and communication with the general public on the management of the adverse effects relating to the removal of trees and vegetation.
Public Art		
56	1	**Public Art DWP** 56.1A Public Art DWP shall be prepared to manage the adverse effects on public art located within or in close proximity to the designation footprint. 56.2The objective of the Public Art DWP is to enable: (a) The appropriate removal and / or relocation of one piece of public art directly affected by the construction of the City Rail Link; (b) The protection of two pieces of public art that are located on public land in close proximity to the City Rail Link construction works. 56.3To achieve the above objective the following shall be included in the Public Art DWP and implemented as required: (a) The process that will be undertaken to remove the public art work known as "Enduring Fires" (at the time of the Notice of Requirement process located within Queen Elizabeth Square), including the consultation undertaken with the

Condition Number	Designation Applies to	Condition
		Auckland Council and Ngati Whatua ki Tamaki or Ngati Whatua o Orakei as to its removal, storage, re-establishment or relocation and / or replacement (as part of the restoration works associated with the City Rail Link construction); (b) The process that will be undertaken to protect or remove the public art work known as "Maori Warrior" (at the time of the Notice of Requirement process located on the pavement of Quay Street adjacent to 1 Queen Street), including the consultation undertaken with the Auckland Council as to its protection during construction or whether it should be removed, stored, relocated and / or replaced (as part of the restoration works associated with the City Rail Link construction); (c) The process to protect the public art known as "Matahorua Anchor and Tainui Anchor" (at the time of the Notice of Requirement process located at the northern end of the Bledisloe Building on Wellesley Street) from construction works to the west, including the consultation undertaken with the Auckland Council as to its protection. 56.4 If one does not already exist, an asset management plan shall be prepared by the Requiring Authority in collaboration with Auckland Council for any of the above listed public art works as part of any protection or removal process. 56.5 Should the above public art works be removed from these sites prior and separate to the City Rail Link project, this condition will not need to be complied with.
Contaminated Land		
57	1 4 5 6	**Contamination DWP** 57.1 A Contamination DWP shall be prepared to manage the adverse effects relating to contaminated land during the construction of the City Rail Link or any part of it. 57.2 The objective of the Contamination DWP is to avoid, remedy or mitigate the adverse effects of construction on human health which may result from the disturbance of contaminated materials during construction. 57.3 To achieve the above objective the following shall be included in the Contamination DWP and implemented as required: (a) A health and safety plan that addresses: (i) Worker safety in relation to hazardous substances; and (ii) Worker training with regard to handling hazardous substances, identifying potentially contaminated soil / material, and notification procedures for discovery of contamination; (b) Procedures for how erosion and sediment control, storm water, dust, and odour control measures will manage the removal of contaminated soil / material; (c) Procedures for contaminated soil classification, management and disposal of contaminated soil / material; (d) Where any trenches/excavations during civil works are to be sealed as a result of contamination and how this is to be recorded; (e) How and which work areas are to be restricted to authorised personnel only and procedures to limit the presence of ignition sources in these areas (e.g. no smoking within or adjacent to construction area, no welding or open flames near areas with high concentrations of hydrocarbon contamination); (f) Procedures for the monitoring and management of the removal of contaminated soil / material by a suitably qualified environmental specialist; (g) How the placement of re-used contaminated soil / material will be recorded and tracked;

Condition Number	Designation Applies to	Condition
		(h) Where areas for stockpiling and storing contaminated soil / material will be established on the construction site and the procedures for managing the containment of the contaminated soil / material in these areas; (i) Cross references to the specific sections in the Communication and Consultation Plan which detail how the general public are to be communicated with on the management of the adverse effects relating to the removal of contaminated soil / material.
58	1 4 5 6	**Contamination Validation Report at Completion of Construction** 58.1 At the completion of construction works a validation report will be prepared in accordance with any Ministry for the Environment guidelines and submitted to the Auckland Council Consent Monitoring officer documenting the management of soil and evidence of appropriate disposal. The validation report shall include a record of all analytical results, volumes, tip dockets, and any incidents or complaints and how these were addressed. The validation report shall also identify any areas which need on-going monitoring and management by the Requiring Authority.
Air Quality		
59	1 4 5 6	**Air Quality DWP** 59.1 An Air Quality DWP shall be prepared to avoid, remedy or mitigate the adverse effects on air quality during the construction of the City Rail Link or any part of it. 59.2 The objective of the Air Quality DWP is to detail the best practicable option to avoid dust and odour nuisance being caused by construction works and to remedy any such effects should they occur. 59.3 To achieve the above objective the following shall be included in the Air Quality DWP and implemented as required: (a) The procedures to be implemented for the continuous monitoring of Total Suspended Particulate (TSP) concentrations and meteorology including, but not limited to, the establishment of two monitoring sites (to the north and south of the site); (b) Identification of the sensitive locations, and the specific methods for monitoring, including trigger limits to determine whether further action (such as implementation of the mitigation measures discussed below or other mitigation measures) is required; (c) Procedures for responding to malfunctions with construction machinery or works causing accidental dust discharges including, but not limited to, the requirement to remedy any malfunction within 24 hours; (d) Procedures for monitoring weather conditions and the requirement that water spray is used on soil stockpiles, any non-paved construction areas, and the wheels of trucks where dust may disperse beyond the site; (e) Procedures for establishing when the covering of trucks will be required; (f) Procedures for determining when hard surfaced areas in construction yards and active construction areas should be cleaned including, but not limited to, the requirement that such areas be cleaned whenever dust generation occurs due to traffic on these surfaces; (g) Procedures for responding to discharges of odour (including in the event of excavation of contaminated sites) including, but not limited to, the requirement to address discharge of objectionable odour by immediately ceasing the activity causing the discharge; (h) Procedures for equipment inspection (including timeframes for regular



Condition Number	Designation Applies to	Condition
		inspections), maintenance, monitoring and recording, including baghouses, pressure relief valves and high level alarms to mitigate dust emissions; (i) Procedures for, where practicable, limiting dust and odour nuisance and the methods for monitoring these procedures including Identification of contingency measures to address identified and verified adverse effects on sensitive receptors. Contingency measures may include options such as: (i) Cleaning of air filtration intakes; or (ii) Cleaning of other buildings and infrastructure; and (j) Procedures for responding to any complaints received and the timeframes for response to complaints and reporting; (k) Cross references to the specific sections in the Communication and Consultation Plan which detail how the communities in the vicinity of construction works are to be communicated with on the management of the adverse effects relating to air quality.
Social Impact and Business Disruptions		
60	1 4 5 6	**Property Management Strategy** 60.1The Requiring Authority will prepare a Property Management Strategy and shall submit the Strategy to Auckland Council within 3 months of the Designation being confirmed for confirmation that the Strategy has been prepared in accordance with this condition. 60.2The purpose of the Strategy is to set out how the Requiring Authority will ensure the properties acquired for the City Rail Link are appropriately managed so they do not deteriorate and adversely affect adjoining properties and the surrounding area. The Strategy shall identify measures and methods to ensure the properties are managed in a manner that: (a) Does not significantly change the character, intensity and scale of the effects of the existing use of the land; (b) Maintains the condition of the property at that which existed at the time of purchase by the Requiring Authority; (c) Contributes to the functioning of the area within which the property is located; (d) Maintains occupancy as far as reasonably practicable; and (e) Provides confidence to occupants, adjoining property owners, and the community that the properties are managed responsibly pending construction.
61	1 4 5 6	**Social Impact and Business Disruption DWP** 61.1The Requiring Authority shall prepare a Social Impact and Business Disruption DWP. The objective of the Social Impact and Business Disruption DWP is to avoid, remedy or mitigate the adverse effects arising from disruption to businesses, residents and community services/facilities so far as reasonably practicable. 61.2To achieve this objective the Requiring Authority shall engage a suitably qualified specialist(s) to prepare a Social Impact and Business Disruption DWP to address the following specific issues: (a) How disruption to access (including pedestrian, cycle, passenger transport and service/private vehicles) for residents, community services and businesses as a result of construction activities will, so far as is reasonably practicable, be avoided, remedied or mitigated; (b) How the disruption effects that result or are likely to result in the loss of

Condition Number	Designation Applies to	Condition
		customers to businesses as a result of construction activities will, so far as is reasonably practicable, be avoided, remedied or mitigated; (c) How the loss and/or relocation of community facilities and the loss or change to catchments associated with these facilities as a result of the property acquisition process particularly to the Chinese Community Centre and Life Centre Church and the temporary loss of car parking at Hopetoun Alpha will be mitigated; and (d) How loss of amenity for residents, community services and businesses as a result of construction activities will be or has been mitigated through the CEMP and other DWPs. 61.3 The Social Impact and Business Disruption DWP shall be prepared in consultation with the community, community facility operators, business owners, affected parties and affected in proximity parties to: (a) Understand client and visitor behaviour and requirements and operational requirements of community facilities and businesses; (b) Identify the scale of disruption and adverse effects likely to result to businesses, residents and community services/facilities as a result of construction of the City Rail Link; (c) Assess access and servicing requirements and in particular any special needs of residents, community facilities and businesses; and (d) To develop methods to address matters outlined in (b) and (c) above, including: (i) The measures to maximise opportunities for pedestrian and service access to businesses, residents and social services/facilities that will be maintained during construction, within the practical requirements of the Transport, Access and Parking conditions (Conditions 25 to 30) and the Transport, Access and Parking DWP; (ii) The measures to mitigate potential severance and loss of business visibility issues by way-finding and supporting signage for pedestrian detours required during construction; (iii) The measures to promote a safe environment, taking a crime prevention through environmental design approach; (iv) Other measures to assist businesses and social services/facilities to maintain client/customer accessibility, including but not limited to client/customer information on temporary parking or parking options for access; (v) Other measures to assist residents, businesses and social services/facilities to provide for service delivery requirements; (vi) The process (if any) for re-establishment and promotion of normal business operation following construction; (vii) If appropriate and reasonable, requirements for temporary relocation during construction and/or assistance for relocation (including information to communities using these services and facilities to advise of relocations); and (viii) The measures to remedy and mitigate the disruption impacts to the community as a result of any closure and/or relocation of community services and facilities required by the Project. 61.4 The Social Impact and Business Disruption DWP shall include: (a) A summary of the findings and recommendations of the Social Impact Assessment report (2013); (b) A record of the consultation undertaken with the community including specific access and operational requirements of individual businesses and residents

Condition Number	Designation Applies to	Condition
		including, if relevant, consultation on the necessity for, and the feasibility of, options and requirements for temporary relocation during construction and/or assistance for relocation); (c) An implementation plan of the methods to mitigate the disruption effects (as developed in 61.3 above); (d) Reference to any site/business specific mitigation plans that exist (though these may not be included in the DWP); (e) Cross reference to detail on how the CEMP and DWPs have responded to the issues of resident, business and social service/facility accessibility and amenity; (f) Details of on-going consultation with the local community through the Community Liaison Groups to provide updates and information relating to the timing for project works and acquisition; (g) Details of best endeavours steps undertaken with regard to acquisition and/or relocation of the Chinese Community Centre and Life Centre Church under the Public Works Act 1981; and (h) The process for resolution of any disputes or complaints in relation to the management / mitigation of social impacts (including business disruption impacts). 61.5 In relation to the site at 32 Normanby Road, the Requiring Authority shall consult with sub-lessees in the presence of the landowner and head lessee when developing site/business specific mitigation plans, unless the sub-lessee(s) request otherwise. 61.6 The Social Impact and Business Disruption DWP shall be implemented and complied with for the duration of the construction of the City Rail Link and for up to 12 months following the completion of the Project if required. 61.7 Suitably qualified independent specialists for the social impact and business disruption mitigation (whose appointment shall be agreed by the Council) shall peer review the Social Impact and Business Disruption DWP pursuant to Condition 11. 61.8 The Requiring Authority shall prepare an annual report on the identification, monitoring, evaluation and management of the effects outlined in the Social Impact and Business Disruption DWP together with a summary of matters raised by the community, and how these have been responded to. The report shall be presented to the Community Liaison Groups.
Specific Design Requirements		
62	2	62.1 The operational tunnel will avoid running under the building footprint of the property at 152 Vincent Street.
OPERATIONAL CONDITIONS		
63	1 2 4 5	**Operational Rail Vibration** 63.1 The Requiring Authority shall confirm that operational rail vibration and reradiated noise levels comply with the following Project Criteria at any noise or vibration sensitive receiver existing at the time of lodgement of the CRL NoR: Building Type | **Vibration Criteria PPV (mm/s)** | Reradiated Noise Criteria (dB L_{ASmax} re: 20 μPa) Commercial uses with primarily daytime use[1] | 0.2 | 40

Condition Number	Designation Applies to	Condition		
		Residences and buildings where people normally sleep	0.15	35
		Auditoria/Theatres[1]	0.1	30
		TV/Recording Studios	0.06	25

Note:

1. Such as offices, businesses, churches, schools, universities and libraries.
2. This includes Albert Street District Court.

63.2 For any noise or vibration sensitive building types that are not provided for in the table above, the upper limit for vibration and reradiated noise shall not exceed 0.3 mm/s PPV and 50 dB L_{ASmax} respectively.

63.3 For the avoidance of doubt this does not apply to the North Auckland Line and Britomart Designations.

63.4 When assessing operational rail vibration and reradiated noise, compliance with Conditions 63.1 and 63.2 shall be achieved for at least 95% of any 20 consecutive train pass-by 'events'.

Condition Number	Designation Applies to
64	1 2 4 5 6

Operational Noise – Mechanical Ventilation Plant

64.1 Operational noise from mechanical ventilation plant servicing the underground rail sections of the City Rail Link shall be measured and assessed in accordance with the following Project Criteria:

Location	Period	dB L_{Aeq}	dB L_{AFmax}
Auckland Central Area	7.00am to 11:00pm	65	
	11:00pm to 7:00am	60	75
Auckland Isthmus Area	7.00am to 10:00pm	60	
	10:00pm to 7:00am	55	75

64.2 Measurements shall be undertaken in accordance with New Zealand Standard NZS 6801:2008 "Acoustics – Measurement of environmental sound" and assessed in accordance with New Zealand Standard NZS 6802:2008 "Acoustics - Environmental Noise".

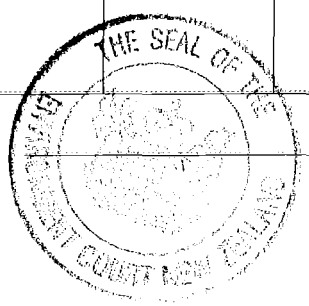
64.3 For the avoidance of doubt this does not apply to the North Auckland Line and Britomart Designations.

Condition Number	Designation Applies to
65	1 2 4 5 6

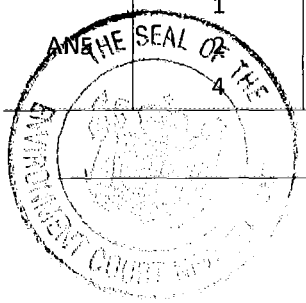
Operational Noise and Vibration Management Plan (ONVMP)

65.1 To manage the adverse effects from the maintenance and operation of the City Rail Link, the Requiring Authority shall, prior to the operation of the CRL, prepare an Operational Noise and Vibration Management Plan, (ONVMP) to the satisfaction of Auckland Council's Compliance Monitoring Manager. The objective of the ONVMP shall be to ensure that the tracks, rolling stock and associated infrastructure (including ventilation and other mechanical plant) are maintained and operated in accordance with maintenance standards as outlined in the Requiring Authority's maintenance programme for the City Rail Link, so that operational noise and vibration levels received at noise sensitive receiver locations, and vibration levels comply with Conditions 63 and 64.

Condition Number	Designation Applies to	Condition
		65.2The ONVMP shall set out procedures for: (a) The maintenance of rolling stock to minimise noise and vibration emissions including, but not limited to, the management of wheel roughness and flats, braking systems, cooling systems, suspension systems and any other significant source associated with the operation of locomotives; (b) The maintenance of tracks to minimise noise and vibration emissions, including, but not limited to, the management of curve squeal, rail roughness, joint constructions and any other significant source associated with the use of the tracks; (c) The implementation of mitigation measures associated with the operation and maintenance of the City Rail Link, for the operational life of the City Rail Link; (d) The management of noise from the operation of the line, including, but not limited to, the use of audible warning devices and acceleration / deceleration controls (where relevant); and (e) The management of noise and maintenance of noise-generating equipment from stations and associated ventilation and mechanical plant infrastructure including, but not limited to, PA systems, fans and ventilation noise and audible warning devices. 65.3The ONVMP shall be adhered to at all times. It may be updated or amended at any time with the approval of Auckland Council's Compliance Monitoring Manager. 65.4For the avoidance of doubt this does not apply to the North Auckland Line and Britomart Designations.
66	6	**Operational Noise and Vibration Management – MediaWorks** 66.1At least six months prior to the opening of the CRL, the Requiring Authority shall provide a report from a suitably qualified noise and vibration expert to Auckland Council's Compliance Monitoring Manager and to MediaWorks. The report shall confirm the trackform mitigation applied to the project has been designed to ensure that operational noise will not exceed the levels as set out in Condition 63. 66.2The Requiring Authority shall implement continuous vibration monitoring on the tunnel structure on the East Link Down Main line within 20m of the closest point of the CRL tunnel to Studio 1 to determine compliance with Condition 63 during the operation of the CRL (but only for so long as MediaWorks remains located at the MediaWorks site). The monitoring regime shall: (a) Be based on PPV measurements ; (b) Ensure that measurement equipment and signal chain complies with the manufacturers guidelines for accuracy and calibration; (c) Capture every train pass-by on the line which may be triggered by vibration level radio frequency tag, interrupted beam or any other practicable triggering method; (d) Ensure the retention of the PPV data for every train pass-by on the line; (e) Ensure the transmission of PPV data for every train pass-by to the Requiring Authority at an interval not exceeding 48 hours between data uploads to enable records to be viewed and interrogated as required without requiring access to the monitoring location; (f) Ensure that the Requiring Authority, Auckland Council's Compliance Monitoring Manager and MediaWorks are alerted to PPV values exceeding a value at the tunnel monitoring location that corresponds to 90% of the limits specified in Condition 63.1 for TV/Recording Studios to enable the Requiring Authority to instigate preventative maintenance of tracks and rolling stock with the aim of avoiding exceedences of the noise and vibration limits at the MediaWorks



Condition Number	Designation Applies to	Condition
		building. The ONVMP required by Condition 65 shall set out the method for determining the transfer function between the tunnel monitoring location and the floor of Studio 1, and what the vibration trigger level is (based on measurements on the tunnel structure) for investigation and corrective action measures relative to Condition 66.2(f) above. The transfer function shall be accurately determined prior to the railway becoming operational using the tunnel monitoring location and the floor of Studio 1. 66.3 Condition 63 shall be complied with at the MediaWorks building for the life of the CRL. 66.4 Noise shall be measured in accordance with the requirements of NZS6801:2008 Acoustics - Measurement of Environmental Sound. Vibration shall be measured in accordance with the requirements of German Standard DIN 4150-3:1999 Structural vibration - Effects of vibration on structures. 66.5 In the event of any exceedance of any noise or vibration limit in Condition 63 during Sensitive Times (as defined in Condition 35.1) measures to reduce the noise or vibration below the relevant limit in Condition 63 shall be implemented as soon as reasonably practicable.
ADVICE NOTES		
AN1	1 4 5 6	The Requiring Authority will require an Authority under the Historic Places Act 1993 to destroy, damage or modify any archaeological site. This Authority is required in advance of earthworks commencing in the area where the archaeological site is located. It is expected that there will be staged Section 12 Authority applied for to cover the earthworks programme. In the event of unanticipated archaeological sites or koiwi being uncovered the Requiring Authority shall cease activity in the vicinity until it has the relevant approvals, and consulted with the Historic Places Trust and relevant iwi interests.
AN2	1 2 4 5 6	The Requiring Authority will need to acquire the relevant property interests in land subject to the designation before it undertakes any works on that land pursuant to the designation. That may include a formal Public Works Act 1981 land acquisition process. It is acknowledged that property rights issues are separate from resource management effects issues and that the resolution of property issues may be subject to confidentiality agreements between the Requiring Authority and the relevant landowners.
AN3	1 2 4 5 6	Prior to construction if Network Utility Operators are carrying out works that do not require prior written consent of the Requiring Authority in accordance with condition 6 of this designation, they must carry out those works in accordance with the Corridor Access Request (CAR) Process (as set out in Part 4 of the National Code of Practice for Utility Operators' Access to Transport Corridors 2011) where that process applies to the works being carried out.
AN4	1 2 4 5 6	Under section 176 of the RMA no person may do anything in relation to the land subject to the designation that would prevent or hinder the Rail Link without the written approval of the Requiring Authority.
AN5	1 4	Some of the land is subject to existing designations. Nothing in these designation conditions negates the need for the Requiring Authority to adhere to the provisions of section 177 of the RMA.



Condition Number	Designation Applies to	Condition
	5	
AN6	6	Some of the land is subject to existing designations. Nothing in these designation conditions negates the need for the Requiring Authority to adhere to the provisions of section 177 of the RMA. For the avoidance of doubt, the Requiring Authority shall obtain the written consent of the Minister of Corrections in accordance with section 177 of the RMA for any work authorised by the City Rail Link designation on the Mt Eden Corrections Facility site at 1 Lauder Road.
AN7	1	Modifications to Britomart Transport Centre to connect the City Rail Link tracks into the rail network are separate to this designation and are covered under the Britomart Transport designation.
AN8	6	Works required to connect the City Rail Link to the North Auckland Rail Line occurring within the North Auckland Rail Line designation are separate to this designation and are covered under the North Auckland Line Rail designation.

Appendix One to Designation Conditions for Designations 1, 2, 4, 5 and 6

Condition 36 of this designation requires as part of the CEMP process the confirmation of where and when building condition surveys will be undertaken in relation to vibration and settlement. Note that those buildings classed in the "heritage" category are covered under the Appendix Two below. In accordance with condition 46, at a minimum building condition surveys shall be considered for the following buildings:.

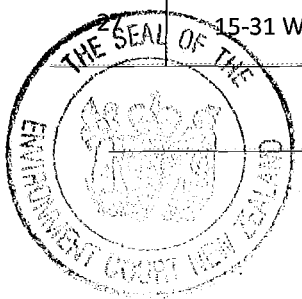
No	Address	Property Known As
1	8-12 Albert Street	Quay West Hotel
2	17 Albert Street	Cohesive Technology House
3	22-26 Albert Street	The Stamford
4	74 Albert Street	Chifley Suites
5	76-84 Albert Street	City Gardens Apartments
6	103,105,107 Albert Street	Manhattan Apartments
7	109-125 Albert Street	Sky City - Grand Hotel & Convention Centre
8	106-108 Albert Street	Elliot Tower (Proposed)
9	128 Albert Street	Crown Plaza
10	103 Vincent Street	YWCA Accommodation
11	109 Vincent Street	The Rodney Apartments
12	113 Vincent Street	Winsun Heights Apartments
13	135 Vincent Street	Dynasty Gardens Hotel
14	150 Vincent Street	The City Lodge
15	156 Vincent Street	Eclipse Apartments
16	71-87 Mayoral Drive	Rendezvous Grand Hotel
17	29,39,41 Pitt Street	Hopetoun Delta Apartments
18	22-28 Beresford Square	The Beresford
19	259-281 Karangahape Road	Retail and Residential building
20	14 East Street	Residential Building
21	9 A-C Mercury Lane	Residential Building
22	18 East Street	Residential Building
23	153 Newton Road	Beatnik
24	10 Flower Street	Eden Terrace Apartments
25	1 Akiraho Street	Eden Oaks
26	21 Queen Street	Zurich House (Anzo Tower)
27	7 Albert Street	Retail and Office building
28	9-11 Albert Street	Food Alley
29	23-29 Albert Street	ANZ Centre
30	12-26 Swanson Street	Affco House Carpark
31	58 Albert Street	APN NZ Complex

No	Address	Property Known As
32	63 Albert Street	AMI House
33	65-69 Albert Street	Auckland District Court
34	38 Wyndham Street	Wyndham Towers
35	92-96 Albert Street	Former Telecom Tower
36	85 Albert Street	Retail and Office building
37	87-89 Albert Street	Albert Plaza
38	99 Albert Street	AA Building
39	135 Albert Street	ASB Building
40	120 Albert Street	BDO Tower
41	44-52 Wellesley Street West	Wellesley Centre
42	67-101 Vincent Street	Auckland Police Station
43	22 Dundonald Street	Soundcraft Ltd
44	3 Flower Street	TV3 Building
45	32 Normanby Road	Commercial Building
46	3 Enfield Street	Horse and Trap
47	101 Mount Eden Road	Hometune
48	1 Ngahura Street	Auckland Boxing Association
49	1 Queen Street	HSBC House
50	125 Queen Street	New World Supermarket tenancy
51	148 Quay Street	Tenham Investments and Body Corporate 184960
52	29 Customs Street West	AMP Centre
53	15-19 East Street	
54	32 Akiraho Street	Bear Park Early Childhood Centre
55	83 Albert Street	
56	4 Kingston Street	
57	6-12 Kingston Street	

Appendix Two to Designation Conditions for Designations 1, 2, 4, 5 and 6

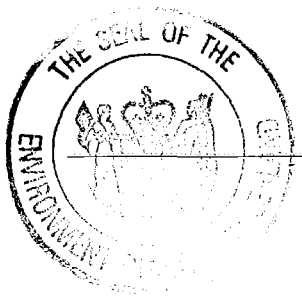
Condition 41 of this designation requires as part of the CEMP process the confirmation of where and when building condition surveys will be undertaken in relation to Built Heritage (including those affected as a result of excavation). In accordance with condition 46, at a minimum building condition surveys shall be considered for the following buildings:

No	Address	Property Known As
1	12 – 32 Customs Street	Customs House
2	2 Queen Street	Endeans Building
3	12 Queen Street	Former CPO - Britomart Transport Centre
4	3 Albert Street	West Plaza
5	13 Albert Street Auckland Central	Yates Building
6	15 Albert Street	Link House
7	35 Albert Street Auckland Central	Price Buchanan Building
8	37 – 39 Albert Street Auckland Central	
9	41 Albert Street	
10	46 Albert Street	New Zealand Herald
11	49 Albert Street Auckland Central	
12	53 Albert Street Auckland Central	
13	55 Albert Street	
14	57 Albert Street	
15	61 Albert Street Auckland Central	Shakespeare Hotel and Brewery
16	76 to 78 Albert Street Auckland Central	Bluestone Wall + toilets under wall
17	83 to 85 Albert Street Auckland Central	
18	102 Albert Street	
19	26, 34 – 36 Wyndham Street	Former Gas Co Building
20	9 – 11 Durham Street	Bluestone Store
21	37-43 Victoria Street West	
22	51-53 Victoria Street West	Martha's Corner
23	61-65 Victoria Street West	
24	66 Victoria Street West	London Dairy
25	68 Victoria Street West	J H Hannan
26	24 Wellesley Street West	Bledisloe House
27	15-31 Wellesley Street West	Archibald and Sons Warehouse/ T & G Building



No	Address	Property Known As
28	42 Wellesley Street	Griffiths Holdings Building
29	33 Wyndham Street	
30	Aotea Square Aotea Centre (rear section)	
31	11 Mayoral Drive	Former Public Trust
32	105 Vincent Street	Auckland Chinese Presbyterian Church
33	133 Vincent Street	Juliette's
34	53 Pitt Street	Former Central Ambulance Station
35	59 Pitt	
36	65 Pitt Street	
37	70 – 74 Pitt Street	The Chatham
38	78 Pitt Street Pitt Street	Wesleyan Church
39	78 Pitt Street	Wesleyan Bicentennial Hall
40	1 Beresford Square Auckland Central	Former Pitt Street Fire Station
41	16 – 18 Beresford Square	
42	211-235 Karangahape Road	Pitt Street Buildings (O'Malley's Corner)
43	238 Karangahape Road	George Court Building
44	1 Cross Street	George Court Factory Building
45	243 Karangahape Road	Naval and Family Hotel
46	246-254 Karangahape Road	Hallenstein Brothers Building
47	251 – 253 Karangahape Road	
48	256 Karangahape Road	Mercury Theatre entrance - Norman Ng Building
49	257 Karangahape Road	
50	258-266 Karangahape Road	
51	268 Karangahape Road	
52	259-261 Karangahape Road	
53	270 Karangahape Road	
54	283 Karangahape Road	Samoa House
55	9 Mercury Lane	Mercury Theatre former Kings Theatre
56	151 Newton Rd	Retail/Recording Studio
57	206-208 Symonds Street	Cheapskates/Penny Farthing Bike Shop
58	210 Symonds Street Retail	French Café

No	Address	Property Known As
59	215 Symonds Street	Edinburgh Castle Building
60	221 Symonds Street	
61	224 Symonds Street	Former Post Office
62	227 Symonds Street	
63	231 Symonds Street Retail	
64	233 Symonds Street	
65	235 Symonds Street	
66	237 Symonds Street	
67	239-241 Symonds Street	
68	243 Symonds Street	
69	245 Symonds Street	
70	249 Symonds Street	
71	253 Symonds Street	
72	1-13 Mt Eden Road	
73	15-17 Mt Eden Road	
74	21 New North Road	
75	14 New North Road	Villa Dalmacija
76	St Patrick's Square 43 Wyndham Street	St Patrick's Cathedral
77	59 Alex Evans Street	St Benedict's Church
78	1 – 9 St Benedicts Street	St Benedict's Presbytery
79	6 St Benedicts Street	Residential
80	43 Wyndham Street & Hobson Street	St Patrick's Presbytery
81	Beresford Square	Forrester's Hall



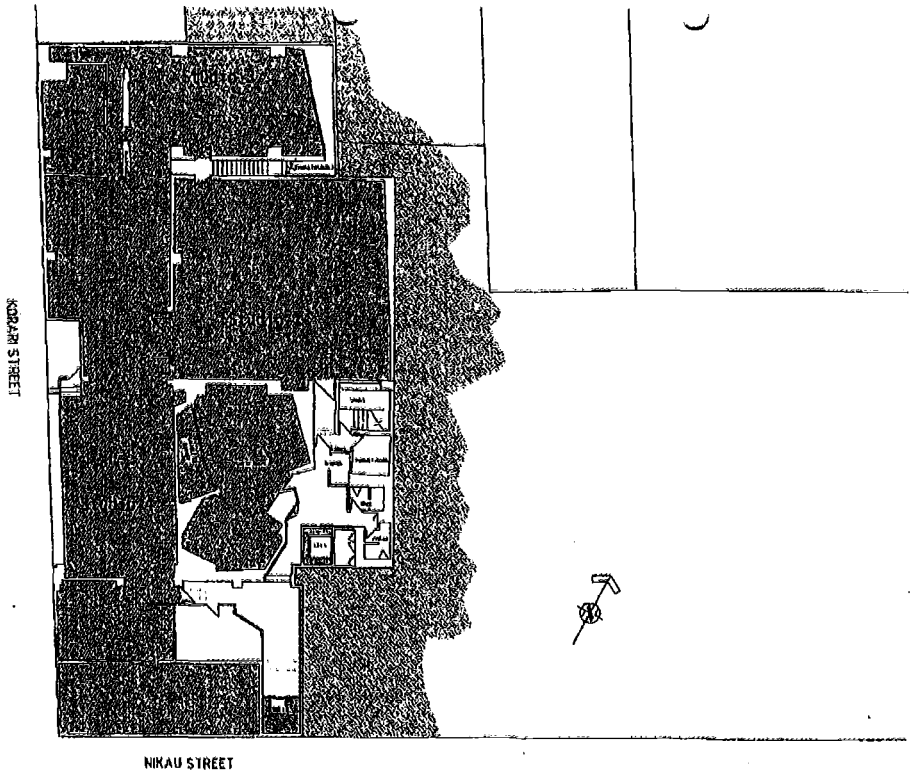
Requiring Authority Designation Conditions for Designation 3

Condition Number	Designation Applies to	Condition
1	3	1.1 The City Rail Link Project (Designation 3) shall be undertaken in general accordance with the following: (a) The information provided by the Requiring Authority in the Notice of Requirement dated 23 August 2012 and supporting documents being: (i) Assessment of Environmental Effects report (contained in Volume 2 of the Notice of Requirement suite of documents, dated 15 August 2012 Rev B); (ii) Supporting environmental assessment reports (contained in Volume 3 of the Notice of Requirement suite of documents, dated August 2012); (iii) The Concept Design Report (contained in Volume 2 of the Notice of Requirement suite of documents, dated 13 August 2012 Rev 3); (iv) Plan sets: • Land requirement plans (contained in Volume 1 of the Notice of Requirement suite of documents, dated 15 August 2012); • Plans contained in the Concept Design Report Appendices (contained in Volume 3 of the Notice of Requirement suite of documents, dated 13 August 2012 Rev 3). (b) Except as modified by the following alterations: (i) Assessment of Environmental Effects (Reference CRL-SYW-RME-000-RPT-0065, Design and Construction Memorandum (Reference CRL-SYW-RME-000-MEM-0002) and Drawings CRL-SYW-RME-000-DRG-0120 to 0124 and 0128 to 0132 'Strata / Sub-Strata Alteration (CRL Designation 2 and 3). (ii) Assessment of Environmental Effects (Reference CRL-MTE-RME- 000-RPT-0060 Revision 7 dated 9/11/16), Design and Construction Memorandum (Reference CRL-MTE-RME-000-MEM-0001 dated 9/11/16) and Drawing CRL-SYW-RME-000-DRG-0133 Revision 1 dated 26/7/17) ('Mt Eden Station Alteration' - CRL Designation 3 and 6). 1.1 Where there is inconsistency between the documents listed above and these conditions, these conditions shall prevail.
2	3	2.1 In accordance with section 184(1) of the Resource Management Act 1991 (the RMA), this designation shall lapse if not given effect to within 10 years from the date on which it is confirmed.
3	3	3.1 The Requiring Authority shall, as soon as reasonably practicable, but no later than at completion of detailed design: (a) Review the area and volume of land of Designation 3 required to protect the structural integrity of the two tunnels (including the relevant considerations at Condition 5.5); (b) Identify any areas of designated land that are no longer necessary to protect the structural integrity, safety or operation of the two tunnels; and (c) Then give notice in accordance with Section 182 of the RMA for the removal of those parts of the designation identified in (b) above.
4	3	4.1 Under s 176(1)(b) of the Resource Management Act 1991 (RMA) no person may do anything in relation to the designated land that would prevent or hinder the City Rail

Condition Number	Designation Applies to	Condition
		Link, without the prior written consent of the Requiring Authority. 4.2 In the periods pre, during and post construction of the City Rail Link, the following activities undertaken by Network Utility Operators will not prevent or hinder the City Rail Link, and can be undertaken without seeking the Requiring Authority's written approval under section 176(1)(b) of the RMA: (a) Maintenance and urgent repair works of existing Network Utilities; (b) Minor renewal works to existing Network Utilities necessary for the on-going provision or security of supply of Network Utility Operations; (c) Minor works such as new property service connections; (d) Upgrades to existing Network Utilities within the same or similar location with the same or similar effects on the City Rail Link designation. 4.3 For the avoidance of doubt, in this condition an "existing Network Utility" includes infrastructure operated by a Network Utility Operator which was: (a) In place at the time the notice of requirement for the City Rail Link was served on Auckland Council (23 August 2012); or (b) Undertaken in accordance with this condition or section 176(1)(b) RMA process.
5	3	5.1 This designation does not authorise any CRL works but restricts development from proceeding without the approval of the Requiring Authority where that development would result in an adverse effect on the CRL in terms of safety, operation or construction. 5.2 The Requiring Authority will work with developers in a collaborative manner and may require alterations or changes to development proposals for the purpose in 5.1. 5.3 The Requiring Authority may require alterations or changes to any proposal for development including but not limited to construction of basements and foundations where such works disturb the ground in a way that is likely to result in loading changes and result in deformations or produce other risks to the integrity of the CRL structures. 5.4 Reasons shall be given by the Requiring Authority for these changes to demonstrate they are reasonably necessary to provide for safety, construction or operation of the CRL, 5.5 Any proposal for physical works or activities within the designation shall be provided to the Requiring Authority and will be assessed on the following: (a) Building height, size, mass and proximity to the CRL structures; (b) Foundation and basement designs; (c) Geotechnical conditions; (d) Separation between the CRL structures and the proposed development; (e) Nature of the activities including methods and staging of construction; (f) The predicted loading change on the CRL structures resulting from the development; and (g) Any other relevant information necessary to determine the likelihood and extent of any adverse effect that may occur as a result of the proposed development. These factors will also be relevant considerations in the drawback of the designation as provided for in Condition 3.1. 5.6 That assessment shall be peer reviewed by an independent certified engineer, paid for

Condition Number	Designation Applies to	Condition
		by the Requiring Authority, and the findings supplied to the landowner/ developer and the Auckland Council for information.
	Advice Notes relating to the Designation	
AN 1	3	This is a designation for protection purposes only. It protects the City Rail Link infrastructure to be constructed, operated and maintained in a separate designation located beneath this designation. The use of the land within this designation is subject to the agreement of the Requiring Authority to protect the subterranean works below. Any person proposing to undertake physical works within this designation is required to contact the Requiring Authority and obtain its approval in accordance with provisions set out in section 176(1)(b) of the Resource Management Act 1991.
AN 2	3	If Network Utility Operators are carrying out works that do not require prior written consent of the Requiring Authority in accordance with condition 6 of this designation, they must carry out those works in accordance with the Corridor Access Request (CAR) Process (as set out in Part 4 of the National Code of Practice for Utility Operators' Access to Transport Corridors 2011) where that process applies to the works being carried out.

Diagram 1



MEDIAWORKS | EXISTING LAYOUT | LEVEL 1 | SCALE 1:100 @ A1
3 FLOWER STREET | LEVEL 1-5 | MT.EDEN | AUCKLAND

ANNEX B: KiwiRail Designation

PART 7 – DESIGNATIONS – Schedules and Designations – New Zealand Railways Corporation

6300 North Auckland Railway Line

Designation Number	6300
Requiring Authority	KiwiRail Holdings Ltd.
Location	North Auckland Railway Line from Bell Avenue, Otahuhu to Ross Road, Topuni
Rollover Designation	Yes
Legacy Reference	Designations H13-09 & B09-06, Auckland Council District Plan (Isthmus Section) 1999; Designation NZR1, Auckland Council District Plan (Waitakere Section) 2003; and Designation 501, Auckland Council District Plan (Rodney Section) 2011
Lapse Date	Given effect to (i.e. no lapse date)

Purpose

The purpose of the designation is to develop, operate and maintain railways, railway lines, railway infrastructure, and railway premises as defined in the Railways Act 2005.

Conditions

1. See Diagram B09-06 for strata diagram for land adjacent to Broadway, Newmarket.

2. No additions or alterations shall be made to the building scheduled in the District Plan (Map Reference E10-23 Remuera Railway Station and Signal Box) other than in accordance with an outline plan submitted and processed in terms of Section 176A of the Resource Management Act 1991. This provision shall also apply to the interior of the building and the site surrounds as dimensioned in the Plan.

The following conditions apply between points X: 1,750,777.116m Y: 5,914,020.693m and X: 1,737,958.656m and Y: 5,921,597.470m (NZTM2000):

3. Where an outline plan of works is submitted in accordance with s176A of the Resource Management Act 1991, prior to commencing the project or work, that plan shall be accompanied by:

a. A statement outlining the District Plan objectives and policies relevant to the works proposed; and

b. An assessment of the effects the works described in the outline plan will have on the environment.

Explanation:

While it is accepted that the project works will be (or should be) in accordance with the designated purpose, the Council will wish to address the relevant objectives and policies of the Plan and be assured that the works will not adversely affect the environment. The Council's principal opportunity to influence the works to assist the requiring authority to meet its environmental responsibilities is through the outline plan, and the assessment of compliance and effects will assist in determining whether to request changes.

4. Appropriate sedimentation and erosion control measures shall be employed for any new earthworks on the designated site.

Explanation:

The District Plan outlines erosion and sediment control measures for earthworks which are above a certain threshold, with that threshold varying according to the particular environment. Compliance with these measures would generally satisfy condition 4. Note that major earthworks may require a consent from the Council.

The following condition applies between points X: 1,757,567.27m Y: 5,918,513.74m and X: 1,757,256.36m Y: 5,918,405.33m; and between X: 1,757,231.23m Y: 5,918,394.69m and X: 1,756,991.17m Y: 5,918,288.67m; and between X: 1,756,611.6m Y: 5,918,312.33m and X: 1,756,430.01m Y: 5,918,230.89m (NZTM2000) (shown as "land to be designated" on plans CRL-SYW-RME-000-DRG-0103 and 0104 Rev 1):

5. Where an outline plan of works is submitted in accordance with s 176A of the Resource Management Act 1991 in relation to the installation of new track, that plan shall confirm:

(a) that, except as provided for in (c), all track to be installed in these locations will be continuously welded rail;

(b) that the track in these locations will be inspected by an EM80 inspection train (or similar) at least every six months, and, if results show track corrugation, that maintenance will be undertaken to remove the corrugations as soon as practicable; and

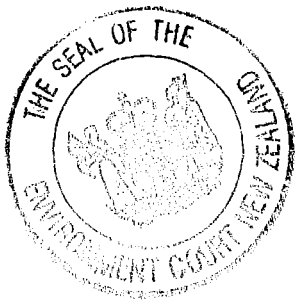
(c) where a turnout or break in the rail is proposed in these locations, the measures that are to be undertaken (including the use of low vibration turnouts) to ensure that vibration will be no greater than the standard set out below, at the measurement point.

(i) The standard is 0.14mm/s RMS between 8 and 80Hz, in accordance with ISO2631-2:2003, for 95% of any 20 consecutive freight train pass-bys.

(ii) The measurement point is to be within 500mm above the ground at the foundation of any building containing residential unit(s) existing as at 1 December 2017, located within 25m of the turnout or break in the rail.

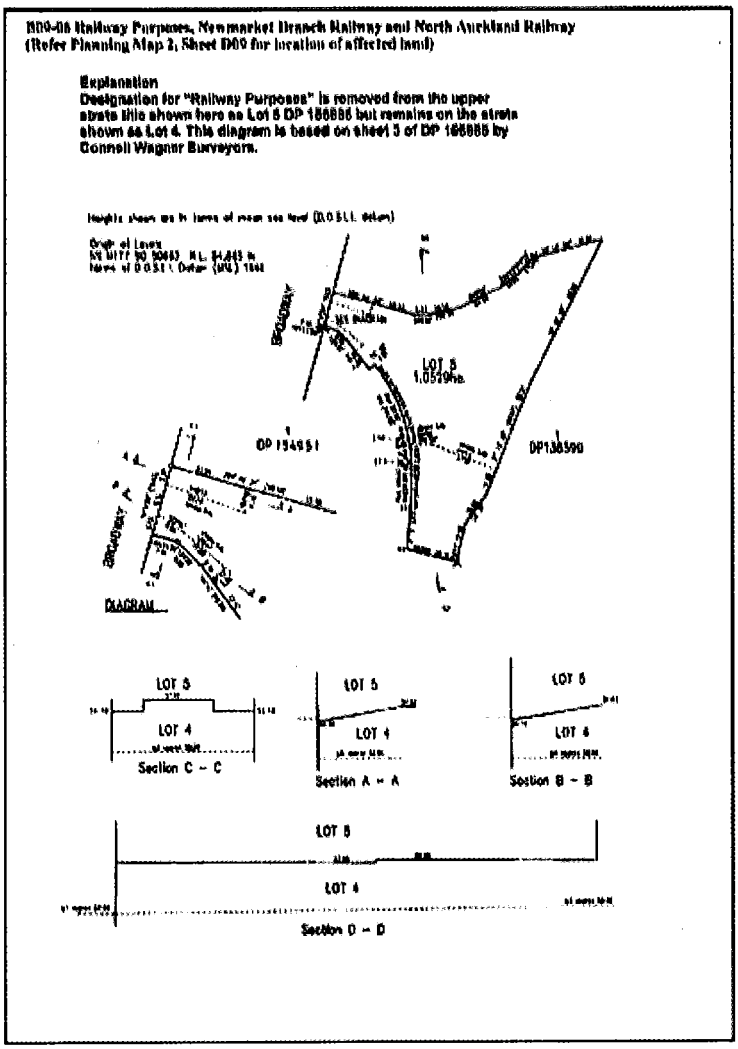
Explanatory note:

"As soon as practicable" in condition 5(b) means maintenance to remove the corrugations will occur at the earliest availability of resources (such as crews and specialised equipment) and access to the track to undertake maintenance works safely. Removal of corrugations is generally scheduled annually using specialised equipment. Localised repairs which are able to be completed using standard equipment will be undertaken at the earliest available opportunity.



Attachments

Diagram B09-06 - Strata Diagram for Land Adjacent to Broadway, Newmarket



BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 203

IN THE MATTER	of the Resource Management Act 1991
AND	of six appeals under s 120 and/or s 174 of the Act for Mount Messenger Bypass proposed State Highway 3 between Uruti and Ahititi, North Taranaki
BETWEEN	DIRECTOR-GENERAL OF CONSERVATION (ENV-2019-WLG-000003) (ENV-2019-WLG-000004)
AND	TE RŪNANGA O NGĀTI TAMA TRUST (ENV-2019-WLG-000005)
AND	POUTAMA KAITIAKI CHARITABLE TRUST AND D & T PASCOE (ENV-2019-WLG-000006) (ENV-2019-WLG-000010)
AND	TE KOROWAI TIAKI O TE HAUĀURU INCORPORATED (ENV-2019-WLG-000009) Appellants
AND	TARANAKI REGIONAL COUNCIL Respondent-Regional Authority
AND	NEW PLYMOUTH DISTRICT COUNCIL Respondent/Section 274
AND	NEW ZEALAND TRANSPORT AGENCY Respondent/Applicant

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Court:	Environment Judge BP Dwyer Māori Land Court Judge M Doogan Environment Judge MJL Dickey Environment Commissioner DJ Bunting Environment Commissioner RM Bartlett
Hearing:	15-19, 23 and 24 July 2019
Appearances:	D Allan and A Brenstrum for New Zealand Transport Agency SJ Ongley for Director-General of Conservation V Morrison-Shaw for Te Runanga o Ngāti Tama R Enright and RG Haazen for Te Korowai Tiaki o Te Hauāuru Incorporated D and T Pascoe for themselves through R Gibbs and M Gibbs R Gibbs and M Gibbs for Poutama Kaitiaki Charitable Trust HP Harwood for New Plymouth District Council and Taranaki Regional Council
Date of Decision:	18 December 2019
Date of Issue:	19 December 2019

INTERIM DECISION OF THE ENVIRONMENT COURT

Table of Contents

Result

1. This is an interim decision of the Court because there is no certainty as to whether or not the Agency can acquire from Te Rūnanga the land necessary to implement the Project and finalise an Agreement for Further Mitigation.

2. In light of the Agency's assurance that it will not compulsorily acquire the Ngāti Tama land, the Court is not prepared to complete its consideration of the NOR and resource consents, absent advice from Te Rūnanga that it has agreed to the acquisition and further mitigation.

3. That is because we cannot determine that the effects of the Project will be appropriately addressed until we receive advice on that acquisition and further mitigation.

4. This proceeding is adjourned until 31 March 2020.

5. On that date we direct that the Agency is to file a memorandum advising the Court of the state of its negotiations with Te Rūnanga.

REASONS

A - Introduction

[1] The New Zealand Transport Agency (**the Agency**) is undertaking a programme of improvements on State Highway 3 (**SH3**) which connects the Taranaki and Waikato regions. It is a requiring authority under s 167 of the Resource Management Act 1991 (**RMA/Act**). It is a Crown entity, and its objective is set out in s 94 of the Land Transport Management Act 2003 (**LTMA**) to:

> undertake its functions in a way that contributes to an effective, efficient, and safe land transport system in the public interest.

[2] Its functions under the LTMA include:[1]

> (a) to contribute to an effective, efficient, and safe land transport system in the public interest:
> ...
> (c) to manage the State highway system, including planning, funding, design, supervision,

[1] LTMA, s 95.

> construction, and maintenance and operations, in accordance with this Act and the Government Roading Powers Act 1989...

[3] In meeting its objective and undertaking its functions under the LTMA the Agency must, among others, exhibit a sense of social and environmental responsibility.[2] The Agency must also use its revenue in a manner that seeks value for money.[3]

[4] As part of its improvement programme the Agency has identified that the existing 7.4km long Mount Messenger section of the state highway located some 58km north-east of New Plymouth has:[4]

- Steep grades, a tortuous alignment and restricted forward visibility;
- Significant lengths with no or only limited shoulders;
- A narrow tunnel at the summit;
- Vulnerability to interruption of service by breakdowns, crashes, landslips and rockfalls;
- Limited alternative route options when service is interrupted, with alternative route options being limited and involving significantly longer travel times (especially for freight).

[5] These constraints translate to problems with safety, route resilience (including road closures with no suitable alternatives), poor road geometry and low speeds which, when combined, mean the road is no longer fit for purpose.[5]

Notice of Requirement and resource consents

[6] In December 2017 the Agency lodged a Notice of Requirement (**NOR**) and applications for resource consents with the New Plymouth District Council and the Taranaki Regional Council for the alteration of the current designation for SH3 to enable the construction and operation of a new 6km section of highway to bypass the existing 7.4km section (**the Project**).

[7] These applications were heard by an independent Commissioner appointed by

2 LTMA, s 96(1)(a).
3 LTMA, s 96(1)(b).
4 Common Bundle (**CB**), Volume (**Vol**) 2, page 318.
5 CB, Vol 2, page 318.

both councils in a hearing held in New Plymouth over a number of days in August and October 2018.

[8] The Commissioner's Recommendation to the requiring authority (the Agency) issued on 8 December 2018 was that the alteration to the designation be confirmed subject to the conditions attached to the decision. The Commissioner's Decision of the same date was that the resource consents applied for should also be granted subject to the conditions attached.[6] (The recommendation and the decision are collectively referred to as the **Commissioner's Decision**.)

[9] The Agency accepted the Commissioner's Recommendation on the NOR (**NOR Decision**) subject to two changes:

- It did not accept the inclusion of a lapse period (condition 3);
- It decided to reinstate words relating to the use of mesh drape associated with cut barriers to condition 25(d).[7]

The appeals

[10] Appeals against the Commissioner's Decision and the NOR Decision were lodged by the Director-General of Conservation (**DOC**), Te Rūnanga O Ngāti Tama Trust (**Te Runanga**), Te Korowai Tiaki O Te Hauāuru Incorporated (**Te Korowai**) and Poutama Kaitiaki Charitable Trust and D and T Pascoe (**Poutama** and **the Pascoes**).

[11] The relief sought in each of these appeals is as follows:

DOC appeal

[12] DOC filed two appeals (against the decision on the applications for resource consent and against the NOR Decision). DOC's appeals challenged four conditions of consent relating to kiwi fencing, legal rights over land within a proposed Pest Management Area (**PMA**), freshwater ecological monitoring and fish passage. The primary relief sought was for the Agency to rectify what DOC considered to be an ambiguity in the conditions of consent relating to the legal agreements/authorisations for the land proposed to be incorporated in a Restoration Package for riparian and

6 CB, Vol 5, pages 2847 and 2848.
7 CB, Vol 5, Agency Decision on NOR, pages 2852-2946.

restoration planting and pest management (in perpetuity). Relief was sought also for the provision of kiwi fencing at identified locations along the road corridor, for amended conditions to provide for an independent freshwater ecologist to be appointed to an Ecological Review Panel, and for there to be a requirement for the monitoring of fish passage at two additional culverts.

Te Rūnanga o Ngāti Tama appeal

[13] Te Rūnanga appealed parts of the decisions made on the resource consent applications and the NOR. In its appeal Te Rūnanga noted that it had been in discussions with the Agency on reaching agreement on measures to address the adverse cultural effects of the Project but that final agreement had not yet been achieved. In order to preserve its position, Te Rūnanga sought provisions to address the adverse cultural effects of the Project.

[14] Te Rūnanga also opposed the way in which the conditions in the decisions provided for the direct involvement of Mr T Pascoe and Mrs D Pascoe in a Kaitiaki Forum Group (**Kaitiaki Forum Group/KFG**).

Te Korowai appeal

[15] Te Korowai appealed the NOR Decision. The primary relief it sought was for the NOR to be cancelled and as secondary relief that the proposed conditions be amended to address the issues identified in their appeal. The appeal alleged that the NOR Decision does not support sustainable management and is inconsistent with Part 2 RMA, is inconsistent with the statutory tests for designations and planning instruments, and results in significant adverse effects on the environment that are not avoided, remedied or mitigated. It acknowledged that while there was no duty for the Agency to consult, this was not precluded. While it had been consulted by the Agency, this had been inadequate. There had also been inadequate consideration in the NOR Decision of the matters to be addressed under s 6(e), s 7(a) and s 8 of the Act, and there had been a failure to provide for s 6(c) effects on biodiversity and taonga species. Finally, it alleged that the NOR Decision does not provide for s 8 Treaty principles. In its memorandum of 17 June 2019, Te Korowai advised that, while ecology effects per se were no longer in contention, the associated cultural effects on taonga species still were.

The Poutama and Pascoe appeals

[16] Notwithstanding that Poutama and Mr and Mrs Pascoe had different interests they lodged two joint appeals challenging the resource consent and the NOR Decisions. The appeals set out what they said were 52 errors in the Commissioner's Decision to grant the resource consents and the NOR Decision.

[17] In substance, despite being put in several different ways, the Appellants' case raised the following issues:

- Consultation/engagement was inadequate;
- Alternatives – the Agency's consideration of alternatives was inadequate; the 'online' option is a viable alternative ;
- The following effects of the Project on the Appellants, particularly the Pascoes, are such that the NOR should be cancelled and resource consents refused: construction, operational, ecological, amenity, social and landscape effects.
- Cultural – it is claimed that:
    - Poutama and Mrs Pascoe are tangata whenua;
    - The Pascoe land is within the rohe of Poutama;
    - Poutama are an iwi exercising mana whenua and kaitiakitanga over the Project area;
    - Mrs Pascoe has whakapapa to Poutama;
    - Mr and Mrs Pascoe are kaitiaki of their land;
    - The Agency did not recognise them as tangata whenua, which means that they have been deprived of the recognition given to Ngāti Tama and the recognition that the Act requires under s 6(e), 7(a) and 8.

[18] We will address a number of these issues in our analysis of the Project's effects on the environment.

[19] The primary relief sought was for both the resource consent and NOR Decisions to be revoked. The secondary relief sought was:

- For the Project to be put on hold to allow Poutama and the Pascoes to have meaningful input into sites, routes, and methods of undertaking the work;
- For the Project to be put on hold to allow time (at least one full year) to monitor the Mount Messenger long-tailed bat colony effectively to gain better understanding on the effect on the wider district that the potential extinction of that colony would have;
- If the Project was to proceed, for the conditions to be amended to provide to Poutama and the Pascoes compensation and mitigation for damage to cultural (including environmental and social) values on the Pascoes and Poutama properties;
- If the Project was to proceed, for the conditions to be amended to provide for the full and active participation of the Pascoes and Poutama across the entire Project, from a governance level through to work fronts.

[20] We explain later in this decision how Mr and Mrs Pascoe's interests came to be combined with those of Poutama.

B - Legal framework for the Decision

[21] First, the Agency has sought an alteration to an existing designation. s 181(2) relevantly provides that:

> (2) Subject to subsection (3), ss 168-179 ... shall, with all necessary modifications, apply to a requirement referred to in subsection (1) as if it were a requirement for a new designation.

[22] No party argued that s 181(3) applied to this alteration.

[23] As the NOR Decision has been appealed to the Environment Court, the Court's decision is to be made under s 174 RMA as follows:

> (4) In determining an appeal, the Environment Court must have regard to the matters set out in s 171(1) and comply with s 171(1A) as if it were a territorial authority, and may–
>
> (a) cancel a requirement; or
>
> (b) confirm a requirement; or
>
> (c) confirm a requirement but modify it or impose conditions on it as the Court thinks fit.

[24] In reaching its decision the Court must have regard to the same considerations as

does a territorial authority when making a recommendation under s 171 RMA which relevantly provides:

> **171 Recommendation by territorial authority**
> ...
> (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.
> (1B) The effects to be considered under subsection (1) may include any positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from the activity enabled by the designation, as long as those effects result from measures proposed or agreed to by the requiring authority.

[25] We may also waive the requirement for an outline plan to be submitted under s 176A of the RMA.

[26] Secondly, the Agency has sought resource consents for certain aspects of the Project. All consent applications were assessed as a single bundle. The overall activity status is discretionary. We are obliged to consider the matters outlined in ss 104, 104B (discretionary activities) and 105 and 107, which relate to discharge permits.

[27] Our consideration under ss 171 and 104 is subject to Part 2 of the RMA.

[28] The relevance of Part 2 to the consideration of applications for resource consent has been considered by the Court of Appeal in *RJ Davidson Family Trust* v *Marlborough District Council* (***Davidson).***[8] The Court of Appeal determined that:

- The position of the words "subject to Part 2" near the outset and preceding the list of matters to which a consent authority must have regard to [in s 104], clearly show that it is necessary to have regard to Part 2, when it is appropriate

[8] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 (***Davidson***).

to do so;[9]

- If it is clear that a plan has been prepared having regard to Part 2, and with a coherent set of policies designed to achieve clear environmental outcomes, reference to Part 2 is unlikely to add anything;[10]

- If a plan has been competently prepared under the Act, in many cases a consent authority will feel assured in taking the view that there is no need to refer to Part 2 because it will not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so.[11]

[29] Counsel for the Agency submitted that the same approach can apply to designations, given the similarity of the statutory wording in ss 104 and 171. However, there is no judicial authority on this point.

[30] Counsel also submitted that while some of the relevant statutory planning documents are older, the planners who gave evidence to the hearing did not identify any circumstances whereby the relevant provisions do not provide a coherent set of environmental outcomes.[12]

[31] In any event we were advised that, out of caution, Mr Roan had provided a 'fulsome Part 2 assessment'.[13] We agree with this approach.

[32] Part 2 matters engaged by the Project are s5, s6(a), 6(c)-(f) and 6(g), s 7(a)-(d), s 7(f) and s7(i), and s 8.

C - Principal issues for this hearing

[33] The principal issues which emerged from the parties' cases for determination were as follows:

9 *Davidson*, at paragraph 47.
10 *Davidson*, at paragraph 74.
11 *Davidson*, at paragraph 75.
12 Agency's opening submissions, paragraph 250.
13 Agency's opening submissions, paragraph 260.

Alternatives

[34] Was the Agency's consideration of alternatives adequate, particularly with regard to the 'online options' (alteration to the existing SH3 road)?

Consultation

[35] Was the Agency's consultation with Te Korowai, Poutama and the Pascoes adequate?

Cultural effects

[36] Given that Te Rūnanga has not consented to the acquisition of that part of its land that is necessary for the Project (**Ngāti Tama Land**), is it appropriate to grant consent to the Project, or should the outcome of this hearing await Te Rūnanga's decision?

[37] Is it appropriate that Te Rūnanga be the only body referred to in any conditions addressing cultural protocols?

[38] Are adverse cultural effects of such significance as to require that the NOR be cancelled and resource consents refused?

[39] Do the proposed conditions sufficiently avoid, remedy, mitigate, offset or compensate the significant adverse cultural effects of the Project?

[40] What role (if any) should Te Korowai have in any condition addressing cultural protocols?

[41] Is Poutama an iwi group exercising mana whenua and kaitiakitanga over land including the Project area? Are Mr and Mrs Pascoe kaitiaki of their land?

Ecology

[42] Generally, are the ecological effects of the Project appropriately addressed? Are the proposed conditions appropriate?

The Pascoes

[43] Are the construction, operational, ecological, amenity, social and landscape effects

on the Pascoes so significant that the NOR should be cancelled and resource consents refused?

Conditions

[44] Do the conditions proposed by the Agency appropriately address the effects of the Project?

[45] Some of these isssues will be discussed as part of our wider consideration and we return to them at the conclusion of this decision.

D – Site and surrounding environment[14]

[46] Mr PA Roan, a planning consultant for the Agency, described the site and the surrounding environment. The existing SH3 corridor north and south of Mount Messenger follows relatively open rural valleys: the Mangapepeke valley in the north and the upper Mimi valley in the south. Pastoral farming/grazing is the predominant land use along the valley flats. These lowland areas are separated by very steep, topographically complex hill country, with indigenous forest contiguous to the east of SH3 and indigenous forest and farmland to the west.

[47] The wider area extends from the coastal terraces south of the Tongaporutu River, south to the pastoral flats of the Mimi valley, west to the coast and the Paraninihi/White cliffs and east to the Mount Messenger forest. In general terms, the wider area is predominantly steep to very steep hill country.

[48] Settlement patterns within the wider Project area are sparse and determined predominantly by the access afforded from SH3. A small number of dwellings are located at Ahititi (at the intersection of Mokau and Okau Roads) and occasional dwellings are present along the SH3 corridor itself.

[49] Landowners affected most significantly by the Project are the Pascoes and Te Rūnanga. They are major landowners on the designation route and each will lose land if the NOR is confirmed.

[50] The new highway route follows a roughly north-south alignment along the floor of

[14] PA Roan Evidence-in-Chief (EIC) Statutory Assessment: Conditions and Management Plans (**Roan EIC-Statutory**), paragraphs 47-49.

the Mangapepeke valley over land owned by Te Rūnanga at the southern end and the Pascoes at the northern end.

[51] The Pascoes' farm comprises some 250 ha. Only a small portion of the overall 250 ha of farmland is farmed with the balance having been left in its natural state. Mr Pascoe said that he and his family had been able to live off the land to survive and made ends meet through pig hunting and possum trapping in the valley.[15]

[52] Te Rūnanga entered into a Deed of Settlement with the Crown in December 2001. That Deed and the Ngāti Tama Claims Settlement Act 2003 settled Ngāti Tama's historical Treaty of Waitangi claims. As part of the settlement, approximately 37 hectares of the Mount Messenger Scenic Reserve and approximately 227 hectares of the Mount Messenger Conservation Area were returned to Ngāti Tama as cultural redress.[16] Of this land approximately 22 hectares is required for the road and another 15.9 hectares is required for the duration of the construction period.[17]

[53] The Mount Messenger area contains a number of cultural, ecological and landscape features that establish the environmental context. These features have been described in the Assessment of Environmental Effects (**AEE**) (Section 8), the Technical Reports, the Māori Values Assessment (**MVA**) provided to the Transport Agency by Te Rūnanga and in the evidence of Mr Roan.[18] These features include:

- Cultural features: Ngāti Tama exercise mana whenua over the Mount Messenger area and the land associated with the Project. Ngāti Tama provided an MVA that highlights cultural values in relation to the wider area and the land affected by the Project. The Whitecliffs and Mount Messenger area is known to Ngāti Tama as Paraninihi and is referred to as 'Te Matua Kanohi o Ngāti Tama Whanui', 'The parent face of Ngāti Tama'. Paraninihi provides the base for Ngāti Tama's sustenance and connection to the whenua, awa and moana. The area affected by the Project has been and remains an area of major importance to Ngāti Tama as an important part of their rohe, traditions, customs and identity;

- A significant proportion of the land through which the Project traverses, along

[15] T Pascoe EIC, paragraph 12.
[16] Ngāti Tama Claims Settlement Act 2003, Schedule 1.
[17] AS Gard, EIC, paragraph 11(f) (**Gard EIC**).
[18] Roan, EIC - Statutory, paragraph 50.

with the Paraninihi land immediately west and east of the Transport Agency's SH3 landholding, is vested in Te Rūnanga;[19]

- Ecological features: The Project footprint sits within a wider area of forested indigenous native vegetation running from the coastal margins inland to the lowland mountains. It includes the Parininihi and the Mount Messenger forest. The Parininihi land to the west of SH3, previously known as "Whitecliffs Conservation Area", is mainly primary forest of approximately 1,332 ha and centred on the Waipingao Stream catchment. Ngāti Tama have led the protection and restoration of biodiversity values and the removal of pests from the Paraninihi land since the late 1990s. These areas will not be affected by the Project. The dominant forest on the Ngāti Tama block to the east of SH3, through which the Project alignment traverses, has not had consistent pest control and is in a poor condition, reflecting the effects of browsers and pests. Within the immediate Project area the Mimi Stream swamp forest is of greatest ecological significance;

- Landscape features: The Project alignment is contained within two valley systems, being the Mangapepeke valley in the north and the upper Mimi valley in the south. Their steeper upper slopes have higher naturalness characteristics, while the lower parts of the valleys occupy a modified pastoral rural landscape. This land is not subject to a significant landscape notation in the District Plan.[20] The Paraninihi landscape to the west of SH3, away from the Project alignment, is scheduled in the District Plan as a regionally significant landscape.

[54] The land required by the NOR is zoned 'Rural Environment' in the New Plymouth Operative District Plan (**District Plan**). SH3, to the west of the proposed designation, is designated in the District Plan for 'Roading Purposes' (DP Ref N36).[21]

E - The Project

[55] The Project consists of:

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[19] This land is subject to two registered interests; a conservation covenant and a right of way easement. If the Project proceeds, the Transport Agency will need to acquire the necessary property rights over the relevant portion of the Ngāti Tama land, including to have the conservation covenant and right of way easement uplifted, and the easement then relocated and reinstated.

[20] Roan EIC– Statutory, paragraph 50.

[21] CB, Vol 1, Tabs 1, 2 and 3.

- A NOR for an amended designation;
- Applications for resource consent.

NOR

[56] The NOR seeks to alter the existing SH3 designation within the District Plan in accordance with s181 of the RMA. The alteration is to add land required for the construction, operation and maintenance of the Project to the existing designation.

[57] The nature of the proposed public work, as set out in the NOR,[22] is:

> ... the construction, operation and maintenance of a new section of SH3, north of New Plymouth, to bypass the existing steep, narrow and winding section of highway at Mount Messenger. The Project comprises a new section of two lane highway, approximately 6km in length (including tie-ins), located to the east of the existing SH3 alignment...

[58] The NOR directly affects 16 private properties totalling some 77.18ha and some 20.93ha of legal road within the existing SH3 designation.[23] It is our understanding that apart from the areas of land required from Te Rūnanga and the Pascoes, the areas of land required from other private properties are relatively minor.[24] The NOR summarises the Project footprint as follows:

> The Project footprint is located generally to the east of SH3 between Uruti and Ahititi, and includes tie-ins to the existing SH3 at the northern and southern ends of the Project footprint...

[59] Details of the proposed alteration of designation and associated land requirement are shown on the following sets of plans:[25]

- **Designation Drawings** (Attachment **B** to the NOR);
- **Schedule of Directly Affected Land** (Attachment **C** to the NOR).

[60] Below is an elevation model showing the Project area as provided in the Agency's AEE.[26]

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[22] Notice of a Requirement for an Alteration to a Designation under ss 168(2) and 181 of the Resource Management Act 1991 – State Highway 3 Mount Messenger Bypass, NZTA, 14 December 2017, CB, page 239.

[23] CB, Vol 2, Assessment of Environmental Effects (**AEE**), page 334.

[24] CB, Vol 2, AEE, page 804.

[25] CB, Vol 1, pages 251 and following.

[26] CB, Vol 2, AEE, page 381.

Figure 4.2 – Elevation model looking from the south to the north along the alignment

Applications for resource consents

[61] As well as the NOR the Agency is seeking resource consents for the construction, operation and maintenance of the Project.

[62] A list of the resource consents sought, and the relevant Regional and District Plan rules are detailed in Table 2.2 of the AEE.[27] In summary, these include applications for a range of activities, including:[28]

- Land use consent (s 9) for disturbance of contaminated soils;
- Water permits (s 13 and s 14) for temporary and permanent activities involving works in, on or under the bed of a watercourse, the damming and taking of water and the diversion of surface and ground water;
- Discharge permits (s 15) for the discharge of contaminants during earthworks to water (sediment) and to air (dust) associated with construction activities;
- Land use consent (s 9) for vegetation removal associated with construction activities.

[27] CB, Vol 2, AEE, pages 336-339.
[28] Roan EIC– Statutory, paragraph 37.

[63] The Project involves a small number of activities that are permitted under the relevant statutory plans. These activities are set out in Table 2.3 of the AEE.[29] The Agency's evidence is that operational stormwater runoff from the new road will meet the permitted activity standards in the Regional Fresh Water Plan for Taranaki.[30]

Approvals required under other legislation

[64] In addition to the matters requiring consideration under the RMA, there are further statutory considerations relevant to the Project, including:

- Public Works Act 1981 in relation to the acquisition of land;[31]
- Archaeological Authority under s 44(a) of the Heritage New Zealand Pouhere Taonga Act 2014;
- Wildlife Act 1953 authority associated with protected species;
- Application under the Fisheries Regulations 1983 associated with the provision of fish passage in waterways affected by the Project.

[65] Where other approvals are required they are either being sought in parallel with the RMA applications or will be sought at a time that will permit construction to commence in accordance with the Project's construction programme.[32]

Outline Plan

[66] Save for certain key elements of the Project where decisions are yet to be made on final design details, the Agency submitted that for the rest of the Project sufficient details of the works have been provided such that s 176A(2) is satisfied or that it is appropriate that a waiver be granted.

[67] The Agency accepts that it is appropriate (proposed Designation condition 7) that an Outline Plan be provided in respect of the following:

- The tunnel control building and emergency water supply tanks;

29 CB, Vol 2, AEE, Table 2.3, pages 341-343.
30 Roan EIC – Statutory, paragraph 38.
31 CB, Vol 2 Drawing Set: property designation plans sheet layout and property list, page 804.
32 Roan EIC – Statutory, paragraphs 40 and 41.

- The two bridges (over a tributary to the Mimi wetland and Bridge O in the Mangapepeke valley.

[68] We are satisfied that the detailed drawings, conditions and management plan processes for the other parts of the Project address the details set out in s 176A(3), such that, if the Project is consented, no outline plan is required for those parts of the Project.

F - Project objectives

[69] The Agency's Project Objectives for upgrading the existing route or constructing a new bypass route are:[33]

> To enhance safety of travel on State Highway 3.
>
> To enhance resilience and journey time reliability of the state highway network
>
> To contribute to enhanced local and regional economic growth and productivity for people and freight by improving connectivity and reducing journey times between the Taranaki and Waikato regions.
>
> To manage the immediate and long term cultural, social, land use and other environmental effects of the Project by so far as practicable avoiding, remedying or mitigating any such effects through route and alignment selection, highway design and conditions.

[70] We evaluate the Project against these objectives later under the heading *The Agency's objectives – reasonable necessity.*

G - Alternatives

Options evaluation

[71] Under s171 (1) (b) (i), given that the Agency does not have an interest in the land sufficient for undertaking the Project, it undertook a detailed evaluation of highway route options.

[72] This evaluation was undertaken in two stages, being a longlist stage followed by a shortlist stage, using a process known as Multi Criteria Analysis (**MCA)** which was described by Mr Roan in the following way:[34]

> MCA is essentially a decision support tool, enabling options to be scored in a transparent and independent fashion against predetermined assessment criteria. The process assists in assessing the relative merits of options, making explicit the key considerations and the values attributed to them. The process generates a score for an option, relative to other options (with

[33] CB, Vol 2, page 820.
[34] Roan EIC – Assessment of Alternative Options, paragraph 22 (**Roan EIC– Alternatives**).

> sub-scoring for selected groupings of criteria also possible), from which it is possible to rank options in relation to each other. It is also possible to apply weightings to scores to factor their importance (or not) in the assessment process and undertake sensitivity testing of the scoring (using weightings) to establish how certain criteria might affect the overall scoring.

The Longlist

[73] The steps adopted in the MCA longlist evaluation process were as follows:[35]

- The generation of corridor options by subject matter experts;
- The development of assessment criteria for the evaluation of the corridor options by subject matter experts;
- The development of a consistent scoring system under which all criteria would be assessed for both positive and negative effects;
- Specialist briefings on the options and scoring methodology, and subsequent expert scoring of the options;
- A workshop for the assessment and evaluation of the options against the scoring criteria adopted for the identified positive and adverse effects;
- Analysis of the options assessment, including weighting and sensitivity analyses;
- Reporting the MCA outcomes and the presentation of these to the Agency as the decision maker responsible for selecting the preferred option.

[74] The scoring system provided for a 'fatal flaw' or negative score where adverse effects were identified that could not be avoided, remedied or mitigated.[36]

[75] The 11 corridors in the longlist were located west and east of the existing highway (the offline options) with two further corridors located on the line of the existing highway (these two being largely within the Agency's ownership and the existing designation (the online options)).[37]

[76] Each of the offline corridor options involved two different design approaches, an

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35 Roan EIC – Alternatives, paragraph 27.
36 CB, Vol 2, AEE, pages 447-448.
37 Roan EIC – Alternatives, paragraph 29.

"earthworks" design based primarily on cuts and fills and a "structures" design involving a combination of bridges, tunnels and earthworks to better avoid or minimise the adverse effects of the earthworks design.

[77] The online options both involved a series of bridges and a tunnel.

[78] The designs for each of these longlist options were developed to a sufficient level to enable the potential effects of each to be assessed.

[79] Taking account of the relevant statutory matters, the Project Objectives and experience from other projects, nine assessment criteria were chosen for the assessment of the longlist options. These criteria were:

- Constructability;
- Performance of the route for transportation;
- Resilience (instability, seismic, liquefaction and lateral spread), flood and storm damage;
- Landscape;
- Historic and archaeological heritage;
- Community (including recreational activities and impacts on those directly affected);
- Property (extent and nature of land required);
- Ecology;
- Cultural heritage and values.[38]

[80] Key findings from the longlist assessment were that:

- The two online options scored best;
- The earthworks options scored less than the structures options because these had higher levels of adverse effects;

[38] Roan EIC – Alternatives, paragraph 35.

- A mix of four offline options involving both west and east routes scored relatively well;

- Nine offline options received a "fatal score" under one or more of the criteria for ecology, cultural heritage and landscape including all four of the far western and coastal options.

The Shortlist

[81] The criteria adopted for the longlist assessment were also adopted for the shortlist assessment with ecology being split into terrestrial ecology and water (including erosion and sediment control inputs) and the community criterion being adjusted to include inputs from recreation, social, noise and vibration experts.[39]

[82] Following further analysis of the findings from the longlist assessment including the consideration of cost estimates for each option (which had not formed part of the MCA process), a five-options shortlist was drawn up. This included four offline options, three to the west of the existing highway and one to the east, and one online option. Longlist options located further west and east of the shortlisted options had scored less and were excluded from the shortlist.

[83] The five shortlist options were assessed in an MCA workshop by a team involving multi-discipline experts and Te Rūnanga representatives for cultural heritage inputs.[40]

[84] While the western-most shortlisted option received the best transport score, it scored relatively poorly on most other criteria including ecology and landscape reflecting its location in the sensitive Waipingoa valley. It also crossed a significant landslide feature. Te Rūnanga identified this option as having very high/very significant adverse cultural effects. (We note that all five options considered at the shortlist stage had "very high/very significant" adverse effects).[41]

[85] The other two western options were on similar alignments closer to the existing highway, the difference between the two being that they diverged at the southern end. Both of these options scored poorly for adverse effects on terrestrial ecology and landscape with Te Rūnanga identifying both as having very high/very significant adverse

[39] Roan EIC – Alternatives, paragraph 36.
[40] Roan EIC – Alternatives, paragraph 68.
[41] CB, Vol 2, AEE, pages 1096-1097.

cultural effects.

[86] The eastern option which follows the Mangapepeke valley ranked second of the five options. It was assessed as having high adverse effects on terrestrial ecology and very high/very significant adverse cultural effects by Te Rūnanga.

[87] The online option, a large portion of which is located on or adjacent to the existing highway ranked first under both RMA and environmental criteria but scored poorly for its high adverse effects on terrestrial ecology at the southern end. Te Rūnanga assessed this option as having very high/very significant adverse cultural effects. It also scored poorly for constructability because of the need to maintain traffic flows on the existing road during construction and would include building a very substantial retaining wall some 1.5km long to support the highway through a large landslide feature.

[88] While the shortlist report did not recommend a preferred option to the Agency it did recommend that the worst performing western-most shortlisted option should not be pursued. It also recommended that one of the other two western options with the worst adverse effects on terrestrial ecology and landscape should be discarded. This left three options for the Agency to consider when deciding on its preferred route, the remaining western option, the eastern option and the online option.

[89] Further work was undertaken on these three options in an endeavour to establish if design refinements or more cost-effective solutions might be available. This work found that it was not possible to refine the western option to address the adverse effects in the Waipingao valley. Likewise, despite endeavours to refine the alignment of the online option it was not possible to avoid the landslide or to meet the Agency's engineering requirements. For the eastern option, in the northern section of the Mangapepeke valley, the alignment was moved to the eastern valley flanks to avoid poorer soil conditions on the valley floor.

[90] Cost estimates including funding risk were then prepared for the each of the five shortlisted options. These ranged from around $219m for the eastern option to $430m for the online option.[42]

[42] Roan EIC – Alternatives, Appendix 4. Note: In his EIC, paragraph 125(a), HJ Milliken identifies a difference in cost of $180m. This does not tally with the difference of $211m ($430 less $219m) in Mr Roan's evidence.

[91] The Agency's former Project Manager, Mr R C Napier, advised that while the outcomes of the MCA process were not intended to be used directly to select the Project option, in conjunction with subsequent refinement work and the consideration of the cost estimates they were central to the Agency's decision in selecting the eastern route as the preferred Project option.[43]

[92] The principal components of this selected route are:[44]

- Construction of 6km of new two-lane road with tie-ins to the existing highway at each end;
- A tunnel approximately 235m long through the ridgeline near the existing Mount Messenger rest area, with an associated tunnel control building and emergency water supply tanks;
- A 120m long bridge over a wetland on a tributary of the Mimi Stream;
- A 25m long bridge in a tributary valley of the Mangapepeke Stream;
- Ten rock cuttings up to 60m high with a combined length of around 2.6km (including the tunnel portals);
- Thirteen earth embankments up to 40m high (but typically less than 5m high), with a combined length of around 2.5km;
- Retaining walls and mechanically stabilised earth (MSE) embankments;
- Stormwater treatment and attenuation facilities (including stormwater retention ponds);
- Swales and a road drainage network;
- Fill disposal sites;
- The removal of up to 31.7 ha of predominant vegetation and the diversion of a total of 3.1 km of streams;
- A comprehensive package of measures identified as the Restoration Package

[43] RC Napier EIC, paragraphs 62 and 63 (**Napier EIC**).
[44] Agency's opening submissions, paragraphs 4-9 and HJ Milliken EIC, paragraph 8 (**Milliken EIC**).

to address the Project's adverse effects on ecological values.

Discount of online option (also known as option Z)

[93] In its s42A report[45] the District Council queried the merits of the Agency's selected route over the online option. As noted in the report, Mr Roan advised the Council that the Agency had decided against progressing the online option for reasons of cost, constructability and cultural values (due to the close proximity of the alignment to the maunga).[46]

[94] With respect to the issue of cost and constructability Mr B Symmans, Design Manager for the Mount Messenger Alliance[47], explained that $110m of the additional cost was for measures required to stabilise a large landslide feature (a feature not present on the selected route) at the northern end of the existing state highway. In particular:[48]

- This landslide is deep seated with two boreholes having identified depths to the fault shear surface of 14.4m and 23m below ground level;
- Parts of the feature are still moving as evidenced by two measuring instruments which have sheared off through displacements of hundreds of millimetres over a period of several months;
- Stability analyses have identified that horizontal movements of up to 6m could occur at the landslide in a design earthquake with further movements also likely under extremely high rainfall;
- To mitigate these hazards to an acceptable level, it would be necessary to construct a 1.5km-long retaining wall at heights of up to 17m above ground level, depths below ground level to the shear surface of around 20m and embedment below this surface of about 3m. In addition, multiple ground anchors up to 65m long would be required to tie back the wall with this length being the edge of feasibility.[49]

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45 RL McBeth EIC (**McBeth EIC**), Appendix A, s 42A Report.

46 McBeth EIC, Appendix A, s42A Report, paragraph 107(b).

47 The Alliance includes the Agency, Downer Construction, HEB Construction, Opus International Consultants and Tonkin and Taylor. Its purpose is to progress the design (including options assessment), consenting and construction of the Project.

48 B Symmans EIC, paragraphs 50 – 71 (**Symmans EIC**).

49 Transcript, page 119.

[95] Mr H J Milliken, Mount Messenger Alliance Manager, added that constructing the online option would also be highly disruptive for both the contractor undertaking the works and for road users during the multi-year construction period.[50]

Discussion and finding on consideration of alternatives

[96] In determining whether adequate consideration has been given to alternatives, we have been guided by the following principles derived from the Final Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project:

- The focus is on the process, not the outcome; whether the requiring authority has made sufficient investigations of alternatives proposed, rather than acting arbitrarily, or giving only cursory consideration to alternatives. Adequate consideration does not mean exhaustive or meticulous consideration;
- The question is not whether the best route, site or method has been chosen, nor whether there are more appropriate routes, sites or methods;
- That there may be routes sites or methods which may be considered by some (including submitters) to be more suitable is irrelevant;
- The Act does not entrust to the decision maker the policy function of deciding the most suitable route; the executive responsibility for selecting the site remains with the requiring authority;
- The Act does not require every alternative, however speculative, to have been fully considered; the requiring authority is not required to eliminate speculative alternatives or suppositious options.[51]

[97] We respectfully adopt that summary. We record also that the adequacy of the consideration of alternatives will be influenced to some degree by the extent of the consequences of the scenarios in s 171(1)(b), which permits, and may require, a more careful consideration of alternatives when there are more significant adverse effects.[52] Further, the measure of adequacy will depend on the extent of the land affected by the

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50 Milliken EIC, paragraph 125.

51 Final Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project Ministry for the Environment, Board of Inquiry, 4 September 2009 at [177]; adopted by the Court in *Pukekohe East Community Society Incorporated v Auckland Council* [2017] NZEnvC 027 at [21] and [22].

52 *New Zealand Transport Agency v Architectural Centre*, [2015] NZRMA 375 at [140] and [142], citing *Queenstown Airport Corporation Limited v Queenstown Lakes District Council*, [2013] NZHC 2347.

designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.[53]

[98] Poutama and Mr and Mrs Pascoe raised questions about the adequacy of the alternatives assessment, asserting:

- The online option had not been fully assessed and considered;[54]
- The potential for "siting the haul road on the road alignment, therefore reducing damage to one side of the valley".[55]

[99] We acknowledge Poutama's and Mr and Mrs Pascoe's concerns with regard to the online option and note that as an option it has a certain appeal, given that it stays within the existing alignment and does not involve an intrusion into the Mangapepeke valley. However, we remind ourselves that our role is to determine the adequacy of the process followed to investigate alternatives, not to decide on what route may be more suitable. In any event we make the observation that there are substantial difficulties with the online option which would require that the existing state highway be kept open during major construction works and dealing with a significant landslip.

[100] In our view, the Agency as the requiring authority undertook a thorough and detailed evaluation of route options before deciding on its preferred route along the Mangapepeke valley.

[101] As to the adequacy of the assessment with regard to the location of the haul road, there was considerable focus at the hearing on the location of the haul road in relation to Mr and Mrs Pascoe's home. Having reflected on the evidence and the issues canvassed at the hearing, in its closing legal submissions the Agency proposed a different approach to the way in which construction would be undertaken in the vicinity of the Pascoes' home. This took the form of a new condition 5A, which addresses a number of matters, including relocation of the Pascoes' home should that be their desire. We address that in more detail later in this decision in **section K - *Conditions***.

[102] We find that the Agency has given adequate consideration to alternative sites,

[53] *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347 at [97] and [121].

[54] Poutama and Mr and Mrs Pascoe closing submissions, 22 July 2019, paragraphs 55-58 (**Poutama/Pascoe Closing submissions**).

[55] Poutama/Pascoe closing submissions, 22 July 2019, paragraph 74.

routes or methods for undertaking the work and has met its obligation under s171 (1) (b) of the Act.

H - Consultation

[103] Poutama and Mr and Mrs Pascoe expressed serious concerns about the adequacy of the consultation undertaken by the Agency. Concerns were also expressed by Te Korowai.

[104] Detailed evidence addressing this issue was provided by Mr R Gibbs for Poutama, Mr and Mrs Pascoe, and for Te Korowai by Mr N Baker. For the Agency we received evidence from Mr Napier and Mr AS Gard, the Mount Messenger Owner Interface Manager.

[105] We observe first that there is no statutory obligation on a requiring authority to consult about a resource consent application or a Notice of Requirement.[56] However, consultation is best practice.[57]

[106] The Agency stated that it had carried out extensive and detailed consultation with key stakeholders and the general public dating back to early 2016.[58] Further, that it had consulted with Te Korowai "to the extent that Te Korowai itself has enabled this".[59]

[107] We have carefully considered all the evidence we received on this point and have concluded that the Agency's consultation with Poutama, the Pascoes and Te Korowai was adequate.

[108] We do observe however that a Project such as this has many complexities, the extent of which have the potential to overwhelm those who might not be familiar with such works. For the Pascoes, those complexities combined with the fear and upset at losing a significant part of their land and home, made the process of engaging with the Agency extremely difficult.

[109] The evidence disclosed that the Pascoes did, for a time, have the benefit of legal counsel but that was primarily to assist with the Public Works Act (**PWA**) part of the

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56 s 36A RMA.
57 *Watercare Services Ltd v Auckland Council* [2011] NZEnvC 155.
58 Agency's opening submissions, paragraph 63.
59 Agency's opening submissions, paragraph 114.

process, that is, the land acquisition.

[110] One of the Pascoes' major issues was the fact that the Agency did not resource them so that they 'could effectively participate'.[60] They felt that they should have been resourced for all aspects of the Project. They also considered that the Agency should have established a framework and process for their ongoing engagement. They drew comparisons with the resourcing that was provided to Te Rūnanga.

[111] Mr Napier for the Agency stated that the Agency does not pay for other parties to be engaged in consultation under the RMA. In response to questions from Ms M Gibbs he said that the Agency did resource Ngāti Tama for consultation as they are tangata whenua.[61] He went on to say that the Agency had supported the Pascoes with resourcing for the Project. He referred to compensation that had been paid to the Pascoes for PWA negotiations, valuations, certain investigations and a new calf shed among other expenses.[62]

[112] We acknowledge the Agency's approach to this issue. It was apparent to us, however, that Mr and Mrs Pascoe were overwhelmed by the process. Mr Pascoe agreed that there were "too many people, too many plans" in reference to the discussions he and Mrs Pascoe had with the Agency.[63] The Pascoes were vulnerable and lost their legal representation at an important time in the process, which intensified their feelings about the impact of the Project on them. Aside from those factors, for reasons we explain more fully later, their relationship with the Agency and their interests were adversely affected by advocacy on their behalf from Poutama, Mr R Gibbs and Ms Gibbs.

[113] Having said that, we are satisfied that the Agency's consultation was extensive and detailed. It may wish to consider in future the desirability of maintaining (as far as possible) consistent points of contact when consulting with individuals.

[114] For Te Korowai, Mr Enright advised that Te Korowai had elected not to pursue disputed facts on consultation, stating that the issues as to consultation are secondary to substantive cultural effects of the proposal.[64]

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60 T Pascoe EIC, paragraph 23.
61 Transcript, page 36, lines 2-29.
62 Napier evidence in rebuttal (EIR), paragraphs 7-9.
63 Notes taken at hearing – Transcript incomplete.
64 Legal submissions for Te Korowai Tiaki o Te Hauāuru Inc, paragraph 49 (**Te Korowai's submissions**).

I - Effects on the environment

[115] There are a number of obvious effects of the Project which were not in dispute before us. The evidence provided by the Agency addressing traffic and transportation effects, economic effects, engineering and hydrology was essentially untested by the parties in the hearing.

[116] The Project will inevitably generate other effects including effects or potential effects on:

- Recreation;
- Heritage-archaeology and historic;
- Water from construction;
- Traffic from construction;
- Noise and vibration from construction;
- Air quality and dust from construction;
- Lighting from the road;
- Natural hazards;
- Soil contamination;
- Hazardous substances.

We rely on the findings of the Commissioner as to those effects being acceptable.

[117] The individuals most obviously affected by the Project are Mr and Mrs Pascoe. The NOR includes part of their land which will be permanently taken for the Project (road and associated works) and part of their land which will be used temporarily (storage, parking areas, construction yards, haul road etc). Neither the permanent nor the temporary areas

include the land on which the Pascoes' home is sited[65] but the house is situated within the designated area in close proximity to the proposed construction area at the northern end of the NOR.

[118] Our understanding is that the Agency has offered the Pascoes two options for relocating during construction:

- Under proposed designation condition 5A(e)(iv) the Agency has offered to purchase their home and surrounding land and to provide them with a new home at another location on their property;

- Under proposed designation condition 19b if the Agency does not complete this acquisition it has offered to provide the Pascoes with alternative accommodation for the duration of the works after which they would return to their existing home.

[119] By implication if they did not agree to either of these relocation options the remaining option would be for them to continue to live in their existing home, notwithstanding that the Agency in its closing legal submissions proffered the view that they would not wish to do so.[66] Our evaluation of construction effects has therefore considered what the effects would be if they were to continue to live in their home during the construction period.

[120] We address for the purposes of this decision the following effects, positive and adverse:

- Transportation effects;
- Economic effects;
- Construction effects;
- Social effects;
- Landscape and visual effects;
- Ecological effects;

[65] Agency closing legal submissions, paragraphs 55-66.
[66] Agency closing legal submissions, paragraphs 87-88.

- Cultural effects.

Transportation effects

[121] We heard from Mr PT McCombs (traffic and transport), and Mr B Symmans (project design) who addressed the traffic and transportation effects of the Project. Their conclusions on the transportation benefits of the Project are outlined in our analysis of the Agency's objectives in **section K**.

Economic effects

[122] Mr MC Copeland provided evidence on the economic effects of the Project. His conclusions on economic effects are outlined in our analysis of the Agency's objectives in **section K**.

Construction effects

[123] Evidence on construction of the Project, was provided Mr Milliken.

Management plans

[124] Mr Milliken advised that construction of the Project is expected to take 4 years and will be undertaken in accordance with a Construction Management Environmental Plan (**CEMP**) with the following appendices.[67]

- Construction Noise Management Plan (**CNMP**);
- Construction Traffic Management Plan (**CTMP**);
- Ecology and Landscape Management Plan (**ELMP**);
- Contaminated Land Management Plan (**CLMP**);
- Construction Water Management Plan (**CWMP**);
- Specific Construction Water Management Plans (**SCWMP**);
- Construction Dust Management Plan (**CDMP**).

[125] In addition, appendices to the CEMP include an Accidental Discovery Protocol, a

[67] Proposed condition 8 (with Advice Note).

Control of Spill Procedure and a procedure for Incident Reporting and Investigation.

[126] Mr Milliken said that the objective of the CEMP is to avoid, remedy, mitigate or offset adverse environmental, cultural, and social effects associated with the construction of the Project, so far as is reasonably practicable.[68] Taken as a whole the plans provide the overarching principles, methodologies, and procedures for managing the effects of the construction of the Project to achieve the environmental outcomes and performance standards required by the designation and resource consent conditions.[69]

[127] Apart from the SCWMPs[70] (each to be drafted and certified by the Council before the relevant works commence) the preparation of draft management plans was completed before the Council hearing with inputs from key stakeholders including DOC, the two councils and the design team's subject matter experts. These draft plans were carefully considered and tested at the Council hearing, with the final plans submitted to the Court being those agreed by the parties and approved by the Commissioner.[71]

Site access, construction yards and haul road

[128] Mr Napier advised that there will be 10 access points off the existing highway for the construction of the new highway, all to be managed in accordance with the CTMP. There will also be a 5,000m^2 construction yard located at the northern end of the new alignment adjacent to the Pascoes' house, with smaller yards at the bridge and tunnel work areas and at other remote areas along the new alignment.

[129] When asked by Ms Gibbs about flooding of the Pascoes' house if the construction yard was raised 1 or 2 metres, Mr Milliken said that the design of the yard had not yet been undertaken as there were a number of potential scenarios for this (we presume based on whether the Pascoes relocated or stayed in their home during construction). The fate of the sheds near to the house would also need to be considered under these scenarios.[72]

[130] We note Mr Symmans' advice that while the currently identified construction yard

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68 Milliken EIC, paragraph 10.

69 Proposed condition 9(a).

70 Agency's closing submissions, at [186] notes that SCMPs have already been completed for the Fill Disposal Site, the Northern Construction Yard and Temporary Access Crossing and are "construction" ready.

71 Milliken EIC, paragraphs 98-99.

72 Transcript, pages 155,156.

site was preferred, there was some flexibility for its configuration to be changed or even relocated.[73]

[131] Mr Milliken was asked a number of questions by Ms Gibbs about the proposed haul road in the Mangapepeke valley. He advised that this road would generally follow the line of an existing farm track, although depending on the conditions encountered along the route there may be localised variations to this. He said that the haul road would be constructed about 1m thick and that it would be desirable for it to be laid on fabric. The width would vary from about 9m at the surface to about 11m at the base.[74]

[132] As the northern end of the haul road (and construction yard) would be located within a few metres of the Pascoes' house, the Agency was committed to providing alternative housing for the Pascoes.[75]

[133] Mr Milliken said that the Project haul roads would be removed[76] and the ground reinstated once construction was complete.[77]

[134] We return later to consider the effects on the Pascoes of the Project, including the location and construction of the main construction yard and the haul road and construction noise.

Earthworks

[135] Earthworks will extend over an area of around 36ha and involve some 1.05 million cubic metres of cut and about the same volume of bulk fill leaving about 95,000 cubic metres of surplus cut material to be placed in disposal sites, all located within the designation area.[78] These disposal sites and any temporary stockpiling areas will be contoured, landscaped and vegetated in accordance with the ELMP.

Stream diversions[79]

[136] Some 3.1km of streams will be impacted by the new highway with the adverse

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73 Transcript, page 207.
74 Transcript, pages 141,142.
75 Transcript, page 151.
76 Transcript, page 144.
77 CB, Vol 6, CEMP, page 2986.
78 Milliken EIC, paragraph 65.
79 Symmans EIC, paragraphs 194-195.

effects of their construction to be addressed through riparian restoration offsetting. This will include the construction of some 1.8km of permanent stream diversions based on one of three typologies depending on whether the stream is in a lowland habitat, a steep stream habitat or a waterfall. The Agency has agreed with Te Rūnanga that the waterfall sections will have up to 5m high sub-vertical steps formed through excavations into the underlying bedrock.

[137] Temporary steam diversions with temporary culverts will be constructed for access to some construction areas. These diversions and stream works will be managed as provided for in the ELMP, the Landscape and Environmental Design Framework and the CWMP with SCWMPs to be developed and certified for each affected stream and culvert.

Culverts[80]

[138] The 19 permanent culverts for the new section of highway have been designed to provide for fish passage based on the *"New Zealand Fish Passage Guidelines for Structures up to 4 Metres"*. The Project's fresh water ecologist Mr K D Hamill also provided specialist advice for the design.

[139] Prior to the hearing the parties to the appeals agreed to a condition for the post-construction monitoring of the effectiveness of identified culverts as fish passages. If, after two years, the recruitment of young fish is not occurring at these culverts then refinements to the culvert fish passage devices are to be made.[81]

Stormwater management[82]

[140] Most of the stormwater run-off from the highway will be diverted to Mimi Stream and Mangapepeke Stream. The run-off will be collected in roadside channels and conveyed along the valley floors to one of three constructed wetlands which will be designed to manage peak flows and to contain and treat the stormwater prior to its discharge into the streams.

[141] At the tie-ins to the existing highway (which are both outside the catchments of the treatment ponds) swales will be constructed for treating the stormwater.

[80] Symmans EIC, paragraphs 199-200.
[81] Parties memorandum dated 8 May 2019, page 14.
[82] Symmans EIC, paragraph 187.

Bridges and tunnel

[142] No party raised any issues with us about the construction or operation of the two bridges and the tunnel. Neither, having read the evidence, did the Court identify any issues of its own.

Construction noise

[143] While construction noise was not raised as an issue by any of the parties during the hearing, it was raised by the Court which had noted that the Construction Noise Management Plan had been prepared on the basis that the Pascoes' house would be purchased and vacated and that therefore this house was not considered a sensitive receiver for the purposes of the management plan.[83] Mr Milliken confirmed that this was his understanding also adding that if the house was to be occupied during construction, specific noise mitigation would need to be provided in accordance with the construction noise standards.[84] Having said this, Mr Milliken did agree with the Court that the noise would be very difficult to mitigate and that this was why the offer had been made to relocate the Pascoes.[85]

The Pascoes' concerns about Mangapepeke valley

[144] Mr and Mrs Pascoe raised concerns with the Agency about the effects of black ice, fog, flooding and groundwater/springs for a highway located in the Mangapepeke valley.[86]

Black ice/frost/fog

[145] The Agency engaged NIWA[87] to assist them with specialist advice on black ice, frost and fog in the Project area.

[146] Light rain falling on a frozen road surface can form a thin layer of clear ice which appears black because it looks like the underlying road. For this to happen the wind must be light, the skies clear and the air very dry.

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83 CB, Vol 6, page 3369.
84 Transcript, page 271.
85 Transcript, page 275.
86 Symmans EIC, paragraph 214.
87 Dr M Revell, Principal Scientist – Meteorology, referred to in Symmans EIC, paragraphs 214-225.

[147] NIWA's estimate was that frost could be expected to occur in the Project area for about 60 days per year, with modelling showing that the new road should receive a few hours of sun in the afternoon even in winter. As the bypass is more or less on the same orientation as the existing route ice conditions on the two alignments could be expected to be similar.

[148] There could be around 30 days of fog a year in the Project area with the likelihood that the frequency of fog on the new alignment south of the northern tie-in could be higher than on the existing alignment but no higher than north of the bypass where the existing highway runs beside the Tongaporutu River.[88]

[149] Mr Symmans' evidence was that the new road will be much safer in fog than the existing road as it will have much wider shoulders, more gentle curvature and be provided with side safety barriers.

Flooding

[150] In response to the flooding concerns raised by the Pascoes, Mr Symmans said that extensive hydrological and hydraulic modelling had been undertaken[89] and that retention wetlands had been designed to prevent significant spikes in peak flows and to reduce flow velocities. He said that the Agency's flood modelling was consistent with the Pascoes' advice that there is widespread flooding in the valley during storm events. The completed road would not be subject to flooding under the 1% AEP design storm as its alignment along the right bank of the valley is elevated above the valley floor.[90]

[151] The modelling had also shown that, following the construction of the fill and the wetland upstream of the Pascoes' house, there would be a reduction in the flood levels at the house compared to those which occur now.

[152] Mr Pascoe was concerned that the proposed straightening of an existing stream in the valley could cause flood flows to move more rapidly down the valley and worsen the flooding downstream. In response Mr Symmans advised that any increase in flows from shortening the stream would be offset by a reduction in peak discharges as a result of

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88 Symmans EIC, paragraph 225.

89 Mr Symmans confirmed that the data from the Pascoes' rainfall gauge had been very useful and had been analysed in great detail as part of the Agency's overall hydrological modelling. (Transcript at page 112).

90 Symmans EIC, Figure 34.

extended detention times in the new wetland.[91] His advice was that it was unlikely that there would be any measurable effect on flood behaviour at the stream or at the existing culvert on SH3.

Groundwater/springs

[153] In response to Mr Pascoe's concern about the effects of the new highway on groundwater and springs Mr Symmans stated that his investigations had identified groundwater in the low-lying valleys as typically extending from the ground surface to 2.0m below the surface. He said that piezometers had been installed for the ongoing monitoring of these levels.

[154] Where sandstone bedding layers are exposed on the valley sides, groundwater emerges as a slow seepage. Mr Symmans stated that these seepages were unlikely to present problems for the stability of the Project's cut and fill slopes. He said that the valley floors are typically infilled with significant depths of relatively homogenous silts with low permeability and that groundwater flows and pressures in these locations are relatively consistent, typically being fed by the overlying streams and/or seepage from the valley sides.

[155] Mr Symmans said that the Project earthworks have been designed to limit any adverse effects on groundwater conditions, with the earthworks unlikely to have any measurable effects on groundwater beyond about 5 to 10m above the cuts and fills. This is because:

- The fill embankments are to be constructed on high-permeability drainage blankets to allow existing groundwater flows to continue;
- Any significant intercepted spring flow is to be collected at cut faces and conveyed under the road formation through specially designed drainage conduits before discharging as close as possible to the original discharge channel.

[156] Overall, Mr Symmans' evidence was that the Project's design would have negligible effects on the existing groundwater and springs regime in the Mangapepeke valley.[92]

[91] Symmans EIC, paragraphs 236–239.
[92] Symmans EIC, paragraph 255.

Findings on construction effects and the Pascoes' concerns

[157] Our findings on construction effects, including the Pascoes' concerns, are as follows:

- Proposed condition 5A in the designation condition set attached to counsel for the Agency's closing legal submissions provides extensive detail of the Agency's offer to relocate the Pascoes to a new home on their farm. In addition, proposed designation condition 19(b) offers the alternative of temporary accommodation at another location during construction;

- The Pascoes' decision on these alternatives is unknown;

- The Agency proposes to locate the proposed northern construction yard in the vicinity of the Pascoes' home. In the unlikely event that the Pascoes elect to remain in their home during construction, this yard will need to be designed to forestall the risk of increased flooding around their home. Resource consent condition 10655-1.0 prescribes an extensive set of conditions for the control of construction stormwater and sediment discharges, with an SCWMP to be prepared for the construction yard. As for all CMP this SCWMP is to be submitted to the Chief Executive of the Regional Council for certification that it complies with the conditions of consent. We accept that would be a suitable mechanism for ensuring that the construction yard is sited and designed to manage the risk of increased flooding around the Pascoes' home;

- Proposed designation condition 19 prescribes the noise limits that are to apply during the construction of the Project. This condition notes that there are exceptions to these limits as set out in proposed conditions 20 and 21. Condition 20 states that the CNMP identifies how the Agency will manage the effects of construction noise that exceeds the limits in condition 19. Condition 21 describes the content of the CNMP, which will include at 21(d) the details of any activities that may not comply with NZS6803: 1999 and measure to mitigate construction noise from those activities as far as practicable to ensure the effects are appropriate;

- Conversely, section 3.2 of the CNMP states that with the understanding the Pascoes' home would be purchased and vacant, this dwelling was not

considered as a sensitive receiver for the purposes of the CNMP.[93] We agree with Mr Milliken that this noise would be very difficult to mitigate. We go further and find that it would be untenable for the Pascoes to continue to live in their house during the construction period;

- We repeat our understanding that both the permanent and temporary areas required for the construction of the new highway do not include the land on which the Pascoes' home is sited although it is within the designation area.[94] We understand that for this reason the Pascoes home will be compulsorily acquired using the Public Works Act processes.

- We accept that the conditions proposed by the Agency are appropriate for the earthworks, stream diversions, culverts and stormwater management;

- We accept the evidence from the Agency that the frequency of black ice, fog and frost on the new highway should be about the same as for the existing highway, with the new road being safer in these conditions as it will have much wider shoulders, more gentle curves and be provided with side safety barriers;

- We find from the evidence of Mr Symmans that the Agency has properly investigated the concerns raised by the Pascoes about the effects of the new highway on flooding, groundwater and springs in the Mangapepeke valley, that the Project's design has addressed each of these concerns and that the resulting effects will be negligible.

Social effects – the Pascoes

[158] In her s 42A report the New Plymouth District Council's reporting officer Ms RL McBeth (who also gave evidence at the hearing) was initially of the view that there would be "significant social impacts on the Pascoes' amenity, way of life and wellbeing".[95] Ms McBeth did not consider that the effects on Mr and Mrs Pascoe could readily be mitigated or offset by way of conditions on the designation, stating that "the severity of these effects will need to be considered in evaluation of the overall merits of the proposal".[96] In her statement following the s 42A report,[97] Ms McBeth had formed the

93 CB, Vol 6, page 3369.
94 Agency's closing submissions, paragraphs 55-66 and Appendix 2.
95 McBeth EIC, Appendix A, s 42A Report, paragraph 244.
96 McBeth EIC, Appendix A, s 42A Report, paragraph 245
97 McBeth EIC, Appendix C Supplementary s 42A report dated 9 October 2018, paragraph 73.

view that, while acknowledging the serious social impact on Mr and Mrs Pascoe, among other effects, on balance the NOR with suggested conditions is consistent with the purpose of sustainable management under s 5 of the RMA.[98]

[159] Ms McBeth confirmed in her evidence to the Court that while the amenity effects on Mr and Mrs Pascoe had been addressed through the contents of the management plans, the effects on their way of life and wellbeing were still to be addressed.[99]

[160] The social effects of the Project on Mr and Mrs Pascoe are significantly adverse. The part of the valley in which their house and farm is located will be split in two by the proposed road. We heard how important the valley is to them, and what value they place on it as a place of healing. Their part of the valley will be forever changed by the Project. We accept that there are serious adverse effects of the Project on the Pascoes.

Landscape and visual effects

[161] The Agency acknowledged that the Project will have adverse landscape, visual and natural character effects, but observed that outstanding natural features and landscapes are avoided.[100]

[162] A detailed analysis of those effects was undertaken on behalf of the Agency by landscape architect Mr GC Lister, for the Council hearing. It was accepted by the Commissioner that landscape and visual effects will be appropriately addressed by the proposed conditions and the ELMP.

[163] For the Pascoes, the landscape, visual and character qualities of the valley are entwined with its ecological and spiritual qualities. Mr Pascoe described the effects of the Project on him and his wife in these terms:[101]

> Loss of habitat, edge effects, loss of our significant trees, loss of our threatened species, effects on our hydrology, the pure air, the healing qualities of our valley should be protected...

[164] The ecological effects of the Project are addressed in a later section of this decision. With respect to the visual effects, Mr Lister acknowledged that two houses will

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98 McBeth EIC, Appendix C Supplementary s 42A Report, paragraph 73.
99 Transcript, page 557.
100 Agency's opening submissions, Appendix 4, paragraph 1.
101 T Pascoe EIC, paragraph 177.

be adversely affected by the Project, being the Pascoes' and another at 2750 Mokau Road. He recorded that the Pascoes' house currently has views to the existing highway at a distance of approximately 120m. The proposed alignment is closer (at approximately 100m distance), which will add to the visual effects of the highway. He noted, however, that the highway will be in a 160m-long box cutting extending from opposite the house to the north that will soften views, as will the proposed revegetation of the valley floor. He considered, taking those factors together, that the adverse visual effects following revegetation would be "moderate-low".[102]

[165] Mr Lister accepted that there will be localised "high" adverse effects of the Project on the natural character of Mangapepeke Stream and its margins. However, he concluded that the proper context for assessing natural character is the valley as a whole along the length of the Project. From that perspective Mangapepeke Stream and its margins are considered to have moderate natural character and the adverse effects on the stream will likewise be moderate. These effects will be remedied by measures aimed at restoring the whole valley to a natural system.[103]

[166] Mr Lister similarly accepted that there will be adverse effects within the Mimi valley from loss of natural landscape features (bush and stream) and the visual impact of the highway.[104] Various measures are proposed by way of mitigation and are outlined in the ELMP.

[167] We accept Mr Lister's evidence as set out above and the Commissioner's findings on landscape, visual and natural character effects.

Ecological effects

The evidence

[168] Expert evidence on ecology was provided by Mr RJ MacGibbon for the Agency and Dr LM Shapiro and Mr CT O'Carroll (on pest management) for Te Rūnanga. DOC did not provide evidence as its points of appeal had been resolved to its satisfaction prior to

[102] CB, Vol 3, Lister SOE, page 2309 (paragraph 40(d)). With regard to the house at 2750 Mokau Road, he observed that it is located on land on top of the main ridge south of the Project. Parts of the Project, such as approach to the tunnel portal, are anticipated to be screened by the topography and bush. The highway will be at a lower elevation reasonably distant and part of a wider panorama. There will be 'low' adverse visual effects.

[103] CB, Vol 3, Lister SOE, page 2310 (paragraphs 41 and 42).

[104] CB, Vol 3, Lister SOE, pages 2510-2512 (paragraphs 43-46).

the commencement of the hearing.

[169] Mr MacGibbon's evidence addressed:

- The existing ecological values of the area;
- The methodology for the proposed restoration package;
- The proposed biodiversity offsetting and compensation and the monitoring of these;
- The pest management programme;
- The riparian restoration works;
- The replacement mitigation and significant tree planting;
- The long-tailed bat radio-tracking survey;
- Kiwi surveys;
- The freshwater baseline monitoring;
- Constraints mapping;
- Engagement with councils, DOC and Te Rūnanga.

[170] Mr MacGibbon also provided the following summary of the adverse ecological effects of the Project and the measures proposed to mitigate these effects:[105]

> 10. The forest and natural habitat along and adjacent to the proposed Mt Messenger Bypass Project ("Project") footprint east of the existing State Highway 3 ("SH3") retains indigenous plant and animal communities that are considered to have high ecological value. However, the full ecological potential of the area has been significantly diminished over many decades by the largely uncontrolled impact of browsing, grazing and predatory animal pests and unfenced cattle.
>
> 11. The unmitigated ecological effects of the Project will be significant and are likely to include: removal of or damage to 31.28ha of predominantly indigenous vegetation; the removal of up to 17 significant trees from along the Project footprint; the loss or alteration of 3705 metres of stream; the loss or alteration of habitat occupied by indigenous bats, forest and wetland birds (including kiwi), lizards, aquatic fauna and invertebrates; increased fragmentation of habitat occupied by indigenous fauna; and the risk of indigenous fauna injury or mortality due to vehicle strikes.
>
> 12. Significant effort was directed during the route selection and design phases at avoiding and minimising the impact on ecological values. However, substantial residual ecological effects are expected and a comprehensive mitigation, offset and compensation package (**"the Restoration Package"**) has been developed to address those effects.

[105] RJ MacGibbon EIC, paragraphs 10 -19 (**MacGibbon EIC**).

13. The principal components of the Restoration Package are to:

    (a) undertake intensive pest management over an area of 3650 ha surrounding the Project area in perpetuity (or until such time as pest control techniques as we currently know them are no longer required);

    (b) remove all farm livestock from the upper Mangapepeke valley and the adjacent forest areas;

    (c) establish 6 ha of ecologically significant kahikatea – swamp forest habitat in an area that would once have been swamp forest but has long since been cleared for farming;

    (d) fence 8.455km of stream from livestock and plant 16.91ha of riparian margin with indigenous species (together referred to as "**riparian restoration**");

    (e) plant 200 seedlings of the same species for every significant tree removed. Currently, this is expected to amount to 3400 seedlings;

    (f) plant 9ha of mitigation planting on areas that are currently predominantly pasture;

    (g) salvage and relocate threatened plant species, lizards, peripatus and wood from the Project footprint;

    (h) compensate for the residual ecological effects on lizards by the provision of $200,000 to DOC to be directed to research that will benefit indigenous herpetofauna; and

    (i) install kiwi roadside barrier fencing along areas of roadside margin that are considered to be locations where there is a risk of kiwi attempting to cross the road during construction and road operation.

14. In addition, vegetation removal protocols are proposed to ensure no trees are felled containing long tailed bats and no kiwi with territories over or adjacent to the Project footprint are harmed.

15. A further 120,000 native plants will be planted along the road margins and on the fill slopes.

16. The restoration and rehabilitation works are expected to result in a rapid and substantial recovery of palatable plant species and forest canopy condition and provide improved habitat and reduced predation that will enable many wetland and forest birds (including kiwi), aquatic organisms and long tailed bats to increase in abundance. For bats in particular, which within the wider area are in low numbers and continuing to decline in abundance due to predation, the Project will provide an environment suitable for significant population growth.

17. The substantial, intensive and enduring pest management programme, accompanied by sizeable areas of replanting, will increase the level of ecosystem function within the managed area. By definition, this means that the capacity of the ecosystem to provide goods and services that support natural life and satisfy human needs – both physical and cultural - will greatly improve. Many of the taonga and mahinga kai species identified by several of the submitters at the Council-level hearing will benefit and become more plentiful.

18. This is the largest and most comprehensive ecological package developed for a new road Project in New Zealand. It creates one of the largest intensively pest managed areas in New Zealand and, with the commitment to pest management in perpetuity, the ecological gains will be substantial and permanent.

19. A state of no net loss of biodiversity is likely to be achieved 10 years following construction and a net gain in biodiversity from 15 years after construction. The biodiversity gains will continue to accrue for decades beyond 15 years.

Pest management programme

[171] Mr O'Carroll explained that since 2012 he had been the project manager for pest control being undertaken on 1,400 hectares of iwi land in the Paraninihi that had been returned to Ngāti Tama as part of the Treaty settlement process. One of the main objectives of this programme, which is being undertaken by the Paraninihi Trust (set up for this purpose), was to re-introduce the Taranaki kokako to this area.

[172] The programme involves intensive rat and possum eradication with targets of less than 5% rat and possum presence (informed by tracking indices). Kokako were re-introduced in 2017 and again in 2018 with over 10 kokako from monitored pairs having been successfully fledged since then. Mr O'Carroll said that Ngāti Tama were very keen to expand their pest management area but so far this had been constrained by a lack of funding. He added that the Trust was very supportive of its 1,400 hectares being included within the 3,650 hectares which would become the responsibility of the Agency to manage and fund.

[173] Dr Shapiro advised that the location of the pest management area had been dependent on field surveys locating more than 10 long-tailed bat maternity roosts. This had been achieved, the bat monitoring programme undertaken between October 2018 and February 2019 having confirmed the presence of more than this number.[106]

[174] He said it was important for Ngāti Tama to be involved in the expanded pest management programme. It was his understanding that this would be provided for in a proposed agreement between Te Rūnanga and the Agency.[107]

[175] Dr Shapiro was unclear as to the details of the ecological concerns raised in the appeals of Te Korowai, Poutama and the Pascoes but his view was that the proposed Restoration Package and the consent conditions would adequately address all the ecological effects of the Project.[108]

Area to be managed and additionality

[176] In answer to a question from the Court about how the final area of 3,650 hectares for the pest management programme had been determined, Mr MacGibbon said that

[106] Dr LM Shapiro EIC, paragraphs 27-28 (**Shapiro EIC**).
[107] Shapiro EIC, paragraph 29.
[108] Shapiro EIC, paragraphs 36-38.

following discussions with DOC this had been based entirely on the needs of the long-tailed bat population.[109] He said that the only piece of research undertaken to determine the area required of which he was aware had been in Fiordland, where population recovery had been achieved when the pest management area had exceeded 3,000 hectares. This had been the base area adopted for the Project with this being increased to 3,650 hectares to follow boundaries. He confirmed that the existing 1,400 hectares in the Ngāti Tama programme would be incorporated within the 3,650 hectares, all to be funded by the Agency.[110]

[177] Responding to comments that taking over the funding of the existing pest management regime in the Paraninihi may not provide an additional ecological benefit, as the predator control work being done under Mr O'Carroll's management was already providing good results, Mr MacGibbon considered that the principle of additionality would be met. The requirement for continuous and consistent funding in perpetuity, as well as a more intensive level of pest control designed to achieve a 5% residual rat tracking index, would, he said, provide significant additional benefit in the Paraninihi area[111].

[178] In closing submissions counsel for the Agency summarised other benefits of including the Paraninihi in the proposed pest management area (**PMA**), noting that the 3,650 ha footprint provides the smallest perimeter possible bordering unmanaged forest (minimising the length of border across which pests can invade the PMA), straddles the area affected by the Project and provides a continuous protected habitat area for birds that extends from the coastline to the ridges west of the Project area. Overall, it was submitted, this provides conservation benefits above and beyond the status quo.

Cost estimates

[179] At the request of the Court Mr MacGibbon provided a summary of the cost estimates for the pest management programme. The establishment phase was estimated to cost around $228 per hectare including cutting the tracks and trapping lines (for an estimated 366 km), providing the traps, the bait stations and other capital items and a project management fee. This phase was expected to take two years to complete.[112]

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[109] Transcript, page 195.
[110] Transcript, page 564, lines 11-20.
[111] MacGibbon Rebuttal, paragraphs 10-15.
[112] Transcript, page 211.

[180] The annual operational costs would vary, with a 1080 aerial application to be undertaken every third year and the traps and devices replaced and the tracks recut every five to seven years. A proportion of this ongoing work would be undertaken each year, with the annualised costs on a per-hectare per-year basis estimated to be:

Item	Cost per hectare per year ($)
Operational Costs	100
Project Management	40
Equipment Maintenance	40
Damage repairs, replacement traps and devices, re-cutting tracks, contingency	26
Total	**206**

[181] Mr MacGibbon said that the total figure was similar to Mr O'Carroll's estimate of $220 per hectare per year ($308,000 for the current 1,400m hectares). He added that in 2018 there had been a considerable shortfall in the funds available for Mr O'Carroll's project (only $192,000 had been available).[113]

Logistics

[182] Asked about how the logistics of the pest management programme might work Mr MacGibbon said that the planning for this had relied heavily on the experience of the existing Ngāti Tama pest management programme being managed by Mr O'Carroll. The ecology team had worked closely with him in choosing the required intensity of gridlines, traplines and locations to achieve a 5% residual trap catch (or lower). For this, stations would need to be located every 150 metres (or closer) although it was acknowledged that because of the terrain, in some areas this would not be achievable. Mr MacGibbon said that Mr O'Carroll's team had not always been able to achieve a 5% trap catch with rats although they had been close to this. His understanding was that at times Mr O'Carroll's team had been under resourced.[114]

[183] Mr MacGibbon said that the control targets could not be achieved solely through a

[113] CT O'Carroll EIC, paragraph 28 (**O'Carroll EIC**).
[114] Transcript, page 197.

ground-based operation and it was essential to the programme's success to include the application of 1080 toxin through the canopy to provide three-dimensional cover of the landscape. He said that research had shown that these aerial drops needed to be undertaken at intervals of no less than three years to prevent rodents becoming resistant to the bait.[115]

Threats to the programme

[184] When asked about the threats to the success of the pest management programme, Mr MacGibbon replied that the most important requirement would be to have a project manager who was both competent in pest management and was given day to day managerial control over the diverse range of contractors who would be engaged to undertake the work. His understanding was that this was the approach that would be taken by the Agency.[116]

Term of programme

[185] In terms of the relationship between the requirement for the pest management programme to be undertaken in perpetuity and the 35-year Ngāti Tama review period provided for in proposed Designation condition 29A, Mr MacGibbon said that his understanding was that this review was to provide Ngāti Tama with the opportunity to decide at that time whether or not to continue with the programme on their land. If they decided not to continue, then the Agency would need to find an equivalent area on Crown land to make up the 3,650 hectares with this being located as close as possible to the existing area.

Ecological review panel

[186] It is proposed that an ecological review panel be established as part of the consent to consider the ecological effects of the Project periodically. Mr MacGibbon advised that the membership of the ecological review panel would include a range of experts, representatives of DOC and representatives of Ngāti Tama. The panel would need to have the necessary experience and capability to evaluate multiple monitoring reports during each year of the programme, to recognise any unexpected outcomes and to recommend adaptions to the programme and its resourcing if it was deemed necessary

[115] Transcript, page 197.
[116] Transcript, page 199.

to respond to these outcomes.[117]

[187] We note that full details of the establishment, make up and responsibilities of the review panel are set out in proposed designation condition 33.

Questions from Mr and Mrs Pascoe and Poutama

[188] Mr MacGibbon was subjected to extensive questioning from Ms Gibbs about the potential for adverse ecological effects from the Project on the Pascoes' land.

[189] He was asked about the dislocation effect of the new highway on a pair of kiwi living on opposite sides of the Mangapēpeke valley, which the Pascoes said called to each other at night.[118] He agreed that this pair would be dislocated – and most likely others – and that this had been the subject of considerable discussion with DOC. As a result, agreement had been reached on mitigation measures including designing culverts under the new highway to be kiwi-friendly and erecting "kiwi fencing" along the full length of the highway to guide kiwi to the culverts. These measures were based on experience from other highway projects where, even though culverts were dark and sometimes flowing half-full of water, kiwi had been observed to use them to maintain contact with their traditional territories.

[190] He said that so far six kiwi had been located in areas which overlapped with the proposed alignment, and that these kiwi had been fitted with radio trackers. Before construction started, these six and any others found would be moved to another location within their territories.

[191] He was asked also about the effectiveness of the bat trapping that had been undertaken, with a suggestion from Ms Gibbs that there had been trapping at full moon when the light from the moon would have made the traps more visible and therefore avoided by the bats.[119] His response was that all of the bat experts involved operated to a standard protocol which excluded trapping within two days of full moon. He said that he was unaware whether trapping had been undertaken at full moon but if it had been it was not standard practice, adding that in the most recent summer which involved radio tracking no bats had been trapped.

[117] Transcript, page 200.
[118] Transcript, page 169.
[119] Transcript, page 171.

[192] In response to a question about the breadth and detail of his ecological expertise, Mr MacGibbon advised that at the Council hearing there had been evidence from a range of experts on avifauna, bats, herpetofauna (lizards and frogs), terrestrial ecology, freshwater ecology and botany.[120] While he had been the only expert called by the Agency to give ecological evidence at the Court hearing, this was because there were no outstanding areas of disagreement between Agency and DOC on ecology.

[193] In response to a suggestion from Ms Gibbs that pest control has already been undertaken on the Pascoes' land by Mr Pascoe shooting possums, Mr MacGibbon pointed out that it was not just possums that damaged native forests but other animals as well such as feral pigs and grazing animals. He said that pest control in its widest sense was being directed at controlling the negative impact of all problematic animals.[121]

[194] Ms Gibbs also asked Mr MacGibbon some questions about the "offset" and "compensation" terminology used in relation to the Restoration Package. She was concerned[122] that the "compensation" proposed for long tailed bats was offered on the expectation that the bats would not survive when trees were felled in the Mangapepeke valley based on her understanding of advice from DOC, and that the "compensation" was a financial contribution rather than a measure to reduce damage or remedy it.

[195] Mr MacGibbon explained that a tree removal protocol, used nationally in such cases, will be followed to minimise harm to the bats and that the mitigation proposed, including pest control, should see an increase in the number of bats in the wider PMA area.[123] He explained that use of the term "compensation" is by definition only, and the Restoration Package cannot be called an "offset" as it is not possible to quantify the number of long tailed bats in the Project area before and after the works are done. But it is an ecological package, he said, and it is like an offset or mitigation. He said there had been discussion with DOC about whether it could be called an offset and that it was eventually agreed that, from a terminology perspective, it had to be called compensation.

[196] He advised Ms Gibbs that if the Pascoes agreed his preference would be for pest management and restoration planting to extend over the full length of the Mangapēpeke

[120] Transcript, page 177 and MacGibbon EIC, paragraph 30.
[121] Transcript, page 182.
[122] Transcript, page185 ln 11-14.
[123] Transcript, pages 185-186.

valley including the valley flats of the Pascoes' land.[124]

[197] We note that the Agency has offered the Pascoes an additional $55,000 on an *Augier* basis for planting in a fenced area on other land they own.[125]

The DOC appeal

[198] DOC's appeal related specifically to the following District Council conditions:[126]

- Condition 29(d) and Schedule 1 clause 4(a): requirements for kiwi fencing along the road corridor;
- Condition 29A: evidence of legal agreements/authorisations for ecological mitigation and biodiversity offsets/compensation measures, required to be provided to the Planning Lead (here, NPDC) prior to Project works commencing;

and to the following Regional Council conditions:

- General conditions:
  - GEN 24A (legal arrangements and authorisations to enter onto land to carry out, continue and maintain all the measures set out in the ELMP);
  - Schedule 1, including clauses 6(j) (fish passage) and 6(k) and (l) (sedimentation); and
- Condition SED 11 on consent number 10655-1.0 (discharge stormwater and sediment).

[199] In their joint memorandum of 22 May 2019 the parties to the appeals (except for the Pascoes and Poutama and Te Korowai) advised their agreement (subject to the Court's approval) for the two DOC appeals to be disposed of by consent based on the amendments to the conditions attached to the memorandum.[127]

[200] The parties who signed the joint memorandum agreed that these amendments

[124] Transcript, page 188.
[125] Agency's closing submissions, paragraph 101, proposed condition 5A.
[126] Joint memorandum in support of Draft Consent Order Dated 22 May 2019.
[127] We have referred to these as the Agency's proposed ecological conditions.

were within the scope of the relief sought in the Appellants' notices of appeal.

[201] Te Korowai advised later that if the Court grants approval for the NOR it accepts that the Agency's conditions are appropriate.[128]

Discussion and finding on ecology

Ecological Project management

[202] An important point raised by Mr MacGibbon in questioning was the need for highly skilled management in the implementation of the ecological Restoration Package. This strikes us as critical to its success. We have not seen a condition that requires a dedicated environmental overview role for this work. There are various roles mentioned in management plans, for example: an "Environmental Manager" appears in a table relating to long tailed bat surveys (nominated as Ed Breese); and in the "Fish Recovery and Rescue Protocols" (Appendix E (July 2018) to the Ecology and Landscape Management Plan) a "managing ecologist" will work with "the contractor's Environmental Manager" in relation to fish recovery works (section 3.1.1); a "Project Freshwater Ecologist" is involved (3.1.4 bullet point 6); a "Project Ecologist" and the "Environmental Team" are also mentioned (3.2 bullet point 5). It would be useful for the Council to ensure that the content of the management plans provides clarity around the management structure for the implementation, monitoring and reporting phases.

Additionality

[203] We are satisfied that the inclusion of the Paraninihi area into the PMA will provide additional benefits both within that area as a result of the additional pest control infrastructure, on-going funding consistent with pest management requirements that vary over time, and measurable outcomes locked in by conditions and also within the rest of the PMA as it will benefit from its geographical connection through to the coast as well as other factors described above. Ngāti Tama's experience in management of the pest control programme in the Paraninihi area can be expected to provide benefits to the programme over the wider area.

[204] Having said that, some of those benefits described above, and particularly those relating to the coast-to-mountains continuity enabled by the inclusion of the Paraninihi

[128] Te Korowai Memorandum of Counsel dated 17 June 2019 paragraph [2], second bullet point.

(embodied in the name Te Ara o te Ata), the compact boundary length to area ratio and the single big PMA straddling the Project area, may be undermined if Ngāti Tama was to decide, after 35 years, that it no longer wished to have the Paraninihi land included in the PMA. We understand that the purpose of the review clause in proposed condition 29A is to enable future generations of Ngāti Tama to have a say in determining the destiny of the area. While the Paraninihi may well never be withdrawn from the PMA, the clause introduces an element of uncertainty into the "in perpetuity" claim in relation to its benefits for the PMA.

[205] If such a decision (to withdraw their land) was made by Te Runanga, a new equivalent area would need to be agreed (presumably between the Agency, DOC and the two Councils) and the required level of pest control implemented, potentially from scratch.

[206] We understand from Mr MacGibbon's evidence (para 170 of this decision) that if any such decision was made and new land was to be brought into the PMA, it would be an equivalent area of Crown land, such that the new land (and thus the entire PMA) could then be protected in perpetuity. There would again be a delay of 15 years or more years following construction to reach the point of no-net-loss of biodiversity and begin achieving a biodiversity gain in the new area (following from Mr MacGibbon's estimate).[129]

[207] Putting such a delay into the context of "perpetuity", it seems to us that this "lost time" is not significant. That is, it seems to us likely that the long-term outcome for a pest management programme, should a new area be necessary, would still be to achieve the benefits intended, even if there was an interruption after 35 years while a replacement area was set up. If the new area was then to be in protected in perpetuity we do not see the potential for the withdrawal of the Ngāti Tama land as a significant impediment to a successful biodiversity outcome for the Project overall. But we know of no commitment from the Crown to make such land available in perpetuity as Mr MacGibbon indicated would occur (and to require that would be *ultra vires*), and neither do we know if appropriate replacement land is available adjacent to or in the near vicinity of the Project area, whether Crown owned or privately owned. If pest control in perpetuity on a single package of land cannot be guaranteed after one, two or even more periods of 35 years the in perpetuity commitment seems somewhat hollow. We would hear further from the parties on this proposal prior to concluding our final decision. At the least we expect that

[129] Paragraph [170], point 19 of this Decision.

proposed condition 29A(f) may need to be amended.

The Restoration Package

[208] We are satisfied that the Restoration Package includes a range of mitigation, offset and compensation that together are sufficient to provide for on-site/near-site ecological benefits in the short term and ecological benefits over the whole PMA (and potentially beyond it) in the longer term.

[209] We consider the in-perpetuity provision of the Restoration Package to be extremely generous, but this is what the parties have agreed and we have no basis on which to convert this to a shorter term. We note, however, that we do not consider the inclusion of an in-perpetuity condition to be precedent-setting in terms of future projects, as the Restoration Package results from the peculiar circumstances of this Project and is volunteered. Should the need for predator control of the type now required no longer be necessary in future (for example, should a national pest management strategy overtake the requirement for local pest/predator control initiatives) the usual recourse to a review of the consent conditions is available.

Costs

[210] In relation to the costs of the pest management programme there was some variance between the costs estimated per hectare by Mr MacGibbon and Mr O'Carroll, but as Mr MacGibbon explained there are various factors that may change on an annual and/or multi-year basis that need to be considered when calculating costs. He considered their estimates to be generally similar. In any event, regardless of the quantum estimated now for a successful outcome from the programme to be achieved, the specificity of the Ecology and Landscape Management plan, and the conditions, place strong imperatives on the Agency to make the Project work as intended. The methods, monitoring and reporting requirements are set out in detail and the outcomes are measurable.

Ecological Review Panel

[211] We are satisfied that proposed condition 33, requiring appointment of three suitably qualified experts to the Ecological Review Panel (and the opportunity to seek additional expert assistance as needed) and the tasks set out therein provide appropriate opportunities for the review of relevant information, monitoring reports, methodologies

and changes to the Ecology and Landscape Monitoring Plan.

Summary and findings

[212] We have summarised Mr MacGibbon's responses to Ms Gibbs' questions about the consideration given to the potential for adverse effects of the Project on the ecology of the Pascoes' land, the Agency's invitation for the Pascoes to have their Mangapēpeke valley land included in the pest management programme and its financial offer to them for additional planting on their land.

[213] We have noted that all of the matters raised in DOC's appeal have been resolved to the satisfaction of DOC, the Agency, Royal Forest and Bird Protection Society and the two Councils through agreed amendments to the conditions of consent. In addition, if the Court approves the NOR, Te Korowai has advised that it would accept the Agency's conditions on ecology.

[214] Having carefully evaluated all this evidence and on the basis that the Project is constructed and operated in accordance with the Agency's proposed conditions of consent for ecology (although not agreed to by the Pascoes and Poutama), we make an interim finding that following mitigation, the immediate and long-term ecological effects of the Project will be appropriately addressed. However, our finding cannot be finalised until we know whether or not the Agency has reached agreement with Te Rūnanga to acquire the Ngāti Tama Land.

Cultural effects

[215] In this section we address the cultural issues raised by the appeals.

Overview – the main issues

Te Rūnanga

[216] A defining feature of the Project is that the NOR includes land recently returned to Ngāti Tama as cultural redress in its Treaty settlement.[130]

[217] Counsel for Te Rūnanga said in opening submissions.[131]

[130] Approximately 22ha of Ngati Tama land is required for the road and a further 15.9ha is required on a temporary basis for the construction period.

[131] Te Rūnanga opening submissions, paragraph 20.

> It is land that was wrongly confiscated from Ngāti Tama in the nineteenth century... The statutory acknowledgement for Mount Messenger notes that it is "an important area containing Ngāti Tama Pā sites and mahinga kai sources of birds and fish". For a people that were rendered virtually landless as a result of the Crown confiscations the cultural significance of the land cannot be over stated.

[218] Te Rūnanga prepared a "Maori Values Assessment in relation to the Paraninihi Te Ara o Te Ata Project"(**MVA**) dated December 2017.[132] The Project name 'Te Ara o Te Ata' is a name provided by Ngāti Tama. Te Ata is a local taniwha which manifests on the coast of Paraninihi (Whitecliffs) and is of major significance to Ngāti Tama.[133]

[219] The Ngāti Tama Deed of Settlement cultural redress included the transfer of parcels of Conservation land, including (relevant to the Project) the Whitecliffs site and the Mount Messenger sites. Te Rūnanga refers to these areas as 'Paraninihi'.

[220] Of these land parcels Te Rūnanga states:[134]

> These land parcels are of great significance to Ngāti Tama, and are regarded as the 'jewel in the Crown' of the Ngāti Tama historical settlement. The Paraninihi Protection Project Strategic plan records this point, noting:
>
> > *"Paraninihi was returned to Ngāti Tama by the Crown in 2003 and has a rich history of pre European occupations shown by the numerous kainga and pa sites. Ngāti Tama wish to protect this land and ensure that it remains a jewel in the Crown of Taranaki for all to enjoy"*

[221] On cultural values, it said:[135]

> There are significant cultural values associated with Paraninihi. These include the following:
>
> (a) Firstly, the value of Paraninihi as the jewel in the crown of the Ngāti Tama settlement, representing return of Ngāti Tama collectively held lands within our ancestral rohe;
>
> (b) Strong kaitiakitanga associations;
>
> (c) Paraninihi is referred to and considered a tāonga;
>
> (d) The important flora and fauna of Paraninihi is a tāonga;
>
> (e) The importance of Parininihi and a cultural, spiritual and resourceful sustenance to our iwi.

[222] The Agency has (correctly in our view) proceeded on the basis that it would be wrong to once again use the Crown's coercive powers against Ngāti Tama in order to re-

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[132] W Simpson EIC, Appendix C MVA.
[133] MVA above n132, at paragraph 2.
[134] MVA above n132, at paragraph 25.
[135] MVA above n132, at paragraph 53.

acquire their land. It has instead proceeded on the basis that the Project will only go ahead if it were able to gain the consent of Te Rūnanga for the Ngāti Tama Land. Extensive mitigation and compensation proposals have been negotiated, and the iwi will decide whether or not to accept them. However, for the purposes of this hearing Te Rūnanga, save for the appeal against the Kaitiaki Forum Group conditions, supported the conditions proposed for the NOR and the resource consent applications. We return to this point later.

Pascoes/Poutama

[223] The land owners most affected by the Project, aside from Ngāti Tama, are Mr and Mrs Pascoe. They own land in the Mangapepeke valley adjacent to the north of the affected Ngāti Tama Land.[136]

[224] Mrs Pascoe's great grandmother (Mrs H Stockman) has whakapapa to a Taranaki hapū whose rohe lies to the south of the Ngāti Tama rohe, outside the area affected by the Project. Nonetheless, the Pascoes' effectively contend that they should receive cultural recognition equivalent to that shown to Ngāti Tama.

[225] This is because it is said that through Mrs Pascoe's whakapapa they are also part of a collective known as Ngā Hapū o Poutama (Poutama) within whose rohe their land is located.

[226] Te Rūnanga disagrees. They argue that Mr and Mrs Pascoe are not tangata whenua or kaitiaki in the sense those terms are used in the Act. They question the alleged link to Poutama as one of very recent origin that is not supported by the evidence. They also deny that Poutama is a hapū collective exercising mana whenua and kaitiakitanga over a rohe equivalent to or greater than that of Ngāti Tama. Poutama, they say, is a largely non-Māori group who own land on the coastal fringes. The few Māori who support the group calling themselves Poutama are either from outside the rohe altogether (for example, Ngāi Tūhoe) or have whakapapa to Ngāti Tama or Ngāti Maniapoto.

[136] Approximately 11.15 hectares of Pascoe land is required for the road and a further 13.5ha is required on a temporary basis for the construction period.

Te Korowai

[227] There is also an appeal by a collective of Ngāti Tama known as Te Korowai.

[228] Te Korowai were formed as an incorporated society in early 2018 as a vehicle to oppose the approach taken by Te Rūnanga to the Project. That appeal is more straightforward and we will address it after consideration of Te Rūnanga's and the Pascoe and Poutama appeals.

[229] Te Rūnanga's and the Pascoe and Poutama appeals raise a number of issues concerning the proper interpretation and application of the relevant provisions in Part 2 of the RMA. We therefore start with an outline of those provisions and our approach to them before turning to the appeals themselves.

Part 2 requirements

[230] There are three relevant requirements. First, in order to achieve the sustainable management purpose of the Act it is deemed a matter of national importance that the Court recognise and provide for: [137]

> The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

Second, the Court is required to have "particular regard to": [138]

> a) Kaitiakitanga...

Thirdly, the Court must "take into account" the principles of the Treaty of Waitangi.[139]

[231] There is a hierarchy of obligation. At the high end, the requirement is to "recognise and provide for" (s 6) then to have "particular regard" (s 7), and finally to "take into account" in s 8.

[232] The terms "tangata whenua", "mana whenua", "kaitiakitanga" and "tikanga Māori" are defined in the Act as follows:[140]

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[137] s 6(e), RMA.
[138] s 7(a)(aa), RMA.
[139] s 8, RMA.
[140] Section 2, RMA.

> "Tangata whenua" in relation to a particular area, means the iwi, or hapū, that holds mana whenua over that area."
>
> "Mana whenua" means customary authority exercised by an iwi or hapū in an identified area."
>
> "Kaitiakitanga" means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources: and includes the ethic of stewardship."
>
> "Tikanga Māori" means Māori customary values and practices."

[233] We are aware of the criticisms made by the Waitangi Tribunal of the use of the term "mana whenua" in statutes such as the RMA. The Tribunal's central concern is that the term can cut across customary concepts and protocols, particularly those that emphasise the interconnectedness between groups and their associations with a place and its resources.[141] The Tribunal cautioned against the assumption that in any particular area only one tribal group could be involved:[142]

> What must be watched closely is the tendency to use Māori terms without an appreciation of the associated cultural ethic.

[234] Case law from this Court and the Māori Appellate Court on similar issues indicates that there is no reason in principle why there could not be more than one tangata whenua in a given area.[143] There is also High Court authority upholding a distinction drawn by the Environment Court between a group holding kaitiakitanga in a place and a second group with a weaker kaitiaki relationship.[144]

[235] In 2012 the High Court made the following observations in relation to a dispute between Taranaki Whānui and Ngāti Toa over redress being offered to Ngāti Toa within what Taranaki Whānui considered to be its exclusive area of interest:[145]

> The problem with statutory acknowledgments and deeds of recognition in the modern era is that they do not reflect the sophisticated hierarchy of interests provided for by Māori custom. They have the effect of flattening out interests as if all are equal, just as the Native Land Court did 150 years ago. In short, modern RMA based acknowledgments dumb down tikanga Māori.
>
> ...
>
> Taranaki Whanui fears, understandably, that its dominant interests will be devalued by a modern system of recognitions that lacks the sophistication of the ancient one. In the Māori world, customary rights that have long since been extinguished in law, continue to be of transcendent importance to modern iwi.

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[141] Waitangi Tribunal *Rekohu a report on Moriori and Ngāti Mutunga claims in the Chatham Islands* (Wai 64, 2001) at 13.2.4 (**Tribunal Report**).

[142] Tribunal Report above n 157, at 2.6.1.

[143] *Ngāti Tuwharetoa v Waikato Regional Council* [2018] NZEnvC 093 at [97], footnotes 14 and 15.

[144] *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401.

[145] *Port Nicholson Block Settlement Trust v Attorney General* [2012] NZHC 3181 at 95–96.

[236] We concur with the approach of this Court in the *Ngāti Hokopū* case, which considered s 6(e). Decision makers must not only recognise but also provide for the relationship of Māori with their ancestral lands, water, wāhi tapu and other taonga. Section 6(e) is not concerned with the ancestral land, water, sites, wāhi tapu and other taonga in themselves, but with the relationship of Māori with those things and the culture and tradition surrounding them. In that case, the Court noted that the Māori word for 'relationship' is 'whanaungatanga', and then cited the following from the Law Commission's 'Māori Custom and Values' paper:[146]

> Of all the values of tikanga Māori, whanaungatanga is the most pervasive. It denotes the fact that in traditional Māori thinking relationships are everything – between people; between people and the physical world; and between people and the atua (spiritual entities). The glue that holds the Māori world together is whakapapa identifying the nature of relationships between all things.

[237] In practical terms the way the Court characterised the s 6(e) requirement in that case was to express it as reflecting an obligation on decision makers to recognise and provide for the whanaungatanga between hapū and other tribal groupings, and their land, water, sites, wāhi tapu and other taonga. This is because the term whanaungatanga incorporates cultural and traditional dimensions and emphasises that it is not the relationship of individual Māori to their taonga that is important but those of their hapū (or other relevant collective). It was also noted that although s 6 suggests that these relationships must be provided for, it is inherent in the concept that the weaker the relationship, the less it needs to be provided for.[147]

[238] In that case the Court adopted a "rule of reason" approach. It held that the Court can and should decide issues arising from disputes over intrinsic values and traditions by listening to, reading and examining (amongst other things):[148]

- whether the values correlate with physical features of the world (places, people);
- people's explanations of their values and their traditions;
- whether there is external evidence (e.g Māori Land Court Minutes) or corroborating information (e.g waiata, or whakatauki) about the values. By 'external' we mean before they became important for a particular issue and (potentially) changed by the value-holders;
- the internal consistency of peoples' explanations (whether there are contradictions);
- the coherence of those values with others;

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[146] *Ngāti Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 at paragraph 39 at footnote 34; *Māori Custom and Values in New Zealand Law* NZ Law Commission at [130] citing an unpublished paper written for the Commission by Joseph Williams ("He Aha Te Tikanga Māori") (**Ngati Hokopu**).

[147] *Ngati Hokopu* above n 146, paragraph 45.

[148] *Ngati Hokopu* above n 146, paragraph 53.

- how widely the beliefs are expressed and held.

In a Court of course, values are ascertained by listening to and assessing evidence dispassionately with the assistance of cross-examination and submissions. Further, there are 'rules' as to how to weigh or assess evidence.

In broad terms, this is the approach we now take to the issues before us.

Te Runanga o Ngāti Tama Trust's appeal

[239] As set out earlier Te Rūnanga appealed parts of the decisions:

- As an agreement had still not been reached with the Agency on measures to address the adverse cultural effects of the proposal, and to preserve its position, it sought to address those effects; and

- It appealed the way in which the conditions proposed the involvement of Mr and Mrs Pascoe in the KFG.

Provisions to address adverse cultural effects

[240] We record that the Agency has stated that it "does not rely on the agreement with Te Rūnanga to demonstrate that it has appropriately addressed the adverse cultural effects of the Project; there are extensive provisions in respect of cultural effects set out in conditions".[149] Having said that, counsel for the Agency reminded us that the Agency "has committed not to seek compulsory acquisition of Ngāti Tama Treaty Settlement land".[150]

[241] In considering the cultural effects of the Project we do not think the proposed conditions can be separated from the fact that the Agency has not yet acquired the Ngāti Tama Land. The two are inextricably intertwined. The proposed conditions provide the means by which certain effects of the Project can be appropriately addressed. On their own, they do not, however, appropriately address the significant cultural effects of the Project. We can only be satisfied on that point if Te Rūnanga advises us that an agreement has been reached with the Agency as to sale of the Ngāti Tama Land and on other key elements it seeks by way of mitigation and offset/compensation.

[242] Te Rūnanga has made it clear in this hearing that appropriate recognition of and

[149] Agency's closing submissions, paragraph 150.
[150] Agency's closing submissions, paragraph 151.

protection for, Ngāti Tama's interests relies on:[151]

- The proposed conditions of consent which include provision for Ngāti Tama feedback in terms of route selection and design; an ongoing role in the Project through the KFG and cultural monitoring; and recognition and provision for cultural uses (such as of significant trees), an ecological restoration package;
- Agreement to sell their land; and
- An agreement (if reached) containing key elements intended to further mitigate and offset/compensate the effects (**Agreement for Further Mitigation**).

[243] We were advised by Mr MPJ Dreaver who gave evidence on this subject for the Agency that elements of the Agreement for Further Mitigation discussed to date include:[152]

- Recognition by the Agency of the cultural association of Ngāti Tama with the Project area;
- A land exchange involving property in Gilbert Road;
- A payment to help address the cultural impact of the Project on Ngāti Tama interests;
- An environmental mitigation package, including the opportunity for Ngāti Tama to control and manage the mitigation on their ancestral lands;
- A process to help enhance the relationship between Ngāti Tama and the Department of Conservation;
- Commitments to maximise housing, work and business opportunities for Ngāti Tama members arising from the Project;
- Cultural input by Ngāti Tama into the design and implementation of the Project;
- Cultural monitoring by Ngāti Tama of works associated with the Project; and
- Establishment of a Trust Fund to be held in trust for Ngāti Tama cultural purposes.

[151] Te Rūnanga opening submissions, paragraphs 69-71.
[152] MPJ Dreaver EIC, paragraphs 88 and 89 (**Dreaver EIC**).

Kaitiaki Forum Membership

[244] The Agency recognised from the outset that the Project would affect land recently returned to Ngāti Tama as cultural redress through its Treaty settlement. In May 2016 the Agency appointed Mr Dreaver to advise and lead engagement with mana whenua and Māori more generally in relation to the Project. Mr Dreaver has over 20 years' experience in the negotiation of historical Treaty settlements and the provision of advice to various parties around engagement with Māori interests. Of particular relevance in this case is his previous experience as a manager at the Office of Treaty Settlements responsible for negotiations with iwi of Taranaki, including Ngāti Tama and Ngāti Mutunga. This included engagement with Ngāti Maniapoto representatives over aspects of the Ngāti Tama settlement. We place some weight on Mr Dreavers' evidence.[153]

[245] From the outset Mr Dreaver discussed the particular challenge posed by the fact that all of the likely options for the Mount Messenger bypass would require use of some Ngāti Tama cultural redress land. Mr Dreaver said that even at an early stage of his engagement, it was clear that the Agency understood and accepted that compulsory acquisition of the Treaty settlement land would not be appropriate or feasible.[154]

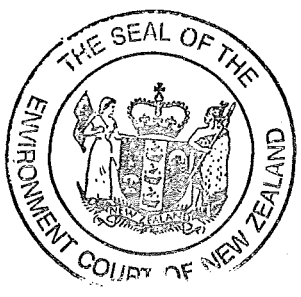
[246] Mr Dreaver described the development of an engagement and negotiation strategy that:[155]

a) Gave appropriate status to the position of Ngāti Tama as land owners and the Rūnanga as its authorised representative.

b) Stressed the importance of the NZTA exhibiting utmost good faith in its dealings with Ngāti Tama.

c) Noted the need for inclusivity and the importance of maintaining contact with other iwi and Māori groups who wished to have their views heard (including Poutama).

[247] Mr Dreaver noted that the Project sits entirely within the Ngāti Tama rohe recognised by other iwi, the Waitangi Tribunal and its Treaty settlement. He noted that Ngāti Mutunga (another of the generally recognised iwi of northern Taranaki) also have interests in Mimi Stream which flows through the Project area and part of the Mount Messenger Conservation Area (although not any part affected by the Project itself). Consequently, the Agency engaged with Ngāti Mutunga at an early stage. The consistent feedback from Ngāti Mutunga has been that the Agency should continue its primary



[153] Dreaver EIC, paragraphs 3–6.
[154] Dreaver EIC, paragraphs 51-52.
[155] Dreaver EIC, paragraph 54.

engagement with Te Rūnanga.[156]

[248] Mr Dreaver also noted that Ngāti Maniapoto has historically expressed an interest in land as far south as the Wahanui line, which includes the entire Project area. Accordingly, the Agency also approached Ngāti Maniapoto at an early stage. Ngāti Maniapoto informed the Agency that although they claim an interest in the area, they are willing to defer to Ngāti Tama in respect of the impacts of the Project.[157]

[249] Mr Dreaver acknowledged that Poutama is another group that asserts interests in the Project area although these interests and their status are disputed by recognised iwi. Mr Dreaver stated that during the overlapping claims hearings in relation to Ngāti Tama's historical Treaty settlement, the claimants who described themselves as descendants of Poutama identified with Ngāti Maniapoto (Wai577).[158] In Mr Dreaver's view it was not necessary for the Agency to take a stance on the status of Poutama in order to engage with them, what mattered was that Poutama was the entity that some Māori individuals (albeit a very small number) with an ancestral association to the land in the Project area had chosen to represent them.[159]

[250] As a result of engagement with Poutama the Agency agreed to the commissioning of a cultural values assessment. This took the form of a report by historian Mr B Stirling. His report was provided at the commencement of the Council hearing.

[251] Mr Dreaver was not initially aware of any whakapapa relationship between Mrs Pascoe and Ngāti Tama, Poutama, or the area Poutama claims an interest in. The first time he was made aware of such a relationship was at the start of the Council hearing. He said that nonetheless Mr and Mrs Pascoe would be offered the opportunity to provide any cultural input into the construction process in relation to their land.[160]

[252] One of the outcomes of the engagement with Ngāti Tama was the establishment of a cultural monitoring framework. An interim Kaitiaki Forum Group had been established by Te Rūnanga. One of its functions was to develop a cultural monitoring plan (**CMP**). A draft of that plan is appended to the evidence of Mr Roan.[161]

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[156] Dreaver EIC, paragraphs 96-99.
[157] Dreaver EIC, paragraph 100.
[158] Dreaver EIC, paragraphs 101-103.
[159] Dreaver EIC, paragraph 104.
[160] Dreaver EIC, paragraphs 105-111.
[161] Roan EIC - Statutory, Appendix 2.

[253] The draft CMP records it has been prepared in alignment with the establishment and operation of the Kaitiaki Forum Group and:[162]

> Using matauranga Māori as a framework, the CMP sets out the following:
>
> - The historic and living cultural values of the area to Ngāti Tama;
> - Measures to be implemented during construction activities;
> - Ways to minimise potential adverse effects on Ngāti Tama values;
> - Cultural monitoring requirements.

[254] The Commissioner's decision noted the contested claims between Te Rūnanga, Poutama, the Pascoes and Te Korowai. He found:[163]

> As a decision maker under the RMA it is not my role to make any determination as to Māori historical events and rights when there are competing histories, nor is it to acknowledge or recognise one Māori person or a group of Māori people who claim to have a s 6(e) relationship with an area over and above another person or group. Instead my role is to ensure that in exercising my decision-making powers I recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, and to have particular regard to Kaitiakitanga. I am also required to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) under s 8 of the RMA.

[255] The Commissioner went on to note that while the Agency engaged with Poutama and funded a cultural impact assessment (**CIA**) it had not recognised Māori who identify with Poutama in any kaitiakitanga sense through the Kaitiaki Forum Group. The Commissioner noted that a position on the Kaitiaki Forum Group carried with it responsibility and recognition.

[256] The Commissioner then found:[164]

> I consider that it is right and appropriate for Mr and Mrs Pascoe who both identify with Poutama and whose land is the most affected of any private landowner to, as specified individuals, be provided the opportunity to be members of the KFG. Having listened carefully to Mr and Mrs Pascoe during the hearing and having walked some of their land in the Mangapepeke valley, I have no doubt they are kaitiaki for that land. If Mrs Pascoe accepts the role on the KFG, this would provide her the opportunity to represent Poutama as a kaitiaki in relation to the wider Project on behalf of tangata whenua who she relates to. Listening to their evidence, I also consider the Pascoe's interests extend to the ethic of stewardship (Section 7(aa)), in relation to their own land.

[257] On appeal, Te Rūnanga argued that it was neither right nor appropriate for the Commissioner to add Mrs Pascoe to the Kaitiaki Forum Group because:[165]

[162] Draft CMP May 2019 at page 1 (Appendix 2 of Roan EIC-Statutory).

[163] Recommendations and decisions report of Hearing commissioner at [140], CB, Vol 5 at 2838 (**Commissioner's Report**).

[164] CB, Vol 5, Commissioner's Report, page 2840.

[165] Te Rūnanga opening submissions, paragraph 28.

- Mr and Mrs Pascoe are not mana whenua;
- Only mana whenua are kaitiaki and can exercise kaitiakitanga;
- Stewardship and kaitiakitanga are different things;
- Non-mana whenua may constrain/inhibit Ngāti Tama in their kaitiaki role;
- There is an alternative avenue for Mr and Mrs Pascoe to provide input.

[258] Te Rūnanga argued that the appeal by Poutama and the Pascoes confounds the interests of long-standing land owners (the Pascoes) with tangata whenua interests. Te Rūnanga opposed the relief sought by Poutama and the Pascoes *in toto*.[166]

[259] The Agency submitted that the Kaitiaki Forum Group as originally conceived was to provide for Ngāti Tama's cultural and kaitiaki input into the Project via Te Rūnanga. It supported Te Rūnanga's appeal and proposed that Mr and Mrs Pascoe should instead be provided for by way of an updated condition (clause 5A) which it argued would better provide for their stewardship. This was said to properly reflect the kaitiaki role of Ngāti Tama with due regard to the distinction between kaitiakitanga and stewardship.[167] The Taranaki Regional Council and the New Plymouth District Council supported this approach.[168]

[260] The Agency noted that Mr and Mrs Pascoe did not refer to cultural effects or to Poutama when they first made a submission on the Project.[169] Nor did Poutama mention Mr and Mrs Pascoe or the Pascoe whānau when they first made a submission on the Project.[170]

[261] The Agency argued that in relation to the resource consents Mr and Mrs Pascoe could not raise cultural issues and Poutama could not rely on a linkage to Mr and Mrs Pascoe and the Pascoe whānau.[171]

[262] The Agency also submitted that there is no statutory or purposive justification for a

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[166] Te Rūnanga opening submissions, paragraphs 9-12.
[167] Agency's closing submissions, paragraphs 41-47.
[168] Taranaki Regional Council's opening submissions, paragraphs 7-9.
[169] Napier EIC, Appendix 2; McBeth EIC, paragraph 30; Agency's opening submissions, paragraphs 139-143.
[170] Napier EIC, Appendix 2.
[171] s 120(1B), RMA.

separate approach with respect to the designation and the same restriction should apply.

Poutama and the Pascoe appeals

[263] The appeals assert that the inclusion of Mrs Pascoe on the Kaitiaki Forum Group is not sufficient recognition of her status as tangata whenua and the fact that she and her husband are kaitiaki over the land they own in the Mangapepeke valley.

[264] In her written evidence, Mrs Pascoe said:[172]

> My great grandmother was Hera Stockman. She was also known as Sara Stockman. I whakapapa to Ngāti Rāhiri and Poutama through her. My cultural identity not only comes through her and Poutama Iwi but from Mangapepeke itself, which is in the Poutama tribal area.

[265] As the Pascoe land is said by Poutama to be within its rohe it was argued that the Commissioner was wrong to decide that the Pascoes and Poutama would be represented on the Kaitiaki Forum Group under the mana and influence of Ngāti Tama. Among other things, it was contended that the Commissioner created new rights for Ngāti Tama and gave undue weight to their Treaty settlement.[173] It was argued the Pascoes and Poutama are entitled to equivalent treatment.

[266] More specifically, as detailed in the notice of appeal filed on behalf of the Pascoes by Mr R Gibbs:[174]

> Poutama is tangata whenua. Poutama is tuturu iwi. Ngā hapū o Poutama is an iwi authority. Poutama have mana whenua.
>
> The Project falls within the rohe of Poutama. Te Whakapuakitanga o Poutama (the Poutama Iwi plan) applies to the entire Project area.
>
> Mrs Pascoe has whakapapa to Poutama through her grandmother Hera (Sarah Stockman). Mr and Mrs Pascoe own and are kaitiaki for their land, including Mangapepeke valley, within the Poutama rohe.
>
> ...
>
> NZTA throughout their planning and application processes, determined that Ngāti Tama hold mana whenua, and therefore by default Pascoes and Poutama do not hold mana whenua.
>
> As a result, NZTA have refused and denied Pascoes and Poutama full and active participation as kaitiaki in the planning process. NZTA has refused and failed to recognise and provide for the relationship of Pascoes and Poutama in their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.

[267] The notice of appeal alleged a range of errors on the part of the Commissioner. In

[172] D Pascoe EIC, paragraph 3.
[173] Notice of appeal, 22 January 2019.
[174] Notice of appeal, 22 January 2019.

essence the complaint (from a cultural perspective) is that simply by providing for the Pascoes to join the Kaitiaki Forum Group the Commissioner has erred in concluding that this would recognise the Pascoes' and Poutama's cultural values. They believe those values are separate and distinct from Ngāti Tama cultural values. The Commissioner was therefore wrong to find that the relationship of the Pascoes and Poutama and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga including kaitiakitanga should be subservient to the mana and influence of those who affiliate with Te Rūnanga.

Some preliminary comments

[268] Mr Pascoe has no Māori ancestry. The Pascoe farm was purchased in the 1950s by Mr Pascoe's parents. It is not Māori land. Mr Pascoe has lived there all his life. Mrs Pascoe has lived there since she married him about 30 years ago.

[269] Both Mr and Mrs Pascoe were honest and straightforward in their evidence. We were fortunate to have the opportunity to carry out a site inspection on their land. As it was to the Commissioner, it is clear to us that both Mr and Mrs Pascoe care deeply about their land and its natural values and that they had been greatly affected by the designation and the resulting process.

[270] One of the unusual aspects of this appeal is the fact that it is based upon a claim that there is whakapapa linking Mrs Pascoe to Poutama, something that Mrs Pascoe herself was not aware of when this process began. The "Pascoe" appeal was prepared as a joint appeal with Poutama and argued by representatives of Poutama, Mr R Gibbs and Ms Gibbs in particular. There are factors arising from this advocacy which require some initial comment.

[271] The first is the fact that none of the Poutama representatives are legally trained. We endeavoured to allow for this during the hearing but problems of focus, relevance and scope did arise. In this decision we confine ourselves to the issues and the evidence necessary to resolve the appeals.[175]

[272] A second factor is more troubling and raises the possibility of divided loyalties and collateral objectives. This appeal appears to be part of an ongoing campaign by Poutama

[175] We record that at the pre-hearing conference on 6 March 2019 we recommended to Mr and Mrs Pascoe that they take appropriate legal advice.

for recognition and status. The Poutama representatives who appeared before us own and farm land on the coast to the west of the Project area. Their initial focus with the Agency was directed towards ensuring that the western options closer to their land were not selected. At a meeting in February 2018 Mr R Gibbs is recorded as saying that Poutama were pleased the Agency had chosen the route through the Pascoe farm, as this was their second most favoured option after improving the existing route. The three western options were the worst from the Poutama perspective.[176]

[273] Our overall concern is that the intervention of Poutama on the Pascoes' behalf has made the task of addressing the Pascoes' rights and interests more complex than it needed to be. Claims to cultural right have been made on behalf of the Pascoes that go well beyond what the evidence supports.

[274] To place these concerns in context, it is first necessary to consider, the nature of the relationship between the Pascoes and Poutama, and how that link came about.

[275] We then address the claims that Mrs Pascoe is tangata whenua and that together with her husband and whānau they are kaitiaki over the Pascoe family land.

[276] Finally, we will consider the claims made on behalf of Poutama that they are an iwi exercising mana whenua and kaitiakitanga over the Project area, including the Pascoe family land. In order to provide necessary context, and avoid repetition we outline in general terms how Poutama characterise themselves and who their representatives are in the following section.

How and when did Poutama become advocates for the Pascoes?

[277] In April or May 2016 the Agency began engaging with Poutama's representative, Mr R Gibbs.

[278] The Poutama representatives who appeared before us were Mr H White, Mr R Gibbs, Mr D Gibbs and Ms Gibbs. The latter three are siblings. They are not Māori. Mr H White is Māori. He has whakapapa links to Ngāti Tama (he is closely related to several Ngāti Tama witnesses including Mr G White whose evidence we refer to). He has previously aligned himself with and worked on behalf of Ngāti Tama and at the time of the hearing he was still a registered member of Te Runanga. For some years now, he

[176] Napier EIC, Appendix 4, pages 45-46.

has identified with the group calling itself Ngā Hapū o Poutama.

[279] In his written evidence Mr H White stated that he lives at Te Kawau within the Poutama rohe. He went on to say:[177]

> Poutama does not seek and has never sought recognition from the Crown, local or central Government, its agents or departments. Poutama is mandated by Poutama. It is not for any of the Crown departments or its agents and representatives to recognise who is and who isn't. We the Poutama people are still on Poutama lands today. I am kaitiaki for the iwi. We hold and exercise kaitiakitanga within our rohe regularly. ...the Pascoe whānau are part of Poutama iwi, through Debbie's whakapapa. We support their position to retain their whenua and cultural assets on behalf of the wider iwi.

[280] Mr H White farms land on the coast around Te Kawau and the Gibbs family farm land on the coast south of Mokau. Mr R Gibbs' wife is Māori, of Ngāi Tūhoe descent.

[281] Poutama have prepared what they describe as an iwi plan entitled Te Whakapuakitanga o Poutama (2010). Section one records Poutama as a first nation iwi and says[178]:

> Poutama is one of the tūturu Tangata Whenua (1st Nation Iwi) from the time before the great fleet arrived in Aotearoa. As the generations have passed, Poutama is recognised as a man, an Atua, the land, and the iwi who are still on the land and carry his name to this day.
>
> Poutama are the collective hapū who descend from Poutama and Panirau through Rakeiora, who have chosen to remain on the land mass known as the Poutama land block, or remain connected to the same lands or those who are whāngai (adopted) according to Poutama Kawa and Tikanga, Whakapumau ngā uri o Hoturoa rāua ko Rakeiora ki runga a Poutama.

[282] The second clause lists Ngā Hapū o Poutama as 14 named hapū and concludes with the words "and others". The two affiliated marae listed are Te Kawau Pā (Wharenui o Waiopapa) and Tongaporutu Pā (Wharenui o Te Ahuru).

[283] We understand that Te Kawau Pā is located on land owned and farmed by Mr H White and Tongaporutu Pā and the associated wharenui are located on land owned and farmed by the Gibbs family.[179]

[284] In November 2016 a charitable trust was also registered in the name "Nga Hapū o Poutama, Poutama Kaitiaki Charitable Trust" (and that is the entity named in the Poutama/Pascoe joint appeal). The trust deed records the Taumata Paepae o Poutama as the tribal council of Poutama the iwi. Ka Rū o Poutama is the representative of the

[177] White EIC, paragraphs 1, 6-7 (**H White EIC**).
[178] Poutama Bundle, Vol 1, Doc 1, page 6.
[179] Poutama Bundle, Vol 1, Doc 1.

Taumata Paepae. There are three trustees, appointed for life or until unable or unwilling to fulfil the role. The trustees are Mr H White, Mr R Gibbs and Mr S Hunt. The functions of the Taumata and the trustees are to advocate for the rights and interests of the hapū, to represent the hapū in negotiations or discussions with third parties, and to exercise kaitiakitanga over the tribal rohe in conjunction with the hapū.[180]

The Pascoes

[285] The Agency began engaging with the Pascoes in about April 2016. Initial meetings and discussions between July 2016 and June 2017 covered high level options and discussion around land entry agreements.

[286] In June 2017 Ms M Hill, a solicitor with expertise in the Public Works Act process was retained to advise the Pascoes. Her instructions were to advise the Pascoes in relation to the land acquisition process including negotiation of the land acquisition and compensation agreement. Her costs were met by the Agency.[181]

[287] On 30 August 2017, Agency representatives met with Mr and Mrs Pascoe to give them advance notice that their land had become part of the preferred route ahead of the Ministerial announcement scheduled for the following day.

[288] Mr Napier, who was the Mount Messenger Project Manager between March 2016 and the end of June 2018, gave evidence of his contact with the Pascoes commencing in April 2016. This included approximately twenty visits to the property. Mr Napier noted that the appeal of the Pascoes and Poutama raised cultural and tangata whenua interests but said that during his time as Project Manager neither Mr nor Mrs Pascoe expressed those sentiments to him. He said: [182]

> At no time during my meetings and conversations with Mr and Mrs Pascoe did they raise Māori cultural issues, or state they had an affiliation with Poutama. Nor, during my extensive discussions and emails with Mr Gibbs (see the section on Poutama below) did Poutama claim the same.

[289] The Agency agreed to fund Poutama for the preparation of a cultural values assessment up to the value of $30,000 (but not to the extent of the $60-$80,000 requested). Mr B Stirling was commissioned by Poutama in May 2018 and his report

[180] Poutama Bundle, Vol 1, Doc 2 and Greg White EIC, Appendix 3.
[181] Poutama Bundle, Volume 6, Doc 86.
[182] Napier EIC, paragraph 85.

was released at the commencement of the hearings before the Commissioner in August 2018. The report does not refer to Mr and Mrs Pascoe or any link they are said to have to Poutama.

[290] Mrs Pascoe lodged a submission on the Project with the New Plymouth District Council and the Taranaki Regional Council on 27 February 2018. She indicated that she wished to be heard and opposed the granting of the NOR and associated resource consents. She noted concern over the effects on the environment, the ecology and effects on wildlife in the valley. She noted that the valley had been her home for 29 years and it was a wonderful place to bring up children with the native birds, trees and fish. She said that there is a call for native bush to be preserved and that the option proposed takes out more native bush than any other option. She also registered concern about potential flooding and the increased risk with global warming.

[291] There was no reference in the submission to her whakapapa or Māori cultural values and neither was there any reference to Poutama or any Poutama hapū or representative organisation of Poutama.

[292] Mr Pascoe also lodged a submission with the local authorities on 27 February 2018. He registered a range of concerns similar to those recorded by his wife. He made no reference to his wife's whakapapa nor to Māori cultural values and neither was there any reference to Poutama or any Poutama hapū or representative organisation of Poutama.

[293] The evidence of Mr H White, Mr R Gibbs and Mrs Pascoe was that non-Māori members of the local community who were concerned about the impact the Project was having on the Pascoes had approached Poutama to see if they could assist. It is unclear exactly when this approach was made and at what point the Pascoes themselves agreed to the offer of assistance from Poutama.

[294] We infer that the Pascoes agreed to the assistance offered by Mr R Gibbs and Mr H White well after they lodged their original submissions on 27 February 2018 and most likely shortly before the hearing before the Commissioner in August 2018.

[295] It appears that Poutama representatives began actively advocating on behalf of the Pascoes in or around July 2018. On 14 August 2018, Mr H White wrote by email to Agency representative Mr Hopkirk referring to a meeting at the Pascoe home on 12 July 2018. Mr H White and Mr R Gibbs were in attendance along with Mr and Mrs Pascoe

and various Agency representatives. The following extracts from that email are illustrative:[183]

> Poutama is one of the tuturu Tangata Whenua Iwi from the time before the great fleet arrived in Aotearoa. As the generations have passed, Poutama is recognised an Atua, as a man, the land, and the iwi who are still on the land carry this name to this day. Debbie Pascoe and all her descendant's through their kuia Tomairangi Kakati have an undeniable whakapapa to Poutama.
>
> The kaitiakitanga on that land rests with Debbie and her whānau, including her husband Tony. The physical values including the ecological values are a fundamental part of those cultural values.
>
> ...
>
> Major issues arising are;
>
> 1. That the Pascoe whānau are part of Poutama.
>
> To make progress we agreed;
>
> NZTA accepted the kaitiakitanga of the Pascoe whānau, and as such the Pascoe whanau need to be treated differently. Cultural values and effects need to be provided for. Involvement with planning will happen.
>
> The Poutama Iwi Taumata will be supporting the whānau through the process. Cost of time spent engaging in the process including monitoring, by the Pascoe whānau and Poutama will be reimbursed through the Poutama Iwi Trust.
>
> Mitigation for cultural damage to lands, including Kaitiakitanga, can and must be made, including costs of rehousing, support buildings and infrastructure.

When did Mrs Pascoe become aware of a whakapapa connection to Poutama?

[296] Mrs Pascoe said she was told that she had a whakapapa connection to Poutama by Mr H White. During re-examination by Ms Gibbs the following exchange took place:[184]

> Q. What have you learnt about your ancestry since you found out through Haumoana about your connection to Poutama?
>
> A. I am still trying to come to terms with it. Yeah, it's just not something that I've had to deal with until now.

[297] In oral evidence Mr H White said that when he became aware that Mrs Pascoe was related to Mrs Stockman, he phoned a cousin in Australia (Mr J Stockman) and on the basis of that discussion was satisfied that there was a link to Poutama. He said this was through the union of Tomairangi and Kakati.[185]

[298] In response to questions Mr H White said that his cousin Mr Stockman had told him

[183] Poutama Bundle, Vol 6, Doc 86, pages 29-30.

[184] Transcript, page 465, lines 10-13.

[185] We note this differs from the reference to "their kuia Tomairangi Kakati" contained in Mr White's email (see [297] above). Mr White was clear in his oral evidence that there were two tipuna, not one.

that Kakati and Tomairangi were born at Mokau. They had whakapapa links to Ngāti Rāhiri, to Mokau and to Whanganui.[186]

[299] Mrs Pascoe was asked in cross examination as to when she first learned of connection to Poutama. She said it was not through her grandmother or her grandfather, it was through Mr H White and Mr R Gibbs:[187]

> Because as I said to you, I have never looked into my ancestry.

[300] In other answers under cross examination Mrs Pascoe said she thought that the connection to Poutama was through Mr R Gibbs' grandchildren as they had a whakapapa to Mrs Stockman as well. When asked about the reference to Tomairangi Mrs Pascoe said:[188]

> I do not know those facts. I have never looked into the history. I am only just starting to try to trace back past my grandmother.

[301] When asked about her position on the Poutama Taumata Mrs Pascoe responded:[189]

> I must explain. I am not converse in Te Reo. My grandfather died at 97 when I was around about 17 and until about three weeks before he died I never even knew he could speak Māori, and Māori was not spoken. My dad could not speak Māori and I am only just starting to try to come to grips with Māori terms. That doesn't mean we weren't taught growing up about the love of the land or all the things that are on the land, in the land and that we treasure.

[302] Mrs Pascoe was asked whether she had an interest in the Project area prior to her marriage to Mr Pascoe. She said that she used to visit the area frequently as she had friends who lived down the road from where he lived. She described it as an interest in visiting the area.[190]

[303] While Mrs Pascoe was aware of her whakapapa connection to Ngāti Rāhiri, it was common ground that this hapū identifies with land to the south of the Project area. It is not claimed that Ngāti Rāhiri was part of the Poutama Hapū Collective. When asked, Mrs Pascoe was not able to identify which hapū of Poutama she affiliated to.[191]

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[186] Transcript, pages 444-445, lines 25-30.
[187] Transcript, page 462, line 21.
[188] Transcript, page 461, lines 5-10.
[189] Transcript, pages 456-457, lines 30-35, 1-3.
[190] Transcript, page 459, lines 1-15.
[191] Transcript, pages 463-464, lines 20-30, 1-4.

[304] At the conclusion of her oral evidence the presiding Judge asked Mrs Pascoe why she had not included any reference to a cultural connection to the property in the original submission she filed with the local authorities. The following exchange then took place:[192]

The Court:	...I would've thought if that was a genuine issue of concern, some aspect of it would've been touched on in the submission. Now, was it not touched on because you weren't aware of this particular connection to this particular property or – the connection that's now been claimed?
A.	It's – as I said, we did not have any help, we did not know anything about it and it was just not thought about to put in there
The Court:	Well was it not put in because you didn't know about until you were subsequently told?
A.	I knew my Ngāti Rāhiri side and that, but I didn't realise that grandma, Great Grandmother Stockman went back to Poutama.
The Court:	But the connections that's been claimed is sort of a direct one to the property, as I understand it in the cultural sense. And were you not aware of that, that you had a sort of – you were aware of your, obviously, your ancestry in a general sense, but you weren't aware of this cultural connection to the property where you now live that's now being asserted, is that – would that be a fair assessment?
A.	Yes.

[305] We find that Mrs Pascoe (and Mr Pascoe) made no reference to cultural factors in their original submission because they were not aware of any such connection at the time they lodged the submission. In her evidence before us Mrs Pascoe does not profess personal knowledge of such a link but relies upon Mr H White and Mr R Gibbs for her present belief that there is such a connection.

[306] The increasing reliance of Mr and Mrs Pascoe on the support of the Poutama representatives caused difficulty for their solicitor, Ms Hill. Ms Hill wrote to the Pascoes seeking clarification of her role and raising concerns about the role Mr R Gibbs was playing in the negotiations with Agency in relation to land acquisition. After setting out the background to her original retainer, she said:[193]

> My main concern about using Russell as your negotiator in relation to the land acquisition is that your legal rights and interests may not be best protected or advanced. I consider that Russell's direct involvement in the negotiations (as opposed to being a support person and advisor) could disadvantage you.
>
> Ultimately, I am not in a position to continue acting for you on the land acquisition if I am removed as your negotiator and my role is limited to the provision as legal advisor. This would significantly inhibit my ability to properly advise you and put me at risk of negligent advice.

[192] Transcript, page 476, lines 16-33.

[193] Poutama Bundle, Vol 6, Doc 86 at 37-38, letter to Pascoes dated 15 February 2019.

[307] An email response was sent to Ms Hill on 25 February 2019 from Nga Hapū o Poutama under the names of Mr and Mrs Pascoe, and Mr R Gibbs and Ms Gibbs informing her that Mr Pascoe, Mr R Gibbs and Ms Gibbs were to be the negotiators for all aspects of the Project. In light of that, Ms Hill advised the Pascoes by email dated 28 February 2019 that she was no longer able to act for them as the change in negotiators put her at serious risk of offering negligent advice.

Scope of appeal: Can the Pascoes raise cultural arguments on appeal?

[308] Counsel for the Agency and counsel for Te Rūnanga argued that the failure of the Pascoes to refer to a cultural association to their land or Poutama in their original submissions means that it cannot now be raised on appeal.

[309] Section 120(1)(B) of the RMA provides that a person may appeal only in respect of a matter raised in that person's submission on the application.

[310] Mr Allan noted that this provision restricts the scope of the appeal with respect to the resource consents, but no similar restriction applies with respect to the designation.

[311] While we think there is force in Mr Allen's submission that there is no statutory or purposive justification for a different approach with respect to the designation, we doubt that it is open to us to apply a jurisdictional barrier such as this by implication. For the purposes of resolving the appeal it is not a question we need to answer definitively.

[312] Ms Morrison-Shaw argued that while a joint appeal may include any matter raised in those parties' respective submissions, such an appeal cannot extend beyond the scope of matters if they are not directly raised. Counsel argued that the following matters appeared to be outside scope:[194]

(a) Mrs Pascoe is Poutama;

(b) Mr and Mrs Pascoe are kaitiaki for their land and their kaitiaki interests need to be provided for;

(c) Consultation with the Pascoes was insufficient to understand and recognise the key relationships under s 6(e) of the RMA;

(d) The Kaitiaki Forum Group did not appropriately provide for Mr and Mrs Pascoes' cultural interests;

(e) There has been a failure to recognise and provide for the Pascoes' s 6(e),

[194] Te Rūnanga opening submissions, paragraph 77.

7(a), and 8 RMA interests;

(f) Mitigation and compensation for cultural effects on the Pascoes has been denied; and

(g) An agreement to not compulsorily acquire land in recognition of cultural interests was denied to Mr and Mrs Pascoe.

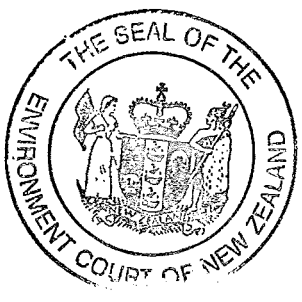
[313] Ms Morrison-Shaw submitted that to the extent the Court considers there is any uncertainty as to whether any of these issues are within scope it would be useful for the Court to record that as well as its substantive findings on the issues raised.[195]

[314] We accept there is a good argument that all the matters identified by counsel for Te Rūnanga are out of scope on appeal. However, by the time hearings commenced before the Commissioner in August 2018, the Pascoes believed, on the basis of what they were told, that Mrs Pascoe had a whakapapa link to Poutama. That is the way matters were argued before the Commissioner. His resulting findings with respect to the composition of the Kaitiaki Forum Group and associated kaitiaki responsibilities are matters that we need to address in order to dispose of the Te Rūnanga appeal. They are an inescapable live issue enmeshed in the cultural matters before us. In the circumstances of this case we therefore decline to rule out the cultural issues raised by the Pascoes and Poutama on the basis of s 120(1)(B).

[315] The failure on the part of both the Pascoes and Poutama to refer to a whakapapa link between them in their original submissions is however a matter that goes to the weight we give to these recent claims.

[316] We will first address what the evidence shows about the nature of Mrs Pascoe's ancestral relationships to the Pascoe land. Our focus is on the s 6(e) duty to recognise and provide for that relationship.

[317] Because the s 6(e) duty is directed towards the hapū and iwi collectives that individual Māori whakapapa to, we also need to address the question of whether Mrs Pascoe is part of a hapū/iwi collective known as Poutama, and if so, what is the nature of the ancestral relationship of that group to the Project area?



[195] Te Rūnanga opening submissions, paragraph 78.

Mrs Pascoe: tangata whenua living on ancestral land?

[318] It is clear that:

- Mrs Pascoe understands that through her great-grandmother she has a whakapapa connection to Ngāti Rāhiri and she also understands that Ngāti Rāhiri is not a hapū associated with the Pascoe family land in the Project area;
- Mrs Pascoe has a limited understanding of her Māori ancestry. It is not something that has been passed down to her. It is something she is only now trying to understand;
- Mrs Pascoe has no personal knowledge of a whakapapa connection to Poutama;
- Mrs Pascoe does not know which Poutama hapū she is said to affiliate to and which Poutama hapū is said to have links to the Pascoe family land and Mount Messenger area;
- While Mrs Pascoe had visited the area prior to her marriage to Mr Pascoe, she described it simply as an interest in visiting the area. She did not offer any evidence of an understanding of a traditional Māori relationship with that area;
- While Mrs Pascoe gave compelling evidence of her strong association with the valley and its natural features, the values and traditions that she (and her husband) described lacked the whakapapa or whanaungatanga foundation intrinsic to a Māori connection with the land. It is not knowledge that Mr and Mrs Pascoe hold.

[319] While we acknowledge and respect the fact that Mrs Pascoe has Māori ancestry, reliable evidence linking that ancestry to the Pascoe land is simply not before us. Reliable evidence linking Mrs Pascoe to Poutama is simply not there either. As we have already noted, although the s 6(e) requirement is to recognise and provide for an ancestral relationship, it follows that the weaker the relationship, the less it needs to be provided for.

[320] There was no corroborating evidence before us that might validate the claims being made. Mr Stirling's report makes no reference to the Pascoes and the Poutama witnesses did not refer us to waiata or whakatauki that would corroborate the relationship

between Mrs Pascoe and Poutama and the land. There was very little evidence of a whakapapa connection and even that was subject to countervailing evidence showing the tipuna Tomairangi as having a Te Atiawa – Ngati Rahiri whakapapa.[196] There is no relevant corroboration in various reports of the Waitangi Tribunal either which instead confirm recognition of Ngāti Tama and Ngāti Maniapoto in this area. There is no recognition of Poutama as a hapū collective by neighbouring iwi or hapū. It was not even clear from the evidence from Mr H White and Mr R Gibbs which hapū of Poutama they considered had historical association with or mana whenua over the Mangapepeke valley.

[321] Te Rūnanga commissioned their own historical report in response to Mr Stirling's report. They commissioned Mr PR Thomas, a historian who has worked extensively researching Treaty of Waitangi issues. In 2011 Mr Thomas wrote a report for the Waitangi Tribunal's Te Rohe Potae Inquiry entitled "The Crown and Māori in Mokau 1840-1911".

[322] Mr Thomas' brief of evidence outlined what the historical record reveals about tribal land rights in the Mokau/Poutama area in the nineteenth century. He also responded to the claim made by Mr Stirling that the historical record suggests that a tribal group known as "Nga Hapū o Poutama or Ka Rū o Poutama" historically held mana whenua over this area and that their rights were recognised by government institutions and officials in the mid to late nineteenth century.[197]

[323] Mr Thomas summarised his evidence as follows:[198]

> The crux of my evidence is that land rights in the Mokau-Poutama area during the nineteenth century were complex, disputed and subject to change. But one constant was that there are no historical records, at least as far as I am aware, that refer to a tribal group known as Nga Hapu o Poutama. Instead a wide range of individuals, hapū, iwi, and pan tribal groups asserted rights in the area. Particularly important amongst these various groups were Ngāti Tama and Ngāti Maniapoto. They were at the forefront of the struggle for land rights. It would seem, from the evidence that is available that local people and hapū were tied, in a complex but powerful way, to one or both of these iwi.

[324] We have not found it necessary to refer in depth to the points of difference between Mr Stirling and Mr Thomas, as we consider that the appeal can be resolved primarily on the basis of the findings we have made in relation to Mrs Pascoe's connection to the land and to Poutama. We would observe, however, that Mr Thomas' conclusions are more in

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[196] Exhibit 15 "Whakapapa of Sarah (Hera) Stockman".
[197] PR Thomas EIC, paragraphs 1-8 (**Thomas EIC**).
[198] Thomas EIC, paragraph 11.

alignment with what the Waitangi Tribunal has found in its Taranaki and Ngāti Tama/Ngāti Maniapoto cross-claim report. The way in which the Ngāti Tama settlement progressed and the lack of any record of protest by representatives of the collective now calling itself Poutama also lend support to Mr Thomas' conclusions that the hapū/iwi with primary affiliation to the area affected by the Project are Ngāti Tama and Ngāti Maniapoto.

[325] We prefer Mr Thomas' evidence on this central issue. His findings also lend weight to Mr Dreaver's conclusion that those small number of Māori with ancestral links to the Project area who choose to be represented by the Poutama Trust are most likely to have whakapapa connections to either Ngāti Maniapoto or Ngāti Tama. This is certainly true of Mr H White, the only person of Māori ancestry who appeared before us as a witness for Poutama. His whakapapa links to Ngāti Tama are clear and not contested.

[326] We wish to emphasise that in making our findings we do not mean to be critical of Mrs Pascoe nor to disrespect her whakapapa. Neither do we intend to diminish or downplay the fact that she and her husband and family have a very strong attachment to their land. The salient point is that Mrs Pascoe and her family simply do not carry the knowledge, and consequently are not able to demonstrate the whanaungatanga relationships or exercise the associated tikanga, that would require recognition in accordance with Part 2 of the Act.

[327] The evidence for Te Rūnanga in relation to cultural issues was given by Mr G White. He addressed the distinction between kaitiakitanga and stewardship and we find the following points drawn from his evidence persuasive:[199]

> 68. Kaitiakitanga and stewardship stem from two completely different cultures and belief/value systems and while both may endorse the ethos of caring for the environment, that on its own does not mean they both can be conflated together;
>
> 69. The fundamental component of kaitiakitanga is whakapapa. It is whakapapa that links individual kin to each other, to a specific location, resources, nga Atua, as well as the dearly departed;
>
> 70. Kaitiakitanga is not a birth right but a birth obligation that is inherited from generations past and passed down in perpetuity. The obligation can be impacted (but not extinguished) by land loss, whether by confiscation or sale. It can also be restored by acquisition of more land within the kin group rohe. It is not transient and cannot be imposed outside the rohe;
>
> 71. Another aspect of kaitiakitanga is that it incorporates communication between the ever present dead, the environment, the living, and usually the relevant

[199] GL White EIC, paragraphs 68-74 (**White EIC**).

matter/s at hand;

74. My understanding of stewardship is that it is mobile, not confined to any particular place, space, family or community. A person can be a steward of a piece of land anywhere in the country, provided they have some rights (ownership, lease etc) over it. However, kaitiaki can only exercise kaitiakitanga in their own rohe. Kaitiaki are part of the whenua with tupuna descending from the whenua itself;

[328] Mr G White said that stewardship has none of these characteristics and is fundamentally different to kaitiakitanga. Simply calling someone a kaitiaki or them carrying out come activities similar to a kaitiaki does not change that.

[329] Mr G White also said that it is culturally offensive to have persons who are not kaitiaki referred to as such and to be provided with a kaitiaki role within the Kaitiaki Forum Group. We would add that it would also be unfair to Mrs Pascoe to place her in a role for which she is not equipped.

[330] There is insufficient (if any) probative evidence to support the nature of the ancestral connection now claimed on Mrs Pascoe's behalf and we conclude that the Commissioner erred in deciding that it was necessary to add the Pascoes to the Kaitiaki Forum Group to provide for that relationship. We believe the Commissioner also erred in characterising the Pascoes as kaitiaki for the land they own in the Mangapepeke valley. We agree with counsel for the Agency and counsel for Te Rūnanga that the relationship the Pascoes have with their land is better characterised as one of stewardship. In our view that relationship is appropriately provided for under the terms of the proposed Condition 5A.

[331] It follows that Te Rūnanga's appeal must succeed on that point, but there remain a number of matters we need to address and it is to those that we now turn.

Ngāti Tama and Poutama

[332] In this section we address, to the extent we consider we are required to, some remaining issues that arise from the claims made on behalf of Poutama that they, as a collective, are tangata whenua exercising mana whenua and kaitiakitanga over the Project area.

[333] First, we accept as incontrovertible the fact that Ngāti Tama are tangata whenua exercising mana whenua and kaitiakitanga over the land affected by the designation. We

do not accept the submission made by Poutama that Ngāti Tama derive authority from their Treaty settlement. The Treaty settlement is not the source of Ngāti Tama's mana whenua and kaitiakitanga but it is a form of legal and political recognition of their mana whenua and kaitiakitanga that carries considerable weight.

[334] Mr G White noted that it is generally understood within Māori society that hapū or collectives of hapū are the product of prior history of whānau, events, and interaction with others. Hapū always have a common whakapapa and descend from eponymous ancestors that are, in turn, acknowledged by surrounding hapū. Mr White said that Poutama has none of the hallmarks of Māori identity and sits outside the normal cultural context. He pointed to the fact that the rules of its trust deed show that Poutama is at odds with accepted kin genealogy in that Poutama is able to adopt new members at its sole discretion, to self-select individuals who have no whakapapa connection to the land and to appoint these people as kaitiaki for the life of the trust.[200]

[335] Mr R Gibbs is one of the trustees of the Poutama Charitable Trust. In his evidence he said, "I am a kaitiaki for Poutama". He went on to say that he is part of the Taumata Paepae o Poutama, "by way of being from Te Ahuru Hapū"[201].

[336] Mr R Gibbs has no Māori ancestry. His evidence concerning how he and his family came to be regarded as part of Te Ahuru Hapū was not entirely clear. As we understand it, it is based on a combination of occupation of their family farm over several generations and what is said to be Poutama tikanga which allows for whāngai or customary adoption into Poutama of those who may not whakapapa to the area. As we understand his evidence, this is the basis upon which he, along with his wife and his father-in-law (who are of Ngāi Tūhoe descent) are now said to be part of Te Ahuru Hapū.

[337] Mr R Gibbs and his siblings are clearly committed to the incorporation of Māori cultural values into the way they live. Unquestionably it is their right to do so and can be seen as a constructive and positive force, not only for them, but for their children and those yet to come. The problem, however, is that cultural rights are being asserted that intrude upon and usurp rights recognised at law and under tikanga as those of the tangata whenua.

[338] Counsel for Te Rūnanga was right to point out:

[200] G White EIC, paragraphs 100-101.
[201] R Gibbs EIC, paragraphs 1-2.

> 102. Tangata whenua and mana whenua are accorded special recognition and rights under the RMA. As the Privy Council has noted, these rights are "strong directions to be borne in mind at every stage of the decision-making process". These rights are hard won and reflect the culmination of over 150 years of protest and advocacy on behalf of Māori. It is therefore extremely important that such rights are reserved for tangata whenua/mana whenua alone. Extending such rights to non tangata whenua/mana whenua interests, is inconsistent with the RMA, and diminishes both the value and meaning of such rights, and the mana of the iwi or hapū that holds mana whenua.[202]

[339] We do not accept that Poutama and Mr and Mrs Pascoe are tangata whenua exercising mana whenua over the Project area as those terms are used in the Act. Those terms as used in the Act interrelate so that tangata whenua means the iwi or hapu that holds mana whenua over a particular area and mana whenua in turn means the exercise of customary authority by an iwi or hapu in a particular area. While Mrs Pascoe has whakapapa it is to a hapu that makes no claim to exercise mana whenua over the Project area. We are not persuaded that Poutama is an iwi or hapu that has customary authority over the Project area (mana whenua) and there is insufficient probative evidence linking Mrs Pascoe to Poutama in any event. It also follows from these findings that Poutama does not exercise kaitiakitanga over the wider Project area. Once again, as that term is used in the Act it links to the iwi or hapu who are tangata whenua over the area. It would therefore also be incorrect to characterise Mrs Pascoe or Mr R Gibbs as kaitiaki in the sense the term "kaitiakitanga" is used in the Act.

[340] Earlier in this decision we registered a concern that aspects of this appeal appeared to be part of an ongoing campaign by Poutama for recognition and status. Poutama witnesses placed before us a good deal of documentary evidence designed to demonstrate that they had been recognised previously by the Crown and public authorities as tangata whenua exercising mana whenua. In terms of recognition by the Crown, they pointed to inclusion on Te Puni Kōkiri's "Te Kāhui Māngai" website.

[341] Counsel for Te Rūnanga referred us to a 2011 decision of the Māori Land Court which is of particular relevance to a number of the arguments now made on behalf of Poutama.[203]

[342] That decision concerned an application by Mr R Gibbs and his wife to establish a Māori reservation over the Gibbs family farm. The farm consists of approximately 227 hectares of general land. The Gibbs made an application as they were attempting to live

[202] Te Rūnanga opening submissions, paragraph 102.
[203] *Gibbs v Te Rūnanga o Ngāti Tama and ors* (2011) 274 Aotea MB 47 (274 AOT 47) (***Gibbs***).

in "Te Ao Māori" and wanted to operate their farm as a unified whole according to tikanga Māori.

[343] The application was opposed by Te Rūnanga on the basis that, if granted, an unintended precedent would be set permitting non-tangata whenua to create large Māori reservations in areas traditionally within the domain of another iwi, in this instance Ngāti Tama. Judge Harvey made the following findings and observations which are of relevance:[204]

> Connection back to the pre-migration tribes does not give Mrs Gibbs any particular status over and above that of tangata whenua of the district, Ngāti Tama and the Ngāti Maniapoto and Tainui aligned hapū. ... there is no generally accepted claim or recognition of a claim of tangata whenua status by Ngāi Tūhoe Iwi to the land covered by the present applications.
>
> ...
>
> Ngāti Tama and hapū affiliating with Ngāti Maniapoto have been tangata whenua of the area in question for generations over several hundred years.
>
> ...
>
> The applicants cannot rely on the traditions and history of either of the tribes who are traditional tangata whenua to this area in order to create a Māori reservation of such size and for such purposes exclusively in their own favour when they do not whakapapa to those tribes.
>
> ...
>
> This underscores the importance of the customary association and link to land through whakapapa in accordance with tikanga Māori.
>
> ...
>
> That Mr Gibbs family have owned the land for generations is acknowledged. But that fact does not then make that non-Māori family – Mr Gibbs and his siblings, their parents and grandparents – "tangata whenua" as that phrase is commonly understood and applied.

[344] We were informed by Mr R Gibbs that he had lodged an appeal against that decision. As we understand the position, the appeal was adjourned and no steps have been taken since 2012.

[345] Section 35A RMA imposes a duty on local authorities to maintain a register of the iwi and hapū within its region or district. Section 35A(2) imposes an obligation on the Crown to provide each local authority with information on the iwi authorities within the region or district and the areas over which one or more iwi exercise kaitiakitanga.

[204] *Gibbs* above n 202, paragraphs 110, 132, 135, 137, 148.

[346] We called for submissions on the implications of s 35A(5), a provision which addresses how conflicts in records of iwi and hapū are to be resolved. Te Kāhui Māngai is a directory of iwi and Māori organisations managed by Te Puni Kōkiri. It records information on iwi identified in the Māori Fisheries Act 2004, iwi and hapū that have been recognised by the Government for Treaty settlement purposes and iwi authorities and groups that represent hapū for the purposes of the RMA.

[347] Te Kāhui Māngai lists Ka Rū o Poutama as an "other iwi authority". Te Kāhui Māngai directory notes that entry as an "other" iwi authority does not imply formal Crown recognition of that group as an iwi or formal recognition by the Crown of that group as having authority to act on behalf of the iwi. Poutama relies on this listing as evidence that Ka Rū o Poutama is a recognised iwi authority under the RMA.

[348] In 2012 Te Puni Kōkiri wrote to Mr R Gibbs, noting that:[205]

> Te Kāhui Māngai is a passive record of Crown/iwi relationships. The Crown records your assertion of iwi authority status, but in doing so neither affirms nor rejects that status.

[349] We conclude that counsel for Te Rūnanga were right to submit that at best, inclusion of the Te Kāhui Māngai registry is neutral, it neither confirms that a group is an iwi authority, nor does it disprove it. [206]

[350] We accept the submission of counsel for Te Rūnanga that inclusion of Ka Rū o Poutama on Te Kāhui Māngai as an "other iwi authority" does not and cannot create iwi authority or mana whenua status where no such status otherwise exists. We have found there is no reliable evidence before us that the Poutama collective is in fact an iwi or an iwi authority exercising mana whenua in the Project area. As counsel argued:[207]

> Poutama is not an "iwi" or "hapū" as those terms are used in the RMA context and nor is it "tangata whenua' or "mana whenua". Consequently, Ka Rū a Poutama cannot be an "iwi authority".

[351] Counsel for Te Rūnanga noted that prior to the introduction of s 35A in 2005 there was no obligation on the Crown or local authorities to maintain records of iwi and hapū. The onus fell on applicants to identify appropriate iwi and hapū groups for consultation as best they could. This led to difficulties and delays and s 35A was introduced to

[205] Poutama Bundle, Doc 4, page 2.

[206] Submission on behalf of Te Rūnanga in relation to s 35A RMA, 6 August 2019 (Te **Rūnanga s 35A submissions**), paragraph 17.

[207] Te Rūnanga s 35A submissions, paragraphs 1-3.

address those issues and provide greater certainty for iwi consultation purposes. We agree that this is relevant context to the interpretation of s 35A.[208]

[352] As to the requirements of s 35A, we adopt the following summary of the key components from the submissions of counsel for Te Rūnanga:[209]

> 10. There are four key components in this section relevant to the issues. These are that:
>
> (a) a local authority is required to keep and maintain records of iwi and hapū within its district or region;
>
> (b) the Crown must provide information on iwi and hapū to local authorities;
>
> (c) the local authority must include in its record any information provided to it by the Crown; and
>
> (d) where information in the local authority record conflicts with the provisions of another enactment, or advice or determinations made under another enactment, those other provisions, advice or determinations prevail.

[353] Iwi authority is defined in s2 of the RMA as meaning "the authority which represents an iwi and which is recognised by that iwi as having authority to do so."

[354] Counsel for Te Rūnanga argued that the Trust has not provided any credible evidence that Poutama is an iwi or that Ka Rū o Poutama is an iwi authority. She pointed to the following factors as countering any such claim:[210]

> 18. To the contrary, evidence given at the hearing by the Trust's witnesses confirmed that:
>
> (a) to be part of Poutama iwi:
>
> i. you do not need to be Māori;
>
> ii. you can be from another iwi or hapū such as Ngāi Tūhoe but join through marriage;
>
> (b) Poutama does not have a register of members;
>
> (c) while Poutama has a register of hapū (being the list of hapū names contained in the Poutama iwi management plan):
>
> i. the majority of hapū listed in the Poutama iwi management plan are not active;
>
> ii. not all hapū were contacted and asked whether they consented to their inclusion in the list and/or to being represented by Poutama;
>
> (d) the Taumata Paepae o Poutama, being the tribal council of Poutama iwi, includes pākeha members;

[208] Te Rūnanga s 35A submissions, paragraphs 7-8.
[209] Te Rūnanga s 35A submissions, paragraph 10.
[210] Te Rūnanga opening submissions, paragraph 18.

(e) long-standing ownership of land by a pākeha family is sufficient to constitute a customary or kaitiaki interest; and

(f) it is a person's choice to be kaitiaki or not for their land – no Māori or ancestral connection is required.

[355] Counsel also referred to evidence that Poutama is not recognised as an iwi or iwi authority by Ngāti Tama or other neighbouring iwi, and neither the Taranaki Regional Council nor the New Plymouth District Council recognise Poutama as such on their respective websites.

[356] Section 35A(5) provides that the provisions and advice of other determinations or enactments must prevail over the Crown and local authority iwi and hapū records if there is a conflict.

[357] In this case, while there is no direct conflict there are a range of provisions and determinations that are clearly inconsistent with such recognition. They have already been referred to. Of particular relevance is the Ngāti Tama Treaty settlement and the Settlement Act, the Ngāti Maniapoto Agreement in Principle and the decision of Judge Harvey in the *Gibbs* case.

[358] It follows therefore that we see no relevant error in the approach taken by the Agency and the local authorities in terms of their engagement with Māori over the Project. While we conclude that the Commissioner did err in finding that Mrs Pascoe should be added to the Kaitiaki Forum Group, we do not see error in his refusal to accord Poutama status within the Kaitiaki Forum Group or separate and distinct engagement with the Agency equivalent to that shown to Ngāti Tama.

Te Korowai's appeal

[359] Te Korowai is a collective of Ngāti Tama members formed as an incorporated society named Te Korowai Tiaki o Te Hauauru Inc (Te Korowai). The society was formed in early 2018 as a vehicle to oppose the approach taken by Te Rūnanga to the Project. We have already outlined the grounds of appeal and relief sought.

[360] In their opening submissions counsel for Te Korowai set out in detail nine issues. We have endeavoured to encapsulate Te Korowai's concerns with reference to counsel's statement of issues.

Issue 1 – The Proposal results in significant adverse cultural effects

[361] Counsel noted that all parties agree that the settlement lands have high cultural values and that the use of settlement lands has high (or significant) adverse cultural effects, both metaphysical and physical, on the relationship of Ngāti Tama to ancestral lands and taonga. Reference was made to the MVA prepared by Te Rūnanga.

[362] A key difference between Te Rūnanga and Te Korowai relates to outcome – Te Korowai seeks that the NOR be cancelled and that no reliance be placed on Te Rūnanga's power to veto the Project. It was submitted that the relationship of Māori to Treaty Settlement lands is harmed by diverting those lands to the Crown for state highways.

Issue 2 - Part 2 RMA applies to Designations

[363] Counsel submitted that Part 2 is relevant to the Court's consideration of the NOR, relying on *New Zealand Transport Agency v Architectural Centre Inc.*[211]

Issue 3 - Cultural bottom line

[364] Counsel submitted that s 8 RMA sets a cultural bottom line within Part 2 of the RMA and that this includes an active duty to protect taonga.[212] Where alternatives exist for a public work involving Treaty settlement land, the least impact option should be preferred even if it is not ideal.[213] Reasonable alternatives existed they said, citing Mr Roan's evidence that "It would have been reasonable for the Transport Agency to select Options Z, P or E if a decision was based solely on the results of the shortlist MCA assessment".[214] Further, some cultural values are so important that they merit protection through avoidance and not remedial or trade-off options, such as mitigation, offset and compensation.

Issue 4 - Mandatory to consider layers of interest under s6(e) RMA

[365] Section 6(e) RMA requires that all layers of relationship between Maori and their ancestral land must be considered. Counsel submitted that it is not limited to "iwi

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[211] *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, at paragraph [118].
[212] *Attorney General v Trustees of Motiti Rohe Moana Trust* [2017] NZHC 1429.
[213] Te Korowai submissions, paragraph 21, referring to *McGuire v Hastings District Council* [2002] 2 NZLR 577.
[214] Roan EIC – Alternatives, paragraph 88.

authorities" or "mana whenua" but relates to all Maori. Te Korowai are not represented by Te Rūnanga but have their own view on the Project. They said their kaumatua who gave evidence are kaitiakitanga by whakapapa and customary connection and their status was not challenged. Counsel submitted that an exclusionary approach had been taken to Te Korowai in favour of Te Rūnanga which failed to recognize the s 6(e) layering of interests which they submitted must be "recognized and provided for".

[366] While Te Korowai agreed that a requiring authority should engage with the iwi authority that should not be to the exclusion of other kaumatua where there is disagreement with Te Rūnanga. Citing the RPS and District Plan counsel submitted that the objectives, policies and methods refer variously to Maori, tangata whenua, iwi and iwi authority; that the views of tangata whenua are identified as relevant by both the RPS and District Plan and that they are not excluded where not consonant with iwi authority views.

Issue 5 – Court must satisfy itself that RMA conditions render significant cultural effects appropriate

[367] Counsel submitted that significant adverse cultural effects must be avoided or, if not avoided, then remedied, mitigated, offset and compensated. Offsetting and compensation to address residual effects under the RMA should not override the protective bottom lines in Part 2 of the RMA. Counsel raised a concern about the "sterilisation" of the land once the designation has been approved, which would affect Ngāti Tama and the Pascoes. They questioned whether Condition 29A is legally effective or in fact *ultra vires*; and submitted that the ability of Ngāti Tama to "veto" the designation is unorthodox.

[368] Because the side agreement between Te Rūnanga and the Agency has not been made available to Te Korowai they could not explore in the hearing how it may address relevant significant cultural effects; as it is not complete it cannot be relied on to conclude that the adverse cultural effects are acceptable (noting that after the trustee elections it may be endorsed, amended or rejected). If the Court disregards the intended side agreement as the Agency asserted it should, the NOR conditions are inadequate to address significant cultural effects of a physical and metaphysical nature (setting aside ecological effects, as these are addressed separately in the NOR conditions). The land swap that is part of the side agreement is a necessary component for land lost. Counsel submitted that the side deal forms part of the RMA consents package.

Issue 6 – Conditions if approved

[369] Te Korowai sought a position on the Kaitiaki Forum Group should the designation be approved. They raised the question as to whether the land underlying the soil can be retained in some form of title. They accepted that the "lease" option is not available legally for a state highway. However Mr Enright submitted that it is possible to retain some title, that this requires approval by the Trustees and is "legally available".

Issue 7: Who is Te Korowai

[370] The kaumatua who have filed evidence in support of Te Korowai all whakapapa to Ngāti Tama and are qualified to express views on Ngāti Tama tikanga. Te Korowai noted that the Agency's questioning of the status of the Te Korowai to raise s6(e) issues did not recognize or provide for Te Korowai's layer of interest.

Issue 8 - Matters not disputed

[371] Te Korowai did not pursue disputed facts on consultation, stating that these are secondary to the substantive cultural effects of the proposal. In relation to ecology, Te Korowai accepted that the proposed conditions relating to ecological values are appropriate, as adopted by their witness Mr Carlyon. They also accepted the positive ecological effects of the NOR as identified by Mr Carlyon in evidence, with their case focusing on the relevant cultural effects.

Issue 9 – Outcome

[372] Besides considering the effects on Te Rūnanga, counsel submitted that the Court must consider effects on tangata whenua and their ancestral and contemporary relationships with the lands, waters and taonga affected by the NOR. Priority status is not necessarily given to the iwi authority over the other representative groups but should depend on the weighting given to the evidence, much of which in relation to high cultural values and significant effects, is common ground. The NOR should be cancelled to avoid adverse effects on settlement lands and effects on high cultural values and relationships that are matters of national importance under s6(e) RMA.

Consideration of Issues

[373] There is no argument between Te Korowai and Te Rūnanga in terms of Te Korowai's first issue that the effects of the Project will be culturally significant. We too

accept the Project will have effects that are culturally significant. In terms of Issue 3, Te Korowai say that the cultural values should be protected through avoidance of effects on them. However Te Rūnanga has agreed to negotiate an agreement for acquisition of its land that may result in it agreeing to the NOR and resource consents, and to that extent its approach diverges from Te Korowai who seek that the NOR be declined.

[374] Te Korowai stated that significant adverse cultural effects must be avoided or remedied, mitigated, offset and compensated (Issue 5). To that end, concern was expressed about the validity of proposed Condition 29A and Te Rūnanga's ability to veto the designation.

[375] Counsel for Te Rūnanga submitted that the Te Korowai cultural values assessment is to a large degree, confirmatory of the assessment provided by Te Rūnanga. That was acknowledged by Mr Carlyon who gave planning evidence for Te Korowai.[215]

[376] The primary differences between Te Rūnanga and Te Korowai are whether the cultural effects can be appropriately mitigated and the extent to which Te Korowai should be involved in the Project. We have heard from Te Rūnanga that the Agency's proposed conditions addressing cultural values, the Agency's undertaking not to exercise its Public Works Act powers to acquire their land and the potential Agreement for Further Mitigation should provide appropriate recognition of, and protection for, Ngāti Tama's interests.[216] We have set out further detail at paragraphs 242 and 243.

[377] However Te Korowai is not satisfied that the terms being negotiated between Te Rūnanga and the Agency through the side agreement and the conditions will result in those effects being avoided, having had no opportunity for input to those matters.

[378] We infer from the general tenor of Te Korowai's evidence and submissions that their concerns arise in part from a lack of confidence in the present Te Rūnanga leadership and its advisors. Mr N Baker a kaumatua who gave evidence for Te Korowai said as much and also said that Te Korowai could not rule out the possibility they might ultimately support a side agreement with the Agency, provided it was on suitable terms.[217]

[379] Should the Court decline to cancel the NOR, Te Korowai sought inclusion in the

[215] Carlyon EIC, paragraph 33.
[216] Te Rūnanga opening submissions, paragraphs 69-71.
[217] Transcript, page 386, line 4 – page 387, line 7.

Kaitiaki Forum Group through proposed condition 4, and that the subsoil of the highway be retained in Ngāti Tama ownership. That brings to the fore its Issues 4 (layers of interest), 6 (position on the KFG) and 7 (who is Te Korowai).

[380] Te Runanga and the Agency opposed the inclusion of Te Korowai in the Kaitiaki Forum Group. As all members of Te Korowai whakapapa to Ngāti Tama, the other parties considered that Te Korowai's interests are appropriately recognised and represented through Te Rūnanga.

[381] The local authorities also said that such an approach would be unprecedented and administratively inefficient. They argued that as a matter of administrative necessity the Agency, local authorities and other bodies that wish to engage with Ngāti Tama must be able to rely on Te Rūnanga as the voice for Ngāti Tama. To the extent there may be internal dissatisfaction with the leadership or direction of Ngāti Tama, they are matters that should be left to Ngāti Tama to resolve through its own processes.[218]

[382] We think there is considerable force in that submission.

[383] The first and obvious point that arises is that Te Korowai supporters have had opportunity to register their concerns and to influence the ultimate decision about the Project by actively participating in the debate within Te Rūnanga. It was common ground that Te Korowai supporters whakapapa to Ngāti Tama and to the extent that some of their members or supporters may not yet be registered members of Te Rūnanga, we were not made aware of any relevant barriers to registration.

[384] Te Rūnanga pointed out that two of the founding members of Te Korowai (Mr A and Ms L White) were at that time trustees of Te Rūnanga. They have since resigned from Te Korowai and returned to active governance on the Rūnanga from late September 2018. Counsel for Te Rūnanga pointed out that they have been required to go through a comprehensive mandating process to achieve recognition for Treaty settlement and other representative purposes. While Te Korowai supporters are entitled to be heard they have not been through any such process and accordingly, to the extent their view is relevant to the issues on appeal, it becomes one of weight.[219]

[218] Agency closing submissions, paragraphs 55-173; Taranaki Regional Council's Opening submissions, paragraphs 10-13.

[219] Te Rūnanga opening submissions, paragraphs 53-54.

[385] Counsel for Te Rūnanga also pointed out that a number of Te Korowai members or supporters intended to stand for elected positions on the Rūnanga at elections scheduled to take place at an AGM in September 2019.

[386] We understand that the negotiations between the Agency and Te Runanga over the compensation and mitigation package are well advanced, but they are not yet complete. Once complete, they will be taken to the Ngāti Tama beneficiaries for consideration at the AGM. New trustees elected at that meeting would then ultimately have the responsibility of deciding how to proceed.

[387] The issues raised by Te Korowai can and should be pursued within the processes of Te Rūnanga, a course which we understand a number of Te Korowai members and supporters are actively pursuing.

[388] We place considerable weight on the fact that the Agency and other public authorities are entitled to rely on the fact that Ngāti Tama have an established representative entity in their Rūnanga.

[389] We made it clear to the parties during the course of the hearing that we would issue this decision as an interim decision, pending clarification of what Te Rūnanga's ultimate position on the Project will be. We see no basis in the Te Korowai appeal to intervene and grant relief that would cut across the opportunity for Ngāti Tama to come together and consider and decide upon the proposals put forward by the Agency.

[390] Finally, counsel for Te Korowai submitted that Part 2 is relevant to our assessment of the NOR (Issue 2). We have determined for the purposes of this decision that we will have regard to Part 2. The remaining issue raised by Te Korowai, including alternate relief (that the subsoil of the highway be retained in Ngāti Tama ownership) is opposed by the Agency. We do not understand Te Rūnanga to support this. We put this issue to one side pending Te Rūnanga's decision on acquisition of their property.

J - The planning instruments

[391] Under ss 104(1)(b) and 171(1)(a) we are required to consider[220] any relevant provisions of:

[220] For resource consent applications we are required to "have regard to" the instruments, and for the NOR we are required to "have particular regard to" them.

- A national environmental standard;
- Other regulations;
- A national policy statement;
- A New Zealand coastal policy statement;
- A regional policy statement or proposed regional policy statement;
- A plan or proposed plan.

Statutory instruments

[392] The following RMA statutory instruments are relevant to the Project:[221]

- National Policy Statement for Freshwater Management 2014 (**NPS Freshwater**);
- New Zealand Coastal Policy Statement 2010 (**NZCPS**);
- Regional Policy Statement for Taranaki 2010 (**RPS**);
- Regional Fresh Water Plan for Taranaki 2001 (**Fresh Water Plan**);
- Regional Soil Plan for Taranaki 2001 (**Soil Plan**);
- Regional Air Quality Plan for Taranaki 2011 (**Air Quality Plan**);
- New Plymouth Operative District Plan 2005 (**District Plan**).

[393] Mr Roan's evidence[222] set out the key statutory planning documents and identified key issues/themes that are particularly relevant to the Project. No party raised an issue with regard to the relevant provisions that had been identified, save that counsel for Te Korowai referred us to 'Issue' statements from the RPS and the District Plan. We have had regard to those matters.

[394] Mr Roan identified themes arising from the planning documents and relevant to the Project. We accept them and set them out in the following paragraphs.

[221] Roan EIC – Statutory, paragraph 109.
[222] Roan EIC – Statutory, paragraphs 109-160.

Resource use and development to support people and communities

[395] In the RPS, UDR Objective 1 recognises "the role of resource use and development in the Taranaki region and its contribution to enabling people and communities to provide for their social, economic and cultural wellbeing", while 'UDR' Policy 1 directs further that "Recognition will be given in resource management processes to the role of resource use and development".[223]

[396] Evidence from the Agency which was not challenged, highlighted the strategic importance of SH3 and that the Project will have transportation, economic and social benefits (at a regional and local level).[224]

[397] We accept the strategic importance of SH3 and that the Project will have those benefits but record that, at a local level, there will be costs. There will be social costs, particularly on the Pascoes who face losing their home and part of their land and their remaining land will be forever changed. There will be cultural costs to the Ngati Tama people who will lose part of their settlement land. There will also be significant ecological effects.

Regionally significant infrastructure

[398] Section 15.2 of the RPS, *Providing for Regionally Significant* Infrastructure is relevant. It identifies the importance of transport route security and reliability to Taranaki's growth and development, particularly in relation to SH3 north (and south), along with network efficiency, capacity and safety.

[399] INF Objective 1 and Policy 1 of the RPS relate to the safe and efficient establishment, operation and maintenance of regionally significant infrastructure, while avoiding, remedying and mitigating adverse environmental effects. Similarly, the District Plan Objective 20, recognises the safe and efficient operation of the road transport network.[225]

[400] We acknowledge the importance of ensuring the security of SH3 as a transport route and have received evidence addressing the environmental effects of the Project.

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[223] RPS, Part B, s 4, "Use and development of resources".

[224] Roan EIC – Statutory, paragraphs 112, 113, referring to EIC from PT McCombs, JD Hickman and MC Copeland.

[225] Roan EIC– Statutory, paragraphs 115 and 116, RPS, Part B, s 15.2.

While the Project will have significant ecological effects, we accept that the proposed conditions will address those effects.

Natural hazards-avoiding and mitigating effects

[401] Section 11 of the RPS contains provisions concerning the reduction of risk to the community from natural hazards, including HAZ Objective 1 and Policies 2 and 6. CCH Objective 1 and Policy 1 address climate change affects.[226]

[402] Unchallenged evidence from the Agency described how the existing SH3 road at Mount Messenger is prone to natural hazards which can affect road safety, result in traffic restrictions and delay or cause road closures that can affect road users and surrounding communities. It was the Agency's case that the Project will result in a significant improvement in the resilience of SH3 to natural hazards.[227]

[403] We accept the Agency's evidence on these matters.

Treaty of Waitangi, tangata whenua values and cultural heritage

[404] The effect of the Project on cultural values was a significant issue in the hearing.

[405] Planning documents of particular relevance to cultural values are the NPS Freshwater, RPS and District Plan.

[406] In the NPS Freshwater the following provisions are relevant:

> **Objective AA1** To consider and recognise Te Mana o te Wai in the management of fresh water.
>
> **Objective D1** To provide for the involvement of iwi and hapū, and to ensure that tangata whenua values and interests are identified and reflected in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning...

[407] The relevant RPS objectives are:[228]

> **TOW OBJECTIVE 1** To take into account the principles of the Treaty of Waitangi in the exercise of functions and powers under the Resource Management Act.
>
> **KTA OBJECTIVE 1** To have particular regard to the concept of kaitiakitanga in relation to managing the use, development and protection of natural and physical resources in the

[226] Roan EIC – Statutory, paragraph 120.
[227] EIC from PT McCombs, JD Hickman and B Symmans, summarised in Roan EIC – Statutory, paragraphs 121-126.
[228] RPS, Part C, s 16 "Statement of resource management issues of significance to iwi authorities".

Taranaki region, in a way that accommodates the views of individual iwi and hapu.

REL OBJECTIVE 1 To recognise and provide for the cultural and traditional relationship of Māori with their ancestral lands, water, air, coastal environment, wāhi tapu and other sites and taonga within the Taranaki region.

CSV OBJECTIVE 1 Management of natural and physical resources in the Taranaki region will be carried out in a manner that takes into account the cultural and spiritual values of Iwi o Taranaki and in a manner which respects and accommodates tikanga Māori.

[These include provisions relating to the Treaty of Waitangi, recognising kaitiakitanga, recognising and providing for the relationship of Māori with ancestral lands, water, sites, wāhi tapu and other taonga, and recognising cultural and spiritual values of tangata whenua in resource management processes.]

[408] Key policy elements that give effect to the above objectives include:[229]

TOW POLICY 1 Act cooperatively and in good faith ...

TOW POLICY 2 Management of natural and physical resources...in a manner that takes into account the principles of the Treaty of Waitangi ...

KTA POLICY 1 Iwi and hapu will be consulted with on an individual basis to determine how kaitiakitanga can be recognised and integrated ...

REL POLICY 1 The development, use or protection of iwi and hapu land will be supported in a manner consistent with the purpose of the Act. ...

REL POLICY 3: Wāhi tapu and other sites or features of historical or cultural significance to iwi, and hapu and the cultural and spiritual values associated with ancestral lands, fresh water, air and the coast will be protected from the adverse effects of activities, as far as is practicable.

REL POLICY 4: The protection and enhancement of mahinga kai within the region's waterbodies will be provided for ...

[409] A key objective from the District Plan includes:[230]

Objective 19 To recognise and provide for the cultural and spiritual values of tangata whenua in all aspects of resource management in the district in a manner which respects and accommodates Tikanga Māori.

[410] Policies 19.2 – 19.4 are relevant, in particular Policy 19.2, which states:

Subdivision, land use or development should not adversely affect the relationship, culture or traditions that tangata whenua have with Waahi Taonga/Sites of Significance to Maori.

[411] Mr Roan was of the opinion that:[231]

...the Transport Agency's process of engagement with tangata whenua, the Project development process, and the measures incorporated into the Project are consistent with and respond to the provisions of the RPS and the other statutory documents as they relate to the Treaty of Waitangi and tangata whenua cultural values, traditions and heritage.

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[229] RPS, Part C, s 16.
[230] District Plan, s 2: Management Strategy, "Tangata Whenua".
[231] Roan EIC – Statutory, paragraph 141.

[412] Te Rūnanga accepted that the conditions proposed will address the adverse effects of the Project provided that the Kaitiaki Forum Group condition is limited in scope to kaitiaki and does not include reference to Mr and Mrs Pascoe. While they focused on that point at the hearing, we record that Te Rūnanga has not yet consented to the Agency's use and acquisition of its land for this Project or finalised an Agreement for Further Mitigation (despite recording their support for the Project in their opening submission).

[413] Our evaluation and findings on the cultural effects of the Project are set out under the heading ***Cultural effects*** in **Section I**.

Biodiversity and freshwater ecosystems

[414] The policy framework for these matters is contained in the NPS Freshwater, RPS, Fresh Water Plan and the District Plan.

[415] The following RPS provisions are relevant[232]:

> **BIO OBJECTIVE 1** To maintain and enhance the indigenous biodiversity values of the Taranaki region...
>
> **BIO POLICY 1** The maintenance, enhancement and restoration of indigenous biodiversity will be promoted throughout the Taranaki region and at different scales within the region and will include ecological landscapes, ecosystems, and ecological processes, habitats, communities, species and populations.
>
> **BIO POLICY 2** Adverse effects on indigenous biodiversity in the Taranaki region arising from the use and development of natural and physical resources will be avoided, remedied or mitigated as far as is practicable.
>
> **BIO POLICY 3** Priority will be given to the protection, enhancement or restoration of terrestrial, freshwater and marine ecosystems, habitats and areas that have significant indigenous biodiversity values.
>
> **BIO POLICY 4** When identifying ecosystems, habitats and areas with significant indigenous biodiversity values, matters to be considered will include:
>
> (a) the presence of rare or distinctive indigenous flora and fauna species; or
>
> (b) the representativeness of an area; or
>
> (c) the ecological context of an area.
>
> Once identified as significant, consideration should be given to the sustainability of the area to continue to be significant in future when deciding on what action (if any) should reasonably and practicably be taken to protect the values of the area.

[416] In the District Plan, Objective 16 and Policy 16.1 address indigenous vegetation

[232] Roan EIC – Statutory, paragraphs 144-147.

and habitats and significant natural areas (**SNA**s).[233]

[417] Policy direction for freshwater ecosystems is provided in the NPS Freshwater, RPS, Fresh Water Plan and the District Plan. Key provisions include: safeguarding and restoring the life supporting capacity, ecosystem process and indigenous species of water bodies; protecting the significant values of wetlands; maintaining or enhancing water quality; and avoiding, remedying or mitigating the effects of river bed disturbance. The RPS identifies that the Mimi Stream and Tongaporutu River (which the Mangapepeke Stream discharges to) as being "river and stream catchments of high quality or high value for their natural, ecological and amenity values".[234]

[418] The RPS policy framework supports the maintenance, enhancement and restoration of indigenous biodiversity. The Project will result in adverse effects on the biodiversity values of habitats affected by the roading alignment. Many of the habitats affected would meet the criteria for significance contained in RPS BIO Policy 4, including habitats located on the Ngāti Tama and Pascoe lands.

[419] We have addressed these effects and those on freshwater ecosystems in our decision under the heading ***Ecological effects*** in **Section I**.

Natural features, landscapes and amenity

[420] The RPS provisions, including NFL Objective 1, and Policies 2 and 3, recognise the protection of outstanding natural features and landscapes of the Taranaki region from inappropriate use and development, and the appropriate management of other natural areas, features and landscapes and natural character of value to the region.[235]

[421] There are no outstanding natural features or landscapes within the Project area listed as such in the District Plan. However Mr Lister acknowledged that there are other natural areas, features and landscapes of value within the Project area.[236]

[422] We have addressed effects on these areas in this decision under the heading ***Landscape and visual effects*** in **Section I**.

[233] District Plan, s 2 Management Strategy, "Natural Values".
[234] Roan EIC – Statutory, paragraph 149.
[235] Roan EIC – Statutory, paragraph 155.
[236] CB, Vol 3, GC Lister Statement of Evidence, pages 2296 and following (**Lister SOE**).

Non-statutory instruments

[423] The non-statutory instruments to which we were referred are:[237]

- The Government Policy Statement on Land Transport 2018;
- The Regional Land Transport Plan for Taranaki 2015/16 – 2020/21 which identifies the efficiency, safety and reliability of SH3 north over Mount Messenger (and through to Awakino Gorge) as a priority inter-regional issue for Taranaki;
- The Road Ahead, Economic Development Study on State Highway 3 North (Venture Taranaki 2012) which describes SH3's current state and makes a case for improvement;
- "Tapuae Roa: Make Way for Taranaki." Taranaki Regional Economic Development Strategy (August 2017) which identifies improvement of the northern highway as part of the infrastructure required to underpin a modern growing economy;
- Civil Defence Emergency Management Group Plan for Taranaki: 2018-2023, identifies SH3 as a lifeline utility and the primary route for the delivery of fast-moving consumer goods and petrol movements for the region, as well as being the primary road evacuation route;
- The TRC Long Term Plan 2015-2025;
- The NPDC Long Term Plan 2015-2025.

[424] As nothing turns on the significance of these documents, we do no more than record their relevance to the Project.

K - The Agency's objectives – reasonable necessity

[425] When considering the NOR, we are required to have particular regard to:

> s171 (1) (c)...whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought

[237] Agency's opening submissions, paragraphs 206-209.

[426] Evidence about how the Project will meet the Agency's objectives was provided by Mr Symmans (project design), Mr P McCombs (traffic and transport) and Mr M Copeland (economics). We note that none of the parties sought to question Mr McCombs or Mr Copeland and both were excused from attending the hearing with their evidence being taken as read.

[427] Starting with the first objective: *To enhance safety of travel on State Highway 3,* Mr McCombs said that the new section of highway will enhance safety by providing:[238]

- An improved Safety Star Rating of 3[239] which matches the higher safety operating standards now sought across all of the Agency's rural state highway network;
- Improved forward visibility with 100km/h operating speed throughout;
- Increased passing opportunities over the full length of the Project;
- A reduced route length from 7.4km to 6km;
- Improved geometry with eased curves, widened lanes, flatter grades, full standard shoulders and side barriers throughout;
- Reduced driver frustration through a fully dependable no surprises environment.

[428] Based on this evidence, which was not disputed, we are satisfied that once completed and in operation there can be little disagreement that the new section of highway will provide and enhance the safety of travel for all road users.

[429] For the second objective: *To enhance resilience and journey time reliability of the state highway network*, as noted earlier in this decision the existing Mount Messenger section of SH3:[240]

- Is highly vulnerable to disruptions from rockfalls, landslips, vehicle breakdowns and crashes;

[238] McCombs EIC, paragraph 118.

[239] Exhibit 1 *KiwiRAP New Zealand Road Assessment Programme* provided by Mr Symmans states that Star Ratings are determined through an evaluation of each of a road's design elements. These vary from a high of 5 stars to a low of 1 star. The existing road is rated Star 2.

[240] McCombs EIC, paragraphs 16-17 and 135.

- Has steep grades, narrow widths, a winding alignment with tight curves, restricted forward visibility, limited overtaking opportunities and a tunnel which physically constrains maximum load sizes;

- Is used by an average of 460 heavy trucks per day, some carrying hazardous goods such as LPG.

[430] With respect to delays for traffic using the existing route Mr Symmans advised that.[241]

- The last modest landslip in May 2018 required a closure of almost 4 hours with lane closures for 12 ½ days resulting in long queues with wait times of up to 1 hour;

- During resealing work in summer 2018, there were queues over 1 km in length with wait times of over 1 hour (unlike the new route which will have sufficient width to maintain two-way traffic).

[431] With respect to travel times for the new route, Mr McCombs said that:[242]

- If trucks are not encountered light vehicle travel times on the existing route average around 8 minutes whereas on the Project route this will reduce to half or 3.9 minutes which is a significant saving for travellers;

- For heavy vehicles travel times between the existing route and the Project route will reduce from about 13 minutes to about 6.5 minutes;

- The designation for the new route will also provide sufficient width for a full passing lane to be introduced to meet future increase in traffic volumes.[243]

[432] With respect to resilience, Mr Symmans outlined the following design features of the Project:[244]

- It avoids deep seated landslide features;

- Its embankments have been designed to minimise displacements in 1-in-1000-

[241] Symmans EIC, paragraph 35.
[242] McCombs EIC, paragraphs 120-129.
[243] McCombs EIC, paragraph 129.
[244] Symmans EIC, paragraph 35.

year seismic events (large embankments) and 1-in-500-year events (small embankments);

- Its tunnel, bridges and large culverts have been designed for 1-in-2,500-year seismic and flood events;
- Its carriageways have been designed for a 1-in-500-year flood event with no accumulation of standing water on active lanes in 1-in-10-year events;
- Its slopes, swale/verge barrier and shoulder configurations have been designed to minimise debris entering the carriageway.

[433] We are satisfied that by replacing the poor alignment and geologically unstable section of the existing route this new section of State Highway 3 will provide enhanced resilience and journey time reliability for users of the state highway network.

[434] The third objective is: *To contribute to enhanced local and regional economic growth and productivity for people and freight by improving connectivity and reducing journey times between the Taranaki and Waikato regions.*

[435] Mr Copeland's evidence was that:[245]

- In present value terms, over its life the Project is expected to result in savings of $44.8m in travel times, $19.9m in vehicle operating costs, $11.3m in accident costs and $13.7m in road resilience benefits, with carbon dioxide emission reduction benefits of $1m and reduced maintenance costs of $1.4m;
- These benefits are expected to transfer to the local economy as most traffic will have an origin or destination in the Taranaki region;
- There will also be economic benefits from improved trip reliability, the potential for the Project to generate additional traffic, for trucks to be able to complete New Plymouth to Auckland return journeys in a day without having to provide a replacement driver and for the Project route to accommodate over-sized loads which currently need to use the much longer SH1 route.

[436] We accept the evidence of Mr Copeland that this local and regional economic

[245] Copeland EIC, paragraphs 52-53, 69 on pages 16 and 19.

growth and productivity Objective will be satisfied through the improved connectivity and reduced travel times which will be afforded to users of the new route.

[437] The fourth Objective is: *To manage the immediate and long term cultural, social, land use and other environmental effects of the Project by so far as practicable avoiding, remedying or mitigating any such effects through route and alignment selection, highway design and conditions.*

[438] A significant part of the Agency's ability to avoid, remedy and mitigate the effects of the Project rests on compliance with the proposed conditions addressing cultural and ecological effects. At present there is a major obstacle, namely that the Agency has not acquired the Ngāti Tama Land which is needed for the Project and the ecological enhancement. It has assured Ngāti Tama and the Court that it will not compulsorily acquire that land. As at the date of this interim decision the land has not been acquired, and agreement on other 'key elements' referred to in Te Runanga's opening submissions has not been reached.

[439] Until that land has been acquired and agreement reached, the Project is to all intents and purposes 'incomplete'. In the normal course, we would not concern ourselves with acquisition of land for a particular work because the Public Works Act 1981 sets out powers for that acquisition to occur – be it by agreement or by compulsory acquisition.

[440] In this case however, the Agency cannot proceed with the Project without agreement from Te Rūnanga. We cannot presently be certain that the Agency's final objective can be fulfilled.

[441] For those reasons we are unable to make a final determination as to whether the work and designation are reasonably necessary for achieving the Agency's objectives, but we record that the Project does achieve the first three objectives as we have identified. Whether or not the fourth objective can be achieved is dependent on the Agency reaching agreement with Te Rūnanga.

L - Conditions

[442] The Agency submitted its final condition set of proposed conditions with its closing legal submissions on 13 August 2019 comprising Designation Conditions and Resource Consent Conditions. These include a number of amendments to the version which was

current at the time of the hearing.

[443] Counsel told us that these conditions have been agreed to by all parties to the DOC appeal (other than Poutama and Mr and Mrs Pascoe).[246] While we are not aware of any disagreements from the two Councils this needs to be confirmed.

[444] Other than the matter of proposed condition 5A relating to the Pascoes, we make no furher observations on the conditions at this time.

[445] One condition that has been substantially amended in the final condition set is proposed condition 5A (replicated in condition GEN.6A.) which sets out the Agency's proposals for responding to the Project's effects on the Pascoes. The Advice Note to this condition notes that this condition has been offered on an *Augier* basis. We note that condition 19(b) may need to be amended for consistency with the provisions in the amended conditions 5A and GEN.6A.

[446] The consequences of the Agency being unable to reach agreement with the Pascoes on the matters provided for in proposed condition 5A have been discussed in section I of this decision. Also, as advised to us during the hearing, the Pascoes have been removed from participation in the Kaitiaki Forum Group (Condition 4) and instead offered on-going participation with the Agency through the extensive provisions provided for under conditions 5A and GEN.6A.

[447] The area of Pascoes' land which the Agency proposes to be permanently acquired for the new highway is a little over 11 ha with a further 13.5 ha required for temporary occupation during its construction.

[448] In addition to these areas, on a willing buyer/willing seller basis the Agency would like to acquire:[247]

- The Pascoes' dwelling and outbuildings so that the underlying land can be used for construction storage and related activities;
- A number of tongues of land extending up the side valleys off the new alignment to provide for core ecological mitigation/offset compensation

[246] Agency's closing submissions, paragraph 182.
[247] Agency's closing submissions, paragraphs 60-62.

activities, the PMA and restoration and mitigation planting;

- The largest of these tongues which would be used for temporary storage during construction.

[449] The Agency has proposed an extensive package of measures to address the potential effects of the Project on the Pascoes. This has been structured under three phases; pre-construction; during construction; and operations/on-going.[248]

[450] In the first of these phases, the Pascoes would be invited to attend a design workshop, a site visit to another active Agency project, offered health and safety training and be provided with protective equipment for their use during construction.

[451] In the construction phase they would be invited to fortnightly meetings to discuss construction effects and mitigation, to undertake site walk-overs, to identify any features on their land to be protected, to ensure that access to their land is maintained, to have inputs for ecological mitigation on their land and at the completion of construction, for all temporary construction areas on their land to be reinstated as far as possible to their original condition.

[452] Long term measures would be dependent on whether the Pascoes elected to sell the land required for the new highway including their existing home. If they elected to sell, then the Agency has offered to build them a new home incorporating material salvaged from their existing home and to provide them with temporary accommodation while the new home was being built. In addition, there are offers to install fencing to prevent stock accessing the PMA, $15,000 for landscaping at the new home and $55,000 of additional planting at a location to be agreed on their land. A new walking track would also be established on the floor of the Mangapepeke valley.

[453] If the Pascoes decide against selling all of their property, the Agency has offered to work with them to develop a plan for visual planting adjacent to their home to screen views of the new highway. The $55,000 additional planting offer would also remain.

[454] As noted at [143], the CNMP has been prepared on the basis that the Pascoes will relocate at least during construction and therefore have not been identified as noise sensitive receivers. We will proceed with our final decision on the basis that the Pascoes

[248] Agency's closing submissions, paragraph 71.

will relocate (as they indicated they would) should the Project proceed. If necessary, we would hear from the Pascoes on that matter as part of any final determination.

M - Commissioner's Decision

[455] Section 290A of the RMA requires us to have regard to the Commissioner's Decision.

[456] We have had regard to the Commissioner's Decision and referred to it as necessary throughout this decision. We have reached a different view to the Commissioner on the membership of the Kaitiaki Forum Group, Mrs Pascoe's claim to be tangata whenua, the social effects of the Project on the Pascoes and the cultural effects in terms of how they can be addressed in the context of the timing of the possible acquisition of Te Runanga's land and confirming or otherwise the NOR.

N - Summary of Findings

[457] We summarise our findings on the core central Issues which emerged from the parties cases and which we outlined in **Section C**.

Alternatives

[458] We have determined that the Agency's consideration of alternative sites, routes or methods of undertaking the Project was adequate.

[459] We observe that the online option (staying within the existing SH3 alignment) was considered and not chosen, primarily for reasons of cost, constructability and cultural values.

Consultation

[460] The Agency's consultation was detailed and extensive.

Cultural effects

[461] There are significant adverse cultural effects from the Project on Ngāti Tama which are yet to be resolved.

[462] We have found that Ngāti Tama has mana whenua over the Project area and it is

appropriate that it be the only body referred to in conditions addressing cultural matters.

[463] Mrs Pascoe and her family have not established on the evidence that they have and are able to maintain the whanaungatanga relationships or exercise the associated tikanga that would require recognition under Part 2 of the Act.

[464] We have found that Mrs Pascoe is not kaitiaki in the sense the term 'kaitiakitanga' is used in the Act. The relationship the Pascoes have with their land is one of stewardship.

Te Korowai

[465] We do not consider it is appropriate for Te Korowai to be included in the Kaitiaki Forum Group.

[466] As we have already observed, the primary difference between Te Rūnanga and Te Korowai is whether the cultural effects can be appropriately mitigated. Te Korowai is not satisfied that the terms of the agreement being negotiated between Te Rūnanga and the Agency, together with the proposed conditions, will result in cultural effects being appropriately avoided. We will not determine that issue until we receive advice from Te Rūnanga as to what has been decided with regard to its land.

Poutama

[467] We have found that Poutama are not tangata whenua exercising mana whenua over the Project area. It follows, therefore, that it is not appropriate that it be recognised in any consent conditions addressing kaitiakitanga that may issue.

Mr and Mrs Pascoe

[468] There is no doubt that the Project will have significant adverse effects on the Pascoes and their land. The adverse social impact of the Project on the Pascoes is severe. We consider, however, that proposed condition 5A will mitigate those effects to the extent possible if the Project is approved and proceeds and the Pascoes accept the Agency's offer to buy their house, the land on which it sits, and the other land that is required for the Project.

Ecology

[469] We consider that the Project will have significant adverse effects on the area that it affects, but that those effects will be appropriately addressed through the proposed conditions in the event that Te Rūnanga agree to transfer the Ngāti Tama Land to the Agency.

Conditions

[470] Except for those proposed conditions we have addressed in this decision, we are presently unable to find that the proposed conditions, on their own, appropriately avoid, remedy or mitigate the effects of the Project. It may be that those effects can only be adequately addressed through the proposed conditions, the acquisition of the Ngāti Tama Land, and the Agreement for Further Mitigation. Until we know whether or not the acquisition has been agreed, the related agreement entered into (and whether any further amendments to conditions are required as a consequence of such agreements) we cannot finally determine these appeals.

Outcome

[471] For the reasons previously expressed, we are not prepared to finally determine these appeals at this time. When we do finally determine these appeals, we will have regard to the above findings.

[472] In their closing submissions counsel for the Agency endeavored to address our concerns about the prospect of confirming the NOR absent an agreement from Te Rūnanga to sell their land. We remain concerned however with the effects of the Project. Our consideration of the effects cannot be completed until we receive advice on whether or not agreement has been reached between Te Rūnanga and the Agency.

[473] Counsel for the Agency filed a memorandum dated 1 November 2019 updating the Court on the status of the Te Rūnanga agreement. Counsel advised that Te Rūnanga and the Agency have continued work to finalise the agreement and the documentation is now substantially complete. Elections for Te Rūnanga o Ngāti Tama Trust took place in September 2019 and the results were certified by Election NZ. Five of the seven previous trustees were re-elected and two new trustees were elected. The Agency understands that the previous trustees had formerly recommended that the new trustees accept and agree to the package negotiated between the Agency and Te Rūnanga.

[474] Counsel also noted that the day before the election Te Korowai applied to the Māori Land Court for orders including an urgent interim injunction to suspend the elections and prohibiting the trustees from undertaking trust business, including finalising their agreement with the Agency. Te Korowai also asked that the election be re-run. In a decision dated 23 October 2019 the Māori Land Court declined to issue an injunction requiring the newly elected trustees to hold fresh elections or to restrain their decision making. The Court has directed that a written report be provided by Te Rūnanga on matters relating to eligibility to be a beneficiary of the trust.[249]

Video

[475] As part of the submissions filed for Poutama and Mr and Mrs Pascoe we were supplied with a video. That video provided names and pictures of certain staff from the Agency and repeated allegations made in the hearing as to the way in which the Agency interacted with Poutama and the Pascoes. Further, impropriety was alleged in respect of which no evidence was called. The Agency informed us that the video had been published on the internet.

[476] We record that we have not had regard to that video because it was not put before us in evidence. Other parties, therefore, had no opportunity to test its contents in the hearing. We consider that it was inappropriate to 'target' witnesses and individuals in the manner it did. Further to that we refer to the finding that we have previously made that the Agency's consultation was detailed and extensive. The evidence we heard did not establish any bad faith on the Agency's behalf.

Memoranda

[477] In addition to closing submissions from the parties on a number of issues we also received two memoranda filed on behalf of Poutama and Mr and Mrs Pascoe. The first memorandum was dated 31 July 2019 and referred to an August 2017 letter from DOC to the Agency setting out its view of the 'shortlist' options. The memorandum raised an issue with Mr Napier's evidence which was to the effect that DOC confirmed its preference for the eastern alignment options, compared to all other options. The memorandum claimed that was not what the advice from DOC said; that it qualified its advice with regard to the options it had considered.

[249] *Te Korowai Tiaki v Te Runanga o Ngāti Tama Trust* [2019] 407 Aotea MB 47 (407 AOT 47).

[478] In response, the Agency stated that the potential effects of each of the shortlisted options on ecological values was fundamental to the assessment of the options. It noted that DOC had not challenged the selection of the eastern alignment option.[250] We have no concerns with Mr Napier's evidence on this point.

[479] The second memorandum dated 5 November 2019 asserted that Mr Dreaver, who gave evidence for the Agency, did not disclose that in addition to being related through his wife and daughter to Ngāti Mutunga he is also related to Ngāti Tama. It was alleged that the omission is material to the Court's consideration of the evidence given by Mr Dreaver.

[480] We sought a response from the Agency which advised that it is well known that there are connections between Ngāti Mutunga and Ngāti Tama as with many iwi and Māori groups. That said, Mr Dreaver had advised the Agency that neither his wife nor daughter are registered members of Ngāti Tama. Further, Mr Dreaver provided evidence relating to his role as a negotiator for the Agency and Te Rūnanga and detail of his engagement with other iwi and Māori groups.[251]

[481] We accept the Agency's advice on this point. We have no concerns with the evidence provided by Mr Dreaver.

Determination

[482] This is an interim decision of the Court because there is no certainty as to whether or not the Agency can acquire from Te Rūnanga the land necessary to implement the Project and finalise an Agreement for Further Mitigation.

[483] In light of the Agency's assurance that it will not compulsorily acquire the Ngāti Tama land, the Court is not prepared to complete its consideration of the NOR and resource consents absent advice from Te Rūnanga that its has agreed to the acquisition and further mitigation.

[484] That is because we cannot determine that the effects of the NOR and the Project will be appropriately addressed until we receive advice on that acquisition and further

[250] Agency's closing submissions, paragraphs 200-201 and Memorandum of counsel for the Agency dated 19 November 2019, paragraphs 3-5.
[251] Memorandum of counsel for the Agency dated 19 November 2019, paragraphs 6-11.

mitigation.

[485] This proceeding is adjourned until 31 March 2020.

[486] On that date we direct that the Agency is to file a memorandum advising the Court of the state of its negotiations with Te Rūnanga.

For the Court:

BP Dwyer
Environment Judge

M Doogan
Māori Land Court Judge

MJL Dickey
Environment Judge

RM Bartlett
Environment Commissioner

DJ Bunting
Environment Commissioner

Dye v Auckland Regional Council

Court of Appeal Wellington CA 86/01
26 July; 11 September 2001
Gault, Keith and Tipping JJ

Resource management – Resource consents – Subdivision development into "lifestyle blocks" – Non-complying activity – Objectives and policies of district plan – Whether consideration of cumulative effects ought to be limited to those due solely to rural character – Whether application gave rise to precedent effects – Meaning of "effect" – Precedent and cumulative effects – Role of High Court on appeal from Environment Court – Resource Management Act 1991, ss 104(1), 105(1)(c), 105(2A)(a) and (b).

The appellants wished to pursue a subdivision development whereby their land would be divided into five lots of various sizes. The land was zoned rural and the development was non-complying so the appellants applied to the district council for a resource consent. The council refused to grant consent, the application being opposed by the respondent regional council. The owners successfully appealed to the Environment Court but the regional council successfully appealed to the High Court on questions of law. As the application was non-complying the owners had to pass through one of the gateways referred to in s 105(2A)(a) and (b) of the Resource Management Act 1991. Then, if a gateway was satisfied the owners had to satisfy the consent authority that the application ought to be granted having regard to the matters set out in s 104(1) and in terms of the overall discretion inherent in s 105(1)(c). The Environment Court had found that the proposal satisfied both gateways. The High Court found that the Environment Court had erred on key questions of law. The owners appealed to the Court of Appeal on three points of law: whether the High Court had misinterpreted the objectives and policies of the relevant district plan, this being gateway (b) in s 105(2A); whether consideration of cumulative effects ought to be limited to those due solely to rural character; and whether the application gave rise to precedent effects under s 104.

Held: 1 Rather than considering whether the decision of the Environment Court had been one open to it at law the High Court had reached an independent assessment. The High Court had not interpreted the objectives and policies and then identified the manner in which they had been misinterpreted or misunderstood. Instead the High Court had worked backwards, reasoning that the proposal was not consistent with the objectives and policies as the Court saw them, and thus that the Environment Court must have misunderstood them. It was not for the High Court to differ on whether the proposal was contrary to the objectives and policies as the appeal was limited to the questions of law. Either the Judge had substituted his own assessment of the weight to be applied

to various factors or had found an error of law different from that which he said formed the basis of his conclusion. There was no impediment at law which prevented the Environment Court from holding that the proposal was not contrary to the objectives and policies of the plan. That Court had not been influenced in any improper way or been selective in the reading of documents. It was fully mindful of the basic thrust of the relevant objectives and policies. The application was thus not wrongly assessed under s 104(1)(a) and s 105(2A)(b) (see paras [13], [16], [20], [21], [22], [25]).

Arrigato Investments Ltd v Auckland Regional Council [2002] 1 NZLR 323 referred to.

2 The Environment Court had been entitled to conclude that no precedent would be set by granting the application. In setting out the factors that it regarded as relevant to that conclusion the Court had not established a checklist that if met, would require an authority to grant an application in a subsequent case. The High Court should have been concerned with matters of law only, but had moved to consider matters of fact and had reached its own assessment as to whether the granting of consent would have a precedent effect (see paras [33], [34], [35]).

3 In s 104(1)(a) Parliament had implicitly abandoned the definition of "effect" set out in s 3 which only applied unless the context otherwise required. Had Parliament wished the s 3 definition to apply it would not have used the phrase "any actual or potential effects". Section 104(1)(a) was concerned with the impact of a particular activity on the environment, not with the effect which the application might have on the fate of subsequent applications for resource consents. Precedent effects ought to be considered under s 104(1)(d) which was similar in concept to gateway (b) in s 105(2A) or alternatively under para (i) of s 104(1) (see paras [41], [42]).

4 In order to reach its conclusion the High Court must have found that it was a mandatory requirement to make an area-wide assessment with input from all relevant areas of expertise. This was wrong. The correct approach to the concept of effects did not require such an approach as compliance with the resource management process was already complicated and expensive enough. Precedent effects were a relevant factor which a consent authority should take into account when considering an application for a non-complying activity. Cumulative effects should also be taken into account but without the obligation for an area-wide investigation. Therefore the High Court was not correct in its finding that the Environment Court had erred in failing to consider "all of the cumulative effects of the proposed subdivision". Nor was it correct in finding that the Environment Court erred in finding that the application would not give rise to "precedent effects under s 104" (see paras [45], [49]).

Appeal allowed.

Other case mentioned in judgment

Wellington Regional Council (Bulkwater) v Wellington Regional Council (Environment Court, Wellington, W 3/98, 7 January 1998, Judge Treadwell).

Appeal

This was an appeal by Russell Dye, an applicant for resource consent, to the Court of Appeal on three questions of law from the judgment of Chambers J (reported at [2001] NZRMA 49) allowing an appeal from the

Environment Court's decision (Auckland, A 22/00, 6 March 2000, Judge Whiting) to overturn the decision of the Rodney District Council (the RDC), the second respondent, to refuse Mr Dye's application for resource consent for a non-complying subdivision development, an application opposed by the Auckland Regional Council (the ARC), the first respondent.

R B Brabant and *M J E Williams* for Mr Dye.
B I J Cowper and *J A Burns* for the ARC.
W S Loutit and *A J Bull* for the RDC.

The judgment of the Court was delivered by

TIPPING J. [1] This appeal from the judgment of Chambers J (reported at [2001] NZRMA 49) in resource management proceedings concerns three questions of law, in respect of which the Judge gave leave to appeal to this Court. We will describe the history of the case only to the extent necessary to put the legal questions in sufficient context.

[2] The appellant, Mr Dye, owns with his wife a property comprising 16.48 ha at 94 Pomana Road, Kumeu. The locality was described by the Environment Court (Auckland, A 22/00, 6 March 2000, Judge Whiting) at para [5] as having:

> ". . . the characteristics of a peri-urban zone in transition from an earlier generation of town supply dairy farms, small orchards and vineyards to the present relatively small blocks occupied by an increasing number of large, modern houses on properties used for low-intensity agriculture, stud farming, some remnant horticulture and casual 'hobby' grazing."

[3] Within 400 m of the site are two quite substantial restaurants, one catering for up to 100 people and the other for up to 60 people. Each has substantial offstreet parking facilities. Other properties in the vicinity on Pomana Road were described as comprising a range of older and newer dwellings on small "lifestyle" sections, generally from 2 ha to 4 ha, with the largest being a little under 7 ha.

[4] Mr Dye applied to the second respondent, the Rodney District Council (the RDC), to subdivide the land into five lots ranging in size from 1.4 ha to 6.4 ha with an access lot of 0.57 ha. The 6.4 ha lot was identified as being suitable for horticultural use. The land is zoned rural in the operative plan and similarly in what was then a proposed change, now operative, known as change 55. In both cases the subdivision was a non-complying activity. The RDC declined to grant a resource consent, Mr Dye's application having been opposed by the first respondent, the Auckland Regional Council (the ARC). On Mr Dye's appeal to the Environment Court the ARC also appeared in opposition. When the Environment Court granted consent, the ARC appealed to the High Court on questions of law. Its appeal was allowed by Chambers J and Mr Dye then obtained leave to appeal to this Court on the three questions of law to which we will refer a little later.

[5] As Mr Dye's application was for consent to a non-complying activity, it had to pass through one or other of the gateways referred to in paras (a) and (b) of s 105(2A) of the Resource Management Act 1991 (the Act). If neither gateway was satisfied the application would fail. If the application passed through either gateway Mr Dye then had to satisfy the consent authority that the application should be granted, bearing in mind the matters referred to in s 104(1) and in terms of the overall discretion inherent in s 105(1)(c) of the Act. These matters are more fully discussed in the case of

Arrigato Investments Ltd v Auckland Regional Council [2002] 1 NZLR 323, which was heard immediately before the present appeal and in which judgment is being given contemporaneously. The two cases involved a partial overlap of issues and were argued by the same counsel. The Environment Court found that the Dyes' development would be in keeping with the existing environment in Pomana Road. The Court further held, on unchallenged evidence, that because of slope and soil type, continued stock grazing would have adverse effects on the property.

[6] The RDC, supported by the ARC, had contended that the adverse effects of the proposal would be: loss of rural character; loss of amenity; and removal of most of the land from present production. The Court found that the particular neighbourhood was already one characterised by rural residential lifestyle use and, as earlier noted, already contained two restaurants in the close vicinity of the subject land. In view of these various factors the Court found that the development would not adversely affect rural character or amenity values. With regard to loss of present production, the Court found that the land in question had relatively little productive potential and also that retiring the poorer parts of the land into areas of regenerating native bush would enhance environmental values. In the light of these views the Court held that the proposal satisfied gateway (a) in s 105(2A) in that any adverse effects on the environment would be minor; indeed the Court was of the view that no adverse effects would ensue. This conclusion was also relevant and helpful to the Dyes in relation to s 104(1)(a) which requires that when considering an application, the consent authority have regard to any actual and potential effects on the environment of allowing the activity concerned.

[7] In spite of finding that the proposal satisfied gateway (a), the Environment Court considered gateway (b) on a precautionary basis lest it be wrong in relation to gateway (a). The Court held that the proposed development was not contrary to the objectives and policies of the RDC's plan. Chambers J found that the Court had misinterpreted or misunderstood those objectives and policies and had thus erred in law. The first question on the appeal to this Court is whether the Judge himself erred in law in coming to that conclusion.

Question one: objectives and policies

[8] The formal question on which leave to appeal was given is in these terms:

> (a) Was the High Court correct in holding that the Environment Court had misinterpreted or misunderstood the objectives and policies of the District Plan in the overall context of Part II of the Resource Management Act 1991 and the statutory documents formulated under the Resource Management Act with the consequence that Mr Dye's application was wrongly assessed under ss 104(1) and 105(2A)(b)?

[9] The Environment Court set out the relevant provisions of the plan in its decision at para [49]. The general objective of the general rural activity area in which the land lies is:

> ". . . to ensure the long term protection and enhancement of the soil, water, air, natural features, indigenous fauna and general rural character of the area, while maintaining flexibility to accommodate future rural land use options and a level of amenity which enables rural production to be effectively and efficiently undertaken. This objective complements the objectives of the Plan in relation to metropolitan Auckland and the urban

areas and settlements within the District together with the opportunities for countryside living and lifestyle activities."

[10] Of further relevance is the provision at para [50] which limits subdivisions to those which:

"(i) Will facilitate primary production . . .

. . .

(iii) Will provide a limited pool of rural-residential sites which, while available on the market generally, will enable those with a need or wish to live in a particular locality, such as rural workers or retiring farmers, to find sites locally . . .

(iv) Will provide for the legal preservation of areas of good native bush or other significant natural features.

. . .

[11] There are two relevant policies described as policy 2 and policy 4. Policy 2 provides at para [48]:

"Maintain and enhance the overall character and productive capacities of the main rural production area. Land, soil, mineral and water resources will be managed so that they remain available for a wide range of rural production activities (including mineral extraction) now and in the future. The number, diversity of size, and location of sites is considered to be generally adequate for existing and foreseeable productive needs as well as contributing significantly to the character of much of the rural area. Consequently the opportunities for further rural subdivision are limited to the following instances:

(a) Some dispersed countryside living;
(b) Indigenous bush and natural feature protection;
(c) Household units on Maori land associated with a Marae;
(d) Horse training sites in the Boord Crescent area;
(e) Boundary relocations;
(f) Various 'one-off' activities permitted or with resource consent;
(g) The creation of sites in excess of 120 hectares.

It is recognised that there will be from time to time intensive productive activity proposals which are reliant upon special climatic or physical conditions which are not found on existing sites of an appropriate size. Applications for non-complying activity resource consent will in part be assessed against the tests that any subdivided site is used for the purpose specified, and that consent would not result in loss of existing rural character or significant adverse effects on the sustainability of primary production potential, either singly, or cumulatively with other applications that could be expected in the vicinity."

And policy 4:

"Facilitate countryside living opportunities focused on specified areas where pressures on rural production activities (including mineral extraction) are or can be limited, and a rural character is maintained. The extension or intensification of countryside living areas shall:

(a) Avoid use of land of moderate to high value for primary production, (as defined by the New Zealand Land Resource Inventory worksheets) so far as practicable;
(b) Not result in significant adverse effects on regionally or locally significant landscape, heritage values, or biological and ecological resources;
(c) Protect the operational needs of rural production activities (including mineral extraction) from lifestyle amenity expectations;
(d) Not limit the likely land needs for growth of urban centres or settlements;
(e) Not adversely affect the safe and efficient operation of existing and future infrastructure;
(f) Not require reticulated wastewater and effluent treatment and disposal services;
(g) Avoid or mitigate any increase in immediate and downstream flooding effects;
(h) Avoid adverse traffic impacts on local roads and State Highways; and
(i) Have regard to the advantages of efficient use of physical resources such as sealed roads, schools and commercial services;
(j) Avoid use of land that is incompatible with existing rural production activities."

[12] Change 55 makes specific provision for rural residential development in what is called the countryside living 2 (town) activity area, the general objective of which is, in relevant part, at para [54]:

> "Provision is made in such a way that adverse impacts on natural resources and rural character are minimised, undue pressure to upgrade the rural roading network or provide reticulated water supply or stormwater or sewage disposal services is avoided, and the future expansion of existing urban settlements is not prejudiced. By concentrating lifestyle blocks at a limited number of locations it is intended to minimise the potential for friction between lifestylers and full-time farmers over the impact of amenity values of some farming operations. Also, by offering lifestylers the opportunity of obtaining a site in a Countryside Living Activity Area some of the pressure for sites for countryside living in the Production, Special Character and Conservation Activity Areas that make up the rest of the rural area of the District may be reduced, with benefits to the natural character and economics of farming in those areas."

[13] There are eight such areas. The Environment Court concluded that while provision for rural residential dwellings was specifically provided for in these eight areas, change 55 "nevertheless recognises that some rural-residential subdivisions can be expected to occur in the general rural activity area". The key issue in relation to question one is whether that conclusion was correct as a matter of law. If it was, Chambers J was in error in coming to the view that the Environment Court misinterpreted or misunderstood the relevant objectives and policies. As in the *Arrigato* case, we consider that the decision of the High Court represents more of an independent assessment by the Judge than a consideration by him of whether the conclusion to which the Environment Court came was open to it in law. The Judge did not interpret the

objectives and policies and then identify the manner in which they had been misinterpreted or misunderstood by the Environment Court. Rather he worked backwards. He reasoned that because the proposal was not consistent with the objectives and policies, as he saw them, the Court must have misinterpreted or misunderstood them. There is a difficulty with that reasoning. The Environment Court may well have taken a different view from the Judge about whether the proposal was contrary to the objectives and policies. It was not for the Judge to differ on an appeal limited to questions of law.

[14] The Judge also appears not to have given sufficient attention to the fact that in the case of a non-complying activity, one cannot expect to find support for the activity in the plan. The crucial question was whether the proposed development was contrary to the objectives and policies of the plan. If it was, the proposal did not satisfy gateway (b) and, although s 104(1)(d) requires the consent authority only to have regard to any relevant objectives and policies, the error at the gateway stage must be regarded as having infected the s 104 consideration.

[15] The key focus is therefore on whether it was open to the Environment Court to take the view that the proposal was not contrary to the relevant objectives and policies. The Judge in effect held that it was not open to the Court to do so; albeit, as we have said, his judgment did not address the matter quite in that way. We have come to the view, after a careful consideration of the objectives and policies, that the Environment Court's conclusion that the proposal was not contrary to them, did not represent any misconstruction of their terms. Thus in reaching its conclusion the Environment Court did not err in law.

[16] The general objective set out above signals a desire to maintain flexibility to accommodate future rural land use options. Thus rural residential type activities are not ruled out altogether at the general level. Indeed at the end of the general objective, there is specific reference to opportunities for countryside living and lifestyle activities. The general reference to subdivisions signals an intent to limit them but such limitation itself contemplates a limited pool of rural residential sites. The phrase "such as" which introduces examples of those wishing to utilise such sites, does not involve any limitation to the examples given. The two relevant policies continue the same theme. Policy 2 contemplates some "dispersed" countryside living and one-off activities, not necessarily confined to the eight specifically designated areas.

[17] Although the Environment Court noted that policy 2 was subject to appeal, we were informed that all appeals have now been resolved and there was no suggestion that policy 2 had undergone any material change. Policy 4 refers to the facilitation of countryside living opportunities focused on specified areas. Those areas have been provided for in the plan. But the policy, in its reference to the extension of countryside living areas and its earlier reference to focusing on specified areas, does not indicate that the policy is to confine countryside living to such areas or to place a complete embargo on such activity outside those areas. Indeed the general objective of the specified areas is to reduce "some of the pressure" on the ordinary rural area.

[18] The question of law before us relates to the RDC's plan and whether the Environment Court misinterpreted or misunderstood its objectives and policies. We do not therefore consider it necessary to go wider into regional documents, there being no suggestion that there was any clash between such regional documents and the plan under consideration.

[19] After he had set out his summary of the Environment Court's reasoning, the Judge said at p 57:

> " **[27]** That reasoning demonstrates a clear misunderstanding of the objectives and policies of the transitional plan and Change 55. It ignores the principal objective of the Rural 1 (General Rural) zone which is 'to preserve the capacity of the land for food and other forms of primary production'. It ignores the fact that the district council, after public consultation, has provided rules for rural-residential subdivision of land which is of lower quality for food production. Those standards are set out at para [14] above. It ignores the fact that this subdivision proposal is quite at odds with those standards. It ignores the fact that the council has provided for rural-residential development by the enactment of special zones. No doubt those zones were selected following 'an integrated consideration of the relevant issues', with extensive input from those living in the district. It has ignored the overall thrust of the planning documents, both at regional level and at district level to contain urbanisation of the countryside to specific areas."

[20] We must say, with respect, that the Judge's repeated use of the word "ignores" is problematic. We do not think the Judge can have intended to use the word literally because the Environment Court expressly referred to many of the matters said to have been ignored. The concept of ignoring is also difficult to reconcile with the Judge's ultimate conclusion that the Court had misinterpreted or misunderstood the objectives and policies. If the Judge intended to convey by his use of the word "ignores" the proposition that the Environment Court had given no or insufficient weight to the matters he listed, he either fell into the error of substituting his own assessment of what weight certain factors should have for that of the Court, or in reality found an error of law different from that which he said formed the basis of his conclusion. Failing to give any weight to a relevant consideration is broadly equivalent to failing to take account of a relevant consideration. It is not equivalent to misunderstanding or misinterpreting a plan provision to which, ex hypothesi, you have given consideration.

[21] Another issue was whether the Judge was correct in saying at p 57, para [28] that the restorative tree-planting dimension was the crucial factor leading to the success of the application. The Environment Court was not however influenced in its conclusion that change 55 recognised that some rural residential subdivisions could be expected to occur in the general rural activity area by its separate emphasis on the tree-planting dimension. The conclusion in question came after a careful and detailed examination of the relevant objectives and policies which the Court had set out in full. That aspect of the decision contained no reference to tree planting at all. Whether the Judge was correct in saying that the restorative tree-planting dimension was the crucial factor is of no present moment. What can be said is that the tree-planting dimension did not improperly influence the Court's approach to gateway (b) and s 104(1)(d).

[22] At the end of para [33] on p 59, the Judge implied that the Environment Court had been selective in its reading of what he called the statutory documents. He also said that to do so would be a perverse exercise of the discretion given to a consent authority. This implied criticism of the Environment Court was unjustified. The use of the word "perverse" was

unfortunate. Even if the Court had misunderstood or misinterpreted the documents, it can hardly be said to have been selective in its reading of them or to have acted perversely.

[23] In reaching our conclusions we have given full consideration to the submissions of Mr Cowper for the ARC and Mr Loutit for the RDC. As a general observation we do not consider those submissions focused sharply enough on the actual provisions of the relevant objectives and policies. The question of law inherent in question one is a confined one. It focuses on the "district plan", meaning the RDC's operative plan and specifically change 55. While we accept that regional and national documents and the provisions of Part II of the Act can have a bearing on what is contained in a plan, the starting point when considering the objectives and policies of the plan must surely be with those objectives and policies themselves. Nor do we consider the councils' submissions took sufficiently into account that this was an application for a non-complying activity which, ex hypothesi, was not going to comply with the plan. The essential question was whether it was contrary to the objectives and policies of the plan properly construed.

[24] We do not have before us, and therefore do not need to consider, what the situation would be if the objectives and policies of a plan are inconsistent with or contrary to the terms of a regional plan or other document or indeed the provisions of Part II. As pointed out in *Arrigato*, Part II, in its reference in s 6(a) to subdivisions, refers to the protection of the specified values from inappropriate subdivision and s 11 contemplates that a subdivision may be allowed by a rule in a district plan or by a resource consent and such a consent can of course be given to a non-complying activity, subject always to the provisions of ss 104 and 105. There was no suggestion in the present case that the objectives and policies of the district plan were contrary to higher level planning factors. It was suggested that the proposal itself was contrary to those higher-level documents, but the essential focus for present purposes is on the objectives and policies of the district plan which were not said to be inconsistent with those higher-level matters.

[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. We 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.

[26] For these reasons our answer to question one is that the High Court was not correct in holding that the Environment Court had misinterpreted or misunderstood the objectives and policies of the district plan. The application was therefore not wrongly assessed under ss 104(1)(a) and 105(2A)(b).

Questions two and three: precedent and cumulative effects

[27] These two questions can be dealt with together as they effectively cover the same ground. Question two is whether the High Court was correct in holding that the Environment Court had made an error of law in limiting its consideration of cumulative effects solely to "rural character", and in failing to consider all of the cumulative effects of the proposed subdivision. Question three asks whether the High Court was correct in holding that the Environment Court had made an error of law in finding that the application would not give rise to "precedent" effects under s 104 of the Act.

[28] The Environment Court found that to grant consent to the subdivision would not result in a loss of rural character, either in relation to the particular subdivision or from the point of view of the effects the granting of the present application might have on future applications of a like nature. Chambers J held at p 61, para [44] that the Environment Court had erred in law in not having regard to:

> "the cumulative wastewater, stormwater, ecological, roading, and surfacing [sc: servicing] effects of the change in land use and in the population densities which might result from the number of restorative subdivision proposals which might follow from allowing this one."

[29] The Judge continued:

> " **[44]** . . . Mr Cowper submitted that these additional cumulative effects had to be addressed in a comprehensive manner. He said that had been done in the regional policy statement and the conclusion that the regional council had there come to was quite different from the approach of the Environment Court. The Court had simply ignored the regional council's and district council's conclusions as expressed in their respective planning documents.
>
> **[45]** Mr Cowper said that while the concept of restorative subdivision might be innovative and beneficial in respect of one particular property in an area, that did not mean the repetition of that idea throughout the area on an ad hoc site by site basis would necessarily be beneficial as well. Unless an area-wide assessment was carried out with input from all relevant areas of expertise, the consequences of, for example, the increase in population density resulting from all like proposals might have adverse effects which are quite unforeseen when restorative subdivision is looked at in respect of an individual site.
>
> **[46]** In my view, that criticism is justified and the Environment Court did fail adequately to consider all the cumulative effects of this grant of a resource consent. In limiting itself to a consideration of cumulative effects solely to 'rural character', the Court made an error of law. This error means that the Court will need to reconsider the 'effects' of allowing the activity in terms of s 104(1)(a). In addition, the Court will need to reassess the first threshold test (s 105(2A)(a)) as to whether 'the adverse effects on the environment' of the non-complying activity will be minor."

[30] The Environment Court proceeded on the basis that the evidence before it in relation to each of the matters referred to by the Judge, ie wastewater,

stormwater and so on, was that no extension of public infrastructure was required to service the lots to be created by the proposed subdivision. Notwithstanding this assessment by the Environment Court, the High Court held that it was an error in law not to have made an area-wide assessment with input from all relevant areas of expertise. It should be noted at the outset that the Judge's approach would substantially increase the ambit and cost of an application such as the present, and indeed make such applications significantly more extensive and complicated.

[31] There are really two legal aspects to the issues which were raised by the parties when they argued questions two and three. The first concerns the concept of precedent in this field, and the second concerns the concept of effects and in particular that of cumulative effects. It is convenient to deal with precedent first.

Precedent

[32] The granting of a resource consent has no precedent effect in the strict sense. It is obviously necessary to have consistency in the application of legal principles, because all resource consent applications must be decided in accordance with a correct understanding of those principles. But a consent authority is not formally bound by a previous decision of the same or another authority. Indeed in factual terms no two applications are ever likely to be the same; albeit one may be similar to another. The most that can be said is that the granting of one consent may well have an influence on how another application should be dealt with. The extent of that influence will obviously depend on the extent of the similarities. The present application had a number of particular features which have already been noted. The most significant of them for present purposes are: the lack of any need for extension of the public infrastructure; the poor productive quality of much of the relevant land; the largely rural residential character of the locality; and the existence of the two nearby restaurants. The Environment Court's view on the question of precedent effect was, at para [75]:

> " **[75]** In this instance we do not consider that a precedent will be set by granting the application. As we have said, the proposal:
>
> - does not detract from the rural character;
> - does not exclude land of high productive capacity from primary production; and
> - makes detailed provision for substantial restoration of land that has suffered from the debilitating effects of past development."

[33] We consider that the Environment Court was entitled in law to come to the conclusion that no precedent would be set by granting the application. The suggestion that the three bullet points comprise a checklist and any other application satisfying those three points would have to be granted is unpersuasive. The Court was obviously emphasising the matters that it regarded as particularly relevant to the instant case. Even if those three same matters could be found in another case, it would be naïve to suggest that this would require the consent authority to grant approval, irrespective of all the particular features of the application. It is self-evident that the Environment Court was not endeavouring to set out a checklist for future cases. There was also a criticism of the Court because it had failed to refer to the issue of cumulative effects in the so-called checklist. We will address that issue separately a little later.

[34] We cannot accept Chambers J's conclusion at p 60, para [38] that the Court was:

> ". . . wrong if it considered that no precedent was being set by the granting of this application. The evidence before the Court was that Mr Dye's land, including its productive capacity, is typical of land throughout the Rodney District. There was nothing exceptional about this farmland."

[35] The Judge was of course concerned only with errors of law. His reference to the Environment Court being "wrong" was not in terms a finding that the Court was wrong in law. Indeed the Judge's reference, in the very next sentence, to the evidence before the Court reinforces the impression that the Judge was moving outside the scope of matters of law. The Judge expressed the view that the Court's decision "if it stood would have significant precedent effect". That was his own assessment. What he should have been considering was whether the Environment Court was wrong in law in holding that its decision would have no precedent effect. What is more, we cannot identify anything in the Environment Court's decision to justify the Judge's statement of fact that the Dyes' land, including its productive capacity, was typical of land throughout the Rodney district.

[36] For these reasons we are of the view that the Judge was himself in error of law when he held that the Environment Court had made an error of law in finding that the Dyes' application would not give rise to "precedent effects" under s 104 of the Act. We turn now to the topic of effects and cumulative effects.

Effects and cumulative effects

[37] Section 3 of the Act defines the term "effect" in a non-exhaustive way:

> **3. Meaning of "effect" –** 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 –
>
> 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.

[38] The present issue is the way the word "effects" should be construed in ss 104 and 105 of the Act. Each section is concerned, in its relevant part, with effects on the environment. In s 104(1)(a) the focus is on "any actual and potential effects on the environment of allowing the activity". In s 105(2A)(b) it is on "the adverse effects on the environment". The definition of "effect" includes "any cumulative effect which arises over time or in combination with other effects". The first thing which should be noted is that a cumulative effect is not the same as a potential effect. This is self-evident from the inclusion of potential effect separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. This meaning is reinforced by the use of the qualifying words "which arises over time or in

combination with other effects". 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 of 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".

[39] Potential effects, by contrast, are effects which may happen or they may not. Their definition incorporates levels of probability of occurrence. A high probability of occurrence is enough to qualify the potential effect as an effect, whereas a potential effect which has a low probability of occurrence qualifies as an effect only if its occurrence would have a high potential impact. The definition is such that any "precedent" effect which may result from the granting of a resource consent is not within the concept of a cumulative effect. That concept is confined to the effect of the activity itself on the environment. If the precedent effect of granting a resource consent is to fit within the definition at all, it must do so by dint of its potential effect and it would then have to satisfy the probability and, if applicable, the potential impact criteria. It is unnecessary to say more at a general level.

[40] The present case involves a consideration of the concept of effect for the purposes of ss 104 and 105. It is logical to start with s 105. The question in gateway (a) is whether the adverse effects on the environment will be no more than minor. This question, as discussed above, is directed to the effect of the non-complying activity itself. It is concerned with the effects of that activity as it impacts on the environment. The question cannot reasonably be regarded as involving any precedent effect deriving from the granting of the resource consent. That, in context, would involve an unnatural and unintended extension of the concept of the environment.

[41] As noted, s 104(1)(a) requires the consent authority to have regard to "any actual and potential effects on the environment of allowing the activity" in question. In this respect we consider Parliament has implicitly abandoned the s 3 definition of "effect" which only applies unless the context otherwise requires. Had Parliament wished to adopt the definition, it would have used simply the word "effects" (as in s 105(2A)) rather than the words "any actual or potential effects". Indeed if the definition is invoked it would have the awkward consequence that s 104(1)(a) would be dealing with actual potential effects and potential potential effects. Everything points to a deliberate intention here to address only effects which are "actual" and "potential"; albeit putting the matter that way is in any case inherently very wide and capable of capturing some, if not all, of the subtleties of the s 3 definition. So far therefore, in spite of the seemingly deliberate decision not to rest on the defined term "effect", it is not easy to see what confining purpose the legislature may have had.

[42] The next point is the same as that which applies to s 105(2A)(a). It is the effects on the environment which are being addressed. Section 104(1)(a) was brought into line with s 105(2A)(a) in this respect by the 1993 amendment to the Act. Furthermore, the focus is on the effects on the environment of allowing the relevant activity. The use of the words "of allowing the activity" could be thought to signal an intention that precedent effects are here intended to be brought into account. The words used are not "any . . . effects of the activity on the environment". However, we consider such a conclusion would be too subtle and not in accordance with the purpose and policy of s 104(1)(a) viewed as a

whole. As with gateway (a), we consider para (a) of s 104(1) is concerned with the impact of the particular activity on the environment. It is not concerned with the effect which allowing the activity might have on the fate of subsequent applications for resource consents. If there is a concern at precedent effect, it should be addressed under para (d) of s 104(1) which is similar in concept to gateway (b) in s 105(2A); albeit para (d) does not have the same constraining effect as gateway (b). Alternatively precedent concerns may be addressed under para (i) of s 104(1).

[43] How then does all this relate to the question before us? The approach adopted by Chambers J resulted in his finding that the Environment Court had erred in law. It did so, in his view at p 61, para [44] by failing to have regard to:

> ". . . the cumulative wastewater, stormwater, ecological, roading, and surfacing [sc: servicing] effects of the change in land use and in the population densities which might result from the number of restorative subdivision proposals which might follow from allowing this one."

[44] The Judge was of the view that it was necessary for the Environment Court to carry out what he described as an area-wide assessment with input from all relevant areas of expertise. He said that the increase in population density resulting from all like proposals might have adverse effects which were quite unforeseen when the matter was looked at from the point of view of an individual site.

[45] In order to be able to hold that the Environment Court's failure to make the Judge's "area-wide assessment" amounted to an error of law, the Judge must have been of the view that what had been omitted was a mandatory requirement. We cannot accept that proposition. The correct approach to the concept of effects, as described in our earlier discussion, does not make it mandatory to adopt the sort of exercise the Judge had in mind. Nor does s 104(1)(d) have that consequence, the more so in the light of the Environment Court's conclusion, which we have held not to have been erroneous in law, that the proposed subdivision was not contrary to the objectives and policies of the plan. There are good policy reasons why such an inquiry as that contemplated by the Judge should not be regarded as mandatory in present circumstances. Compliance with the manifold requirements of the Resource Management Act is already complicated and expensive enough as it is; some would say too complicated and expensive. To require applicants for consent to non-complying activities to entertain, on a mandatory basis, an area-wide inquiry to deal with all the possible future implications of the granting of the particular consent, would impose very considerable additional burdens on all concerned. It would also be a rather speculative exercise.

[46] We are reinforced in the view we take by the following passage from the decision of the Environment Court in *Wellington Regional Council (Bulkwater) v Wellington Regional Council* (Environment Court, Wellington, W 3/98, 7 January 1998, Judge Treadwell) at pp 7 – 8:

> "For our part we cannot see any rush of applications for resource consents for abstraction but if there were and if they were of significance, then each would need to be considered on its merits. We do not accept that the RMA allows us to arbitrarily refuse an application for a resource consent on the basis that hypothetical applicants may appear and be granted consents based on a grant of this consent without further

examination of the capacity of the resource. It is our opinion that the 1993 amendment to the RMA by including the word 'environment' in s 104(1)(a) clearly intended to restrict the word 'effect' (which was previously unqualified). This brought s 104 into line with s 105(2)(b)(i) relating to adverse effects upon the environment. That evinced a deliberate legislative intent and it is our opinion that to now attempt to define the word 'effect' in s 3 as referring to conjectural future actions by persons unknown who are not even parties to proceedings is stretching the intention of Parliament beyond that intended by this Act. The word 'effect' now has the s 104 qualification that it must be 'on the environment'. Furthermore to even consider future applications as a potential effect or a cumulative effect is to make a totally untenable assumption that the consent authority will allow the dike to be breached without evincing any further interest and control, merely because it has granted one consent."

[47] We were informed by Mr Brabant that this case had been cited to Chambers J; albeit he did not refer to it in his judgment. We agree with the views of the Environment Court in this passage, the last sentence of which seems particularly apt to the matters we are now considering. In coming to its conclusions the Environment Court was not required as a matter of law to take into account what were characterised in argument as potential cumulative precedent effects. Mr Burns for the ARC put it that his client was concerned with the macro issues which the case raised, such as population increases outside the areas designated for rural residential living. We do not consider that the facts of the present case were such that the Environment Court erred in law by not specifically addressing that sort of issue.

[48] Mr Burns asked rhetorically to what extent the activity consented to was likely to be repeated throughout the area and if it was to any appreciable extent, what the consequences of that would be. Conversely he asked rhetorically whether this case represented a genuine one-off situation. We infer that the Environment Court considered on the evidence that the case was in a genuine one-off category, and its present ruling can properly be viewed in that light. We cannot accept counsel's submission that the Environment Court was establishing a precedent while at the same time saying it was not doing so. In coming to our conclusions, we have also taken into account the submissions made by Mr Loutit on behalf of the RDC which it is not necessary to address separately.

[49] We can summarise our views on both questions two and three in the following way. The precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when considering an application for consent to a non-complying activity. The issue falls for consideration under s 105(2A)(b) and s 104(1)(d). Cumulative effects properly understood should also be taken into account pursuant to s 105(2A)(a) and s 104(1)(a). But in taking those matters into account, the consent authority has no mandatory obligation to conduct an area-wide investigation involving a consideration of what others may seek to do in the future in unspecified places and unspecified ways in reliance on the granting of the application before it. The High Court was not correct in its conclusion that the Environment Court had erred in law in failing to consider, in the sense adopted by the High Court, "all of the cumulative

effects of the proposed subdivision". Nor was the High Court correct in holding that the Environment Court had erred in law in finding that Mr Dye's application would not give rise to "precedent effects under s 104 of the Act".

Formal orders

[50] For the reasons given each of the questions is answered No – the High Court was not correct. The appeal is accordingly allowed. The orders made in the High Court are set aside. In their place we substitute an order dismissing the appeal from the Environment Court to the High Court. Mr Dye is entitled to costs in this Court in the sum of $5000, plus disbursements including the reasonable travel and accommodation expenses of two counsel to be fixed if necessary by the Registrar. Those costs and disbursements to be paid equally by the ARC and the RDC. Costs in the High Court are to be fixed, if necessary, in that Court in the light of this decision.

Appeal allowed.

Solicitors for Mr Dye: *Martelli McKegg Wells & Cormack* (Auckland).
Solicitors for the ARC: *Bell Gully* (Auckland).
Solicitors for the RDC: *Simpson Grierson* (Auckland).

Reported by: James Kirk, *Barrister*

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 109

IN THE MATTER	of an appeal under Section 174 of the Resource Management Act 1991 (**the Act**)
BETWEEN	DIANA MAREE ELLIS (ENV-2013-AKL-000096)
	Appellant
AND	THE MINISTER OF EDUCATION
	Respondent

Hearing at:	Omapere on 28, 29 and 30 April 2014
Court:	Principal Environment Judge L J Newhook Environment Commissioner M P Oliver Environment Commissioner A C E Leijnen
Parties:	DA Allan for the Minister of Education as Requiring Authority under s168 RMA DM Ellis for herself as appellant J Verry on behalf of Far North District Council as Territorial Authority which made recommendation under s171 RMA
Date of Decision:	19 May 2014

DECISION OF THE ENVIRONMENT COURT

A. The appeal is refused, and the requirement confirmed subject to the set of conditions attached as Appendix 1 to this decision.

B. Costs are reserved.

REASONS FOR DECISION

Introduction

[1] The Minister of Education is a requiring authority pursuant to s166 RMA. On 15 May 2012 she lodged a Notice of Requirement ("**NoR**") with the Far North District Council ("**FNDC**") for designation of a Kura Kaupapa, Wharekura and associated activities on a site at Koutu Point on the Hokianga Harbour pursuant to s168 RMA. The NoR was publicly notified by FNDC and a hearing conducted by Hearing Commissioners. They recommended on 18 March 2013 that the NoR be confirmed subject to conditions.

[2] On 14 May 2013 the Minister issued a decision accepting the recommendation under s172 RMA, subject to modifications to four of the recommended conditions.

[3] This appeal followed.

[4] Mediation was conducted in the Environment Court, and some further modifications to conditions were proposed, subject however to the continuing overall opposition by the appellant.

The issues in the appeal

[5] The extent of communication by the appellant with the Court has been considerable, constant, and extremely detailed since the appeal was lodged, in comparison with cases of this kind. In this context, the case managing Judge took particular steps to require the appellant to identify the key issues in the case. The Court issued a Minute on 16 October 2013 which recorded that the appellant had advised in a teleconference that she would focus on the impacts of the proposal on the Hokianga Harbour, social, economic and cultural wellbeing impacts, and Treaty of Waitangi principles.

[6] During the course of further preparation for hearing, it became apparent that the appellant also wished to address traffic effects onthe local roading network, sea level rise, coastal inundation and tsunami risk, and those topics became issues in the case as well[1].

The proposal

[7] The Crown owns a site comprising 6 largely vacant, contiguous titles, totalling 3.2687ha, on Koutu Point on the eastern side of Hokianga Harbour north of Opononi. The site has frontage to a local road, Koutu Point Road. The Kura Kaupapa, Wharekura and associated activities ("**Kura**", for short) is part of the state school network, being a Maori language immersion school for students in years 1-13 (that is primary, intermediate and secondary school age) established under sections 155 to 155F of the Education Act 1989. The operation of the Kura is designed to comply with an educational philosophy known as Te Aho Matua which is defined in s155A of the Education Act.

[8] The Kura is in fact already established nearby, having been operated successively on two sites in the small settlement of Whirinaki, about 7km by road east of the Koutu Point site. Over the years the Kura has grown from its initial roll of 19 to a current roll of 100, at which it is capped because of the physical constraints of its current site of 1.3ha. Prospective students have been turned away in recent times. The Kura is (and will continue to be) named Te Kura Kaupapa Maori o te Tonga o Hokianga.

Further detail concerning the Kura – past, present and future

[9] It is appropriate to record further detail about the Kura. This is because, despite not having been expressly listed as an issue by the appellant, the topic of alternatives featured strongly in her case in relation to social and cultural wellbeing, and aspects of the Treaty of Waitangi including consultation (or as she saw it, lack of consultation).

[10] Detailed evidence about the Kura, past, present and future, was given by:

[1] The Court was particularly generous to the appellant in allowing this issue-creep, as it was in a number of other ways as will become apparent in this decision.

[11] Mr JH Norman, senior partnership advisor (Pouherenga Matauranga) in the Auckland office of the Ministry of Education;

[12] Michelle Sarich, one of the two co-principals of the Kura since its commencement;

[13] Isobel Bristow, a clearly revered elder in the Hokianga community, holding (amongst other posts) a trusteeship over many years of the Whirinaki Education, Recreation and Cultural Trust which administers the site currently occupied by the Kura;

[14] Molly Walters Morunga, a similarly well-qualified elder who with others was instrumental in establishment of the Kura;

[15] Mr CW Huggins, a ministry project manager, as to site selection and acquisition.

[16] There was little dispute on the part of the appellant about either the desirability of the Kura being located somewhere in the Hokianga area, or as to the quality of the Kura as currently established. Intriguingly, despite the Kura as currently established being on a cramped site, and in old buildings, and in a flood plain,[2] the appellant appeared to assert that it could (indeed perhaps should) remain at its current location in Whirinaki. Having said that, the case was not concerned with teaching methodology (despite the Court needing to remind the appellant of that fact constantly while she was cross-examining witnesses called by the Minister). We will therefore keep this section of our Decision quite short. The brevity should not be taken as any indication that the present Kura is, and the looked-for expanded version would be, anything other than impressive. The evidence of the witnesses just named made it clear that that is, and would indeed, be so.

[17] Mr Norman is trained as a teacher, and in Maori studies, and bilingual negotiation. He was involved in the current proposal from the start, and described for us the philosophy of the education at the Kura, cultural aspects of its education model, cultural aspects of the proposed location of the Kura from Whirinaki to Koutu, and the education and cultural factors that should govern its location and the desirability of physically separating it from other schools. The latter arose particularly to answer the

[2] As mapped by the Council

insistence of the appellant that other sites would be preferable to Koutu Point, including in association with an established school in the area.

[18] Mr Norman quoted to us from a 2011 review by the Education Review Office concerning this Kura, clearly indicating that it performs highly and is committed to delivering high quality Maori medium education to its communities.

[19] He strongly addressed another of the perceived concerns of the appellant, that some members of the Whirinaki community might be concerned about the Kura departing their settlement, and about an alleged loss of mana for that community. He was certain that there would be no cultural reasons why the Koutu site might be inappropriate, and considered that the Kura would be better able to offer appropriate cultural education for the whole district, in contrast to being perceived to be tied to one small part of the district.[3]

[20] Mr Norman considered that it would be less than appropriate for the Kura to be located adjacent to the Opononi Area School as suggested by the appellant, because Te Aho Matua philosophy regarding authentic Maori learning is not the same as the educational philosophy in mainstream education settings. Maintaining the purity of the *te reo me ona tikanga* is paramount within that vision.[4]

[21] Ms Sarich described the slightly tortured history of the Kura since 1989, its educational role (including its expansion to include Wharekura or secondary school status since 2011);[5] the present severe limitation on roll numbers; current significant limitations of an administrative, pastoral, teaching and physical nature with the current site (including views of the students about these); potential constraints if the Kura were to locate next to the Opononi Area School;[6] the considerable benefits of the Koutu site; and the cultural impact of relocation of the Kura.

[22] Remembering that it is not our duty in law to ensure that the best site is selected, we were nevertheless impressed with Ms Sarich's description of the benefits of the Koutu site as including its size, central location, accessibility from the main highway, fine views over the Hokianga Harbour (which will enable students to relate to the ecological, scientific and historical matters in their curriculum), and the related cultural links; benefits of not being linked to any particular Marae, but instead

[3] JH Norman, Evidence-in-chief, paragraph [33]
[4] JH Norman, Evidence-in-chief, paragraph [35]
[5] M Sarich, Evidence-in-chief, paragraphs [31] and [32]
[6] M Sarich, Evidence-in-chief, paragraphs [41]-[44]0

maintaining strong relationships with Marae throughout Hokianga; potential for good building design and landscaping; and being of sufficient size and suitable shape to accommodate all aspects including administrative, classrooms, sports activities, cultural and multi-purpose spaces, parking, manoeuvring, and wastewater treatment and disposal, all for a maximum roll of 200 students.[7]

[23] Ms Sarich acknowledged that some in the Whirinaki community might feel hurt about the Kura leaving, but felt that the shift would be an inevitable part of the growth and maturity of the Kura, and desirable. The Kura maintains an open door policy for Kaumatua and Kuia from throughout the region to visit and to help at the Kura.[8]

[24] Mrs Bristow was born in the district 77 years ago, was one of twelve children, and has lived in the settlement of Whirinaki for most of her life. She and her husband have many children, grandchildren and great-grandchildren. She wrote movingly about her involvement in the establishment of the Kura. She felt certain that there would be no loss of mana for her community and for the three Marae there, from the relocation of the Kura. She spoke of the closure of other schools in the district over time, including in the 1970s the Whirinaki Native School, which brought some sadness, but no reduction in Mana.

[25] Mrs Morunga wrote equally movingly of the early years of the Kura at Whirinaki and its continued growth in importance in the wider community. She has lived in the Whirinaki settlement for the majority of the last thirty years and knows it well. She was equally clear that there would be no loss of Mana for the Whirinaki community were the Kura to move as proposed. She felt strongly about her vision and passion that great leadership would come from the students, given the opportunity to develop and keep alive the Mana and Maoridom of the wider community for the future of her people.

The legal framework for the case

[26] Section 174(4) RMA provides:

> (4) In determining an appeal, the Environment Court 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 may –
> (a) Cancel a requirement; or

[7] M Sarich, Evidence-in-chief, paragraphs [45]-[51]
[8] M Sarich, Evidence-in-chief, paragraphs [59]-[62[

(b) Confirm a requirement; or
(c) Confirm a requirement, but modify it or impose conditions on it as the Court thinks fit.

[27] Section 171(1) RMA 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 designation is sought; and
> (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

Potential effects on the environment

[28] We shall commence with an examination of effects on the environment of the proposal, having particular regard to relevant statutory instruments, including consideration of an issue that was of slight concern to the Court during the early stages of case management, as to whether certain discharge consents should be sought at the same time as the NoR.

Impacts on the harbour

[29] It was a major plank in the appellant's case that there would be serious adverse effects on the sand flats and harbour waters adjoining the site at Koutu Point (both to the north and the south) from discharge of stormwater and wastewater (particularly the latter). This was a theme running through her evidence and that of most of the local witnesses she called. In addition, the one expert witness she called, Mr Andreas Kurmann, a scientist trained in Europe who now operates a Northland laboratory specialising in testing water and wastewater, gave evidence of the potential for this kind of problem if the Kura were to be established on the site proposed. We shall come to the detail of Mr Kurmann's evidence and his participation in the hearing, shortly.

[30] In her own evidence the appellant expressed concern about the sheer numbers of people likely to be on site on school days, and questioned the potential impact of 240 persons as had recently become the basis for calculations by the Ministry's witnesses, as opposed to the 220 that they had originally used for assessment purposes.

[31] Ms Ellis wrote that it was common knowledge that the Koutu Point peninsula sits on a hard limestone pan; she pointed to evidence from a longstanding resident of the area who she called as a witness, Mr AG Wynyard, about this feature, and about relative dearth of topsoil and effects from gum-digging activities on the land early last century. She posed questions about the ability of the site to cope with disposal of wastewater. She, her witnesses, and witnesses called by the Ministry, were largely in agreement about the presence of shellfish beds around Koutu Point, particularly to the south, and there was no dispute about the importance of those beds to the local community for the gathering of Kaimoana.

[32] The appellant's witnesses wrote about this issue, which was clearly very worrying for them, and which is acknowledged to be a culturally sensitive issue if proven.

[33] Mr John Klaricich, a longstanding member of the community and of Maori and Dalmatian descent and well versed in local government matters, spoke of the community concern for wellbeing of the harbour waters and ongoing safety of the "sole surviving pipi beds". He did not wish to see a discharge right given to the school without full and proper public process.[9]

[34] Mrs PL King, another longstanding member of the local Maori community expressed brief but passionate concern about the potential for further pollution of the Hokianga Harbour.

[35] Mr MG Fell, a local property owner on Koutu Point Road, lodged evidence but did not appear for questioning, as a result of which we advised the parties we could place little weight on his evidence. Nevertheless he did write briefly about problems with flows from septic tanks on existing properties in the neighbourhood, and the presence of the hard pan that runs under the peninsula.

[9] J Klaricich, Evidence-in-chief, paragraphs [6] & [7]

[36] Mr Kurmann's evidence was interesting for the fact that, though called by the appellant in opposition to the proposal on wastewater grounds, his principal theme was that by employing methodology recommended by him, an extremely high level of treatment could be obtained, and "*The clean overflow from the system can then safely be discharged into the harbour.*" Although not expressly discussed in his evidence-in-chief, it became clear to us from considering the joint witness statement on wastewater matters, that Mr Kurmann had based his assessment on a need as he saw it for any wastewater discharge from the site to meet an extremely high level set by an EU standard with which he was familiar. It was apparent from the joint statement that Mr Kurmann intended that any system consented for the land must offer a phosphorous discharge limited to 0.05mg/l, equivalent to expectations in the EU standard concerning concentrations in direct discharges to sensitive waters in freshwater streams or lakes in Switzerland. We will discuss the response on behalf of the Ministry shortly.

[37] It was a major part of the case for the Ministry that rather than rely on the permitted activity rules in the Northland Regional Council operative Regional Plan, there would be an application in due course for discharge consents. The application would be made at the same time as the lodgement with FNDC of an Outline Plan of Works ("OPW") under s176A RMA. That would come about because there was a clear concession by the Ministry that in seeking this particular designation, it had not taken the approach authorised by ss2(b) of s176A, of incorporating into the designation full details of the proposed work or project.

[38] This aspect of the case caused great mystification for the appellant and her supporters. They appeared insistent that the whole of this issue, an important one for them, be the subject of a ruling now that there would be serious adverse wastewater effects, and that the Notice of Requirement for Designation should accordingly be cancelled. We will say more about this shortly.

[39] As mentioned, the Court gained the impression at an early stage during case management last year that this issue was of extremely high importance for the appellant. The Court went to the lengths of directing the Ministry to file legal submissions about whether the principles of the decision of the Environment Court in ***AFFCO NZ Limited v Far North District Council (No. 2)***[10] might be applicable. At that juncture it was not clear to the Court that the Ministry had not incorporated into the Requirement, full details of the proposed work or project.

[10] [1994] NZRMA 224

[40] Counsel for the Ministry responded at that time with detailed submissions, the essence of which was:

(a) There is a clear distinction between the resource consent and designation mechanisms in the RMA;

(b) The principles expressed in the ***AFFCO*** decision do not apply to the Notice of Requirement phase for Designations that are intended to make use of the OPW process in the Act; and

(c) Applying those principles to the designation process would be contrary to the scheme of Part 8 RMA, most notably the two stage mechanism (NoR followed by OPW) which applies to Designations but not to resource consents.

[41] There is no need for us to traverse the considerable detail offered in the memorandum. As noted, the Court had not previously perceived that the Ministry expressly intended the two stage process for this proposal. It was now made very clear that that is the approach taken by the Ministry as Requiring Authority.

[42] It is fair to say that this issue caused significant consternation for the appellant and her supporters right through to the conclusion of the hearing. They simply seemed unable to comprehend that there would be a further formal process at a later time, thus limiting the extent of our present enquiry to ensuring that we be satisfied that issues of effects on the environment could sensibly be addressed and concluded during the subsequent stage of the lodgement of an OPW and the bringing of applications for discharge consents.

[43] It was also ironic that the appellant's own expert witness Mr Kurmann essentially agreed in evidence, and confirmed under cross-examination, that this result was capable of being achieved, albeit that his expectations could be described as somewhat higher than those of the Ministry's relevant expert witnesses.

[44] Some time was taken with those witnesses and Mr Kurmann during the hearing, to gain preliminary advice about a possible strengthening of conditions that could attach to the designation if confirmed. We shall deal with the detail of that aspect later in this decision.

[45] Given the wide-ranging nature of the case indicated by the appellant in the early stages of case management, the Ministry presented extremely full evidence on this topic (as well as numbers of others). In the event the case brought by the appellant was very limited and general as we have just described. In addition, the cross-examination of the Ministry's witnesses by the appellant uncovered nothing new, let alone anything detrimental to the Ministry's case, because the appellant invariably asked very general open questions that simply resulted in the witnesses reiterating aspects of their evidence-in-chief.

[46] In these circumstances our description of the expert evidence called by the Ministry can be very brief, because they wound up essentially unchallenged; and concerning wastewater essentially challenged only as to a matter of minor detail as already described.

[47] The Ministry called the evidence of Mr CJ Leibert, a civil engineer and a director of Fraser Thomas Limited, a multi-disciplinary engineering and surveying practice based in Northland and elsewhere. Fraser Thomas had been engaged by the Ministry since mid-2010 to carry out investigations into all relevant engineering issues. Building on a number of detailed reports provided at various stages to the Ministry, this witness provided us with strong evidence about many of the relevant engineering issues with the site, including geotechnical studies, earthworks, stormwater management, water supply and other services.

[48] Details of the geotechnical investigation confirmed some aspects of the site that somewhat worried the appellant's witnesses, but provided considerable advice and recommendations for dealing with treatment and disposal of wastewater amongst other things. Not unnaturally in a remote location like this, there is no public infrastructure for the reticulation of water, stormwater and disposal of waste.

[49] Mr Leibert was able comfortably to conclude, drawing on the many engineering reports, that the sheer size of the site and its topography would contribute to the conclusion that there are no engineering issues which would not allow for all relevant servicing, including wastewater servicing, to be adequately undertaken on site.

[50] Given the concerns of the appellant, and the potential sensitivity of adjoining harbour waters and sand flats, and their importance for the gathering of Kaimoana, the Ministry also called the evidence of Mr RM Hedgland, a principal of

Fraser Thomas, an environmental engineer specialising in wastewater engineering including sewage treatment and disposal solutions for many kinds of development including relatively large scale ones such as schools, especially in environmentally sensitive areas.[11]

[51] It was of note that Mr Hedgland's involvement with the project commenced in September last year and focussed, subsequent to a site inspection in November, on an increase in overall personnel numbers on site from 220 to 240 on a daily basis (to take account of possible increased numbers of staff and volunteers), the likely daily use of six showers on site, and an extension of geotechnical investigations on site. He considered that unit flow rates would likely be higher than normal for comparable-sized schools, so he assessed a design unit flow higher than had previously been adopted in the Fraser Thomas reports, opting for a rate of 20L/p/d in the industry standard document TP58 (of the former Auckland Regional Council), Table 6.2. On this basis he calculated a total design discharge of 5,100 litres per day, which he advised was less than the Permitted Activity maximum discharge limit of 600m^3 per day but at the same time more than the permitted average discharge over a month (5 days per week) of 3m^3 per day, at 3.6m^3 per day.

[52] Mr Hedgland also upgraded the earlier assumptions about wastewater strength, particularly concerning biochemical oxygen demand and total nitrogen. He worked with a commercial supplier of wastewater treatment plants, Innoflow Technologies NZ Limited to satisfy himself that it would be entirely feasible to treat and dispose of waste water on this site. In offering these opinions he also took into account, in detail, the nature of the proposed site, analysing some new additional borelogs, one of which in particular was drilled deeper through the shallow hard layer which earlier borelogs had stopped at.[12]

[53] Mr Hedgland considered whether, given the proximity of the shellfish beds, there should be additional treatment with a UV disinfection unit. He opined such would entail unnecessary added cost and complexity. Drawing on his detailed studies, he was confident that under normal weather conditions the low application rate proposed would ensure that bacteria would be removed by the land disposal system. He also considered that even under extreme wet weather conditions the contingencies provided of storage within the permeable subsoils, the increased

[11] RM Hedgland, Evidence-in-chief, paragraph [5]
[12] RM Hedgland, Evidence-in-chief, paragraphs [18] – [28]

seepage area proposed for lateral seepage, and a grass swale, would address any "breakout" and would ensure adequate protection.[13]

[54] Mr Hedgland noted that the witness called by the Ministry on ecological matters, Mr MR Poynter, had stressed that the site is not far from the mouth of the Hokianga Harbour where water quality is good, there is good tidal flushing, and shellfish and swimming waters would not be impacted by any aspect of the proposed discharge to land. Accordingly he (Mr Hedgland) was able to offer the opinion that the proposed level of treatment and disposal would ensure that no significant detrimental effects would occur to the receiving environment, and that a system could be installed, subsequent to resource consents being obtained, that would meet the requirements of the Resource Management Act.

[55] Mr Hedgland considered the opinions of Mr Kurmann already described, involving the implementation of a zero discharge wastewater treatment system at the site. We do not need to analyse the competing views of Mr Hedgland and Mr Kurmann about what kind of system should be installed, for the reason already noted that Mr Kurmann conceded in the joint witness statement, and under cross-examination by Mr Allan, that the site would be able to host a treatment and disposal system that would achieve his own recommendations (and therefore also by implication the slightly less stringent recommendations of Mr Hedgland). That level of detail must be left for consideration of the appropriate consent authority upon application for resource consents at a later time. It would be wrong for us to purport to pre-empt that process. Our task is to satisfy ourselves that the relevant effects can be appropriately avoided, remedied or mitigated, and if we confirm the designation, are (if necessary) subject to appropriate conditions of consent. Given Mr Kurmann's concessions, there is no evidentiary basis for us to refuse to confirm the Designation on the grounds of potential waste water disposal effects. Attention will be given to the adequacy of conditions of consent as already indicated.

Landscape and visual issues

[56] The appellant raised as an issue (but did not address it in her own evidence) a concern that the scale and height of structures would constitute an adverse visual effect on Koutu Point and the Harbour. The appellant and some of her witnesses live on Koutu Point, but they barely addressed the issue in their evidence. Questions were asked in cross-examination of some of the Ministry's witnesses, particularly expert

[13] RM Hedgland, Evidence-in-chief, paragraph [9]

landscape architect Mr MI Farrow that demonstrated that the appellant's concerns remained, but there was absolutely no evidence to challenge the facts and opinions offered by him. Once again, questions of him elicited nothing other than confirmation of aspects of his written evidence. We will therefore set out limited information about the issue.

[57] Mr Farrow had visited the site on three occasions in 2012 and 2013, provided reports and advice to the Ministry, and prepared evidence-in-chief and a considerable number of visual exhibits. Nothing observed on our visit to the site and locality caused us to question the accuracy of any of Mr Farrow's exhibits, or indeed anything that he recorded by way of fact and expert opinion. His conclusion that the Kura could be constructed on the site in a manner where any adverse visual, landscape or natural character effects would be negligible, and that there are no visual, landscape or natural character impact reasons why the designation should not be confirmed, cannot be assailed.

[58] Mr Farrow recorded that Koutu Point is a distinctive element on the outer eastern shore of the Hokianga Harbour, being an elongated peninsula that protrudes into the body of the Harbour, approximately 7.5km north of the Harbour mouth. The headland terminates in a pentagon-shaped plateau that sits approximately 10m above high water. A small knoll along the southern shore of the peninsula stands above the otherwise flat headland. A small residential area, Koutu, is located in the vicinity comprising about 50 dwellings. To the north-east there is a newly formed road serving approximately 12 undeveloped lots.

[59] The vegetation in the area is mostly shelter-belt planting along frontages and between properties. The headland itself is predominantly covered in pasture or mown lawns, the exception being the subject site which has a dense low cover of manuka and gorse seedlings (which we observed being mown) interspersed with low reeds and sedges that are commonly found on poorly drained sites with limited fertility. There are some shallow swales and some very scattered amenity planting, probably associated with a recent subdivision of the site. A belt of coastline Pohutukawa extends from the southern to the western edge of the plateau and some properties near the northern cliff-line are partly enclosed by mature shelter-belt planting and trees.

[60] The floor space requirements of the proposed facility are anticipated to be approximately 2,400m^2, albeit that the proposed conditions provide for a maximum building coverage of up to 10% of the whole site. In addition to which there would be

outdoor sports fields, courts, a bus bay, and vehicle access and parking facilities. Many structures would comply with the permitted height limit of the underlying zone of 8 metres, but two, a multi-use hall and a gateway structure were originally intended to be 10 metres, with the Ministry now indicating that it would accept a condition limiting those to 9 metres.

[61] The intention of the requiring authority being to pursue the OPW process, detailed designs were not offered in evidence. Rather, some options for conceptual layout were advanced. Whichever of these might ultimately be adopted and developed through detailed plans, it was Mr Farrow's opinion that while there would be significantly higher density of buildings on a part of the site than might be anticipated by the underlying Coastal Living zone, there would be large parts of the site free of buildings, with generous allocations of open space.

[62] Mr Farrow's landscape assessment provided a description of various viewing audiences and affected parties, and it was his opinion that the visual effect of the Kura on them would be no greater than that of six domestically developed sites. For clarity, counsel emphasised that the Minister is not asking the Court to treat six houses on the six existing titles as a permitted baseline; that is we were not being asked to disregard the effects of any permitted structures on the site when assessing the NoR. Mr Farrow was simply putting forward practical and sensible possibilities given the underlying zoning.[14]

[63] Koutu Point has not been identified in any planning instrument as being an Outstanding Landscape or of having any particular values in relation to its coastal setting. Mr Farrow nevertheless conceded that there is a measure of landscape sensitivity due to its projection into the harbour and as something of a gatepost to the inner, mid-section of the water body, also on account of its very simple landform and limited vegetative framework.[15]

[64] Mr Farrow offered recommendations about possible conditions should we confirm the Designation. We will return to those later. We agree with Mr Farrow that the Kura could be constructed on the site, after undergoing the OPW process, in a manner where any adverse visual, landscape or natural character effects would be negligible.

[14] MR Farrow, Evidence-in-chief, paragraphs [28] – [30]
[15] MR Farrow, Evidence-in-chief, paragraph [31]

[65] In a later section of this decision we will consider the opinions of the consultant planner called by the Ministry, Mr DN Hay, as to provisions of statutory instruments relevant to this issue. No matters of moment were drawn to our attention in that regard that would cause us to question Mr Farrow's expert opinion.

[66] To the very limited extent that the appellant and her witnesses offered us any information about these issues, we regret to say that the most that could be said of them is that they are resistant to change and hold an uninformed and unrealistic expectation that views on, from, and across the site will remain forever available.

[67] Before and during the hearing Ms Ellis expressed concern about a possibility that the Kura site and its facilities might in future be used by third parties for community or private events. This idea had unfortunately arisen from an ill-advised observation to Ms Ellis by a member of the team working on the proposal for the Ministry and the Board of Trustees. The appellant appeared unwilling to accept the categorical assurance of counsel for the Ministry that the Minister's ability to designate is limited to educational activities and works, and that the use of facilities by third parties for activities unrelated to the Kura cannot be and is not sought to be authorised by the NoR. We completely understand and accept that statement by counsel. Any activities beyond those authorised by the Designation would, to the extent that they are not permitted activities in relevant planning regimes, require resource consent. Mr Allan assured us that the Board of Trustees has been advised of these constraints, and understands them.[16] As explained to the appellant during the hearing, no-one has the power to prohibit or limit anyone in bringing resource consent applications in the future.

Impact on wellbeing of residents of Koutu Point

[68] Ms Ellis raised this issue, again without offering much evidence. The concern appeared to be that the Kura would not be compatible with the surrounding coastal settlement. The point also seemed associated with the view offered by her and others of her witnesses, that the Kura would be best retained on its existing site in Whirinaki.

[69] As we will discuss in more detail in the section of this decision concerned with "alternatives", our consideration of a Notice of Requirement for Designation

[16] Opening submissions on behalf of the Ministry, paragraph [6.8]

does not extend to identifying, a "best" site. The inquiry is confined within the parameters of s171 RMA, subject to Part 2.

[70] We accept the Ministry's case that while the site might not be at the immediate centre of its catchment, it is nevertheless well-placed to host a Kura to attract students across a broad geographical area around the Hokianga. It will be unavoidable that many staff and students will need to travel to the Kura in vehicles. This will happen to one degree or another wherever it is established. This should not be a disqualifying characteristic on the present site.

[71] As will also be considered in the section of this decision relating to "alternatives", the number of potential sites that were available for consideration by the Ministry, was limited. We also accept that schools are a common feature of small rural and coastal settlements, and, quite apart from the visual landscape and natural character issues that we have already dealt with, the Kura would not be out of place functionally or aesthetically on the proposed site.

[72] The appellant provided us with no useful material to work with about this stated concern.

Traffic issues

[73] As just mentioned, it is inevitable that the Kura, if established on this site, will see many staff and students having to travel by vehicle to get there, whether car, van, or minibus. This will almost invariably be a product of the establishment of any school intended to serve a wide catchment.

[74] A number of the appellant's witnesses expressed views that there would be serious adverse traffic effects in the vicinity of the site, and on the local roading network. Once again, no expert evidence was called by any party other than the Ministry, on this issue.

[75] The Ministry called the evidence of Mr BC Perry, an engineer trained in the USA and having more than ten years experience there, throughout New Zealand, and in particular in Northland, with projects that have traffic-generating characteristics.

[76] Mr Perry studied the site, the access to it along Koutu Point Road and Koutu Loop Road, and the intersection of the latter on State Highway 12. He recommended

that the Koutu Point Road and Koutu Loop Road intersection should be upgraded in terms of a plan that he presented, with widening of Koutu Loop Road to provide a basic right turn for traffic turning into Koutu Point Road from Koutu Loop Road. The treatment would provide 7.5m of widening from the centre line, some vegetation removal within the road reserve, and the shifting of some letter boxes located on the road reserve.

[77] Mr Perry also recommended some upgrading of the intersection of Koutu Loop Road with SH12 to provide a basic left turn for traffic moving onto the state highway from Koutu Loop Road, as well as traffic turning left from SH12. This upgrading would provide for left turns without the need to cross the centre line, for vehicles up to 19m long. Again, some vegetation removal was recommended to improve sight lines.

[78] The suggested improvements to the local roads have been discussed and agreed with Council officers. The improvements suggested for the SH12 intersection have been discussed and agreed with representatives of the NZ Transport Agency.

[79] Mr Perry otherwise offered detailed analysis of the site, the roads, and the likely numbers of pedestrians, cyclists, and vehicles, and had no difficulty in offering his opinion that there are no traffic engineering issues which would impact on the ability to construct and operate the Kura on the subject site.

[80] The Ministry has put forward conditions that Mr Perry considered to be suitable for imposition upon confirmation of the Designation. We generally agree, and attention can be given to the form of those conditions at the appropriate time.

Sea level rise, coastal inundation, and tsunami risk

[81] These topics, having once again been raised by the appellant unsupported by hard evidence, were nevertheless addressed comprehensively by Mr Perry. He considered published and unpublished information about the site, aerial imagery, geomorphology and coastal processes, site survey information, and storm wave run-up calculations.

[82] The site is generally about 10m above MHWS. Mr Perry included in his consideration the combined effects of tides, storm surge and wave assisted flooding

(wave run-up), together with current international predictions of sea level rise (we infer conservative and otherwise).

[83] Mr Perry understood a Category 4 tropical cyclone to be similar to a 1 in 100 year return event, and assumed in that connection a sustained wind speed of 180km/hour and a fetch of 5km within which sustained winds would have fairly uniform speed and direction. His unchallenged view, having considered much available data, was that storm wave run-up at the cliff face along the northern edge of the site could produce a water elevation of 5.5m above MHWS relative to the relevant Northland datum.

[84] As to tsunami risk, the witness acknowledged that he was not expert, but was familiar with a publication from GNS Science "Review of Tsunami Hazard in New Zealand (2013 update)" offering probabilistic modelling from various sources, for a 100 year event. The report defines tsunami height as the maximum height that would be reached against an imaginary vertical wall at the coast, relative to background sea level at the time of the event. A maximum height is offered for every 20km of New Zealand coastline. In the subject locality, tsunami height is estimated to be in the range of 2 to 4 metres at a return period of 100 years with an 84 percentile at the harbour entrance, without taking into account characteristics of the harbour and this site which could dissipate tsunami energy and therefore lessen maximum height. Mr Perry therefore calculated very conservatively that a maximum water elevation of 8.6m relevant to the chosen datum could be indicated, inclusive of allowance for 0.8m of sea level rise.

[85] These conservatively derived figures, relative to the height of the subject land above MHWS, enabled Mr Perry to express the confident opinion that in the foreseeable future, it is unlikely that storm wave run-up or tsunami wave sources would cause inundation of the site.

Planning instruments

[86] We remind ourselves that under s171(1)(a) RMA we must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to certain listed planning instruments amongst other things. The first item in that list is any National Policy Statement, and the second is the NZ Coastal Policy Statement. The third is any Regional Policy Statement.

[87] The Ministry called a consultant planner, Mr DN Hay, to provide evidence on this aspect amongst other things. Mr Hay has had extensive experience with development, educational, cultural and infrastructure projects since 1991, including for major infrastructure providers, local government entities, and the Ministry of Education. He has been instrumental in processes concerning the present proposal, commencing with site evaluation analysis in 2010.[17]

[88] Mr Hay gave close consideration to the provisions of the New Zealand Coastal Policy Statement 2010, due to the close proximity of the site to the Hokianga Harbour. Giving reasons, and drawing quite extensively from the evidence of other experts called by the Ministry, he considered that the proposal would not be contrary to Objectives 1 to 7 and supporting Policies, in particular Policies 6 and 23. In terms of Policy 6, the proposal is essentially within an existing coastal settlement and, drawing on the evidence of Mr Farrow, would not result in significant adverse visual, natural character or amenity impacts and would not impact on public access to the coastal environment. As to Policy 23, drawing on the evidence of Mr Hedgland, the proposal would not involve the discharge of human sewage directly into the coastal environment, and stormwater discharges from the site could be managed to avoid adverse effects on the coastal marine area.

[89] Mr Hay considered that there were no other relevant national policy statements requiring consideration.

[90] Regarding the Northland Regional Policy Statement, he considered that with appropriate design of earthworks, wastewater disposal system, stormwater disposal and future implementation of a traffic management plan, the implementation of the proposal would not be contrary to the many objectives and policies. We took this to relate to the operative and more recently proposed Northland Regional Policy Statements.

[91] As regards the Far North District Plan, the site is zoned Coastal Living. If the Designation is confirmed, the zoning would essentially become an underlying one, but nevertheless s171 requires us to have particular regard to its provisions.

[92] The Coastal Living zone applies to those areas of the coastal environment which have already been developed but which maintain a high level of amenity

[17] The site evaluation followed the Ministry's methodology for site evaluation – Auckland region (3 August 2007)

associated with the coast, and are located outside the larger settlements (where a more intensive Coastal Residential zone is found). Explanatory material in the plan indicates that areas zoned Coastal Living have been identified as having an ability to absorb further low-density, mainly rural residential development, without detriment to their overall coastal character. The objectives and policies of the zone reflect that.

[93] Mr Hay told us that the District Plan is silent on the need to provide for educational facilities and/or community facilities in both the urban and rural areas. He offered the opinion that it was appropriate within the wider Hokianga area, that a new school or Kura servicing students from both the residential and rural areas could be located within the Coastal Living zone. This zone is a significant "residential" type zone in the smaller settlements found throughout the wider Hokianga area.

[94] Mr Hay addressed relevant sections of the plan, Expected Environmental Outcomes (s10.7.2) and Objectives (s10.7.3) and Policies (s10.7.4), and considered that the Kura could be developed on the site in a manner that does not detract from the existing overall nature or character, features and landscapes of this particular area, and in a manner where potential adverse effects are avoided, remedied or mitigated to an appropriate level. In offering this advice he was clearly drawing on the expert evidence of Mr Farrow.

[95] The FNDC played a particularly low-key role in this hearing, the opening submissions from Mr Verry probably taking a record for succinctness, at half a page! The Council helpfully called the evidence of its Senior Resource Consents Planner, Mr WE Smith, who had had involvement with the proposal on behalf of the Council since mid 2012. Mr Smith's consideration of the relevant statutory planning documents was very consistent with that of Mr Hay.

[96] The appellant called no expert planning evidence, with the result that the statements by Mr Hay and Mr Smith were essentially unanswered. The appellant's cross-examination of them tended to hone in on areas where they had drawn on the statements of other expert statements whom she had already had the opportunity to cross-examine. No answers were elicited from the planning witnesses that would in any way have the effect of undermining their confident opinions on the contents of the statutory planning instruments.

Consultation

[97] Alleged lack of consultation was a strong complaint by the appellant and many of her witnesses. She alleged that consultation undertaken by the Ministry was unduly limited, and included the withholding of information, the holding of "exclusive meetings", a disregard for the wider community, unsatisfactory outcomes of meetings, failure to understand the potential cultural effects relating to the site, and avoidance of consultation as an element of the principles of the Treaty of Waitangi which are to be taken account of under s8 RMA.

[98] The evidence of the appellant and her witnesses on this topic tended to be significantly bound up with their complaints about the extent of the Ministry's consideration of alternatives. We will deal with that in the next section of this decision, but simply record at this juncture that the complaints appeared to us to be as much about the appellant and her supporters not being satisfied with the outcomes of meetings, as with process. While the extent of persons consulted by the Ministry might have been somewhat limited (and we will discuss the Ministry's reasons for that shortly), contact and communications amongst the parties was not inconsiderable in this case, given the propensity of the appellant to attempt to engage with anyone remotely involved with the case from the Minister down, the Ministry, the Councils, and even the Court. The appellant is no stranger to extensive use of the Official Information legislation.

[99] The attitude of the appellant to the Ministry in this area is well illustrated by quoting from her own evidence.[18]

> (13) While it is apparent that the Ministry and the Kura Board consider consultation has in fact taken place and has been appropriate, and the Ministry are not willing to revisit the decision to relocate, my view is that the complete lack of regard to appropriate consultation has been culturally and arrogantly offensive to all the people affected by this relocation proposal and I believe without a doubt, we are only in this Environment Court appeal process today because one crucial point of community engagement and consultation was deliberately omitted, that being:
>
> > *The community and hapu engagement and consultation for input and land availability and potential new site options, when the Kura was first granted Wharekura status in 2009.*

[100] This evidence is followed by extensive criticism of the decision to "relocate", the outcome of certain meetings where "relocation" was put to a vote and

[18] Appellant, Evidence-in-chief, paragraph [13]

allegedly "lost", and even the approach to land acquisition on a willing vendor – willing purchaser basis as opposed to the use of the Public Works Act 1981.

[101] As with much of the appellant's evidence, she then posed a number of "questions" to the Minister and the Ministry, rather than offering concrete evidence inclusive of reasons for her assertions. In particular she posed a series of questions in relation to four meetings or hui. These questions related to such matters as information allegedly omitted in various Official Information Act responses addressed to her on behalf of the Ministry and other such matters that essentially pointed to unhappiness with the outcome of such consultation as did in fact occur.

[102] Another aspect of the appellant's criticisms, and those levelled by some of her witnesses, was that such consultation as did occur did not properly follow "Tikanga". A theme emerging in her evidence about this seems based on a sad feature of the case that one sector of the Maori community appears strongly to oppose the proposal, while another supports it, with the opposition group's views essentially "not winning the day."

[103] The Ministry's witnesses, Mr Huggins, Mr Norman, Ms Sarich, Mrs Bristow and Mrs Morunga discussed various aspects of the consultation that was undertaken by the Ministry. An interesting proposition was addressed by Mr Huggins. He advised that consultation regarding schools and school site selection can often be fraught. While schools are important components of communities, it is important to endeavour to have the schools accepted by those communities, and the site selection and design and construction phase of schools can sometimes influence the school's ongoing relationship with some members of the wider community. Often schools are strongly welcomed into communities. However, it was within his experience that, where consultation is undertaken with neighbouring landowners, the site selection and purchase process can become fraught and delayed without the consultation producing significant benefits in terms of site selection.

[104] The Ministry considered, he said, that in this case the most important part of the Hokianga community in terms of the relocation of their existing school was the Kura community itself, represented by the Board of Trustees. The Board caters for students from throughout the area and needed to make a series of challenging decisions regarding the future of the Kura. Those needed to be made with reference to the best interests of the students. There was concern that bringing additional parties into that decision-making process would add complexity and delay, and that this could

be seen alongside lack of a legal obligation to consult. Mr Huggins said that the Ministry, including himself as a site selection advisor, considered that relocation of the Kura away from Whirinaki was a matter of primary concern to the Kura itself. He understood that other members of the community, particularly in Whirinaki, might regret the move, but that would not be a basis for preventing the Kura from moving to a purpose-built, permanent facility elsewhere.

[105] We can understand these sentiments. Leaving aside for the moment the legal aspects, we formed the distinct impression from the totality of the evidence on the subject, that:

- while consultation was confined mainly to what the Ministry called the "Kura community", it did at stages go wider than that;

- the confining of consultation in that way was probably always going to cause unhappiness amongst those who oppose the Kura leaving Whirinaki, or oppose it being established at Koutu Point;

- the confining of consultation in that way was probably unfortunate in one sense, but consultation was sufficiently extensive to ensure that the requiring authority was fully informed of relevant RMA issues concerning the Kura proposal and concerning the community;

- the opposition to the "relocation" of the Kura was frankly so vehement that further consultation would not have altered the outcome;

- the ultimate concerns of those opposed to the Kura was with relocation, and unless they got the answer they wanted, they were never going to be satisfied.

[106] Counsel for the Ministry pointed out that a sign was erected on the site in September 2010 prior to the NoR being lodged with the Council, directing inquiries to its consultant planner Mr Hay. Further, that the NoR was publicly notified as open for submissions and people were able to express views through that process. Further, that the present appeal was subject to two days of mediation. We infer that Mr Allan was indicating, as we have now found, that further consultation was never going to work. This is unfortunately a community divided, and as we said at the conclusion of the hearing, it is now up to us to make the decision.

[107] Mr Allan submitted as follows concerning the law. The extent of an obligation to consult on a NoR is set out in s36A RMA, which provides:

> (1) The following apply to an application for resource consent and the local authority:
>
> (a) neither has a duty under this Act to consult any person about the application; and
>
> (b) each must comply with a duty under any other enactment to consult any person about the application; and
>
> (c) each may consult any person about the application.
>
> (2) This section applies to a Notice of Requirement issued under any of sections 168, 168A, 189 and 189A by a requiring authority or a heritage protection authority, as if:
>
> (a) the Notice were an application for a resource consent; and
>
> (b) the authority were an applicant.

[108] Mr Allan submitted in respect of this provision, (there being no obligations on the Crown regarding consultation pursuant to other legislation), that our finding must be that there was no obligation on the Ministry to consult for the purposes of placing this NoR.

[109] Mr Allan next submitted concerning the Treaty of Waitangi. He said that while it is acknowledged that consultation is one of the principles of the treaty, referring to the words of s36A, the Treaty is not "*any other enactment*". As regards s8, while persons exercising certain functions and powers under the RMA must take into account the principles of the Treaty, the section does not expressly require consultation to be undertaken. In any event, he submitted, even taking the consultation principle into account, consideration should be given to factors such as the nature of the RMA proposal, the nature and scope of the function and power being exercised under the RMA; and the manner in which the proposal may raise RMA concerns as opposed to concerns unrelated to the inquiry before the Court.

[110] In these regards, Mr Allan submitted that the complaint about removal of the Kura from Whirinaki was not an issue raised by the NoR (which is solely related to the Koutu site), and that no consents are required under the RMA to cease operating a school in any place. Equally, any suggestion that the Kura co-locate with the Opononi Area School is not an issue raised by the NOR, and the RMA appeal hearing is not the forum for challenging the decision made on educational grounds not to do so; and there can be no obligation under the RMA to consult in terms of the Treaty in

that regard. Thirdly, the evidence about consultation so far as it relates to effects on the Koutu Point site and locality is relevant under the RMA, but the evidence in this regard refers to physical rather than cultural effects which have all been thoroughly addressed in evidence by the Ministry (one small exception being a passing comment by Mr Klaricich about some undefined cultural effects, not supported in detail).

[111] We agree with these observations about the evidence as well as about the legal duties. We also took particular note of the oral supplementary evidence given by the appellant's witnesses, where cultural matters were mentioned only in the briefest and most general of ways, for instance a mention by Mr AG Wynyard of "taonga", but with no specifics; "taonga" mentioned in a general way by Mrs DW Washbrook (this time identified as being the Kura itself as allegedly "belonging to a local hapu Te Hikutu "); and finally a pair of unspecific and inconsistent suggestions by Mrs Washbrook that blood had been spilled on the wider Koutu Point area (Battle of the Plank) , or that her forebears had helped to resolve the situation and prevented blood being spilled. These vague references to Maori cultural issues that the appellant and her witnesses conveyed to the Court did not advance this issue, moreover it seems to us unlikely that further consultation would have elicited any more information to the Ministry.

[112] We accept the submissions about consultation made on behalf of the Ministry, and have no basis in law or in fact for refusing to confirm the designation on these grounds.

Alternatives

[113] There is no obligation under s171(1)(b) to establish that a designated site is the best site for an activity. Rather, our duty is to consider whether adequate consideration has been given by the requiring authority to alternative sites, routes, or methods of undertaking the work if the requiring authority does not have an interest in the land sufficient for undertaking the work, or it is likely that the work will have a significant adverse effect on the environment.

[114] In this instance, the requiring authority owns the site at Koutu Point. Further, we have found that there will be no significant adverse effects on the environment. We are therefore under no duty to consider whether adequate consideration has been given by the requiring authority to alternatives.

[115] Even if that was not the case, it was clear from the evidence of Mr Hay, essentially unchallenged, that much consideration was given to alternative sites, methods and access routes, and that the site is entirely appropriate in terms of its topography, the roading network, its placement within the region, and its size in relation to surrounding land.

Objectives of the Requiring Authority

[116] Section 171(1)(c) addresses whether or not the work and designation are reasonably necessary for achieving the objectives of the requiring authority. The NoR states that the Minister's principal objective is to fulfil a statutory obligation under the Education Act to provide a suitable facility for students who wish to be educated in a Kura Kaupapa Maori in the Hokianga area. Mr Huggins said that in order to meet the Minister's objective of providing for a permanent Hokianga wharekura, the Kura will need to relocate from its current temporary site at Whirinaki.

[117] The planning experts, Mr Hay and Mr Smith, were both of the opinion that the work and the designation were reasonably necessary for achieving the requiring authority's objectives.

Part 2 RMA

[118] As already noted, the matters to which we must have particular regard listed in s171(1) are expressly subject to Part 2 of the Act.

[119] We do not need to set out the full text of sections 5, 6, 7 and 8 of the Act. They are well known.

[120] The findings that we have already made in the several sections of this decision enable us to consider whether the purpose of the Act, the promotion of sustainable management of natural and physical resources in the way defined in s5(2), is met.

[121] There can be no doubt that establishing and operating the Kura on this site constitutes "managing the use, development and protection of natural and physical resources".

[122] The next question is as to whether that would be in a way or at a rate which would enable people and communities to provide for their social, economic and cultural wellbeing and for their health and safety. We have no hesitation in finding that this is the case, despite the considerable assertions of the appellant to the contrary. The proposal involves the provision of education to students in one of New Zealand's official languages, is obviously well supported in the community, and is of growing popularity when one takes into account the evidence about the burgeoning roll, presently artificially capped at 100 students.

[123] No cogent evidence was led about any economic disbenefit. One assertion was that the site might be off centre in its catchment, leading to the need for many vehicle trips. In this regard we have found that the Kura would, wherever established within its wide catchment in the Hokianga, require that kind of transport servicing.

[124] The appellant called evidence from Mr PL Oldham, a resident of Waimamaku and chairman of the Opononi-Omapere Residents & Ratepayers Association Inc. Mr Oldham was unable to attend the hearing while it was running, and was therefore unavailable for questioning so we have not been able to place as much weight on his written evidence as lodged as we might otherwise. Mr Oldham wrote of potential large traffic flows and the possible need at some time for the construction of footpaths or walkways at a cost to ratepayers. He also complained that because the land had been bought by the Crown, no rates would be paid on it, so that funding of existing services would be spread over fewer ratepayers. Equally, he complained that the Ministry of Education does not pay development fees to the Council. He added that he was concerned "for the future viability of other schools in the area", making particular reference to the Opononi Area School.

[125] Mr Oldham does not claim to be an economist and provided no background about himself other than having been involved in community affairs in Auckland and Northland throughout his adult life. The FNDC was a party in the present case, in support of the requiring authority, and raised no complaint about loss of rates or cost of infrastructure to ratepayers. The issue of viability of local schools is essentially a matter for the requiring authority, the Ministry of Education, and in any event we have no evidence about any of these matters – purely assertions.

[126] Cultural wellbeing will obviously be served by establishment of the Kura, and although the appellant was highly critical of the proposed location, it did not appear to us that she was critical of the concept in the general sense. Education is

obviously a central component of the wellbeing of the community, and Maori language education is something that as a matter of high policy, the Minister wishes to provide, particularly in Northland.

[127] We have found that any potential adverse effects of the activity on the environment can be avoided, remedied or mitigated through the imposition of appropriate conditions to the extent that it is lawful for us to do so at this first stage of the establishment process.

[128] As regards sections 6 and 7 of the Act, nothing has been drawn to our attention concerning the characteristics of the site or the locality that should raise concerns under these provisions. Mrs Washbrook, one of the witnesses for the appellant, mentioned s6(e), (f) and (g) in passing, and as previously discussed in this decision, even the oral evidence of the appellant's witnesses hardly advanced things in this regard. We have no evidence that the site contains or is close to waahi tapu or other taonga that would be compromised by the establishment and operation of the Kura. The Kura would not amount to inappropriate use or development in respect of any historic heritage on the Koutu site, whether of a physical kind, or cultural. We have already made our findings about the latter, and in connection with the former, we had comprehensive evidence from experienced archaeologist Dr RE Clough that indicated that there was nothing of interest within a site that had been highly modified over a long period of time, particularly by gum-digging early last century. There was no evidence that the Kura would compromise any protected customary rights.

[129] Regarding the provisions of s8, the Treaty of Waitangi, the Ministry submitted that the provision of modern, purpose-built premises for the Kura would be consistent with the Crown's obligations in terms of the Treaty, and we do not doubt that.

[130] During the case management process the appellant signalled that she wished to call two witnesses, we perceived Kaumatua, to give evidence in Te Reo Maori, and orally, without pre-circulated written statements. After some discussion between the Court and the parties in a pre-hearing conference, the Court reluctantly authorised that, despite a risk that brand new evidence, unheralded before the hearing, could have a disruptive affect on concluding the hearing in a timely way. The Court also agreed to engage an interpreter to assist these witnesses in Court.

[131] In the event there was little need for the assistance of the interpreter, in circumstances as follows. During the course of the hearing (essentially a conference in open court) the two witnesses, Mr Ben Morunga and Mr Anania Wikaira, offered overnight to produce written statements. This they did the following morning, helpfully offering them in Te Reo and in English.[19] Unfortunately on the day we were advised that Mr Wikaira had taken ill and could not come to Court. The appellant claimed that he had interpreted remarks that we had made in the conference in Court to the effect that we would not be receiving his evidence. That had not been the case at all, arrangements clearly being made in a constructive and friendly fashion, that we would gratefully receive the written statements, and that each witness would be given half an hour to speak to them. Mr Morunga came to Court, but he too was upset. At one point the appellant suggested he did not wish his evidence to be received at all, however he made it clear that he wished us to receive his written statement but would not be sworn in as a witness and questioned on it.

[132] Our ruling accordingly was that both statements would be received by us, read and considered, but that as with other witnesses who had not been available for questioning, we would be forced to place less weight on them than otherwise.

[133] The statements of Mr Morunga and Mr Wikaira, impeccably translated by themselves as confirmed by our interpreter, contained a mixture of Karakia, description or definition of Maori concepts like Tapu, Noa, Tika, and Pono (without relating them expressly to the site), genealogy including the origin of beings, and a statement that appeared to challenge the jurisdiction of the Court to make a decision in these proceedings. Mr Wikaira also offered Korero concerning fish life and kaimoana in the vicinity of Koutu Point, which although very interesting, did not advance the issue of any potential adverse effects on local ecology. He also offered criticism of the Ministry's consultation processes that did not advance any of the matters we have described elsewhere in this decision.

[134] Regrettably therefore, these two statements did not advance our knowledge of cultural or other matters. Rather, we continued to have the strong impression that one (large) part of the community was strongly in support of the Kura, and one (smaller) part, including these 2 witnesses, was vehemently opposed to it. The latter however, was still not providing us with cogent evidence that could persuade us to cancel the requirement.

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[19] Our interpreter, Dr Hohepa, advised that the translations into English in the written statements were impeccable.

[135] We note particularly that the Kura is expressly not to be affiliated with any particular hapu or marae, but rather seeks to foster relationships with all marae in the Hokianga. The lack of nearby marae, and absence of any particular cultural concerns with the site, will assist to avoid any perceptions that the Kura might be affiliated with any particular body.

[136] We accept the submission of the Ministry's counsel that it considers that the continued provision for the Kura in premises that are purpose built and of adequate size is entirely consistent with the Crown's obligations in terms of the Treaty of Waitangi and is the most fundamental way in which the proposal will interact with the Treaty.

Section 290A RMA

[137] We have had regard to the decision of the hearing commissioners of the Council. Our decision differs only in matters of relatively small detail, but we have arrived at the same overall conclusions.

Result

[138] There can be absolutely no basis for cancelling the Requirement. We are prepared to confirm it upon appropriate conditions.

[139] A recommended set of conditions was provided to us, which was essentially the set that was approved by the Hearing Commissioners.[20] In response to questions from the Court during the hearing, Mr Hay proposed amended wording to better address three matters :

a) In the Joint Witness Statement on wastewater and ecology the three experts were agreed that any discharge of breakout in subsurface irrigation would be better directed to the north and not to the south. While this is a matter that is more appropriately addressed in any subsequent resource consent procedures, it was agreed that it was a consideration worth recording at this stage.

b) In relation to landscaping, Mr Farrow agreed that the conditions could be expanded to clarify that the information to be included in the first

[20] D Hay, Evidence-in-Chief, Attachment Three.

OPW was to integrate the development of the whole site and not just relate to boundary planting and screening.

c) Mr Farrow also agreed that the existing poor soils would require some treatment and that this too should be addressed in some detail in the OPW.

[140] These matters were subsequently put to the relevant expert witnesses for the other parties, being Mr Kurmann and Mr Smith, who agreed that they were appropriate amendments to the conditions.

[141] In closing submissions Mr Allan confirmed that the Ministry agreed to all of Mr Hay's amendments.

[142] Accordingly the Notice of Requirement is confirmed subject to the set of conditions attached as Appendix 1 to this decision. The amendments proposed by Mr Hay have been included in the Designation Specific Conditions 3(b), 3(d) and 3(f).

[143] Costs are reserved.

SIGNED at AUCKLAND this 19th day of May 2014

For the Court

L J Newhook
Principal Environment Judge

APPENDIX 1

The Notice Of Requirement by the Minister of Education for a designation for a public work – "Kura Kaupapa, Wharekura and Associated Activities" at Koutu Point Road, Koutu Point is <u>confirmed</u> subject to the following conditions:

Standard FNDC District Plan Conditions Which Apply To This Designation:

1 Car Parking

Where new development increases the number of classrooms (or classroom equivalents) on a particular site, additional parking shall be provided at the rate of not less than two car parks per additional classroom or classroom equivalent, except where the Council accepts, on the basis of a specifically commissioned car parking study by an appropriately qualified engineer, that a lesser level is appropriate.

2 Traffic Management

Where an additional classroom or classrooms are proposed to be erected on the sites listed below a traffic management plan shall be submitted as part of the outline plan of works:

(i) "Kura Kaupapa, Wharekura and Associated Activities (Koutu Point Road)"

3 Building Setbacks

New buildings or structures shall comply with the setbacks from boundaries for permitted activities for the applicable underlying zone provided that the setback can be reduced where the written consent to such a reduction has been obtained from the registered proprietor of the relevant adjacent land.

Designation-Specific Conditions

1 In accordance with section 184(1)(c) of the Resource Management Act 1991 this designation shall lapse on the expiry of 10 years after the date on which the designation is included in the District Plan unless:
- It is given effect to before the end of that period; or

- The territorial authority determines that substantial progress or effort has been made towards giving effect to the designation and is continuing to be made; or
- The designation lapses earlier by virtue of the District Plan ceasing to be operative.

2 The Kura shall be limited to a roll of 200 students.

3 As part of the first outline plan the following information shall be provided:

(a) A Traffic Management Plan incorporating a draft Kura Travel Plan, which shall set out the methods to be employed by the Kura to:
(i) Encourage shared transport to and from the Kura by students and staff;
(ii) Discourage the dropping-off and picking-up of students except on the Kura grounds;
(iii) Manage visitor parking during special Kura events on site.

(b) A concept site development, building layout, landscaping and planting plan for the integrated development of the site in a manner which minimises the impact of the Kura facilities and activities on the natural character of the coastal environment. This plan is to identify all areas of planting necessary to achieve successful integration of the development. This is to include but not be limited to areas for boundary planting, building and carpark screening and shall detail species, number, spacing of proposed species, and size at planting along with a five year maintenance plan. The proposed location and type of boundary fencing is also to be shown;

(c) The proposed palette of exterior building colours and materials to be used and measures to address any reflectivity issues arising from the exterior of buildings;

(d) A Site Servicing Report covering wastewater treatment and disposal, stormwater management (with express consideration given to low impact design principles and the use of detention pond(s)) and potable and fire-fighting water supply. Consideration is to be given to providing for the discharge of breakout and subsurface irrigation area flow going to the north and not the south; and

(e) An entranceway, vehicle circulation, parking and set-down layout plan. This shall incorporate (as a minimum):
- 2 parking spaces per classroom;
- 6 drop-off spaces;
- 3 van/mini-bus spaces;
- Off-road bus turn-around;
- On-site parking for at least 10 bicycles; and
- Any other provisions as set out in the Traffic Management Plan.

(f) Areas of and methodology for soil pan modification, soil management, enhancement, enrichment, and/or augmentation.

4 The planting plan is to be implemented during the planting season directly following the construction of the first stage of the educational facility and thereafter maintained, including the replacement of plants that die during the first three years after planting.

5 The maximum height of any building shall not exceed 8m except for any "gateway" structure into the Kura site and a single gymnasium/multi-use building which are not to exceed 9m in height. The latter building shall not exceed 540m^2 in open plan recreational floor area.

6 The height of any boundary fencing will not exceed 2m.

7 The maximum building coverage over the whole site shall not exceed 10% of the site area.

8 The Koutu Loop Road/SH12 Intersection (west) shall be upgraded. The upgrading work is to be designed in general accordance with the concept plan prepared by Fraser Thomas Limited and referenced as 'Koutu Loop Road & SH12 Intersection 2 Vegetation Removal', drawing number 38526 INT-02. This upgrading shall be completed prior to the educational facility becoming operational. These works may be undertaken either by the Requiring Authority or by NZTA at the expense of the Requiring Authority.

9 The Koutu Loop Road/Koutu Point Road intersection shall be upgraded. The layout shall be in general accordance with the concept plan prepared by Fraser Thomas Limited and referenced as 'Koutu Loop Road and Koutu Point Road Intersection 1 Upgrade', drawing number 38526 INT-01 and the balance of the design and plans for the upgrading shall be in accordance with the FNDC Engineering Standards. This upgrading shall be completed prior to the educational facility becoming operational. These works may be undertaken either by the Requiring Authority or by FNDC at the expense of the Requiring Authority.

10 The operation of the educational facility shall comply with the following noise limits measured at or within the boundary of any other site in this zone:

0700hrs-2200hrs	55dBA L_{10}
2200hrs-0700hrs	45dBA L_{10} and 70dBA L_{max}

This provision shall not apply in respect of the noise generated from student voices outside between 0800hrs and 1800hrs (excluding Sundays and public holidays).

Sound levels shall be measured in accordance with the requirements of NZS 6801: 1991 Measurement of Sound and assessed in accordance with the requirements of NZS 6802: 1991 Assessment of Environmental Sound.

11 Construction noise shall comply with the requirements of NZS 6803:1999 Acoustics — Construction Noise.

12 Light spill is not to exceed 10 lux at the boundary of any adjoining site or 15 lux at the road reserve boundary.

13 Prior to the educational facility becoming operational, if requested by the Council the Minister of Education shall pay the Council a financial contribution of up to $40,000 (plus GST) for the future construction of a footpath along Koutu Point Road to provide pedestrian access to the educational facility.

14 In the event of an "accidental discovery" of archaeological material during site development works the following steps shall be taken:

(a) All work on the site in the vicinity of the discovery will cease immediately. The contractor/works supervisor shall shut down all equipment and activity in that area.

(b) The contractor/works supervision will take immediate steps to secure the site (tape it off) to ensure the archaeological remains are undisturbed and the site is safe in terms of health and safety requirements. Work may continue outside of the site area.

(c) The contract/works supervision/owner will notify the Area Archaeologist of the Historic Places Trust (Northland Office), Tangata Whenua, and any required statutory agencies if this has not already occurred.

(d) The New Zealand Historic Places Trust will appoint/advise a qualified archaeologist who will confirm the nature of the accidentally discovered material.

(e) If the material is confirmed as being archaeological under the terms of the Historic Places Act, the landowner will ensure that an archaeological assessment is carried out by a qualified archaeologist, and if appropriate, an archaeological authority is obtained from the Trust before work resumes.

(f) If burials, human remains/Koiwi Tangata are uncovered, steps (a) to (c) above must be taken and the Area Archaeologist of the Historic Places Trust, the New Zealand Police and the Iwi representative for the area must be contacted immediately. The area must be treated with discretion and respect and the Koiwi Tangata/human remains dealt with according to law and Tikanga.

(g) Works at the site shall not recommence until an archaeological assessment has been made, all archaeological material has been dealt with appropriately, and statutory requirements met. All parties will work towards work recommencement in the shortest possible timeframe while ensure that archaeological and cultural requirements are complied with.

BEFORE THE ENVIRONMENT COURT

Decision No. [2012] NZEnvC 120

IN THE MATTER of appeals under Clause 14(1) of the First Schedule of the Resource Management Act 1991 **(the Act)**

BETWEEN

GAVIN H WALLACE LIMITED
(ENV-2009-AKL-000505)
(ENV-2010-AKL-000011)
(ENV-2010-AKL-000031)

MAKAURAU MARAE MAORI TRUST BOARD INCORPORATED
(ENV-2010-AKL-000024)
(ENV-2010-AKL-000027)

THE TRUSTEES OF THE ERNEST ELLETT RYEGRASS TRUST AND OTHERS
(ENV-2010-AKL-000030)
(ENV-2010-AKL-000147)

EVELYN MENDELSSOHN (BY THE EXECUTORS OF HER ESTATE)
(ENV-2009-AKL-000502)

Appellants

AND

AUCKLAND COUNCIL (as successor to Auckland Regional Council and Manukau City Council)

Respondent

Hearing: At Auckland, 28 November – 2 December 2011, 5 – 8 December 2011, 26 – 29 March 2012, 4 May 2012

Court: Environment Judge R G Whiting
Environment Commissioner M Oliver
Environment Commissioner K Prime

Counsel: Ms M J Dickey & Mr M C Allan for Auckland Council **(the Council)**
Mr P Cavanagh QC for The Trustees of the Ernest Ellett Ryegrass Trust and Others **(the Ellett Interests)**
Mr K R M Littlejohn for Evelyn Mendelssohn (by the Executors of her Estate) **(the Mendelssohn Estate)**
Mr M E Casey QC and Ms A J Davidson for Gavin H Wallace Limited **(Gavin H Wallace)**
Mr R B Enright for Makaurau Marae Maori Trust Board Incorporated and Te Kawerau Iwi Tribal Authority Incorporated (s 274 party) **(the Maori Appellants)**
Ms J Bain for the New Zealand Transport Agency (NZTA) (s 274 party)

DECISION OF THE ENVIRONMENT COURT

A. The MUL is to be extended to include the land subject to appeal;

B. The land subject to appeal is to be zoned Future Development Zone;

C. The NOR is cancelled as it affects the land subject to appeal

D. The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals:

1. A change to the Auckland Regional Policy Statement to amend the location of the MUL in accordance with A above; and

2. A change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

a. A succinct description and explanation of the subzone and its context which:

i. Identifies and provides for the significant characteristics of the area, including:

- Maori cultural associations with the area, including wahi tapu;
- Heritage and historic associations;
- The Otuataua Stonefields Historic Reserve;
- Landscape and amenity values;
- The Manukau Harbour and coastal environment; and
- The Auckland International Airport and business zoned lands.

ii. Requires that a future structure planning process for the subzone:

- Further identifies and recognises these significant characteristics;
- Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and
- Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).

b. The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

c. Any consequential amendments to the District Plan.

E. The Council is to submit the changes directed under D. to the Court for confirmation by 28 September 2012.

F. Costs are reserved, but in our tentative view should lie where they fall.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

TABLE OF CONTENTS

REASONS FOR THE DECISION

INTRODUCTION

[2] This hearing concerned appeals against three planning instruments that relate to an area at the end of the Ihumātao Peninsula encompassing land to the west of Oruarangi Road and to the west of Auckland International Airport. The area was termed in the evidence as the *Western Gateway Area.* The Ihumātao Peninsula generally forms part of what is referred to as the *Mangere Gateway Heritage Area* (**MGHA**).

[3] The MGHA has recently come under increasing development pressure for a number of reasons, including:[1]

[a] Continued expansion at Auckland International Airport, including the proposed second runway, and expansion of airport commercial activities to the north of the second runway as provided for under the Airport Designation;

[b] The associated need to plan for the realignment of several public roads which will be affected by the development of the second runway;

[c] The upgrading of the Mangere Wastewater Treatment Plant and the establishment of an Odour Buffer Area, which creates the opportunity for potential development of land for business purposes in the Kirkbride Road area;

[d] The rapid development of business land in the vicinity of the Airport, and of the emerging shortage of business land available in Auckland, particularly for large-scale business uses such as distribution activities and warehousing in close proximity to major transport infrastructure; and

[e] The desire by the Council to reduce employment related trips out of the Mangere area by increasing employment opportunities within the MGHA.

[1] Reaburn, EIC, at [5.3]

[4] As a consequence of the development pressure, the then Manukau City Council initiated Plan Change 14 (**PC14**) which introduced urban zones – the Airport Activities Zone and the Mangere Gateway Business Zone. To accommodate PC14, the Manukau City Council applied to the then Auckland Regional Council for a change to the Metropolitan Urban Limit (**MUL**). Change 13 to the Auckland Regional Policy Statement was notified to give effect to the MUL change. Both PC14 and Change 13 were notified on 18 October 2007.

[5] Following the Councils' decisions there were a number of appeals to this Court. All but the appeals which are the subject of this hearing have been settled resulting in consent orders. As a consequence, the MUL has been extended out to a line along Oruarangi Road. Thus, the subject land which is to the west of Oruarangi Road is outside the MUL.

[6] The appellants wish to have their land included within the MUL and some of the appellants have sought a change of zoning of their land from the current rural zoning.

[7] In addition to the current rural zoned land of the appellants, the land to the west of Oruarangi Road contains the Otuataua Stonefields Historic Reserve (**the Stonefields or OSHR**). To the west and north, the land is bounded by the Manukau Harbour coastline.

[8] It is accepted by all that the land to the west of Oruarangi Road, as is all the land in the MGHA, is of special significance to Maori and also contains important historical associations to post-European settlement.

[9] Recognising the cultural and historical significance of the area and to protect and preserve the public open space and landscape characteristics of the appellants' land and the neighbouring Stonefields, the former Manukau City Council issued a Notice of Requirement (**NOR**) over the appellants' land on 18 October 2007. The NOR was for "*Otuataua Stonefields Passive Public Open Space and Landscape Protection Purposes*".

[10] The Council released its decision on the NOR on 27 March 2009. The appellants' whose land is subject to the NOR have appealed and seek the removal of their land from the designation and its cancellation.

[11] There are thus three major issues:

[a] The line of the MUL;

[b] The appropriate zoning of the appellants' land; and

[c] The cancellation of the NOR.

[12] It was common ground that there is a close relationship between Change 13, PC14 and the NOR. Thus it was appropriate that they be considered together. Further, there were a number of matters where we heard disputed evidence which relate to all three, such as cultural, historical, landscape, and the planning context. We propose to deal with the general matters first before assessing the merits of the competing planning options.

THE APPELLANTS AND THE SUBJECT LAND

[13] We attach as **Appendix 1** a map produced by Mr Reaburn, planning consultant for the Council, which shows the subject land.

The land belonging to the Ellett Interests

[14] Mr Ellett's family have farmed land owned by the Ellett Interests for approximately 147 years. These interests include:

[a] Mr Ellett himself;

[b] the Ernest Ellett Ryegrass Trust;

[c] Scoria Sales Limited; and

[d] Johnston Trust Quarry.

Parcel 1 – Ernest Ellett Ryegrass Trust

[15] Parcel 1 is a 5.61ha site owned by the Trust. It is relatively flat pasture land bounded by the Manukau Harbour to the west, Parcel 7 (owned by the Mendelssohn Estate) to the east, and Ihumātao Road to the south. To the north it is bounded by the Stonefields. The Elletts originally owned part of the Stonefields which were acquired by the then Manukau City Council in 1999.

[16] The land is zoned *Mangere–Puhinui Rural* and is subject to the NOR. The appellants seek a *Future Development (Ellett Holdings) Zone* or similar, the cancellation of the NOR, and that all the land be included within the MUL.

Parcel 2 – T R Ellett

[17] Parcel 2 is a 30.30ha site owned by Mr Ellett. It is generally rolling pasture land bounded by the Manukau Harbour to the west, and the Ellett land to the southeast. It is zoned *Mangere–Puhinui Rural.* The appellants seek a *Future Development (Ellett Holdings) Zone* or similar, and that all the land be included within the MUL.

Parcel 3 – Scoria Sales Limited & Parcel 4 – Johnston Trust

[18] Parcel 3 is a 24.58ha site owned by Scoria Sales Limited, Mr Ellett being the sole director. Parcel 4 is a 6.59ha site owned by the Trust. Together, these parcels contain an active quarrying operation. Parcel 3 adjoins the Ellett land to the north and extends to the coastal edge to the southwest. Parcel 4 adjoins land owned by the Auckland International Airport to the southeast, which has recently been designated for airport purposes. This land is zoned *Mangere–Puhinui Rural.* The appellants seek to rezone the land to *Future Development (Ellett Holdings) Zone*, or similar, and that all the land be included within the MUL.

Parcel 5 – T R Ellett

[19] Parcel 5 is a 14.2ha site owned by Mr Ellett. It is generally flat pasture land bounded by Ihumātao Road to the north, the quarry to the southwest, and other Ellett land to the northwest. This land is also zoned *Mangere–Puhinui Rural.* The appellants seek to have it rezoned *Future Development (Ellett Holdings) Zone*, or similar, and that it be included within the MUL.

Parcel 6 – T R Ellett

[20] Parcel 6 is a 0.45ha residential site owned by Mr Ellett, containing Mr Ellett's house. It is zoned *Mangere–Puhinui Rural.* The appellant seeks the same relief as the owners of Parcels 2 – 5.

The land belonging to the Mendelssohn Estate

Parcel 7 – E Mendelssohn Estate

[21] Parcel 7 is a 9.06ha site owned by the E C Mendelssohn Estate and has been in the Mendelssohn family for over 50 years. It is relatively flat pasture land bounded by Parcel 1 (owned by the Ellett Rygrass Trust) to the west, Ihumātao Road to the south, and the Stonefields to the north.

[22] The land was originally farmed as a 55 acre dairy block. A large part of the original farm was acquired by the then Manukau City Council in 1999 to form part of the Stonefields. The remaining 9.06ha of the land is subject to the NOR.

[23] The land is zoned *Mangere–Puhunui Rural*, but the Plan reserves a controlled activity subdivision opportunity for the land to be divided into two parcels, without which the subdivision would be non-complying. The subdivision entitlement was provided by Variation 5 as part of the agreement with the Manukau City Council acquiring the balance of the land for the Stonefields.

[24] The appellants seek the cancellation of the NOR. The Estate is not a participant in the Change 13 (MUL) or PC14 (Zoning) proceedings.

The land belonging to Gavin H Wallace

Parcel 8 (including the adjacent parcel) – Gavin H Wallace Limited

[25] Parcel 8 is a 24.2ha site owned by Gavin H Wallace Limited. The Wallace family have had a long association with the land for some 145 years. In 1999 a significant portion of the land was acquired by the then Manukau City Council for the Stonefields. This parcel is generally flat to gently rolling pasture land, bounded to the north by the Stonefields, and to the southeast by Oruarangi Road. This land is zoned *Mangere-Puhunui Rural* and is subject to the NOR.

[26] It will be noted from Appendix 1, that there is an adjacent parcel of land (identified as "Wallace") owned by Gavin H Wallace Limited which is also zoned *Mangere-Puhunui Rural*, but it is not included in the NOR. It is bounded on the east by the Papakainga Zone housing land. It was the intention of the Council to zone this adjacent parcel of land residential, but the proposal was not carried through to the notified version of PC14.

[27] By its appeal, Gavin H Wallace Limited challenged the decisions of the former Manukau City Council to designate its land, and of the former Regional Council to exclude the land from the MUL. At the hearing it was contended, subject to jurisdictional objections, that the appropriate zoning for this land was a Future Development Zone.

Other Parties

Makaurau Marae Maori Trust Board Incorporated (Makaurau)

[28] Makaurau filed two appeals relating to Change 13 (MUL) and PC14. The appeals challenged the decisions of the Auckland Regional Council and the Manukau District Council respectively. Settlement was reached on all matters, with the exception of the Western Gateway Area.

[29] Before us, Makaurau opposed any urban development on the subject land and any extension of the MUL to include the subject land.

Te Kawerau Iwi Tribal Authority Incorporated (Kawerau)

[30] Kawerau were a Section 274 party to the appeals relating to Change 13 and PC14. Before us, they also opposed any urban development on the subject land and any extension of the MUL to include the subject land.

The New Zealand Transport Agency (NZTA)

[31] The NZTA is a Section 274 party with respect to two of the appeals filed against Change 13 and PC14.

[32] The NZTA's principal concern was the potential traffic and transportation effects of the proposed re-zoning of land as Future Development Zone.

GENERAL MATTERS

[33] We now propose to deal with the general matters that pertain to all three planning instruments.

Statutory Framework

[34] Mr Reaburn, Mr Putt and Mr Jarvis (planning witnesses) analysed the rezoning of the land in terms of what is referred to as the ***Long Bay*** tests[2] and also as these are set out by the Court in ***Clevedon Cares***[3] for the post 2005 Amendment to the Resource Management Act 1991. Those cases set out fully the now well settled framework which begins with Sections 72 – 76 and incorporates, by reference, Sections 31 and 32.

[35] Those cases related only to district plan changes. In this case we are also considering a change to the Regional Policy Statement and hence Section 30 (Regional Functions) and Sections 59 – 62 (relating to Regional Policy Statements) are also relevant to the shift in the MUL.

[36] In terms of the NOR, Section 171(1) of the Act sets out a list of matters to have regard to when considering the effects on the environment of allowing the requirement.

[37] Finally, recognising the structure of the Act, Part 2 matters provide overarching directives to be considered in terms of all of the proposed planning provisions.

[38] We propose to discuss the relevant statutory provisions in more detail, where appropriate, when we deal with each of the proposed planning instruments.

Planning Documents

[39] In the Planners' Joint Witness Statement (JWS) it was agreed that the Auckland Regional Policy Statement (***ARPS***) and the Auckland Council District Plan (Manukau Section) (***District Plan***) contained the primary assessment framework for addressing the issues. The relevant provisions were included in the Agreed Bundle of

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[2] ***Long Bay Okura Great Parks Society Inc. v North Shore City Council***, A078/2008
[3] ***Clevedon Cares Incorporated & Ors v Manukau City Council*** [2010] NZEnvC211

documents prepared by the parties. Towards the end of the hearing Mr Reaburn provided an updated version of relevant provisions, particularly the recently operative version of Change 6 to the ARPS, as agreed in the Planners JWS.

[40] Reference was also made to provisions in the New Zealand Coastal Policy Statement (**NZCPS**) in relation to section 6(a) of the RMA and the natural character of the coastal environment, and to the Auckland Regional Plan: Coastal.

Auckland Regional Policy Statement (ARPS)

[41] The updated operative provisions provided to the Court were dated 21 March 2012. The Chapters referred to included:

[a] *Chapter 2 – Regional Overview and Strategic Direction, and in particular Sections 2.2 (The Setting – Auckland Today); 2.3 (The Auckland Regional Growth Strategy); and 2.6 (The Strategic Direction)*
Chapter 2 of the ARPS states that the function of that chapter is to integrate the management of the various components and specifically address growth and development issues. The subsequent chapters deal with the effects of growth and development on the natural and physical resources. These other chapters provide for the management of specific resources.

Subsequent chapters highlighted in this case were:

[b] *Chapter 3 – Matters of Significance to Iwi*
A suite of directions to give regional effect to the strong directions relating to Maori matters in Part 2 of the Act.

[c] *Chapter 6 – Heritage*
Directions aimed at protecting and providing for heritage matters as required by Part 2 of the Act.

[d] *Chapter 7 – Coastal Environment*
Directions relating to the preservation of the natural character of the coastal environment and protection from inappropriate development, and public access, as required by Part 2 of the Act.

Auckland Council District Plan (Manukau Operative Section)

[42] Relevant Chapters included in the Planners' JWS included:

[a] Chapter 2 – the City's Resources

[b] Chapter 3A – Tangata Whenua

[c] Chapter 6 – Heritage

[d] Chapter 16 – Future Development Areas

[e] Chapter 17.3 – Mangere-Puhinui Rural Area

[f] Chapter 17.13 – Mangere Gateway Heritage Area

[43] The District Plan provisions give effect to the NZCPS and the ARPS. Chapters 3A and 6 particularly recognise the significance to be accorded to Maori matters including the relationship of Tangata Whenua and their taonga, culture and traditions. The wide range of matters encompassed in the Act's definition of historic heritage is also recognised in Chapter 6. Many of these district-wide provisions are given local meaning in Chapter 17.13 – Mangere Gateway Heritage Area which contains extensive provisions detailing the significance of the area's heritage, public open space, social, cultural and natural resources and by reference to the comprehensive list of resources and features included in 17.13.1.1. Chapter 17.3 contains the current rural zone provisions applying to the subject land and Chapter 16 details the manner in which this District Plan identifies areas for future development and the structure planning process to be undertaken prior to specific zonings and development.

LANDSCAPE, CULTURE AND HERITAGE

[44] Two landscape architects gave evidence – Ms Absolum, called by the Council, and Mr Scott, called by the landowner appellants. As directed, the landscape architects caucused on 24 November 2011. As a consequence of the caucusing, they produced a joint landscape architect witness statement which set out the agreed key facts and the areas where agreement was reached.

Agreement Key Facts – Cultural, Heritage, Landscape and Context

[45] The following facts were agreed by the landscape architects:[4]

> **2 AGREED KEY FACTS**
>
> ...
>
> **Characteristics of the subject land**
>
> The majority of the land is within the Coastal Environment.
>
> The majority of the land has a gently rolling, subtle landform, with remnant volcanic cones within the OSHR and a working quarry on parcels 3 and 4, shown on Figure 1.
>
> The subject land is currently used for farming purposes, apart from the quarry, with public access provided for on the OSHR.
>
> The landscape character is open, rural, gently rolling with few buildings, extensive dry stone walling, scattered specimen trees, copses and shelterbelts. There are no permanent water courses on the subject land.
>
> The long history of occupation and use of the subject land, by both Maori and European settlers has left numerous tangible heritage features across the subject land.
>
> The history of occupation by Maori and European settlers has also left intangible associations and meanings ascribed to the land or parts of it. These are described in the evidence of other expert witnesses.
>
> **Context of the subject land**
>
> The land lies between the Manukau Harbour to the north-west, west and south-west, the Makaurau Marae and Papakainga to the north-east and recently rezoned and designated land which will, in due course, be developed for business development to the east and airport expansion to the south-east.
>
> The proposed Mangere Gateway Heritage Route passes along the boundary of the subject land and accesses the OSHR.
>
> Te Araroa Walkway passes through the subject land, utilising, the recently reinstated coastal edge of the OSHR.

[46] The cultural and heritage characteristics, although largely agreed, occupied a considerable amount of the evidence and deserves some comment. Mr Murdoch, a historian called by the Council, described how the wider Mangere-Puhunui area has rich human historical and cultural associations that have developed over eight centuries.

[47] He said:[5]

[4] Joint Landscape Architects Witness Statement
[5] Murdoch, EIC, at [3.1]

> 3.1 In my opinion the undeveloped Ihumātao portion of [the area] is collectively a cohesive cultural heritage landscape of regional significance ...

[48] Mr Murdoch then set out in some detail an historic narrative that identified both Maori and European associations with the land.

[49] We heard evidence from an archaeologist, Dr Clough. He described in detail the archaeological values of the area and concluded:[6]

> 9.1 In reviewing the archaeology and history of the general "Mangere Gateway Heritage Area", it is evident that this is a rich historic heritage landscape interweaving numerous strands of history from the earliest settlement of New Zealand, to the earliest European contact and beyond, incorporating evidence for pre-European subsistence and cultivation, the response of Maori to the introduction of European crops, animals and farming practices, for the activities of missionaries, and for those of early European farmers and their descendants still living on the land today.

[50] The Maori dimension is of particular importance. There was no dispute that the subject lands are part of a peninsula which has significance to Maori. We heard a considerable quantity of evidence telling us of the Maori perspective. A summary of that evidence is attached as **Appendix 2**.[7]

[51] As will be seen from **Appendix 2**, a number of Maori witnesses gave evidence at a special sitting of the Court on the Makaurau Marae. This included a statement of evidence by Te Warena Taua, chairman of Te Kauwerau Iwi Tribal Authority Incorporated. He outlined the Maori associations with the subject land. Importantly, Mr Taua identified a number of waahi tapu sites, some of which were situated on, or partly on, the subject land. These sites included:[8]

- The sacred mountain, Maungataketake, also known as Te Ihu a Mataoho;
- Ancient and contemporary (20th century) burials;
- Ancient and more recent (19th century) pa sites;
- Battle sites;
- Subterranean caverns that contain ancestral taonga –

...

[6] Clough, EIC, at [9.1]
[7] Appendix 2, headed "Summary of Evidence Relating to Maori Issues"
[8] Taua, EIC, at [31]

[52] He then said:[9]

> 33 Furthermore, given that the subject site is part of a wider network of sites of significance, and that it contains a number of interrelated waahi tapu, from the perspective of tangata whenua the subject area is considered waahi tapu in its entirety.

[53] We acknowledge Maori have strong associations to the land subject to these appeals and that there are particular sites of special significance. However, it is also clear from the evidence that Maori lived, worked, fought and played there. It was at all times a working and lived in landscape which seems incompatible with the whole area being of waahi tapu status.

[54] Mr Taua was cross-examined on this at the Marae. In our view his answers were general and not specific. He tended to exaggerate at times and habitually refused to make even the slightest concession. Even if the whole area is waahi tapu as he claimed, it is still a working and lived in landscape and the waahi tapu status needs to be considered in this context.

[55] Ms Absolum considered that the Ihumātao Peninsula, including the subject land, the Stonefields and the Papakainga constitutes a Heritage Landscape that is at least of regional and possibly national significance. She said:[10]

> 5.21 In my opinion the Ihumātao Peninsula, including the land subject to these appeals, the OSHR and Papakainga constitutes a heritage landscape that is of at least regional and possibly national significance. I base this opinion on the following evidence:
>
> - Both the archaeological and historical record indicate that the volcanic soils of the Ihumātao Peninsula were intensively cultivated over the generations, and that the resources of the adjoining marine environment provided a varied and bountiful harvest.
>
> - The only areas that were not cultivated were the defensive areas of the cone pa, the settlements themselves, and sacred burial areas, several of which lie within the NOR land and on the land surrounding Maungataketake.
>
> - The evidence of both Mr Murdoch and Dr Clough that the Wesleyan Mission Station, established in 1847, is significant as one of the few archaeologically intact mission sites on the Tamaki Isthmus that retains its rural context and farmstead.

[9] Taua, EIC, at [33]
[10] Absolum, EIC, at [5.21]

- Ihumātao retains a special place in the history of the Tainui people because of its direct association with Te Wherowhero and the foundation of the Kingitanga (Maori King Movement).

- The Ellett, Montgomerie (later Mendelssohn), Rennie and Wallace properties have a historical coherence in that they were all developed and farmed in a similar manner for well over a century, and remained in the ownership of the same families for most of this time.

- The large number of scheduled and listed heritage sites and items found in the area, and the range of early vernacular farm buildings, including barns and cowsheds, as well as an unusually large number of former windmill sites and cisterns.

- The high potential for archaeological remains surviving under the pasture throughout the subject land, particularly on the Ellett block (Parcels 2, 5 and 6).

- The archaeological, architectural, cultural, historic, scientific and technological values associated with the natural and physical resources of Ihumātao that relate to both the Maori and the European occupation and use of the land.

- The historic farmscape which, as well as the scheduled buildings, also contain the extensive 19th century dry stone wall field boundaries and a number of historic trees associated with existing and former house sites.

- The extensive regionally significant coastal edge which retains a high degree of natural character.

[56] It would appear from the Joint Witness Statement that there was disagreement between the landscape architects as to the extent to which the heritage, cultural and archaeological values identified by the expert witnesses, contribute to the subject land being identified as a heritage landscape. However, that apparent difference evaporated at the hearing.

[57] First, in his evidence Mr Scott acknowledged the basis of Ms Absolum's opinion.[11] He said:[12]

> 36 To this extent I support the respondent's evidence that the landscape (subject to these appeals) is dominated by its historical associations and its heritage features.

[11] Scott, EIC, at [35]
[12] Scott, EIC, at [36]

[58] He went even further in his evidence as is evidenced from this exchange from the Court:[13]

QUESTIONS FROM THE COURT:

Q. Mr Scott, listening to the cross-examination from Mr Allan and from Mr Enright, I got the clear impression that as far as you are concerned as an expert witness you are in agreement with the heritage and cultural values that have been, and archaeological values, that other witnesses had averred to?

A. Yes.

Q. And in fact you don't profess to have any of those areas of expertise?

A. No.

Q. And to the extent that there are cultural and archaeological and historical nodes in the subject land, you accept that to that extent it is a heritage landscape?

A. Yes.

Q. The next question is of course whether it is a heritage landscape which is elevated to a s 6 status, are you able to give an opinion on that?

A. I think it does have a s 6 status –

Q. Yes, thank you.

A. - yes. Well I'm sure it does, yes.

Q. You are therefore in complete agreement with Ms Absolum?

A. Yes.

Q. And you defer to Dr Clough and Mr Murdoch?

A. Yes.

Q. The difference between you and the other witnesses that I have mentioned is that it being a heritage landscape they say it should be conserved –

A. That's correct.

Q. - and conservation, total conservation should apply>

A. That's correct.

Q. Whereas you say no, some development should be allowed providing adequate protection is made for the heritage, historical, and archaeological values?

A. That is correct.

Q. So that's the difference between the two of you?

A. And it's more than protection. It's actually enhancement.

[13] Transcript, Volume 2, at pages 308 - 309

[59] Thus, there is no dispute as to the importance of the historical, cultural or heritage associations in the landscape. In addition to Ms Absolum, Mr Murdoch and Dr Clough sought that the Court determine the land, the subject of the appeals, to be part of a *Cultural Heritage Landscape*. And indeed, Mr Scott appeared to acquiesce to such a suggestion.

[60] The construct *Cultural Heritage Landscape* is of relatively recent origin. Its use as a concept in landscape analysis stems from a trial study conducted in Bannockburn, Central Otago, commonly referred to as the *Bannockburn Heritage Landscape Study* published in a monograph in September 2004.[14]

[61] The primary purpose of the Bannockburn Study was to trial a newly developed methodology for investigating heritage in a landscape scale. The monograph described its content:

> ***Identification.*** The study offers an understanding of the landscape both spatially and as it has evolved over time through human interaction. It identifies relationships between physical features in the land, both where these evolved simultaneously and where they evolved sequentially. It also provides information about the relationships between people and the landscape, both in the past and today. It attempts to identify key heritage features, stories and traditions in the Bannockburn landscape.

[62] It defines heritage landscape as:

> A **heritage landscape** is a landscape, or network of sites, which has heritage significance to communities, tangata whenua, and/or the nation.

[63] The authors of the monograph entered into a complex and detailed interdisciplinary methodology of spatial analysis, using connectivities between super-imposed layers of history.

[64] This division of the Court, although differently constituted, has held that it is open to us to find, on sufficiently probative evidence, that a landscape, or part of it, is a heritage landscape under Section 6(f) of the Act.[15] However, it was stressed that decision-makers should exercise a degree of caution before determining such a landscape to be a heritage or cultural landscape and to recognise the need to avoid

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[14] Janet Stephenson, Heather Beauchop, and Peter Petchey, *Bannockburn Heritage Landscape Study*, Wellington, Department of Conservation, Te Papa Atawhai, 2004

[15] See ***Wairakei Valley Preservation Society Incorporated & Ors v Waitaki District Council & Otago Regional Council***, C58/09, at [224] – [231], and ***Clevedon Cares Incorporated v Manukau District Council***, NZEnvC211, 2010

double counting of Maori issues. Maori issues are specifically provided for in Sections 6(e), 7(a) and 8 of the Act.

[65] Another division of the Court, led by Judge Jackson, signalled the following note of caution:[16]

> [208] The phrase 'heritage landscape' is often used when speaking of the surroundings of historic heritage ... However, we consider this usage may be dangerous under the RMA where the word 'landscape' is used only in Section 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.

[66] On reflection we have difficulty in endorsing the concept as part of the RMA process for a number of reasons, including:

[a] *Heritage Landscape* is not a concept referred to in the Act;

[b] Outstanding landscapes and features are protected from inappropriate subdivision use and development by Section 6(b) of the Act;

[c] Maori values are recognised and protected by Sections 6(e), 7(a) and 8 of the Act;

[d] Historic heritage is protected from inappropriate subdivision use and development by Section 6(f) of the Act; and

[e] There are also other important matters provided for in the Act that would apply, such as matters relating to amenity, indigenous vegetation, natural character and coastal environment, that may at times be relevant to a given situation.

[67] To introduce a new concept not recognised explicitly by the statute would in our view add to the already complex web of the Act and make matters more confusing.

[68] Suffice it to say therefore, that in this case there is no dispute as to the importance of the historical, cultural or heritage associations in the landscape. There

[16] ***Maniatoto Environmental Society Incorporated v Central Otago District Council***, C103/09, at [208]

is no dispute about the importance of the coastal edge. There is no dispute as to the open rural character and amenity.

[69] There is no dispute as to the context of the subject land. It lies between the Manukau Harbour to the northwest, west and southwest; the Makaurau Marae and Papakainga to the northeast; and recently rezoned and designated land which will, in due course, be developed for business development to the east and airport expansion to the southeast.

Areas of Disagreement

[70] What is disputed is the extent to which the acknowledged landscape, cultural and heritage values should prevent any prospect of the land being developed for urban purposes.

[71] On the one hand, the Council, supported by the Maori parties, with its suite of techniques, seek to protect landscape, heritage and amenity values by way of an overall development exclusion approach.[17] This suite of techniques will fundamentally lock up the land.

[72] On the other hand, Mr Scott identifies an opportunity to protect the sensitive characteristics of the subject land while enabling careful development through a long-term planning approach. He said:[18]

> 25 While, in my opinion, the subject land does comprise a relatively sensitive coastal and rural character, incorporating clear legibility of significant historic heritage and cultural values, therein also lies the opportunity. The opportunity, in my opinion, is that this is an appropriate time to reconsider this regressive landscape planning and management option in favour of a positive, creative and innovative approach to the long term planning and management of the subject land.

[73] Mr Scott pointed out that the current zoning enables some unacceptable development, particularly in relation to land coverage opportunities by built structures (e.g. greenhouses) given the heritage and landscape characteristics.[19] He also made the point that the subject land, in a landscape sense, is very much located within an urban context.[20] In addition to the obvious infrastructural focus of the Auckland

[17] Scott, EIC, at [24]
[18] Ibid, at [25]
[19] Ibid, at [24]
[20] Ibid, at [27]

Airport and its national importance as the nation's primary port, is the auxiliary business development provided for by PC14 and earlier District Plan zone changes on the eastern side of Oruarangi Road.[21] He concluded:[22]

> 30 I also recognise and support "fresh voices" communicating a new relevance to the current perception of the nation's landscapes, and how landscape is an important element to us all as individuals and as diverse and interacting different cultural and social groups and therefore as a society. **In this sense, I have no debate with much of the respondent's heritage and archaeological assessments, including many of the perceptions and assertions underlying the assessment of the landscape and visual issues. However, this does not require the land to be locked away.**
>
> *[our emphasis]*

[74] Mr Scott then undertook a detailed land use and landscape planning, design and management strategy which he put forward as "*a realistic development scenario*" [23] for the subject land. This strategy recognised the urban, coastal and open space contextual location; the biophysical, visual, cultural and heritage sensitivity of the land; and the effects of development. He concluded:[24]

> 119 ... This landscape is significant. The opportunity for the collective land holdings "sandwiched" between the two critical land use entities – the urban/infrastructural (airport and associated service industry) and the historic/heritage landscape of the OSHR – is yet to be imagined. Our view of the world can be too simple and so reductionist that we often avoid the exploration of loftier options. This is the interface of significant open space, heritage, private rural holdings and significant infrastructure.
>
> 120 In my opinion, to pause and preserve the NOR land as public open space does not do justice to the outstanding future use, development and management opportunity for the area. I support the requests for new zones and inclusion within the MUL as set out in the appellant's relief.

[75] Ms Absolum, Mr Murdoch and Dr Clough all supported the suite of techniques put forward by the Council to protect the subject land from development. Ms Absolum considered the protection of the land would:

> [a] be a perfect response to the relationship of the proposed heritage route and the Stonefields;[25]

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[21] Ibid, at [28]
[22] Ibid, at [30]
[23] Ibid, at [117]
[24] Ibid, at [119] – [120]
[25] Absolum, EIC, at [6.7]

[b] would ensure the retention of clear visual connections for the residents and visitors;[26]

[c] would enhance the interface between the business development zone to the east of Oruarangi Road and the Stonefields;[27] and

[d] would provide an open space frontage to the Stonefields which would ensure the open, expansive and strongly rural character of the Stonefields and enhance the relationship between the Stonefields and important heritage features.[28]

[76] In summary, Ms Absolum said:[29]

> 6.7 In summary, the NOR land forms the foreground of public views to the OSHR from the southern part of Oruarangi Road and from Ihumatao Road. As such, it complements the open pastoral character of the OSHR and in fact, carries many of the same landscape features, such as mature trees, stone boundary walls and grass paddocks. In order to protect the integrity of the OSHR it is appropriate to keep this foreground land similarly open and rural in character. In other words, the introduction of any sort of development on to the land, other than that directly related to the appreciation of the important cultural heritage characteristics of the OSHR and surrounding area, would be inappropriate.

[77] In her rebuttal evidence, Ms Absolum criticised the long-term planning approach of Mr Scott. She was of the view that despite Mr Scott's comprehensive descriptive material, at no point in his evidence does he demonstrate a causal link between his description of the subject land and its context and the Preliminary Development Opportunities exhibited to his evidence.[30]

[78] Ms Absolum concluded:[31]

> 2.20 In summary, by my reading of Mr Scott's evidence, he has concentrated his attention so strongly on the degree to which the landscape of the nine parcels of land has changed since human occupation of the area began, that he has lost sight of heritage, rural, open space and amenity values inherent in the landscape of today. While we both acknowledge the inevitable changes about to occur in the landscape context of the subject land, as a result of settled parts

[26] Ibid, at [6.3]
[27] Ibid, at [6.6]
[28] Ibid, at [6.6]
[29] Ibid, at [6.7]
[30] Absolum, Rebuttal Evidence, at [2.3]
[31] Ibid, at [2.20] – [2.21]

> of Plan Change 14 and the Airport expansion programme, Mr Scott has seen this as sufficient reason to propose extending intensive urban development across the appeal area.
>
> 2.21 I remain fundamentally opposed to this approach, because of the reasons set out in my evidence in chief.

[79] We do not agree with Ms Absolum's criticism that Mr Scott has lost sight of heritage, rural, open space and amenity values inherent in the landscape today. Those values do not necessarily mean that the landscape has to be protected from all urban type development. The Bannockburn Report, after finding the area was an important heritage landscape, then asked what the implications of such findings should be. Referring to the Conservation Act and ICOMOS, the authors observed:[32]

> The practice of conservation ... is usually applied to historic places which are limited in extent – most often a building or cluster of buildings, but occasionally a pa site or other archaeological feature. It has rarely, from our knowledge, been applied at a landscape scale except possibly where the entire area is managed for conservation purposes (e.g. Bendigo).
>
> ... We consider that it is unrealistic to expect the entire [Bannockburn] area to be 'conserved' (in the preservation sense), because it is a living landscape. People have always used the land to make a living and to live, and must be able to continue to do this. It is not possible to regard it simply as a heritage artefact – it is simultaneously a place in which people have social, economic, and cultural stakes. While there are particular features, nodes, networks, and spaces that may require a conservation approach, we believe that this is inappropriate for a whole landscape.

[80] That approach reflects the approach taken by Mr Scott. We consider that sympathetic development which protects specific heritage, cultural and historic values, and which does not detract from the Stonefields, could be undertaken under the right planning regime. Such a regime needs to ensure that the development would have to be such that the area remains an appropriate buffer to the Stonefields from the business development proposed to the east of Oruarangi Road. This would mean providing for areas of open space and protecting the coastal environment. Such a regime would reflect the fact that this is a living landscape.

Part 2 Assessment

[81] We need to be satisfied that such a finding is in accordance with the single purpose of the Act – sustainable management. This term is defined in Section 5 of the Act and that definition is informed by the remaining sections in Part 2.

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[32] Janet Stephenson, Heather Beauchop, and Peter Petchey, *Bannockburn Heritage Landscape Study*, Wellington, Department of Conservation, Te Papa Atawhai, 2004, at pages 100 - 101

[82] Part 2 of the Act involves an overall broad judgment of whether or not some form of constrained development promotes the sustainable management of natural and physical resources.

[83] In our view the protection afforded under Section 6 of the Act has been overstated by the Council witnesses. The protection is from *inappropriate subdivision, use, and development.*

[84] With regard to Section 6(a) of the Act, the protection is for the natural character of the coastal environment. A carefully and constrained development could be undertaken, that is sensitive to and protects the character of the coastal environment.

[85] The protection of Maori relationships under Section 6(e) of the Act is already largely provided for on the Stonefields Reserve. The evidence establishes that by far the majority of identified archaeological and Maori spiritual sites are located there. Those that are located on the subject land are more widely dispersed, and could be catered for by sensitive development. In fact, by cautious and thoughtful development, their status and historical association could be enhanced.

[86] Identified heritage values under Section 6(f) are similarly, in part, protected by the Stonefields Reserve. The heritage characteristics of the subject land could also be protected, provided the land is developed in a manner that is sympathetic to relevant heritage aspects.

[87] Amenity and landscape values could equally be accommodated by appropriate development. We discuss the parameters of such development later in this decision. We are satisfied that, subject to the constraints imposed by those parameters, and the need for them to be satisfied in any Plan Change or resource consent application, that future urban development could satisfy relevant directions contained in Sections 6, 7 and 8 of the Act.

[88] This would, unlike a development exclusion approach, enable the owners of the land to also provide their social and economic well-being in accordance with Section 5 of the Act. This would also enable the value of the land to reflect its potential for appropriate development.

Overall finding on Landscape, Culture and Heritage

[89] We therefore find that a degree of sensitive urban development, appropriately constrained, would better give effect to the single purpose of the Act, than a total restraint on future development. We discuss the appropriate constraints later in this decision.

SHOULD THE MUL BE EXTENDED?

[90] The ARPS, as amended by Change 6[33] provides for the containment of urban activities within the MUL. While *Urban Activities* and *Rural Activities* are defined in the Policy Statement, the case law[34] reflects a continuing debate as to what is an *Urban Activity* or a *Rural Activity*, and therefore allowed outside the MUL.

[91] The definition of MUL in the ARPS is:

> ... the boundary between the rural area and the urban area. The urban area includes both the existing built-up area and those areas committed for future urban expansion in conformity with the objectives and policies expressed in the Regional Development chapter of the RPS. The metropolitan urban limits are delineated on the Map Series 1, Sheets 1 – 20. Also see definitions of Urban area and Rural lands/area.

[92] The Strategic Policy of the ARPS provides a framework for limited extension to the MUL. Policies 2.6.2 provide the policy direction which is based upon not compromising the strategic direction of containment and intensification, supporting the integration of land use and transport, and avoiding adverse effects on the environment.[35]

[93] In accordance with *Methods 2.6.3 – Urban Containment*, the then Manukau City Council made a request to the Auckland Regional Council to change the ARPS which included, relevantly for these proceedings, extending the MUL northwards to include the Airport area and land to the north. The request was considered by the Regional Council on 27 August 2007. The Council agreed to accept the request in

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[33] Change 6 was made operative by the Council 21 March 2012

[34] See ***Roman Catholic Diocese of Auckland v Franklin District Council***, W61/04, 29 July 2004; ***Runciman Rural Protection Society Inc v Franklin District Council***, [2006] NZRMA 278; ***Roman Catholic Diocese of Auckland v Franklin District Council***, W18/07, 22 March 2007; ***Auckland Regional Council v Roman Catholic Diocese of Auckland***, [2008] NZRMA 409

[35] ARPS at page 2 – 32; *Reasons 2.6.4 – Urban Containment*

part, and Change 13 was notified on 18 October 2007 as a private change. The period for further submissions closed on 14 March 2008.

[94] A number of submissions sought that the Bianconi land (on the southeast side of Oruarangi Road) be included within the MUL, but the Council in its decision[36] decided not to include the land for the following reasons:[37]

> 4.26 We consider that the inclusion of this land in the MUL and its subsequent development will have adverse effects on the heritage resources of the area (including the Otuataua Stonefields) and will not appropriately provide for the relationship between the Makaurau Marae and its peoples relationship with their ancestral lands. We consider that the Makaurau Marae is a rare if not unique resource in the Auckland Region as its relationship with its ancestral land is largely intact. The surrounding land has not been significantly developed and we recognise that this relationship is under pressure from development in the airport area. We heard considerable evidence from the Marae about the importance of the Marae peoples' relationship with the area and its landscape that was not challenged in our view.

[95] Appeals were lodged by the Bianconi submitters, and consent orders were made, reflecting negotiated agreements, resulting in the land being brought within the MUL. The result is that the MUL line now follows Oruarangi Road. The land is thus identified for urban purposes and is now zoned *Mangere Gateway Business Zone*. This together with the expansion of the *Airport Zone*, the second runway and associated service industry development, now effectively creates a hard edge to the current open space patterns of the subject land – save for a small and, in our view, ineffective buffer area within the Bianconi land.[38]

[96] All of the land northwest of Oruarangi Road falls outside the MUL. This constitutes the land, the subject of these appeals, a small piece of land purchased by the Council to be used as a reserve contiguous to the Stonefields and the Stonefields Reserve itself.

[97] Of the appellants, the Ellett Interests and Gavin H Wallace submitted on Change 13 seeking that their land be included within the MUL. The Council in its decision decided not to include the land, for the following reasons:[39]

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[36] See Decision Report, 17 November 2009 at [4.23] – [4.29]
[37] At [4.26]
[38] See Scott EIC, at [7]
[39] At [4.36] - [4.39]

4.36 We are satisfied on the basis of the evidence that this land should remain outside of the MUL. We consider that urban development on this land has the potential to have adverse effects on the landscape and heritage values in the area.

4.37 We also consider that the inclusion of this land will have adverse effects on the heritage resources of the area and specifically on the relationship between the Makaurau Marae and its relationship (and their peoples' relationship) with their ancestral lands. We consider that the Makaurau Marae is a unique resource in the Auckland Region in that its relationship with its ancestral land is largely intact and we recognise that this relationship is under pressure from development in the Airport area. We heard considerable evidence from the Marae about this relationship that was not challenged in our view.

4.38 We also consider that the landscape values associated with the coastal edge in this area together with the location and relationship of the Otuataua Stonefields are such that inclusion of the land within the MUL is not warranted.

4.39 We are also satisfied that we were not presented with any convincing evidence concerning the need for this land to be included within the MUL and note that a portion of this land is used as a quarry, the consent for which has some time yet to run. This activity is not compatible with urban development in our view.

[98] Hence, the appeals to this Court.

[99] We note that the Council in its decision, assessed Change 13 against *Methods 2.6.3* of the ARPS, and the relevant comprehensive provisions of the ARPS. Importantly, it found:

[a] The Airport is regionally significant infrastructure;[40]

[b] Because of the synergistic nature of modern airports and the related need for a broader range of activities in the Airport area, it is appropriate that the land within the existing Airport zonings and designations should be within the MUL;[41]

[c] There is a recognised shortage of business land in Auckland, especially for activities that require large sized sites;[42]

[d] The Airport is an appropriate location for such activities;[43]

[40] At [4.2]
[41] At [4.2]
[42] At [4.3]

[e] Some expansion of the MUL is generally consistent with the criteria set out in the ARPS and Change 13;[44] and

[f] It is not appropriate to extend the MUL into the area south of the Stonefields (the Bianconi and appellant's land), as to do so would have the potential to have significant adverse effects on the Marae.[45]

[100] It is the findings from the Council's decision that relate to the subject land that form the basis of the appeals. Clearly, the Council's panel of Commissioners found that urban development on the land has the potential to have adverse effects on:

[a] Landscape and heritage values;

[b] The relationship of Maori with their ancestral lands;

[c] The landscape values of the coastal edges; and

[d] The Stonefields.

[101] It is not surprising, that before us, by far the bulk of the evidence was directed at the Maori values, heritage and landscape issues and whether a development exclusion approach should be adopted, or whether the subject land should be zoned to allow for some development while protecting the sensitivities of the landscape.

Current Zoning and Usage

[102] The land is currently zoned Mangere – Puhunui Rural. Apart from the quarry operation, the land is largely used for grazing. We are satisfied from the evidence[46] that the size of the holdings are such that the current use is far from economic.

[103] Mr Hollis, a farm management consultant and registered valuer, carried out an assessment of other land use options, including:

[a] Pastoral farming;

[43] At [4.3]
[44] At [4.5]
[45] At [4.7] – [4.10]
[46] See T R Ellett, EIC; R G Hollis, EIC; J Blackwell, EIC

[b] Dairy support;

[c] Arable;

[d] Intensive food production; and

[e] Sheep farming.

[104] We summarise his findings:

[a] Farming in such close proximity to urban development and the International Airport has significant limitations and liabilities;

[b] The scale of the activity also makes farming uneconomic;

[c] The obstacles to farming are not only financial, with high rates relative to marginal returns, but also a growing environment somewhat hostile to normal farming activities;

[d] There is no possible return on capital for any farming enterprise.

[105] He concluded:[47]

> The areas being considered are already isolated, almost trapped within an environment of urban development on one side, the harbour and Otuataua Stonefields on the other, each with their own constraints to good farming. This is not conducive to the land being utilised economically for primary production.
>
> It is my conclusion that the subject farms are uneconomic with no viability in the foreseeable future. At best their future is hobby farming only.

[106] While Mr Hollis was cross-examined, there was really no dent made on his findings, which were effectively incontestable. Further, if, as is the most feasible, some form of intensive farming was undertaken, this would give rise to large buildings, such as glasshouses, which would not ensure that an open space character would be retained on this land.

[107] We conclude that the farms are uneconomic with no viability in the foreseeable future. Clearly, with the advance north and west of the Airport related

[47] Hollis, EIC, at page 17

land to provide industrial and commercial support to the Airport, this pocket of existing rural land has become sandwiched between that expansion and the Stonefields and the coast. It is therefore an anomaly.

[108] We are satisfied on the evidence, that to keep this relatively small piece of land outside the MUL would affect its value considerably, to the detriment of the owners.

Protectionism v Sensitive Development

[109] We have already discussed this debate in some detail where we found that some form of urban development, sensitive to the special landscape characteristics of the land, could be undertaken. We discuss the bounds of such development in the next part of this decision.

[110] Suffice it to say, we found that the witnesses for the Council and Maori appellants were too narrowly and intensively focussed on the subject land's heritage, cultural, archaeological and landscape values. Other potential land use scenarios were not adequately analysed. In our view, the evidence of the Council and the Maori appellants has underplayed the scale of the Airport and commercial development in contrast to, what they considered to be the main determinant, the landscape and heritage matters.

[111] We agree with Mr Scott,[48] that the heritage route will be the future connection that opens this *cultural treasure* to public attention. Such an opportunity could be extended to accommodate a range of appropriate high quality development opportunities set within an open space framework that identifies and respects the heritage features. As we make clear in the next part of this decision, such opportunities need to be constrained by appropriate controls. We consider, keeping the land outside the MUL would be too constraining in view of the continuous debate as to what is, or is not, an *urban activity*.

Is the current MUL line defensible?

[112] Again, we agree with Mr Scott, that the MUL in its current location, creates an anomaly in landscape management and land use terms.[49] The MUL does not relate to physical constraints in the landscape, such as a coastal edge, mountain range or

[48] Scott, EIC, at [22]
[49] Ibid, EIC at [12]

prominent ridge. Its inherent instability is exacerbated by the difference in property value that is created by allowing development on one side of the line and not on the other. If the property values become significant, those outside the line inevitably strive to be included.

[113] We agree that the close proximity of the land to the nationally significant infrastructure of the Airport and other urban activities will further exacerbate the unstable nature of the MUL in this landscape.

[114] The most defensible line for the MUL in this area is the coastal edge. The Stonefields would be protected by its reserve designation. The landscape and heritage characteristics of the subject land could be protected by an appropriate zoning of the land. However, because of the jurisdictional difficulties raised by the Council,[50] we are limited in the scope of these appeals to extending the MUL to include the Ellett land and the Wallace land, unless we invoke Section 293 of the Act. We conclude that the MUL line should be extended to include all of the subject land, which also includes the Mendelssohn land for which a direction under Section 293 will be necessary.

Should a shift in the MUL be restricted without appropriate zoning in place?

[115] In her opening submissions, Ms Dickey, counsel for the Council, said:

> ... a shift in the MUL should ... be restricted where there is no clear evidence-based zoning proposed to accompany it.

[116] In reply, counsel for the Wallace interests quoted the following passage from an earlier decision of this division of the Court in ***Clevedon Cares***:[51]

> [96] We are satisfied, that looking at the ARPS as a whole, the clear direction is that new urban development outside of the MUL ... requires a two-fold procedure. A district plan change preceded or paralleled by a change to the ARPS which, if approved, would ... shift the MUL ... This two-fold procedure would reflect the integrated management approach envisaged by the ARPS.

[117] We think the position is as stated in that quote. There is no fundamental reason why a shift in the MUL should not precede a change of zoning. Nor is that

[50] The Ellett and Wallace appeals only sought the MUL to be extended to include their land. The land owned by the Council and zoned MPRZ (shown as Parcel 9 on the plan at Appendix 1 to this decision) is not part of the subject land.
[51] [2010] NZEnvC211 at [96]

approach unprecedented, with the Long Bay area having been brought within the MUL some years before the specific zonings for its development were devised.

[118] We agree with Mr Casey QC, that there are two main reasons why in this case it is appropriate that the MUL shift precede, rather than parallel, the zone change, namely:

[a] While the land is proposed to be brought within the MUL now, it is not proposed to be released for development immediately. It would be premature to write into the District Plan a highly specific structure plan when actual development might not take place for up to a decade. The particular details should be devised closer to the time when the receiving environment would be better known;

[b] The shift is not being pursued by the territorial authority, but by private land owners. Should we hold that the MUL cannot be shifted in the absence of what amounts to a fully developed structure plan exercise, it would place an insurmountable hurdle to anyone other than a Council to seek its extension; and

[c] We would add a third reason – namely, that the extension sought by the appellants arises out of Change 13 which has been preceded by the request sought by the then Manukau City Council in accordance with *Methods 2.6.3*.

Should there be a thorough assessment under Method 2.6.3.3?

[119] The general answer to this is yes. Method 2.6.3.3 is the springboard for a local authority to request a Change. It was the basis for the Council to make the request in 2007. The request was assessed by the Council before notifying Change 13. Method 2.6.3.3 was also assessed by the Commissioners appointed by the Council to hear Change 13 at the first instance hearing. The Council's decision, together with the analytical findings in the many reports that have been put before us, form the background of this hearing. There has been a cumulative aggregation of data which is available to us.

[120] The findings contained in the decision of the Council are generally accepted, save for the finding that the MUL should not extend beyond the line sought as notified

in Change 13. Even that finding has, in part, been compromised by the consent orders bringing the Bianconi land within the MUL.

[121] This leaves just the subject land in issue. The challenge to the Council's decision is focussed on one underlying issue – whether the sensitive landscape and heritage characteristics are such, that the land should be protected from any form of urban development.

[122] We are satisfied that we have sufficient information before us to make an informed decision on that fundamental issue.

Application of our findings in the context of Part 2 and the ARPS

[123] The whole focus of the ARPS, and indeed the RMA itself, is to ensure that decision makers give effect to the single purpose of the Act – sustainable management. As we have said, this term is defined in Section 5 of the Act and that definition is inferred by the remaining sections in Part 2.

[124] By achieving the purpose of the Act, any proposal would:

[a] Assist the Council to carry out its functions of achieving integrated management of the natural and physical resources of the region;

[b] Assist the council to carry out is functions in relation to any actual or potential effects of the use, development, or protection of land which is of regional significance; and

[c] Has a purpose of achieving the objectives and policies of the Regional Policy Statement.

[125] We are required to be satisfied that excluding the subject land from the MUL better achieves the purpose of the Act than bringing it within the MUL. This involves the balancing of the landowner's interests in providing for their social and economic well-being, and providing urban zoned land against locking the land up from any urban development to protect heritage and landscape characteristics.

[126] We are conscious of the strong directions contained in Part 2 protecting historic heritage from inappropriate development;[52] and recognising and providing for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.[53]

[127] These strong directions are emphasised in the Strategic Objectives and Policies and other provisions of the ARPS. However, we are satisfied that Maori values and heritage characteristics can be provided for and/or adequately protected by sensitive development with appropriate constraints. This will, at the same time, enable the landowners to provide for their social and economic needs in accordance with Section 5 of the Act. A need which cannot be achieved while this land has a rural zoning because appropriate rural uses are not a viable option.

[128] To keep the land outside the MUL, with a rural zoning, would without further constraints, offer less protection to the characteristics protected by Section 6(e) and (f) of the Act. To lock the land up might indeed provide for Maori and heritage values. But it would not provide for the economic needs and well-being of the owners. By allowing sensitive constrained development, heritage and landscape characteristics can be protected while at the same time allowing the owners to provide for their economic well-being.

[129] We are also conscious of the strong directions relating to amenity and the coastal environment in Part 2 of the Act. These directions are also emphasised in the provisions of the ARPS. Again, we are satisfied, that some urban type development with proper constraints could adequately satisfy those directions.

[130] We accordingly find that an extension of the MUL to include the subject land would reflect the sustainable management provisions provided for in the framework of Part 2 of the Act.

[131] We consider it appropriate for all the subject land to be so included. This means that the Mendelssohn land would need to be activated by a notification under Section 293 of the Act. Accordingly, we make such a direction.

[52] Section 6(f) of the Act
[53] Section 6(e) of the Act

Overall finding on MUL

[132] For the reasons given we find that the MUL should be extended to include the subject land. We direct the Council, under Section 293 of the Act, to prepare, in consultation with all other parties to these appeals, a change to the Auckland Regional Policy Statement to amend the location of the MUL accordingly.

ZONING

Jurisdictional Matters

[133] As outlined earlier in this decision not all of the parties had requested a change to the zoning for all of the land.

[134] The appeals by the Ellett Interests sought a *Future Development (Ellett Holdings) Zone* or similar, for all of Parcels 1 to 6. The Planners' Joint Witness Statement[54] noted that the only direct rezoning outcome sought in appeals was in respect of the Ellett land south of Ihumātao Road, that is excluding Parcel 1 affected by the NOR. This reflected the submissions lodged with the Council which did not seek a change to the zoning of Parcel 1.

[135] The Mendelssohn appeal (Parcel 7) did not seek a change to the zoning.

[136] For the Wallace land (Parcel 8 and the adjacent land to the east) an amendment to the MUL notice of appeal was allowed by the Court to include a consequential prayer for relief that, should the Court decide to include the land within the MUL, the Court should then consider making;

> ... appropriate orders and/or directions as to the appropriate steps to re-zone the appellant's land.

[137] In its decision allowing the amendment the Court noted that the question of whether the Court had jurisdiction to make the order sought by the amendment was a matter to be decided at the substantive hearing.[55]

[138] In terms of the appeals filed the zoning options before us were to retain the current *Mangere –Puhinui Rural Zone (***MPRZ***)* on all of the land, or apply a *Future*

[54] Joint Witness Statement Planners, 8 November 2011, at [2]
[55] [2011] NZEnvC 336

Development (Ellett Holdings) Zone, or similar (**FDZ**), to some of the Ellett land (Parcels 2 -5).

[139] During closing submissions, in response to matters raised by the Court, all Counsel agreed that if the Court found that a zoning other than the current rural zone was appropriate for all of the subject land then Section 293 would be an appropriate way forward given the jurisdictional limitations.

[140] Therefore at this stage we propose to assess the appropriate zoning for all of the subject land affected by these appeals without being restricted by the jurisdictional limitations.

Zoning Evaluation

[141] The current MPRZ rules (Rule 17.3.10) allow, as a permitted activity, one household unit, farming, greenhouses, breeding and boarding of domestic pets, farmstay accommodation, horse riding clubs/schools, pig keeping, produce stalls, production forestry (more than 500m from the coast) and open space. The front yard requirement is 10 metres, the side and rear yards are 3 metres and the coastal setback is 30 metres. The height requirement is 9 metres. Building coverage is not controlled on sites over 5,000m^2, it is 10% for sites less than 5,000m^2.

[142] Mr Reaburn noted that under this rural zoning greenhouses are a potential use and that substantial greenhousing already exists in the area, although not on the subject land. He was concerned about substantial buildings for farming activities. Ms Absolum expressed similar concerns about the possibility of greenhouses.

[143] Mr Reaburn acknowledged that the current grazing activities may not be sustainable for much longer. He noted that the rural zoning potentially allows for significant building development. He considered that the major threat to the heritage, cultural, archaeological and landscape values would arise from more intensive development of the land.

[144] In terms of public access to the coast, the rural zoning only provides for enhanced access if subdivision occurs and Mr Reaburn confirmed that there are limited subdivision possibilities under the rural zoning for this land. Mr Reaburn also held concerns about whether the current MRPZ adequately addressed heritage,

cultural, archaeological and landscape values, noting in particular that the wahi tapu rules were weak.[56]

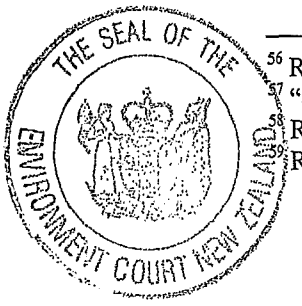
[145] Mr Reaburn advised that prior to his involvement in the plan change the Council had proposed zoning the land to FDZ. The section 32 report to PC 14 makes it clear that the then Manukau City Council's preference was for a wider area to be within the MUL and zoned for urban development. This included the Ellett land south of Ihumātao Road and the small part of the Wallace land adjacent to the Papakainga Zone. It did not include the NOR land. This expanded area was rejected by the then ARC. After lodging an appeal against the ARC decision the Manukau City Council decided to progress a reduced rezoning in line with the ARC decision rather than await the outcome of the appeal.[57]

[146] However in this hearing Mr Reaburn, whilst acknowledging the region's shortage of business land and the potential suitability of the subject land for business use from a "*purely physical and servicing point of view*"[58], stated that he

> ... came to the opinion, informed by my consultation, that the cultural, heritage and landscape values of this land made it inappropriate to continue with a Future Development Zone proposal.
>
> The same concerns have led me to the conclusion that re-zonings (and an associated MUL extension) to provide for an urban scale of development are not appropriate on any part of the land subject to these appeals. ... [59]

[147] Taking into account the research and reports which have culminated in the evidence presented at this hearing, Mr Putt proposed a FDZ as being more appropriate than the current MPRZ. In addition to a FDZ, primarily for the Ellett and Mendelssohn lands, Mr Putt also proposed specific zonings for other parts of the subject lands. This included the Main Residential Zone for the piece of Wallace land outside of the NOR and adjacent to the Papakainga Zone, and the Oruarangi Sub-Zone for the Wallace land affected by the NOR.

[148] A FDZ is already provided for in Chapter 16 of the District Plan. It is effectively a "holding" zone and it requires a structure plan to be prepared as the basis for a subsequent plan change and specific zoning provisions. The process is set out in



[56] Reaburn, EIC, at [8.5], [8.7], [9.5] – [9.7]
[57] "Special Note" at page 8
[58] Reaburn EIC at [8.8] and Rebuttal at [4.3(b)]
[59] Reaburn Rebuttal at [4.10] & [4.11]

Part 16.6.1.2 and has been used in a number of other parts of the Manuaku District to date.

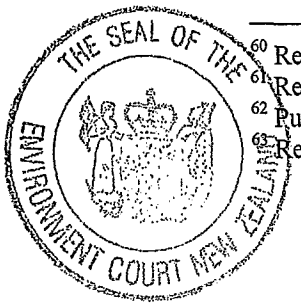
[149] We do not agree with Mr Reaburn when he states that the effects of urban zoning and development are almost certainly likely to be greater on the heritage, cultural, archaeological and landscape values of the subject area than would be the case with activities possible under the current MPRZ provisions.[60] Indeed we have some difficulty reconciling Mr Reaburn's concerns about the effects of permitted activities under the current rural zoning with his support for retaining the MPRZ on this land.

[150] Mr Reaburn accepted that visitor accommodation/tourist destination facility and clustered residential development were possibilities on some parts of the subject land, although he saw them as being at a rural or rural-residential density rather than an urban density.[61] This was repeated in his conclusion that there will likely be a future need to look at a targeted zoning for the land, as an improvement on the MPRZ, but that this would need to be more of a rural zone than an urban one.

[151] We think Mr Reaburn and Mr Jarvis exaggerate the degree of "urbanness" across all of the land that could follow on from a FDZ and a subsequent structure planning and plan change process. We are satisfied that a FDZ can adequately recognise the particular values of the land and provide for more appropriate management and development than is presently provided for under the MPRZ.

[152] On the basis of the information presented through this hearing we do not think it is appropriate to select specific urban zones for some parts of the subject land at this stage. The evidence indicates that the whole of the subject land would benefit from being included in a FDZ and made the subject of a more detailed structure planning exercise in the future.

[153] Mr Putt's amended FDZ illustrates how a set of provisions might be tailored to this land as a subzone and fit within the structure of the District Plan.[62] We recognise that Mr Putt prepared his provisions primarily for the Ellett lands but we consider that many of Mr Reaburn's criticisms are valid.[63] We agree that there needs to be a better recognition of the context of the subject land and the significant Maori, heritage,



[60] Reaburn EIC at [8.9]
[61] Reaburn, EIC, at [9.21]
[62] Putt, EIC, Appendix A
[63] Reaburn, Rebuttal, at [6.3] and [6.4]

coastal and amenity values. We do not consider it appropriate to signal that all of the subject land will be developed in the future for conventional urban activities or densities. However, neither do we consider it appropriate to signal that all of the subject land should be developed at a countryside living scale. As we have previously stated we consider that selective development will be required with some parts of the land likely to be able to be developed for urban activities and other parts managed as open space and lower intensity development. Whilst we understand the reason for the focus on traffic details included in Mr Putt's proposal, we consider that to be unnecessary and premature at this stage. It is more than sufficient to acknowledge that traffic and transport, along with other servicing matters, will be assessed, as usual, as part of a future structure planning process.

Overall finding on Zoning

[154] Accordingly, we find that all of the subject land would be more appropriately zoned FDZ; with the provisions being further amended to better recognise the significant values of the area; to provide guidance to the future structure planning process; and also to limit the interim use and management of the land. This will require amendments to the District Plan Chapter 16 – Future Development Areas.

[155] The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals, a change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

[a] A succinct description and explanation of the subzone and its context which:

[i] Identifies and provides for the significant characteristics of the area, including:

- Maori cultural associations with the area, including wahi tapu;
- Heritage and historic associations;
- The Otuataua Stonefields Historic Reserve;

- Landscape and amenity values;
- The Manukau Harbour and coastal environment; and
- The Auckland International Airport and business zoned lands.

[ii] Requires that a future structure planning process for the subzone:

- Further identifies and recognises these significant characteristics;
- Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and
- Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).

[b] The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

[c] Any consequential amendments to the District Plan.

[156] A FDZ in accordance with these directions will assist the Council to carry out its functions and is the most appropriate way to achieve the single purpose of the Act, as espoused in Part 2.

SHOULD THE NOR BE CONFIRMED?

Introduction and History

[157] On 18 October 2007, the then Manukau City Council issued a Notice of Requirement (**NOR**) for a designation for *Otuataua Stonefields Passive Public Open Space and Landscape Protection Purposes.* The NOR applies to the subject land to

the west of Oruarangi Road and to the north of Ihumātao Road, bordering the Otuataua Stonefields Historic Reserve.

[158] The objective is to *create public open space adjacent to the Otuataua Stonefields ... and to protect the landscape, the cultural heritage landscape, and the visual amenity of the Mangere Gateway Heritage Area.* It is clear from the requirement that its purpose is to extend the Stonefields Reserve so that it includes all of the lands from the coast to Oruarangi and Ihumātao Roads.

[159] The land which constitutes the Stonefields Reserve was acquired from the appellants in 1999.[64] It appears from the evidence,[65] that the Stonefields Reserve has its genesis from investigations and identification of the area for protection by the New Zealand Historic Places Trust (**NZHPT**) in the early 1980s. The Stonefields was listed as an historic place – Category 2, by the NZHPT in November 1991.

[160] It would appear that the Council relied on the work done by the NZHPT and the Department of Conservation as a basis for issuing the NOR for the existing Stonefields in June 1995. The boundary of the designation was similar to, but not the same as, the boundary shown on the NZHPT Plan. The issue of the NOR was accompanied by complementary provisions in the notified version of the 1995 Proposed Manukau City District Plan.

[161] Despite opposition, including from the appellant landowners, the designation was confirmed by Council on 20 May 1998. The Council then embarked on a process of negotiation with the appellants and settled the purchase of all the Stonefields land in late 1999.

[162] Variation 5 to the then Proposed District Plan was promulgated in late 2000. The Variation rezoned the Ellett and Mendelssohn land from Mangere-Puhinui Heritage Zone to Mangere-Puhinui Rural Zone, removed the waahi tapu identification from the Ellett and Mendelssohn land, and introduced site specific land use and subdivision rules for the Ellett and Mendelssohn land. This was part of a negotiated agreement which included that Council would:[66]

[a] Take all reasonable steps, by way of consent order, to zone the residue land Mangere-Puhinui Rural Zone;

[64] There was one other landowner – Rennie
[65] See Reaburn, Supplementary Evidence, Part 3
[66] Reaburn, Supplementary Evidence at [3.6]

[b] Take all reasonable steps, by way of consent order, to permit the creation of two lots from the residue land, including one lot of 1ha; and

[c] Consult with tangata whenua requesting their consent to either remove the waahi tapu notation from the residue land or to agree to the creation of two lots referred to above, including the construction of a single dwelling and garage on the 1ha lot.

[163] In accordance with the negotiated agreement, a kaumatua of the Makaurau Marae *conducted a ceremony to uplift the waahi tapu on the site ... namely Part Allotments 170 and 171 Parish of Manurewa.*[67]

[164] All of the landowners testified to the fact that, in their view, the negotiated agreement set a price well below market value, hence the agreed concessions by Council. More importantly, an assurance was given that no more land would be taken for reserve.

[165] However, by December 2006 the Council's attitude changed. As part of the process relating to Plan Change 14, the Council sought further landscape reviews. The *Peake Design Landscape Assessment*, dated March 2006, and the *Nick Robinson Landscape and Visual Assessment*, dated November 2006, were obtained. Both attributed high values to the NOR land. Two further reports were obtained, one by Buckland and McMillan in July 2007, and one by Absolum in March 2009.

[166] Buckland and McMillan state:

> ... while previous landscape assessments have focussed on individual heritage sites and landscape units, none have focussed on the heritage value of the open space as part of a wider context, a network of high quality open space which includes the Manukau Harbour.

[167] Mr Scott, in his evidence-in-chief, had three major criticisms of the landscape reports relied upon by the Council:

[a] Other potential land use scenarios were not adequately analysed in regard to the existing and proposed zoning of the area and land titles subject to the appeals;[68]

[67] *See* Council Report introducing Variation 5, Section 1.1, Exhibit G to Reaburn Supplementary Evidence

[b] They did not adequately consider the scale of the Airport development as a primary landscape determinant beyond the natural features and/or heritage matters;[69] and

[c] The landscape qualities have been elevated beyond the status identified in the regional provisions.

[168] According to Mr Reaburn, the Council decided to initiate the NOR in November 2006. He said:[70]

> 4.3 Amendments to proposed Plan Change 14 and associated processes were considered (as confidential items) by the Council in November and December 2006. It is at that time that the Council decided to initiate the NOR. This decision was based on the landscape assessments referred to above, the November 2005 Louise Furey archaeological appraisal and a February 2006 Social and Cultural Impact Assessment Report prepared by Integrated Research Solutions Limited for the Makaurau Marae.

[169] Informal notice was given to the landowners by letter dated 30 November 2006 giving them until 11 December 2006 to communicate their views. The Urban Design Committee of the Council resolved to notify the NOR at a meeting in March 2007.

[170] It is against this contextual background that we now look at the contested issues.

Notice of Requirement

[171] Section 168A of the Act[71] relevantly provides as follows. The **bolded** portions are those which identify the contested issues:

> (1) When a territorial authority proposes to issue a notice of requirement for a designation –
>
> (a) **for a public work within its district and for which it has financial responsibility**; or
>
> (b) in respect of any land, water, subsoil, or airspace where a restriction is necessary for the safe or efficient functioning or operation of a public work –

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[68] Scott, EIC, at [19]
[69] Ibid, EIC, at [20]
[70] Reaburn, Supplementary Evidence, at [4.3]
[71] As it applied at the relevant time

It shall notify the requirement in accordance with s.93(2); and the provisions of s.168, with all necessary modifications, shall apply to such notice.

...

(3) 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 decision on the requirement.**

(4) The territorial authority may decide to—

(a) confirm the requirement:

(b) modify the requirement:

(c) impose conditions:

(d) withdraw the requirement.

[172] Under Section 174(4) of the Act, the Court is to have regard to the matters set out in Section 171 which are the same matters set out in Section 168A(3), and the Court may cancel or confirm the requirement, and may modify it or impose conditions.

Is the designation a public work?

[173] Public work is defined in the RMA as:

... the same meaning as in the Public Works Act 1981, and includes any existing or proposed public reserve within the meaning of the Reserves Act 1977 and any National Park purposes under the National Parks Act:

[174] The RMA definition expressly includes existing or proposed public reserves under the Reserves Act 1977. The NOR document needs to be considered robustly and in the round. We are satisfied that it is clear from a reading of the NOR documentation in the round, that the work proposed by the Council is an extension of the Stonefields Reserve.[72]

[175] We thus consider that the NOR is for a public work.

Does the Council have financial responsibility?

[176] As a requiring authority, the Council may notify a requirement for the designation of a public work within its district for which it has financial responsibility (Section 168A(1)(a)). Counsel for Wallace submitted, that the Council has made no financial provision for acquiring the land and has not accepted financial responsibility now or in the reasonably foreseeable future for the work on the designated land.[73]

[177] There is no evidence before us that would suggest the Council has disclaimed financial responsibility for the works. The Council continues to actively pursue the designation. Ms Bowers confirmed that the Council has always accepted, and continues to accept, financial responsibility for the NOR.[74] Council Senior Acquisitions and Disposals Adviser, Mr Alan Walton, repeats this confirmation in his rebuttal evidence.[75]

[178] We agree with the submission of counsel for the Council, that the purpose of the reference to financial responsibility in Section 168A is to avoid situations where a requiring authority issues a NOR but seeks, in some way to disclaim any responsibility for it. As the Environment Court noted in ***Re Waitaki District Council***, citing earlier High Court authority:[76]

> [31] The reason why financial responsibility is important was explained in Waiotahi Contractors Limited v Owen [(1993) 2 NZRMA 425]. There the High Court was considering an appeal from the Planning Tribunal in a case where the Whakatane District Council has refused to accept continuing financial responsibility for a public work. The High Court concluded that a designation could not be maintained in the face of a designating authority's disclaimer of financial responsibility for it. Henry J concluded:

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72 Bowers, EIC, at [5.1] and Reaburn, EIC, at [10.2] – [10.3]
73 Opening Submissions, at [50] and [51]
74 Bowers, EIC, at [4.13]
75 Walton, Rebuttal, at [3.2]
76 [2007] NZRMA 68, at [31]

> ... The provision in a District Plan for a public work such as this is directly tied to financial responsibility for it, which is something the Tribunal cannot force on an authority. *In this context the nature and extent of the financial responsibility is irrelevant. That is something that must necessarily be uncertain and may or may not involve future expenditure of a capital nature, and usually would involve maintenance expenditure. It is the existence of the responsibility which is important.* I am therefore of the view that the Tribunal erred in law in proceeding to consider this appeal on the planning merits without taking into account and giving due weight to a relevant consideration, namely the council's refusal to accept continued financial responsibility for the public work [Emphasis added].

[179] The Town and Country Planning Appeal Board put the matter well in an early decision, ***Newspaper House Limited v Wellington City Council***[77]:

> **By designating land in its district scheme, on its own motion, for a proposed public work, the council thereby records that vis a vis the owners of the land, it accepts the financial responsibility for the acquisition of the land for the proposed work.** But this Board has no jurisdiction positively to order a council to execute a proposed work. The only positive power the Board has is in certain circumstances to order the council to acquire land ... but it does not follow that the designation of the land required for a work binds the Minister or public body to execution of the proposed work. Designation of land for a public work is a planning action. Construction of a public work is an executive action.
>
> *[emphasis ours]*

[180] The acceptance of financial responsibility is evident from the fact that it is the Council (and not some other entity) that has requested the designation, and the fact that, if approved, the Council will be the party that holds the designation. The Council has not disclaimed financial responsibility for the designation.

Are the works and designation reasonably necessary to achieve Council's objectives?

[181] Under Section 171(1) of the Act, we are required to determine whether both the public work and the designation are reasonably necessary for achieving the objectives of the Council for which the designation is sought.

What are the Council's objectives?

[182] It is clear from the NOR and the submission for the Council, that the public work (reserve land) is required to achieve the objective of protecting and preserving the public open space and landscape characteristics (which include the

[77] (1977) 1 NZTPA 289

cultural/historic heritage landscape characteristics) of the land and, importantly, the adjacent Stonefields Reserve.[78]

Is the public work reasonably necessary to achieve the objective?

[183] We consider that the reasonably necessary test is an objective, but qualified one. In ***Watkins v Transit New Zealand***[79] the Court noted:

> ... 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.

[184] We are also aware of the limits of any enquiry into the merits of the objectives. It is now well settled that the Act neither requires or allows the merits of the objectives themselves to be judged by the Court. For instance, in ***Babington***, the Planning Tribunal said:[80]

> ... It is not for us to pass judgment on the merits or otherwise of this objective. What we are required to do is to have particular regard to whether the proposed designation is reasonably necessary for achieving it.

[185] We have already considered some of the evidence base relevant to the historic landscape, and the threat to that landscape. Ms Bowers introduces the NOR in her evidence, describes its purpose,[81] and explains the contribution the land will make in practical terms if it is added to the OSHR. Mr Reaburn discusses the need for the NOR and whether it is necessary to achieve the objectives in his evidence-in-chief.[82] The evidence of Mr Murdoch (historic heritage), Dr Clough (archaeology) and Ms Absolum (landscape), provides direct support for the NOR.

As for the protection of the Stonefields Reserve

[186] We are well aware of the value of the Stonefields as an historic reserve. Its acquisition by the Council from the landowner appellants was preceded by some 20 years or so of research and reporting of its heritage values. These reports consistently referred to the Stonefields as a nearly complete Stonefields system of about 100 acres. The boundaries of the Stonefields were defined in 1984 when Historic Places Trust gave the land a Category 2 registration under the transitional provisions of the

[78] Dickey, Opening Submissions, at [4.19] and [4.83]
[79] A54/03, at [47]
[80] (1993) 2 NZRMA 480, at [486]
[81] Bowers, EIC, at [4.8] and onwards
[82] Reaburn, EIC, at [10.11] – [10.13] and [10.4] – [10.7]

Historic Places Trust Act 1993. The acquisition followed nearly the same boundaries as the Historic Places Trust schedule.

[187] The evidence established, and this was confirmed by our observation on our site visit, that the Stonefields are very well contained, as was pointed out by counsel for Wallace.[83] From the approach to the Stonefields there is already a buffer of sorts in the remnant volcanic cones at Otuataua and Pukeiti (former quarry sites), the former water and quarry reserves and the Wallace land acquired as part of the reserve.

[188] The NOR for the Stonefields identifies that the public works may include an interpretation centre, a carpark, public toilets, and a cultural/heritage centre. Suitable areas for all of these activities were identified within the reserve, areas which had lesser remnants of the Stonefields due to the past farming practices.

[189] We are satisfied that the Stonefields themselves, well contained as they are, can be adequately protected by sensitive development that recognises and provides for their value.

As for the subject land

[190] As for the subject land itself, we are conscious that, notwithstanding the availability of a Mangere-Puhinui Heritage zoning, which is applied to some land within the Mangere-Puhinui Heritage area, the subject land was given a less restrictive *rural zoning* – a zoning that does not protect the heritage and cultural aspects espoused by all the witnesses. This would tend to indicate that the heritage aspects of this land are ranked as less important.

[191] We are also conscious that the Council arranged for a kaumatua to carry out a ceremony over part of the land to lift any tapu. While such a ceremony is not determinative or binding on all Maori, it does reflect the worth of the land in cultural terms to the Council at that time.

[192] In our view, the Council witnesses have over-emphasised the need for a reserve to protect and preserve the special characteristics of this land. By focussing on the special cultural, historical and landscape characteristics of the land, they have closed their minds to the possibility of sensitive development of the properties. In other words, they have not adequately factored in sensitive development of the

[83] Opening Submissions, at [79]

properties. Development that would need to be carried out in compliance with the Historic Places Trust Act, may well require further archaeological survey work and the obtaining of a resource consent. A well thought out Structure Plan could recognise significant features and values and could address landscape buffers, setbacks, height controls, view shafts, and access to the coastal marine area and the Stonefields.

[193] The Council Commissioners in their decision relied heavily on the landscape, heritage and archaeological reports for their finding that the designation is reasonably necessary to achieve the Council's objective of protecting the cultural, heritage and landscape values of the land and the Stonefields Reserve. We have already averred to Mr Scott's three major criticisms of these reports, namely:

[a] Other potential land use scenarios were not adequately analysed in regard to the existing and proposed zoning of the area and land titles subject to the appeals;[84]

[b] They did not adequately consider the scale of the Airport development as a primary landscape determinant beyond the natural features and/or heritage matters;[85] and

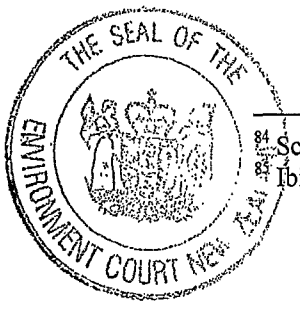
[c] The landscape qualities have been elevated beyond the status identified in the regional provisions.

Criticisms that we consider on the evidence to be valid for the reasons we have given in our discussion on the MUL line.

[194] For the above reasons, we conclude that the public work is not reasonably necessary to achieve the Council's objectives.

Has adequate consideration been given to alternatives?

[195] Where, as in this case, the requiring authority does not have a sufficient interest in the land, Section 171(1)(b) of the Act requires the Court to examine what consideration has been given by the Council to alternative sites or methods for



[84] Scott, EIC, at [19]
[85] Ibid, EIC, at [20]

achieving its objectives. In ***Bungalo Holdings Limited v North Shore City Council,*** the Environment Court observed:[86]

> [111] We understand that Section 171(1)(b) calls for a decision maker to have particular regard to whether the proponent has made sufficient investigations of alternatives to satisfy itself of the alternative proposed, rather than acting arbitrarily or giving only cursory consideration to alternatives. A proponent is not required to eliminate speculative or suppositious options.

[196] The test is whether *adequate consideration* has been given. As counsel for Wallace pointed out, the entire consideration given to alternatives in the NOR is:

> The council considers that this land is part of a cultural heritage landscape, with landscape values and a unique visual amenity. There are no other sites that meet these criteria.

No mention is made of *alternative methods* for achieving the objective, which do not involve designation and the prevention of any reasonable use of the land. He said, it is difficult to describe such an analysis as anything more than *cursory*.

[197] All counsel for the land hold appellants referred to the limited consideration by Mr Reaburn to alternatives. He devoted three paragraphs in his evidence-in-chief and one paragraph in rebuttal. In rebuttal, Mr Reaburn was dismissive of alternatives being practically achieved, but the point is, they were not considered at all, or at most in a very cursory way, prior to issuing the NOR.

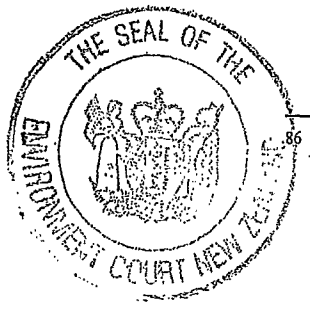
[198] The most obvious alternative methods include:

[a] To acquire the land by private treaty;

[b] To acquire the land under the Public Works Act; or

[c] To address the proper zoning of the land which could have been done as a prelude to Plan Change 14.

[199] Any one of these options could have preserved and protected the open space and landscape characteristics of the appellants' land without driving down the price of the land and disenabling the landowners from any benefit.



[86] A052/01, at [111]

[200] The lacuna left by the Council was addressed in part by the evidence of Mr Scott and Mr Putt. They advocated a *future development zone*. A matter that was peremptorily dismissed in the Council decision:[87]

> Counsel for Mr Ellett et al. suggested that there had been no real consideration of alternatives for achieving the Council's purposes and suggested that an appropriate zoning with particular controls could achieve the same result. However, the Commissioners do not consider Counsel is seriously suggesting that Council has been remiss in its choice of method to achieve its goals, noting that zoning itself provides no opportunities for the purchase of the properties. ...

[201] On the other hand, we have found that a *future development zone* would be in accordance with the purpose of the Act having regard to the relevant provisions of Part 2. This is a matter, that we have already discussed in some detail.

[202] We accordingly find that adequate consideration has not been given to alternative methods.

Overall finding on NOR

[203] For the above reasons, we cancel the requirement as it affects the subject land.

THE COUNCIL DECISIONS

[204] Under Section 290A of the Act, we are required to have regard to the decisions that are the subject of the appeals. As we have decided differently on the underlying general issue relevant to the appeals, we have, not surprisingly, come to a different conclusion.

[205] The fundament of the Council's decisions were that protection from all development was the most appropriate way:

[a] to protect the Stonefields;

[b] to protect Maori associations with the land; and

[c] to protect heritage values.

[87] Notice of Requirement Decision, Section 12, page 15

[206] We have already averred to parts of the Council's decisions in earlier sections of this decision. In the decision of the Commissioners on the NOR dated 27 March 2009, they said:[88]

> Section 6(f) The protection of historic heritage from inappropriate use and development: The NoR will ensure the protection of the Stonefields and provide a buffer from adjoining Airport and other development.

And:

> The Commissioners have carefully carried out this evaluation and accept that Maori have a relationship with the NoR land; that that relationship is no more or less important than the relationship with all of the land in the Mangere-Puhinui area, carrying as it does a rich historical narrative as described in Mr Murdoch's evidence. Given its location adjoining the Stonefields, a recognised wahi tapu, care must be taken to ensure that activities which could be 'intrinsically offensive' are avoided.
>
> The Commissioners find that maintaining this land in a rural zoning will not necessarily maintain the section 6(e) relationship; and that the only way to achieve this is through the passive public open space designation.

[207] The strong directions contained in Section 6 relating to Maori and historic heritage are not a total veto on development. They are directions to decision makers to recognise and provide for protection from inappropriate development. We are satisfied on the evidence before us that the most appropriate way of achieving the statutory directions is to provide for a mechanism that allows sensitive development, while at the same time safeguarding and protecting the special characteristics of this land.

[208] We have had the benefit of lengthy, and at times, detailed cross-examination on the major underlying issue. At all times we have been conscious of the Council's decisions. However, after careful consideration of the evidence before us, we have, for the reasons given in this decision come to a different conclusion.

[88] At page 30

DETERMINATION

[209] We make the following determination:

A. The MUL is to be extended to include the land subject to appeal;

B. The land subject to appeal is to be zoned Future Development Zone;

C. The NOR is cancelled as it affects the land subject to appeal

D. The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals:

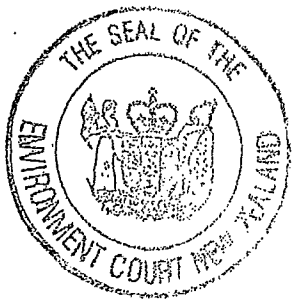
1. A change to the Auckland Regional Policy Statement to amend the location of the MUL in accordance with A above; and

2. A change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

a. A succinct description and explanation of the subzone and its context which:

i. Identifies and provides for the significant characteristics of the area, including:

- **Maori cultural associations with the area, including wahi tapu;**
- **Heritage and historic associations;**
- **The Otuataua Stonefields Historic Reserve;**
- **Landscape and amenity values;**
- **The Manukau Harbour and coastal environment; and**



- **The Auckland International Airport and business zoned lands.**

ii. Requires that a future structure planning process for the subzone:

- **Further identifies and recognises these significant characteristics;**
- **Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and**
- **Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).**

b. The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

c. Any consequential amendments to the District Plan.

E. The Council is to submit the changes directed under D. to the Court for confirmation by 28 September 2012.

F. Costs are reserved, but in our tentative view should lie where they fall.

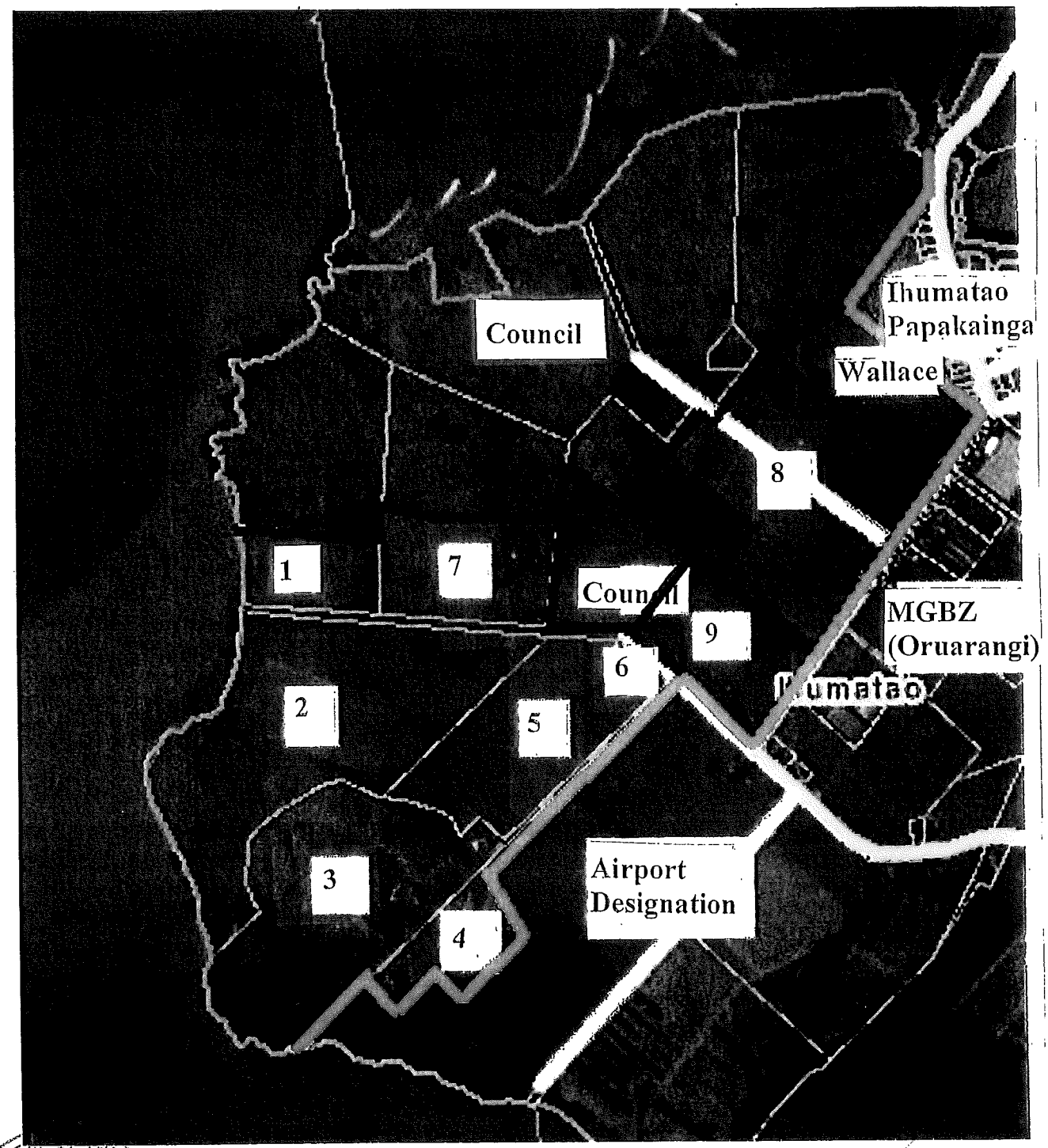
SIGNED at AUCKLAND this 15th day of June 2012

For the Court:

R G Whiting
Environment Judge.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

APPENDIX 1 – The subject land



APPENDIX 2
SUMMARY OF EVIDENCE RELATING TO MAORI ISSUES

Ko Maungataketake te maunga
Ko Rakataura te tangata
Ko Te Kawerau a Maki me Te Waiohua nga iwi
Ngati Te Ahiwaru me Te Akitai oku hapu
Ko Makaurau te Marae (Warena Taua, Mihi eic)

Maungataketake is the mountain
Rakataura is the person
Te Kawerau a Maki and Te Waiohua are the tribes
Ngati Te Ahiwaru and Te Akitai are my sub-tribes
Makaurau is the Marae

[1] Over 8 centuries several iwi and hapu have occupied the Ihumātao area and the wider Auckland Isthmus.

[2] These iwi and hapu include Ngati Rori (later called Te Ahiwaru), Te Kawerau a Maki, Ngati Te Ata, Ngai Tai, Ngati Poutukeka (abbreviated to Ngati Pou then later changed to Te Wai o Hua), Te Akitai, Ngati Paretaua, Ngati Tamaoho, Ngati Huatau, Te Aua, Ngati Tahuhu, Ngati Kaiaua plus others.

[3] There is little doubt that Ngati Ahiwaru, the inhabitants of this area in 1853, were unfairly treated by the Crown but such matters cannot be addressed through this RMA process.[1]

[4] On Wednesday 7 December we sat at the Makaurau Marae. We heard evidence on Maori issues from Mr Hori Winikerei Taua, Mr Hare Paewhiro Huia Tone, Ms Dawn Maria Matata, Mr Rapata Roberts, and Mr Te Warena Taua.

[5] **Te Warena Taua** of Te Kawerau a Maki, Ngati Te Ahiwaru, and Te Akitai of Waikato, and Chairman of Te Kawerau a Maki Tribal Authority gave evidence on their whakapapa, history and tradition which he had learnt from his grandfather and Waikato elders.

[1] Murdoch, EIC, at [6.7]

[6] Having been brought up in te ao Maori by his parents and elders, he trained as an ethnologist and has published history of the Auckland tribes, and Maori history of the Howick, Pakuranga and surrounding area.[2]

[7] His evidence is that Makaurau and Kawerau reached settlement with the landowners and Auckland International Airport Ltd regarding the rezoning of the Metropolitan Urban Limits but consider that protecting the remaining land is of critical importance to them. This land is directly adjacent to the Stonefields reserve, and contains significant wahi tapu. He states, "*Both Kawerau and Makaurau have unbroken ancestral relationships with this land and assert mana whenua over this area*" and because Maungataketake has been desecrated through quarrying they prefer minimal invasive future development on this land.[3]

[8] Mr Taua gave evidence on the historic occupation of their people in this Ihumatao area since the arrival of the Tainui waka up to present day. We received a confidential map setting out waahi tapu sites and sites of special significance within the subject land and adjacent land. This included burial sites of ancestors, sacred caves and tunnels, and other matters of importance to Kawerau and Makaurau. The numerous, and great significance of the, wahi tapu has lead them to regard the whole area as wahi tapu.[4]

[9] He was cross-examined at length regarding the wahi tapu by counsel for the appellants.

[10] When questioned by Mr Cavanagh as to whether food and tapu were able to mix, Mr Taua replied:

> ... Te Rau-anga-anga, King Potatau's father, now he was a General in the wars, and while they were eating at Kaitotehe, the old pā of theirs, they were eating food and kumara. They summoned the heads and hence, his name Te Rau-anga-anga, of 100 heads. They asked for the heads to come, be put in front of them while they ate. They have that right, they are the chiefs. They can determine whatever they wish. They can make tapu, they can break tapu. The right is solely theirs.[5]

[11] Mr Littlejohn queried the validity of the tapu lifting ceremony performed by Mr Wilson on the Mendelssohn property in 1999 given Mr Taua's earlier comments that tangata whenua were able to "*make tapu or break the tapu*". Mr Taua replied:

> ... Please understand that when he went there, it was to placate the owners of the land, because they feared somewhat that a tapu had been put over by the Māoris who were

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[2] Taua, EIC, at [6] – [7]
[3] Ibid, EIC, at [12]
[4] Ibid, EIC, at [14] – [19]
[5] Taua, Transcripts at page 450

> involved with the Stonefields. His karakia was simply to make the family feel happy, by offering a karakia... [6]

[12] Mr Enright argued that there were two separate entities represented at this hearing and that "*any waiver of wahi tapu by the Makaurau Marae kaumatua does not bind Kawerau*".[7]

[13] Mr Casey in his closing submitted that no wahi tapu or sites of significance have been identified on the current Wallace land other than part of the slopes of Puketapapa.[8]

[14] While he accepted Mr Taua's "*broad understanding of the meaning of tapu*", he submitted that this "*expansive understanding does not fit with the meaning ascribed in Section 6(e)*", citing ***Serenella Holdings Ltd v Rodney District Council***:[9]

> It is important however to record that the matters of national importance in s 6(e) that are to be recognised and provided for , should not generally include everyday activities and wide-spread but long lost random burials, with the consequence of preventing new endeavour on the land. The consequences for continuing human endeavour are obvious, it would become difficult or even impossible to obtain consents to carry out activities on land that has passed out of Maori ownership to non-Crown interests, if the principles in s 6(e) are to be considered to operate in some sort of blanket fashion based on daily general association with the land of Maori life in times past. Section 6(e) calls for proof of something more in order to attain recognition and provision as a matter of national importance.

[15] The ancestral relationship and cultural relevance of an area is often reflected in the named localities.[10] We note some of these names in the following examples: [11]

[a] Mataoho - Te Kawerau a Maki and the people of Ihumātao regard this area as part of the creation of the atua Mataoho, as portrayed in many of the landmarks of the Auckland Isthmus;

[b] Te Ihu a Mataoho (Mataoho's nose, later abbreviated to Ihumatao, then Maungataketake, then Elletts Quarry);

[c] Te Pane a Mataoho (The Head of Mataoho or Mangere mountain);

[6] Ibid, Transcripts, at page 464
[7] Points of Reply by Counsel for Makaurau Marae Maori Trust Board Inc & Te Kawerau a Iwi Tribal Authority Inc, at [1]
[8] Casey, Closing Submissions, at [38]
[9] Ibid, Closing Submissions, at [39]
[10] Murdoch, EIC, at [4.59]
[11] Taua, EIC, at [22]

[d] Kouora and Pukaki Craters are Nga Tapuwae a Mataoho (The footprints of Mataoho); and

[e] Te Kapua Kai a Mataoho (Mataoho's Food Bowl or Mt Eden Crater).

[16] Other examples include:[12]

[a] Te Tahuhu o Tainui, now called Otahuhu (alluding to the Tainui waka being carried upside down from Tamaki River to Manukau Harbour);

[b] Te Manukanuka a Hoturoa, now Manukau Harbour (where Hoturoa, the captain of the Tainui waka became anxious due to the treacherous conditions);

[c] Nga Hau Mangere, now Mangere (the lazy winds, named by Rakataura, the Tainui waka tohunga);

[d] Te Motu a Hiaroa, (Hiaroa's Island) named after Rakatarua's sister Hiaroa, now called Puketutu Island.

[17] Mr Murdoch expanded on Puketutu as follows: [13]

> What we now know as Puketutu Island is really known as Te Motu a Hiaroa, the island of Hiaroa, who was a woman on the Tainui canoe, and that's the proper name for the island. The highest point of the island was one of, I think, three or four cones and it had a very sharp pointed peak on it, and that was called Puketutu. And so Puketutu is a landmark on Te Motu a Hiaroa, and as we so often do, we shift and cut and paste Māori names and in the same way Puketapapa has become Ihumatoa [Ihumatao] and so on.

[18] The wahi tapu within the area include sacred mountains, battle sites, burial sites, Pa sites and subterranean caverns that contained taonga.[14]

> Whilst wahi tapu such as Maungataketake have been desecrated and physically destroyed, we hold fast to the tikanga that tapu associated with those sites remains intact.[15]

[19] Of significance to Te Kawerau a Maki and Makaurau is that one of the hui to select the first Maori king was held at Ihumātao and Potatau Te Wherowhero lived there prior to his accepting the mantle as king.[16]

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[12] Ibid, EIC, at [26]
[13] Murdoch, Transcripts, at page 269
[14] Taua, EIC, at [31]
[15] Ibid, EIC, at [32]
[16] Ibid, EIC, at [37] – [38], Murdoch, EIC, at [5.2.2]

[20] Mr Taua cited a number of development ventures in this area that have been detrimental to their iwi. These included:[17]

[a] the Auckland Airport;

[b] the Mangere Sewerage Treatment Facility;

[c] the destruction of Maungataketake for a quarry.

[21] The common elements of these examples are:[18]

[a] Imposition of decisions that directly impact on tangata whenua;

[b] Prioritisation of regional amenity over the values of tangata whenua;

[c] Destruction of significant landmarks;

[d] Environmental degradation, which in turn effects water quality and the availability of natural resources such as kai moana, which are fundamental to our way of life;

[e] Desecration of wahi tapu and other sites of spiritual, cultural and heritage significance;

[f] Marginalisation of tangata whenua from ownership and development opportunities; and

[g] Encroachment of development on the oldest papakainga in the Auckland region, which impacts the character of the area and the quality of lifestyle of tangata whenua.

[22] In summary, Mr Taua concluded that Te Kawerau Iwi Tribal Authority and Makaurau Marae Trust as representatives of the ahi ka:

[a] oppose urbanisation of the Ellett, Wallace and Mendelssohn lands;[19]

[b] support the acquisition of those lands as public open space;[20]

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[17] Taua, EIC, at [40]
[18] Ibid, EIC, at [41]
[19] Ibid, EIC, at [44]

[c] emphasise the significance of the area because of

[i] the number of wahi tapu;[21] and

[ii] wrongful confiscation by the Crown.

[23] **Mr Graeme Murdoch** a noted scholar and historian provided a detailed summary of the pre and post European human and cultural history of the Mangere-Puhinui, Ihumātao block and the wider Auckland region on behalf of the Auckland Council.

[24] He had the added advantage of being proficient in the Maori language and having learnt from a life long association with the elders of Ngati Ahiwaru, Te Akitai, Te Kawerau a Maki and other iwi in the greater Auckland Isthmus.

[25] Mr Murdoch opines that sacred knowledge acquired through discussion with kaumatua has "*equal validity*" and often "*greater importance*" in Section 6(e) RMA matters than academic and archaeological sources.[22]

[26] In his youth he was aware that the volcanic features of the Ihumātao were recognised as taonga by local Maori[23] and that the subsequent modification and destruction of these features have caused "*immense distress*" and "*ongoing grief*" to the tangata whenua.[24]

[27] Examples of these modifications include the creation of the sewerage ponds and the water treatment plant, the quarrying of various maunga (Maungataketake and Puketutu) and building the second runway for the Auckland International Airport.

[28] Another cultural icon, Te Kahui Tipua "*assemblage of spiritual guardians*" Haumia, Papaka and Kaiwhare were destroyed when the Mangere Wastewater Treatment Plant sewerage ponds were built.[25]

[29] Similarly Te Punga o Tainui – "*the anchor stone of Tainui*" situated just off the Oruarangi Creek was "*tragically*" destroyed during the construction of the Mangere Wastewater Treatment Plant sewerage ponds.[26]

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[20] Ibid, EIC, at [44]
[21] Taua, EIC, at [46]
[22] Murdoch, EIC, at [4.1.1]
[23] Ibid, EIC, at [4.2.3]
[24] Ibid, EIC, at [4.2.4]
[25] Ibid, EIC, at [4.2.5]
[26] Ibid, EIC, at [4.2.7]

[30] When Tainui waka left Ihumātao and ventured on to Kawhia, two "*illustrious founding ancestors*", Rakataura their leading tohunga, and a younger rangatira named Poutukeka, remained. Their direct descendants are the people of Ihumātao connected with the Pukaki and Makaurau Marae.[27]

[31] Poutukeka was the eldest son of Hoturoa the captain of the Tainui waka.[28] His descendants, Ngati Poutukeka, lived in this wider Mangere-Puhinui area.[29]

[32] Rakataura later became known as Hape. Puketapapa or Te Puketapapatanga a Hape (the hilltop resting place of Hape) "*imbues the wider Ihumatao Penninsula with particular mana, spiritual unity and significance*".[30]

[33] In spite of the Crown confiscation of the 1100 acre Ihumātao block in 1865 the hapu associated with Makaurau Marae have maintained an unbroken "*ahi ka roa*" in this area for over 6 centuries.[31]

[34] Mr Murdoch also narrated the tribal interactions and occupations arising from the musket wars,[32] and the alienation of lands in the Tamaki-Manukau area.[33]

[35] He gave evidence on the Te Waiohua practice of shifting agriculture in a seasonal cycle of gardening and resource gathering and how they left aside the defensive areas of the cone pa, the settlements and the sacred burial areas.[34]

[36] He cautioned against relying solely on archaeological site records for identifying heritage areas citing the discovery of the largest burial found in the district during earthworks for the Airport second runway as an example.[35]

> Archaeological sites and their qualities and values of course provide only one component of the historic and cultural heritage values of the Ihumatao cultural landscape of significance to Tangata Whenua.[36]

[37] Mr Murdoch emphasises the importance of Maori identity through ancestral relationships to cultural landscapes regardless of whether or not the land is in Maori ownership.[37]

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[27] Ibid, EIC, at [4.2.8]
[28] Taua, Transcripts, page 469
[29] Murdoch, EIC, at [4.3.2]
[30] Ibid, EIC, at [4.2.9]
[31] Ibid, EIC, at [4.3.1]
[32] Ibid, EIC, at [4.3.6] – [4.3.8]
[33] Ibid, EIC, at [4.4.1] – [4.4.7]
[34] Ibid, EIC, at [4.5.5]
[35] Ibid, EIC, at [4.5.8], Taua, EIC, at [42]
[36] Murdoch, EIC, at [4.5.9]

[38] In Section 5, EIC, he detailed the post European occupation of the Ihumātao area including their interactions with local iwi.

[39] With reference to Section 6(f) matters he states:

> ... the archaeological, architectural, cultural, historic, technological, and to some degree scientific qualities associated with the natural and physical resources of Ihumatao, relate to both the Maori and European occupation and use of the land. The Maori ancestral relationship that is held with the land, waters and other taonga associated with Ihumatao, forms a significant and integral component of these values. It is inextricably linked to all of these natural and physical resources, and not just to their "cultural and historical qualities".[38]

[40] He opines that the post-European component of the cultural heritage landscape of Ihumātao illustrates the early adaptation of Maori to the colonial economy and social change, adding that the Maori mission station is the finest remaining example of a nineteenth [century] complex left in the Auckland region.[39]

[41] He summarised that the cultural heritage landscape of Ihumātao is a significant example of "*a coherent and legible landscape that covers the entire continuum of human history and settlement in the region*" and that:[40]

> The Maori ancestral relationship with Ihumatao extends well beyond the nationally significant archaeological assemblage and landscape associated with the OSHR, to all parts of the Ihumatao peninsula and its natural and physical resources, including those areas modified by quarrying.

[42] He closes with the observation that the area is rich in human historical and cultural associations that have developed over nearly eight centuries that reflects the full range of Maori and post European heritage[41] and a quote from the Heritage Chapter of the District Plan:[42]

> Titiro ki nga wa o mua
> Ki te whakamarama I tenei ao
> Rapua te mea ngaro
> Hei maramatanga mo nga Ao e eke mai
>
> Look to the past to understand the present and seek answers for the future

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[37] Ibid, EIC, at [4.5.10]
[38] Ibid, EIC, at [6.3]
[39] Ibid, EIC, at [6.10]
[40] Ibid, EIC, at [6.14]
[41] Ibid, EIC, at [7.5.9]
[42] Ibid, EIC, at [7.5.10]

ORIGINAL

Decision No. C105/2007

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

AND

IN THE MATTER of an application for declarations pursuant to section 311 of the Act

BETWEEN MALVERN HILLS PROTECTION SOCIETY INCORPORATED

(ENV-2007-CHC-144)

Applicant

AND SELWYN DISTRICT COUNCIL, CANTERBURY REGIONAL COUNCIL, CENTRAL PLAINS WATER LIMITED, CENTRAL PLAINS WATER TRUST, ASHBURTON COMMUNITY WATER TRUST, MINISTER FOR THE ENVIRONMENT

Respondents

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith (presiding)
Environment Commissioner D H Menzies
Environment Commissioner A J Sutherland

Hearing at Christchurch on 6 and 7 August 2007

Appearances

Mr N S Elsmore for Malvern Hills Protection Society Incorporated (**Malvern Hills Residents**)
Mr P G Rogers for Selwyn District Council and Christchurch City Council
Ms M C Dysart for Canterbury Regional Council
Dr E D Wylie QC and Ms R M Dunningham for Central Plains Water Limited and Central Plains Water Trust (**CPW**)

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Mr B G Williams for Ashburton Community Water Trust (**ACWT**) and Ashburton District Council (as section 274 party)
Ms B H Arthur for Minister for the Environment (**Minister**)
Mr E J Chapman and Mr A M Copeland for Synlait Limited (section 274 party)

DECISION

Introduction

[1] Malvern Hills Protection Society Incorporated has applied for three declarations from the Environment Court.

[2] These declarations relate to applications currently being processed by Selwyn District Council in respect of notices of requirement (**NOR**), and the Canterbury Regional Council in respect of applications for various take, use and other regional consents required. It is unclear from the applications whether the declarations also relate to applications for consent being processed by the Ashburton District Council.

[3] The applications as listed in clause 5 of the application are:

(a) *That the Selwyn District Council is restricted to considering a notice of requirement under section 171 of the Act to construct a dam to a maximum height of 38 metres in accordance with the application to the Minister for the Environment requiring authority status lodged by CPWL on 18 July 2005.*

(b) *That the Selwyn District Council has no jurisdiction to consider a notice of requirement under section 171 of the Act to convey water to the Waianiwaniwa Valley reservoir via a 10km tunnel because it is not in accordance with the application to the Minister for the Environment for requiring authority status lodged by CPWL on 18 July 2005.*

(c) *That the applications for resource consents by the Ashburton Community Water Trust ("AWCT") must be heard at the same time as the CPW notices of requirement and resource consent applications under section 103 of the Act because they relate to the joint application between ACWT and CPWT, CRC021091, to take up to 40 cumecs from the Rakaia River.*

The scope of the applications for declaration

[4] The scope of these applications or their intended applicability is not clear to the Court. This lack of clarity is reflected in the submissions of the various parties in opposition. It is however clear that applications (a) and (b) can be dealt with together as they clearly relate only to a NOR given to the Selwyn District Council, and application (c) is somewhat broader. We shall refer to 5(a) and (b) as the **Section 171 Declaration** and 5(c) as the **Section 103 Declaration** for convenience.

[5] The Section 103 Declaration is interpreted by Ms Dysart in her submission as encompassing the ACWT applications to the Canterbury Regional Council, the CPW applications to the Regional Council and the application made jointly by ACWT and CPW to the Canterbury Regional Council to take 40 m^3/s from the Rakaia River.

[6] We record that it is the territorial authority that will hear any notice of requirement applications and that section 103 refers to applications to only one consent authority. Thus we conclude Ms Dysart's interpretation of the Section 103 Declaration is reasonable and we accept it.

[7] For completeness we indicate that counsel for Synlait Limited suggested that the Court should, in the exercise of its discretions under section 313, expand the Section 103 Declaration. Mr Chapman gave notice at the pre-hearing conference that Synlait would maintain an interest in the Section 103 Declaration. They have not made any submissions, or taken any interest in the Section 171 Declarations. At the hearing itself Mr Chapman suggested that the Section 103 Declaration should be expanded to a new declaration under section 102 and require a joint hearing of all the Regional Council, the Ashburton District Council and the Selwyn District Council consent applications. It appears that Mr Chapman intends to include within that group the hearing on the NOR to the Selwyn District Council also. This goes significantly beyond the scope of the Section 103 Declaration as sought and several parties, including the Canterbury Regional Council, advised that they had not prepared on that basis and would require further time to make submissions if this were to be acceptable to the Court.

[8] We note firstly that Mr Chapman is not an applicant before this Court but has given notice of an interest under section 274 in the Section 103 Declaration. He is relying on the power of the Court to modify or make any other declarations it sees as necessary and desirable under section 313, and thus make further declarations unrelated to those sought.

[9] In addition to a declaration in relation to section 102 and the requirement for all the applications to the Ashburton District Council, Selwyn District Council (including the NOR) and the Regional Council to be dealt with at the same hearing, he also sought that the Court make directions as to the scope of the hearing before the District Council. Those directions were to include:

> *(a) A joint hearing of the CPWT and ACWT mirroring the joint take application for irrigation use*
> *(b) A decision on whether the take application can be extended to provide for new uses such as hydro electricity development which were not forecast in the original take application;*
> *(c) A decision on whether it is feasible to split a joint application when use applications for both sides of the Rakaia are before the consent authority;*
> *(d) A joint hearing on applications involving two or more consent authorities where all applications are dependent on a single take application.*

Arguably some of these directions rely on yet further declarations. For example, whether the 2001 take application by ACWT and CPW **(the 2001 Joint Application)** covers water for hydroelectricity use.

[10] Both the application for further declarations and the application for directions raise significant new questions given the wording utilised by Mr Chapman before the Court, and raise important questions as to how far a section 274 party can go in suggesting new and different declarations when these have not been signalled to any of the parties at a pre-hearing conference nor are supported by any separate application or evidence.

The Minister's Gazette Notice

[11] These applications give rise to particular concern by the Court as to whether the Court is being asked to make a declaration that the Minister granted status to CPW as a requiring authority beyond his jurisdiction. The reference to the application to the Minister seems to suggest that there is a restriction upon the powers of the Minister to make an appointment as a requiring authority.

[12] Mr Elsmore for the applicants confirmed to the Court that such a proposition was beyond the jurisdiction of this Court and would only be susceptible to review proceedings in the High Court (see ***Berryman v Waitakere City Council***[1]). That is a position reinforced by Ms Arthur for the Minister.

[13] We accept it is axiomatic for the purposes of this hearing that this Court cannot address the validity of the Gazette Notice appointing CPW as a requiring authority. A copy of that Notice is annexed hereto and marked **"A"**.

[14] What Mr Elsmore argued however, was that in interpreting the NOR the Court was obliged to ensure that the Gazette Notice was subject to an implied limitation based upon the application made to the Minister. In short, notwithstanding the wording of the Gazette Notice the requiring authority could not seek a NOR that went beyond the precise terms of the application for appointment as a requiring authority made to the Minister.

[15] It is common ground that in the description of the activity given to the Minister there was an indication that a dam height of approximately 38 metres was envisaged with a storage of around 200 million cubic metres of water. There was also reference to various tunnels and canals, but no indication of their dimensions. A tunnel length could be derived from an attached map.

1 A04/1998 at page 5.

Section 167 of the Act

[16] As can be seen from the Gazette Notice attached, the actual requiring authority status was granted on a significantly wider basis. Section 167 sets out the basis on which a Minister can make an appointment of requiring authority and it is common ground before this Court that the Gazette Notice is in accordance with the Minister's powers under the Act.

[17] Quite simply, the Minister is empowered to grant a requiring authority status to a network utility operator on such terms and conditions as he/she sees fit. The Minister is not limited by the application made, nor is he/she constrained otherwise than set out in section 167. The process is not public and the Minister is not required to consult anyone.

[18] Although it is strictly not necessary for us to comment, it is clear to us that subsection 167(4)(b) intends that the Minister is to be satisfied as to the responsibility of the company to undertake the purpose. The Minister is not required to consider the effects of the purpose on people or communities. The Minister need only be satisfied that the prospective requiring authority will have proper regard to those matters.

[19] The Court and parties have the Gazette Notice No. 196 published in the New Zealand Gazette on 24 November 2005, page 4916, issued by the Minister. This is particularly broad in its terms. We have concluded as a fact that it gives approval of CPW as a requiring authority in respect of the Central Plains Water Enhancement Scheme. There are no terms and conditions beyond the physical limitations to the north, south, east and west and that it must be for irrigation purposes in the central plains area in terms of the general description provided in the Gazette, including associated works. Neither the dam height nor the total volume nor the length of tunnels is a matter which has been constrained by the Minister.

[20] Again, although not strictly necessary to our decision, the broadly worded terms of the Gazette Notice are no more than this Court would expect in respect of a requiring authority for a project of this size. It is inevitable that numerous changes to the design will occur over the life of a project and it may include a multiplicity of changes,

expansions or contractions depending on environmental or other constraints. The Council or the Court might impose significant constraints upon a project and require for example that all of the canals be replaced by tunnels. We suggest that if the requiring authority could not alter its proposal the territorial authority or the Court could not impose terms or conditions. If any NORs were constrained by the original application for requiring authority status to the Minister this would significantly undermine the powers of the consent authority (or Court on appeal) that are anticipated in terms of any designation. We refer to ***Quay Property Management v Transit New Zealand***[2] where at para 101 the Environment Court held:

> *Section 171 anticipates further modification to the proposal from submissions by including these as matters to have regard to before a final decision is made. From this process we conclude that the notice of requirement per se does not "ring fence" the proposal in a way which requires it to be undertaken according to the notice provisions from the outset – or which sets it in stone in a way that the issues it addresses cannot be altered or added to.*

[21] While this refers to changes to the NOR itself (rather than reference back to the original application to the Minister), the principle holds in this case. That is that the public participatory process of the NOR provides for and anticipates changes to a proposal, as it is considered.

[22] Furthermore, the territorial authority has powers under section 171 including those set out in subsection (1). This section outlines what a territorial authority must consider when considering and approving the requiring authority status. This includes considering regional and district plans, whether adequate consideration has been given to alternative sites, routes or methods if it is likely the work will have a significantly adverse effect on the environment – section 171(1)(b)(ii). The territorial authority must also be satisfied that the work and designation are reasonably necessary for achieving the objectives of the requiring authority (section 171(1)(c)). The territorial authority may recommend to the requiring authority that it confirms or modifies the requirement, imposes conditions or withdraws the requirement (section 171(2)).

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2 W28/2000.

[23] Similarly, on appeal the Court has the power to modify the requirement or to impose conditions as it thinks fit (section 174(4)). Importantly, the NOR process provides for filing an outline plan under section 176A with the territorial authority unless this requirement has been waived or the council is otherwise authorised. The outline plan (section 176A(3)(f)) must show any other matters to avoid, remedy or mitigate any adverse effects on the environment. This in itself gives power under subsection (4) for the territorial authority to request changes to the outline plan and provides for an appeal procedure to the Environment Court (section 176A(5)). The criterion for the Environment Court in respect of the outline plan is whether the changes requested by the territorial authority will give effect to the purpose of the Act (section 176A(6)).

[24] In short, there is a very substantive public participatory and decision making process involving NORs and works which may eventually be constructed in compliance with that notice. During this process changes may be made to the NOR. In addition, there are also provisions in respect of compensation if it is likely that land is taken under the NOR and these give rise to further rights of appeal with specific requirements.

[25] It is difficult in such circumstances for the Court to read into the Minister's powers under section 167 the necessity that the Minister consider the scope of the works sought and authorise these specifically. There is nothing in the terms of section 167 itself which would give such an indication. The closest the section comes is at 167(4)(b) which reads:

> *The applicant is likely to satisfactorily carry out all responsibilities, including financial responsibilities (of a requiring authority under this Act) and will give proper regard to the interests of those affected and to the interests of the environment.*

Thus the Minister considers the applicant, not the detailed project.

[26] When we look at the powers of revocation under subsection (5) it becomes clear that the Minister is concerned particularly with whether the utility operator will

undertake or complete a project, whether it will satisfactorily carry out its responsibilities, and that the applicant remains a utility operator as that term is defined in section 166.

[27] We have reached the following conclusions:

(1) the Minister is not required to be independently satisfied as to the scale of the activities to be undertaken or that the interests of parties affected or the environment are met by the proposed works;

(2) the Minister need only be satisfied that those issues will be satisfactorily addressed by the network utility operator;

(3) the Minister has a broad power in approving a requiring authority under section 167. Although there is the power for the Minister to impose such terms and conditions as he/she thinks fit, the Minister is not required to impose terms or conditions on any application made;

(4) in this case the Minister imposed geographical limitations and limited the requiring authority to matters relating to irrigation projects. Other than this the limitations are minimal;

(5) the applications for NOR by CPW are all clearly within the terms of the approval notified by the Minster in the Gazette Notice;

(6) there is no ambiguity in terms of the Gazette Notice and thus there is no necessity to take into account other documents or evidence to interpret the Gazette notice of approval as a requiring authority. Even if it was necessary for the Court to consider any ambiguity it would not be required to limit the approval in terms of either the dam height or the tunnel length as these were not matters that are relevant to a determination of a requiring authority.

[28] We conclude that it would be contradictory with the designation provisions of the Resource Management Act for a requiring authority to be limited to particular aspects of a proposal when there is power for both the territorial authority and the Court on appeal to impose terms and conditions which may constrain or change the nature of the requiring authority's NOR.

Purpose of the Section 171 Declaration

[29] We accept Ms Arthur's submissions for the Minister for the Environment that no purpose could be served by granting the Section 171 Declarations sought. This Court does not have any powers in respect of declaration proceedings to quash a notice of the Minister.

[30] The Court is being asked to issue a form of injunction against the District Council limiting the aspects of the NOR application before it. Given that there are clear wording difficulties with the Section 171 Declaration application, the best the applicant could hope to derive from such an application, is a declaration that the NOR is *ultra vires* its approval as a requiring authority. What particular purpose would be served by such a declaration is not explained by the applicant or any other party. It is difficult to see that this would restrict the Council's decision given that it may always be possible for the requiring authority to obtain status to cover such an application prior to the hearing, or even prior to the implementation of the designation. On its face there would still be a valid NOR given by CPW, within jurisdiction, under section 168 of the Act.

[31] Finally this Court considers that the method provided under the Act to address a concern about particular aspects of a proposal is through the public and participatory procedure envisaged in terms of section 171 of the Act. It is competent for the territorial authority to decide whether any particular aspect of the NOR is within scope. If the parties disagree with the decision of the Council or commissioners on this issue it can be referred to the Environment Court, and subsequently on appeal on law to superior Courts. In those circumstances the Malvern Hills Residents are not left without a remedy. The matter can be addressed on the basis of the fully known facts as they transpire at a hearing. In such circumstances it is difficult to see what particular purpose the Section 171 Declarations would achieve.

[32] We have concluded that even if grounds were made out for a declaration under section 310 of the Act this Court could refuse to exercise its discretion to make the declaration on the basis that it is neither necessary nor desirable nor would it serve any useful purpose. A declaration would essentially amount to a decision that the Minister's approval of the requiring authority was beyond scope. That would give rise to particular

concerns by the Court: given that the question of judicial review in respect of the Minister's decision and whether it was *ultra vires* is more properly within the scope of the High Court as it relates to the exercise of a Ministerial discretion.

[33] Mr Elsmore sought to present the application as if it relates to the interpretation of the Minister's approval. We conclude it is an attempt to represent the Minister's approval as containing restrictions, terms and conditions not expressed within the Gazette Notice. In such circumstances we conclude that this aspect of the application was misconceived. Even on the best presentation of the facts for the applicant it could not have succeeded.

Factual problems

[34] However in case we are wrong in the foregoing we have also concluded that on the facts the application would have no prospect of success for the following reasons.

[35] The Gazette Notice did not become operative until one month after its notification on 24 November 2005. The Minister was advised by e-mail on 24 November 2005 of the concerns of the Malvern Hills Residents in relation to the increase in dam height from approximately 38 to a maximum of 55 metres. Notwithstanding that the matter was explicitly brought to the Minister's attention, there was no change to the approval which came into effect on 22 December 2005.

[36] There was a failure by the applicants to produce a copy of the Gazette Notice in their evidence, although they did acknowledge that it was issued. Rather, the evidence produced by Ms Snoyink for the Malvern Hills Residents referred to the application for status as a requiring authority. Implicit in her evidence is that the original proposal was agreed to by the Minister. She asserts:

> *The original proposal as agreed to by the Minister was a dam of 38 metres high.*

Notwithstanding this assertion no evidence was produced that the Minister ever agreed to any specific detail of the original proposal.

[37] The evidence produced for other parties went to some considerable length to identify the Minister's role in granting CPW requiring authority status. In the background information supplied by the Minister in issuing the related press statement, in the introduction he stated:

> *The fact that CPWL has been granted the status of a requiring authority does not automatically mean they can go ahead with their project. This decision simply allows them to apply for the approvals needed to set up an irrigation scheme.*

[38] In that document the Minister goes on to explain his role and particularly what the Minister must consider on applications for requiring authority status. The Court has been unable to find any reference to the Minister in any way approving the project, even at a preliminary level. The Minister went to the trouble of identifying the role of a NOR and the Council decision making process and the outline plan approval process. In such circumstances this Court cannot find as a fact that the Minister at any time agreed to the proposal put forward or attached to the application for requiring authority status. Quite simply, what the Minister did was appoint CPW as a requiring authority having been satisfied about the matters to which he is to refer under section 167 of the Act.

The Court discretion

[39] Finally in respect of this aspect of the application, even if grounds were made out the Court would not exercise its discretion, given the considerable delay in applying for the declaration. The Malvern Hills Residents were aware of the increase in dam height by at least 24 November 2005 and the application to this Court was not made until mid-June 2007. Furthermore, they were aware of the details of the tunnel extension by at least late March 2007. It appears the Malvern Hills Residents have allowed the process to continue to this point before seeking the declarations. We will discuss the conduct of the Malvern Hills Residents in due course.

Section 103 Declaration

[40] The Section 103 Declaration has particular difficulty with its wording. The application appears to seek a declaration that the applications to the Regional Council to take or use and other consents be dealt with by the Regional Council at the same time as the NOR, i.e. that this is an application with one authority.

[41] The reason for that conclusion is the explicit reference to section 103 of the Act which provides:

> *Combined hearings in respect of two or more applications*
>
> *(1) Where two or more applications for resource consents in relation to the same proposal have been made to a consent authority, and that consent authority has decided to hear the applications, the consent authority shall hear and decide those applications together unless –*
>
> *(a) the consent authority is of the opinion that the applications are sufficiently unrelated so that it is unnecessary to hear and decide the applications together; and*
>
> *(b) the applicant agrees that a combined hearing need not be held.*
>
> *(2) This section shall also apply to any other matter the consent authority is empowered to decide or recommend on under this Act in relation to the same proposal.*

[42] In ***Fleetwing Farms Ltd v Marlborough District Council***[3] the Court of Appeal noted in respect of similarly worded sections 102 and 103:

> *Section 102 is concerned with joint hearings by consent authorities where applications for resource consents have been made to two or more consent authorities. Section 103 is concerned with combined hearings with two or more applications for consent in relation to the same proposal have been made to a consent authority. Significantly both sections are confined to applications involving a single applicant (see for example section 102(1)(b) and section*

[3] 3 NZLR (1997) 257 at 264.

103(1)(b)). That is consistent with the approach taken by the legislature in ss 104 and 105. Clearly the statute requires each applicants application or applications to be determined on their own merits. It does not allow for a comparative assessment of competing claims to the same resource.

Thus any application of section 103 can only be in the context of a single applicant and a single consent authority. This immediately creates problems with the interpretation of the application for the Section 103 Declaration.

[43] Mr Elsmore accepts that paragraph 5(c) of the application for declarations creates interpretation conflict because of its reference to the Ashburton Community Water Trust and the ACWT resource consents, the CPW NOR, resource consent applications, section 103 and the 2001 Joint Application CRC021091 to take 40 cumecs from the Rakaia River. The following is clear:

(1) CRC021091 can only refer to the Canterbury Regional Council application;
(2) the Regional Council cannot process a NOR and this is the role of the Selwyn District Council;
(3) the resource consent application for the ACWT hydro-electric project (**the 2007 HEP**) are to both the CRC and Ashburton District Council unless this is another reference to the 2001 Joint Application of the CPW and ACWT to the Regional Council.

Given that section 103 can only relate to one applicant and one consent authority, the Section 103 Declaration application was fundamentally misconceived.

[44] Mr Chapman for Synlait suggested that if the reference to the section was changed to 102, this would then give the ability to consider whether the NORs and applications for resource consents should be heard together by Ashburton District Council, the Canterbury Regional Council and Selwyn District Council. Immediately the majority of parties, particularly the Councils, raised concerns with such an approach given that it is not signalled within the application and they had not prepared submissions in respect of it.

[45] From our perspective it is a fundamental requirement of a declaration application that both the Court and the parties are able to ascertain from its face what declaration is sought. This Section 103 Declaration, on its face, cannot be made because it does not meet any of the statutory or other requirements, nor is it possible to define its intent from the text itself. The only reference within the grounds, within the application for declarations, that the Court is able to take as being relevant to this are (h) and (i) which read:

> *(h) On March 2007 ACWT lodged a suite of applications with Environment Canterbury and Ashburton District Council to develop a hydro electricity generation scheme on the southern side of the Rakaia River using the ACWT water from the 2001 water take application. These applications have not yet been notified.*
>
> *(i) Because the ACWT applications relate to the same water take from the Rakaia River as the CPWT applications the applications should be heard together pursuant to section 103.*

[46] This again repeats the reference to section 103 so it is not possible for us to conclude that that is a drafting error. Furthermore, it also adds in a reference to the Ashburton District Council. Ashburton District Council were not named as respondents to these proceedings although they did give notice and appeared pursuant to a section 274 notice. An officer of the Council had filed an affidavit addressing this aspect of the grounds and similar comments by Ms Snoyink in her affidavit. Mr Williams, counsel for the Ashburton District Council, made the clear point that a declaration against the Ashburton District Council is beyond those sought by the applicant as the District Council is not a respondent. Accordingly the Court would be making declarations against a section 274 party.

[47] Such an application is not made in the application for the Section 103 Declaration (nor was any amendment advanced by Mr Elsmore in either opening or closing). However, Mr Chapman for Synlait suggested that such orders should be made under section 102. This then gave rise to the curious position where Synlait, a section 274 party, was making an application for a further declaration from the Court to be

made against Ashburton District Council – a section 274 party – and other parties to the proceedings.

Is there a live dispute?

[48] A more fundamental problem underlying this is that neither the Regional Council, the Ashburton District Council or the Selwyn District Council, have made any final decision as to how they intend to proceed with hearing the applications. It is feasible that they may decide to hold a joint application of all the matters.

[49] However, as is pointed out in the affidavit of Dr Freeman for the Regional Council, there are a great many issues which influence the procedure adopted by the Regional and District Councils in hearing proceedings before them. Section 102 provides that where applications in relation to the same proposal are made to two or more consent authorities then the applications should be heard together unless the authorities are satisfied that they are sufficiently unrelated and the applicant agrees that a joint hearing need not be held.

[50] Again we must emphasise that the Court of Appeal has directed the Court in interpreting this provision that it relates to a single applicant[4]. At best it might be said that the 2001 Joint Application for water take has a single applicant in the sense that it is the ACWT and CPW as joint parties. It is not possible for this Court to conclude that the 2007 HEP notified in March 2007 by ACWT and the balance of the Central Plains Irrigation Scheme including the lake and distribution system are made by the same applicant. In fact there may be three distinct applicants, namely:

(1) ACWT;
(2) CPW; and
(3) ACWT and CPW jointly (the 2001 Joint Application).

4 *Fleetwing* above.

[51] Sections 102 and 103 and elsewhere use the words ***the proposal***. We note that the comments in the context of the Central Plains series of cases in ***Ngai Tahu Property Ltd***[5] where the Court noted at paragraph 59:

> *[59] We agree that the distinction between "the nature of the proposal" in s.91 and "nature of the activity" in s.92 ... is significant. We also concur that the word "proposal" has a global connotation, but the indication that that global term means "the activity which is intended by the applicants, and the effects of the activity" rather begs the question as to the bounds of the intended activity in a given case that may be said to relate to or be representative of "the proposal". What may be perceived in the eyes of an applicant as "the intended activity" may not necessarily coincide with a consent authority's objective assessment of the range of activity (and effects associated) involved in or embracing "the proposal".*

[52] In that regard the Court concludes that the question of the scope of ***the proposal*** is intended to be applied by a council in a pragmatic and workable fashion. It will be a question of fact and degree in every case. In this particular case the 2001 Joint Application for take does show inter-relationship between the activities envisaged on the north and south sides of the Rakaia River. However, examination of the application demonstrates that this inter-relationship is to ensure that there is an equitable sharing arrangement to maximise the take to each project when the other is not fully operating, and to ensure that the parties cumulatively do not exceed the maximum take allowed.

[53] What is also clear is that it is intended that the south side of the Rakaia take be from a completely different position to the north side take and that the application was intended to avoid competing priorities between the two takes. There is also clear evidence of distinction in respect of the activities, namely:

(a) one is entirely on the north side of the Rakaia and the other on the south;

5 C104/2006.

(b) they have entirely different infrastructural requirements which are not inter-connected in any way;

(c) the scope of the proposals are entirely different.

The 2007 HEP

[54] In this regard we should note that the 2007 HEP was suggested as being entirely beyond the terms of the 2001 Joint Application. This is because the 2001 Joint Application for resource consent sought water for ***irrigation and other water enhancement purposes***. Mr Chapman again suggested a useful declaration could be made by the Court in this regard. However, he accepted that there had been no notice of this to the other parties, and a number of other parties objected strenuously to the Court proceeding to consider this.

[55] For our part the issue as to whether or not the 2007 HEP application for using water the subject of the 2007 Joint Application can rely on that 2001 Joint Application is a question beyond any declaration properly before this Court. We do not agree with Mr Chapman that it is possible for the Court in hearing the three declarations sought by the applicant to embark upon a general declaratory and direction process to advise or assist the parties as it sees fit. Such an approach is one which would need to be properly notified, submitted on and considered by the Court if it were to be undertaken. It has not been the subject of any evidence before this Court on which the Court has even an evidential basis to reach any conclusion. We also keep in mind that the 2001 Joint Application does not depend on the 2007 HEP application. This Court (differently composed) considered priority of the CPW ACWT 2001 Joint Application without reliance on the application by ACWT for the 2007 HEP. If the 2001 Joint Application water cannot be used for the 2007 HEP this does not preclude an application for variation of any take granted, a new application or an application for transfer of take.

Section 313 – factors affecting the discretion

[56] Turning now more generally to the question of Mr Chapman's section 102 application, it can be seen that if there is more than one applicant, then section 102 would not apply. Even if section 102 does apply the question arises as to whether the

Court should make a pre-emptive declaration given that the Councils have not at this stage finalised or considered their appropriate process. Even if sections 102 or 103 do not apply, the Council still has a discretion as to whether to hear these matters together or sequentially.

[57] Influencing a decision on the hearing process are a significant number of issues. Of particular concern to this Court is that they involve matters which are within the knowledge of the territorial and regional authorities, not the Court. These include:

- what Council resources are available and in what time scale;
- questions of Commissioner availability;
- aspects of the application that may require expert reports or outside assistance;
- the various states of applications, the number of submitters, venue availability and the many other things that influence the conduct of a hearing.

[58] Section 310(a) and (c) provide the Court with power to either define duties under the Act or determine whether a particular act or omission contravenes the Act. It is difficult in the current circumstances for the Court to reach any conclusion that there is any duty of the Council which it has not complied with, nor any contravention of the Act. Quite simply, the Council still has within its power the process of a hearing, a power which it has not yet exercised.

[59] We note the Court of Appeal decision in ***Burrell Demolition and Others v Wellington Regional Council and Others***[6]:

> *Although discretionary in nature, the power given to the Environment Court to make declarations is a useful tool in the administration of the Act. We agree with Doogue J that particularly when parties who are faced with a live issue, as these parties were, combined to seek declaratory assistance, the Environment Court should be slow to decline relief. It is not appropriate to seek to compile*

[6] CA 161/2001 at para 12.

an exhaustive list of circumstances when it may be right nevertheless to refuse declaratory relief.

[60] In this case we struggle to find a live legal or factual issue which requires declaration. The Court can see no proper basis on which it should pre-emptively declare the position prior to the Council exercising its discretion. In reaching that conclusion, we particularly take into account that such a decision is procedural only and would be entirely curable on any appeal before this Court.

[61] We note also that the 2005 Amendment Act has included a new paragraph 310(h):

any other issue or matter relating to the interpretation, administration, and enforcement of this Act, except for an issue as to whether any of sections 93 to 94C have been, or will be contravened.

[62] There appeared to be some general agreement that the Court does have jurisdiction in respect of the administration of the Act which would include questions of process. We are unable to conclude from that that the Court should therefore intervene in a pre-emptive fashion in directing councils how they should exercise discretions which are reserved to them by Act of Parliament. As the Court noted in ***Creednz Incorporated v Governor General***[7]:

The willingness of the Court to interfere with the exercise of discretionary decisions must be affected by the nature and subject matter of the decision in question and by consideration of the constitutional role of the body entrusted by statute with the exercise of the power.

[63] That view is particularly strengthened in circumstances such as this where the Court is not appraised of or seized of the responsibility for ascertaining the particular resources it may have to dispose of the matter or the many other pressures which are probably exercised upon the Regional and District Councils at the same time.

7 [1981] 1 NZLR 172 at 197-198.

[64] Again, any failure in this regard is entirely curable on appeal. This Court, on appeal, is able to assess its own procedure and will need to make similar decisions in respect of how it will resource and deal with a significant number of appeals which relate to a similar resource. Where, as in the current case, there may be some aspect of an application which deals with a common resource (i.e. the Rakaia River), there may be other factors influencing the process to be adopted (i.e. priority).

[65] The Court process in other cases indicates that it too adopts a variable process depending on the particular facts of the case, positions of the parties and the like. Accordingly, we have concluded that this Court should not lightly intervene in the exercise of Council discretions where these have been reserved for them by Act of Parliament, and where there is no proper basis for the Court to believe that there would be a contravention of the Act. As the Court noted in ***Dairy Holdings and Others v Canterbury Regional Council***[8] at para 24:

> *Where I cannot conclude the Commissioners are doing anything wrong it seems difficult to direct them ... any failures on the part of the Commissioners can be remedied on appeal.*

[66] We have concluded that section 310(h) is intended to be utilised rarely and in situations where there is either no guidance or discretion or where it otherwise achieves the primary purpose of the Act under Part 2. Again we have been forced to the conclusion that the Section 103 Declaration had no realistic prospect of success and was misconceived.

Vexatious, frivolous and abuse of process

[67] A number of parties have highlighted to the Court a statement made by Ms Snoyink in The Press about the time of this application, 18 June 2007, where Ms Snoyink is reported as saying:

[8] C35/2007.

If we are successful it will mean everything will go on hold. It will hold them up and be very costly. We want to throw up everything we can to make the process difficult.

[68] This is a direct quotation from Ms Snoyink. It was contained in several of the affidavits and has not been rebutted in any opportunity for reply. The Court accepts this statement made by Ms Snoyink for the applicant as true, given that it is not disputed. This gave rise to particular concerns expressed by Dr Freeman in the following terms:

If this application for declaration is merely a tactic to disrupt CRC's hearing of the applications for the Central Plains Scheme, then the involvement of the CRC in this declaration process is an unfair cost to the ratepayers of the region, which is the entity that ultimately bears the cost of CRC's involvement in these proceedings.

[69] Ms Dysart for the Regional Council in her submissions said that Ms Snoyink's statement and the nature of these applications is such that the Court should conclude that they are frivolous, vexatious and/or an abuse of process under section 279(4). In such circumstances she argues that the only purpose of such applications was to stop or delay the Council carrying out its duties in respect of the processing of these applications under the Act.

[70] Dr Wylie for CPW repeated the same proposition and noted that the declaration applications met the tests of section 279(4). He noted that the declaration applications were misconceived and were evidentially an abuse of process and improper. He suggested that their purpose was to frustrate Central Plains and exhaust its funds, patience and time.

[71] The Court is drawn to the conclusion that these applications were indeed frivolous, vexatious and an abuse of process in terms of section 279(4) of the Act. In reaching that conclusion we have regard to the affidavit filed in support by Ms Snoyink which is eight pages long. Although this refers to the application for requiring authority status, it does not produce the Gazette Notice appointing the CPW as a requiring authority. It essentially asserts, as we have already set out, that the Minister agreed to

the applicant's proposal. She goes on to say further that the changes in size of the dam and the amount of storage are significant changes to what was originally proposed. Similar allegations were made in respect of the change from a three kilometre tunnel to a ten kilometre tunnel between the June 2006 and the March 2007 applications for a NOR.

[72] A misunderstanding as to the scope of the Minister's inquiry under section 167 and the role of the accompanying document to the application might be envisaged. However, Dr Wylie referred us to correspondence to the Minister and the responses which were received subsequently. As we have already noted, the Malvern Hills Residents was aware around the same time as the Gazette Notice was published that the dam height was to be a maximum of 55 metres. There was correspondence with the Minister and there was extensive explanation of the Minister's role, particularly in the document accompanying the Gazette Notice, which we understand was distributed particularly to the Malvern Hills Residents.

[73] We have concluded that there was no proper basis on which the Malvern Hills Residents could have reached the conclusion that the Minister had in any way approved, even at a cursory level, any proposal for development. This is strengthened in our view, by the fact that no action was taken at the time. Subsequently, when the NOR was filed, the Malvern Hills Residents have taken an active interest in that.

[74] Furthermore, the Malvern Hills Residents have been in receipt of experienced legal advice from a firm well versed in resource management matters. They would have been well aware of the distinction between status as a requiring authority and NORs and outline plans under the Act.

[75] In respect of the application for the Section 103 Declaration, Ms Snoyink's affidavit consists of two paragraphs of four sentences which essentially assert that there was a joint application for water take and that as the ACWT and CPW applications relate to the same water take, it is appropriate the applications be heard together.

[76] We agree with Dr Wylie that there was not any sufficient evidential basis to support the assertions which were made, particularly in respect of the Section 103 Declaration. In respect of the Section 171 Declarations, the evidence produced was

incomplete, notwithstanding that it was recognised that the Minister had granted requiring authority status.

[77] We have been drawn inevitably to the conclusion that the purpose of filing these proceedings was to achieve the very purpose stated by Ms Snoyink to the newspaper at the time the application was filed, namely to hold up the progress of the application and particularly the processing by the CRC of the applications it had before it. Furthermore, we accept Dr Wylie's proposition that its further intent was to frustrate Central Plains and exhaust its funds, patience and time.

General comments

[78] Accordingly, we have concluded that these proceedings were commenced for an ulterior purpose. Although we have not relied upon that conclusion as a principal basis for addressing the declarations, we nevertheless consider it important to make it clear to the Malvern Hills Residents that this approach to the scheme was not appropriate. The Act provides extensively for public participation at the NOR stage and in the various applications for consent. All proper opportunities would be given to the Malvern Hills Residents to participate in that and produce such evidence as was appropriate.

[79] The consent authority, and this Court on appeal, have wide powers to consider the effects and whether the various consents are appropriate in full or part. That is the process set up by the legislature for addressing the concerns of residents and others. Attempts to use Court and counsel time and the parties' funds in addressing such declaration applications is completely inappropriate. For our part we consider that applications for these declarations during the conduct of applications before the relevant consent authorities should be rarely, if ever, contemplated and essentially only deal with very urgent or extreme situations.

[80] All the various issues which have been raised here could have been addressed during the course of the hearings before the Commissioners, or this Court on appeal. It is incumbent upon counsel in advising parties to ensure that the procedures available under the Act occur expeditiously and without undue legalisation. This is an

unfortunate example of use of the Act for inappropriate purposes and must be marked out in the strongest terms.

[81] We recognise that the Malvern Hill Residents have legitimate interests and concerns in relation to the various applications and NORs. We appreciate they may have limited funding and in no way wish to dissuade them from pursuing their legitimate concerns in the public and participatory process envisaged under the Act. That they have chosen to forgo that course in favour of declaratory procedure cannot be blamed on the respondents or this Court. It is unfortunate they have applied time and money in this fashion and will now face applications for costs.

Directions

[82] Accordingly, pursuant to section 313 of the Act, this Court refuses to make any of the declarations sought by Malvern Hills Residents. It refuses also to make a further declaration or directions sought by Mr Chapman and advanced at the hearing itself but not advised to the parties at a prior time.

[83] For detailed reasons set out, such applications:

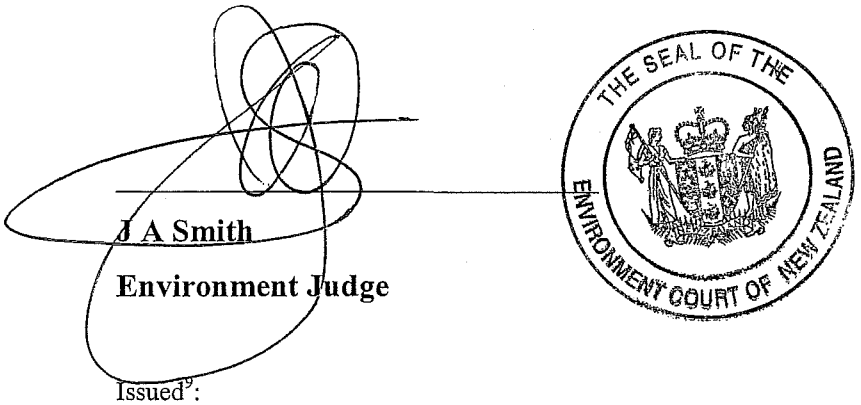
(1) are misconceived in drafting terms;
(2) are unsupported on a factual basis;
(3) have no sound legal basis;
(4) would not be supported on a discretionary basis because:
    (i) they serve no useful purpose;
    (ii) there is undue delay;
    (iii) they relate to matters within statutory discretion of the relevant authority;
(5) are frivolous, vexatious and are otherwise an abuse of process under section 279(4) of the Act.

[84] Inevitably issues as to costs against both Malvern Hills Residents and Synlait were signalled by the respondents. Any applications for costs are to be filed with this

Court within 20 working days, any replies thereto are to be filed within ten working days thereafter and any final reply five working days thereafter.

DATED at CHRISTCHURCH this 9th day of **August** 2007

For the Court:



J A Smith

Environment Judge

Issued[9]:

-9 AUG 2007

9 Smithje/Jud_Rule/D/2007-CHC-144.doc.

A

The Resource Management (Approval of Central Plains Water Limited as Requiring Authority) Notice 2005

Pursuant to section 167 of the Resource Management Act 1991, the Minister for the Environment hereby gives the following notice.

Notice

1. Title and commencement—(1) This notice may be cited as the Resource Management (Approval of Central Plains Water Limited as Requiring Authority) Notice 2005.

(2) This notice shall come into force on the 28th day after the date of its publication in the *New Zealand Gazette*.

2. Approval as requiring authority—Central Plains Water Limited is hereby approved as a requiring authority, under section 167 of the Resource Management Act 1991, in respect of the particular project or work described in clause 3, being the Central Plains Water Enhancement Scheme.

3. Central Plains Water Enhancement Scheme—(1) The particular project or work for which this approval is granted is distribution including associated intake, conveyance, storage and discharge for distribution of water for the purposes of irrigation in the central plains area; and associated:

(a) construction and operation, repair, maintenance and upgrading of roads; and

(b) operation, erection, installation, replacement, alteration, improvement, removal and other use of land (within the meaning of section 9 (4) of the Resource Management Act 1991) in respect of the distribution of water for supply.

(2) The central plains area is the area between the Rakaia River to the south, State Highway No. 1 to the east, the Waimakariri River to the north and the Southern Alps to the west.

Dated at Wellington this 21st day of November 2005.

DAVID BENSON-POPE, Minister for the Environment.

go7838

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2021] NZEnvC 77

IN THE MATTER OF	an appeal under Clause 14 of the First Schedule of the Resource Management Act 1991 (**the Act**)
AND	Appeal topics 7 and 9 Land Use and Disturbance
BETWEEN	MINISTER OF CONSERVATION
	(ENV-2019-AKL-122)
	FEDERATED FARMERS OF NEW ZEALAND
	(ENV-2019-AKL-114)
	HORTICULTURE NEW ZEALAND
	(ENV-2019-AKL-116)
	Appellant
AND	NORTHLAND REGIONAL COUNCIL
	Respondent

Court:	Judge J A Smith Commissioner R M Bartlett
Hearing: Last case event:	19-22 September 2020 Site visit 23 September 2020 and last step April 2021
Appearances:	S J Ongley and M Downing for the Minister of Conservation (**the Minister**) J M Landers for Horticulture New Zealand P R Gardner for Federated Farmers of New Zealand M J Doesburg for Northland Regional Council
Date of Decision:	3 June 2021
Date of Issue:	3 June 2021

INTERIM DECISION OF THE ENVIRONMENT COURT

A: The Court tentatively concludes the definition of īnanga spawning site should read:

> "The margins of the inundated area within 100 metres of the upper reach of the tidal prism during Spring High Tides."

This definition is to apply for C.8.2.1 and C.8.3.1.

B: C.8.2.1(2) to be amended as follows:

The setback for land preparation is:

(a) 10 metres from īnanga spawning sites, lake beds and natural wetlands;

(b) 10 metres from the bed of a continually or intermittently flowing river unless:

(i) The land preparation area is not on erosion prone land; and

(ii) The mean slope of the paddock adjoining the riverbed is 10 degrees or less; and

(iii) Sediment control measures are installed and maintained in accordance with the Erosion and Sediment Control Guidelines for Vegetable Production 2015 (Horticulture New Zealand); and

(iv) The relevant requirements of standards 50 and 55 of the Resource Management (Natural Environmental Standards for Freshwater) Regulations 2020 are complied with;

in which case the setback may be reduced to 5 metres.

There may be consequential amendments to C.8.3.1.

These rules prevail over the provisions of the NES-F under s 43B of the Act.

C: The Regional Council is to prepare its preferred wording of the provisions in accordance with this decision and circulate them to the other parties within 15 working days. Parties are to provide comment to the Council within 15

working days. If wording cannot be agreed the Council is to provide its preferred provisions with the alternative wording and reasons of all parties within a further 15 days. The Court will then finalise the wording on the papers.

D: Applications for costs are not encouraged. Any application is to be made within 30 working days and any reply 10 working days thereafter.

REASONS

Introduction

[1] This decision relates to topics in the proposed Northland Regional Plan (**NRP**) identified at various conferences through mediation as being Topics 7 and 9 of the Plan, relating to aspects of land use and disturbance.

[2] These topics were set down for hearing in September 2020 after delays due to COVID-19. During this time the Government had introduced and made operative provisions known as the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**) and the National Environmental Standards for Freshwater (**NES-F**). Both documents became operative shortly prior to the hearing of this matter in September 2020.

Progress made through mediation

[3] Many of the matters originally identified in Topics 7 and 9 had been resolved through mediation in relation to:

a) Topic 7 discharge to land and water;

b) Topic 9 land use and disturbance activities.

[4] By the time of the hearing, the Council opened on the basis there was one unresolved provision to the Plan namely C.8.2.1 Land Preparation Permitted Activity.

[5] The definition of land preparation had been appealed but this was resolved by consent order issued in May 2020 with the definition confirmed as:

> The disturbance of earth by machinery for planting, replanting, tending or harvesting pastoral crops. It includes blading, contour plowing, reaping, mounding, stepping, contouring, bunding and sediment control measures associated with the activity but does not include direct drilling.

[6] Beyond the Minister of Conservation two other parties had appealed Rule C.8.2.1 and other provisions of Topics 7 and 9. But these aspects have been withdrawn by all parties as a result of the settlement of the various issues. The only appeal extant at the time of hearing in September 2020 was that for the Minister of Conservation in relation to C.8.2.1.

[7] At hearing, Federated Farmers suggested that the provisions of C.8.3.1 might need to be modified to common wording with C.8.2.1 depending on the outcome. We consider this later in this decision.

Two aspects for/to the Minister's appeal

[8] The Minister sought that C.8.2.1 Land Preparation Permitted Activity for land preparation have a constraint:

a) Within 10 metres of īnanga spawning sites; and

b) Within 10 metres of lakes, rivers, streams or natural wetlands.

[9] The Council's position was that the setback point for īnanga spawning sites raised a related issue as to how īnanga spawning sites should be identified. The Council accepted that there is clear evidence that sediment cannot be allowed to adversely affect īnanga spawning habitat which is protected under Policy 11(a) of the New Zealand Coastal Policy Statement (**NZCPS**).

[10] To that extent the Council and the Minister had the same position with the exception of the definition of "īnanga spawning site". The Council preferred the wording of the definition of īnanga spawning site proposed by Horticulture New

Zealand.

[11] In relation to the blanket 10 metre setback of land preparation from lakes, rivers, streams and natural wetland, the Council did not support this position and essentially holds a common position with Federated Farmers and Horticulture New Zealand.

Statutory amendments

[12] In August 2020, just prior to the commencement of this hearing, the Government issued:

a) A new national policy statement for freshwater management, NPSFM 2020, which revokes and replaces its predecessors NPSFM 2014 and NPSFM 2017. The NPSFM 2020 took effect on 3 September 2020;

b) A new national environment standard for freshwater NES-F took effect on 3 September 2020;

c) The Resource Management (Stock Exclusion) Regulations 2020.

[13] The Council noted that this gives rise to two issues:

a) The extent to which the NRP must give effect to the NPSFM 2020; and

b) Whether changes to the NRP more restrictive than the NES-F are justified in the circumstances of the Northland Region.

Complications in considering this appeal

[14] Subsequent to the hearing of this matter, it became clear that issues as to the interpretation of the NES-F arose in respect of areas affected by the tidal prism (i.e., mixed saline/freshwater) and potentially even in relation to other coastal areas. The Court concluded, after hearing submissions from various parties, including the parties to this hearing, that it should consider the issue separately and issue a declaration in respect of the effect of the NES-F.

[15] The Court also sought submissions from the parties as to what steps should be taken in relation to this hearing.

[16] Consequent upon the decision on the declaration being issued,[1] further events have occurred:

a) That declaration has been appealed to the High Court. The time for hearing this Appeal is as yet unknown;

b) The parties made further submissions as to whether this matter could proceed independent of the Appeal decision;

c) There was some difference of opinion on this matter between the parties, with the majority considering the matter could proceed while Federated Farmers were somewhat more reluctant; and

d) In the end the Court issued a separate minute in April 2021 determining that it would proceed to finalise this decision on these issues.

Impact of NES-F on this hearing

[17] We have considered carefully the effect of the NES-F on the matters before us at this hearing. The Court declaration was that the NES-F was intended to apply upstream of the river mouth as that is defined in the various regulations and policy statements. Most of the properties which the Court is considering would be above this margin.

[18] In particular, we note that īnanga spawning occurs during high spring tides on vegetation at the tidal prism limit from which eggs will not be dislodged during subsequent high tides.

[19] In this regard, the īnanga spawning sites we were referred to for our site visit would be at locations above the river mouth as defined in the Act.

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[1] *Bay of Islands Maritime Park Inc v Northland Regional Council* [2021] NZEnvC 6.

[20] In many cases, the tidal prism extends well upriver of the river mouth as defined in the Act. Two īnanga spawning sites referred to us at the hearing were on Hatea River, about a kilometre up from the riverside bridge in Mair Park. Another was in the upper reaches of the Ruakaka River, probably seven or eight kilometres from the river mouth. Sites near the Takahiwae marae we were referred to were beside Whangarei Harbour. Here the īnanga spawning sites also appeared to be above the stream mouths.

[21] There are some areas where land disturbance activities could occur below the river mouth. These do not affect īnanga spawning sites but could result in effect on coastal wetlands such as in Whangarei Harbour.

[22] We have concluded that the effect of the NES-F in relation to the issues to be determined is limited and can be accommodated in the consideration of the various criteria. This is on the basis that the declaration of the Court is overturned on appeal.

The parties' positions

[23] The Regional Council, Horticulture New Zealand and the Minister agreed that land preparation should be permitted if there is a setback of 10 metres from an īnanga spawning site and proposed a new clause (x) setting that out, to follow C.8.2.1(1). Federated Farmers considered that the setback should be 5 metres from an īnanga spawning site if the mean slope is less than ten degrees. If greater than 10 degrees then there should be a 10 metre setback. The NES-F provides for a 10 metre setback subject to exceptions in regulations.

[24] In relation to the C.8.2.1(2) setback provisions, the Regional Council, Horticulture New Zealand and Federated Farmers agreed that land preparation should be permitted if:

a) It is set back 5 metres from a natural wetland, the bed of a lake or the bed of continuously or intermittently flowing (**COIF**) river; and

b) The activities outside that 5 metre setback follow the Horticulture New

Zealand guidelines[2] and 50(2)(a) and (b) of the NES-F. We shall refer to these provisions of the NES-F as **Standards** to avoid confusion with NRP rules.

[25] In the event that land preparation does not meet the criteria in Standard 50(2)(a) and (b) the setback would be 10 metres, consistent with NES-F standards, except those identified above.

[26] The Minister sought to allow the activity with a 5 metre setback from the bed of a COIF river as per Standard 50(2)(b) above if the mean slope is ten degrees or less but would impose a setback of 10 metres from the bed of a COIF river if the slope is ten degrees or more.

[27] The Minister seeks a setback of 10 metres from a natural wetland or the bed of a lake.

[28] The Regional Council and Federated Farmers agreed an alternative which is:

a) A setback 5 metres from a natural wetland, the bed of a lake or the bed of a COIF river if the mean slope is ten degrees or less, the Horticulture NZ guidelines are complied with and Standard 50 of NES-F 2020 is complied with;

b) A setback 10 metres from a natural wetland, bed of a lake or COIF river if the mean slope is ten degrees or more.

[29] We begin our evaluation of these alternatives by considering the statutory and regulatory framework. The parties agreed that the relevant documents are the NZCPS, the NPSFM 2020, the NES-F, the Regional Policy Statement (**RPS**) and the settled provisions of the proposed Plan. In addition, relevant iwi and hapu management plans need to be considered. In this case, no particular iwi or hapu plans were produced to us. Nevertheless, we consider the relevant plans all seek to enable cultural

[2] Erosion and sediment control guidelines for vegetable production (Horticulture New Zealand, 2015).

connections with rivers, lakes and wetlands in the region.

NZCPS

[30] The relevance of the NZCPS to setbacks from īnanga spawning sites and land preparation activity depends on whether that activity is occurring in the coastal environment. We consider the NZCPS out of caution while recognising most land preparation sites are not in the coastal environment.

[31] Objective 1 of the NZCPS is to safeguard the integrity, function, form and resilience of the ecosystems including marine and intertidal areas estuaries, dunes and land. The proposed 10 metre setback is stated to protect the **catchments** of outstanding lakes or dune lakes with outstanding or high ecological value.

[32] Objective 6 is to enable people and communities to provide for their social, economic and cultural wellbeing and their health and safety through subdivision, use and development.

[33] Policies require a precautionary approach (Policy 3) and require appropriate buffers in the coastal environment (in particular clause 1(J)) to areas containing sites of ecological significance. Other relevant polices are 11 (indigenous biological diversity (biodiversity)), 22 (sedimentation) and 23 (discharge of contaminants).

[34] Policies 11(a) and (b) are applicable both to areas of threatened taxa such as īnanga spawning sites/areas and also more broadly to areas of indigenous vegetation and habitat of indigenous fauna.

[35] The objectives and policies are set up to provide bottom lines that avoid adverse effects on:

a) Indigenous taxa listed threatened or at risk in the New Zealand Threat Classification lists;

b) Indigenous ecosystems and vegetation types in the coastal environment

that are threatened or rare;

c) Habitats of indigenous species where the species are at the limit of their natural range or are naturally rare; and

d) Areas containing nationally significant examples of indigenous community types.

[36] As this Court discussed in our decision on biodiversity, the environment must be treated as a whole not only in terms of an integrated Te Ao and Te Mana o te Wai approach to the environment but in terms of the scientific interdependence of the relevant vegetation and of all forms of taxa comprising that environment. As we pointed out in the previous decision this is particularly true within freshwater environments which not only are essential for animal life but also for specialised forms of plant life.

NPSFM 2020

[37] The processing of the NRP change commenced when the NPSFM 2014 (revised 2017) was current and evidence before us was based on that document. It has now been supplanted by the NPSFM 2020, which came into immediate effect. The latter "applies to all freshwater … and to the extent they are affected, to receiving environments which may include estuaries and the wider coastal marine area". However, it is a future obligation on the Council to introduce a Plan that implements the NPSFM 2020 by December 2024.

[38] Under the now revoked NPSFM 2017, freshwater quality was required to be maintained if it was good and enhanced where it is degraded. NPSF 2017 was to be implemented by 2025. There were no specific requirements to manage sediment as an attribute (this is now a compulsory value in NPSFM 2020 Appendix 1A Compulsory Values 1 Ecosystem health, as a component of *Water quality*.)

[39] Relevant provisions of the NPSFM (2014 revised 2017) included Objective 2 – that overall water quality be maintained; and Policy A4 requiring that regard be given

to the effect of a discharge on life-supporting capacity of freshwater and any ecosystem associated with freshwater, and the extent to which discharges that have more than minor adverse effects on freshwater and ecosystems will be avoided. A policy similar to Policy A4 (which was a transitional policy given that the Council has yet to fully implement the NPSFM 2020 water quality requirements) is included in the proposed NRP as Policy D.4.5.

[40] Objective C1 sought to improve the integrated management of fresh water and the use and development of land. This included the interactions between fresh water, land, associated ecosystems and the coastal environment. Policy C1 directed regional councils to recognise those interactions and to manage freshwater and land use and development in catchments in an integrated and sustainable way to avoid, remedy or mitigate adverse effects including cumulative effects.

[41] These provisions were revoked absolutely with the coming into force of the NPSFM 2020. However, they had a future implementation date and envisaged a plan change. Given their revocation they do not require any particular response or action on this appeal. They do however inform us as to the rationale for the Plan provisions.

NPSFM 2020

[42] NPSFM 2020 has changed the freshwater management framework further. It brought to the fore Te Mana o Te Wai "the fundamental importance of water" and in so doing sought to restore and preserve the balance between water, the wider environment and the community. It sets up a framework of six principles to inform the NPS and its implementation – those relate to the roles of tangata whenua and other New Zealanders in the management of freshwater.

[43] It establishes a hierarchy of obligation, being first, the health and wellbeing of water bodies and freshwater ecosystems; second, the health needs of people; and third the ability of people and communities to provide for their social economic and cultural wellbeing now and in future.

[44] It has 15 policies, all of which are relevant but some that have particular

relevance to the matter at hand, being setbacks from natural water bodies (the beds of lakes, the beds of COIF rivers and natural wetlands):

a) Policy 2 (tangata whenua are actively involved);

b) Policy 6 (there is no further loss of natural inland wetlands, their values are protected and their restoration is promoted);

c) Policy 7 (the loss of river extent and values is avoided to the extent practicable);

d) Policy 8 (significant values of outstanding water bodies are protected);

e) Policy 9 (the habitats of indigenous freshwater species are protected);

f) Policy 13 (the condition of waterbodies and freshwater ecosystem is monitored, and action taken where freshwater is degraded to reverse deteriorating trends; and

g) Policy 15 (communities are enabled to provide for their social, economic and cultural well-being in a manner consistent with the NPS).

[45] These are strong policies with implementation requirements to match. They require that:

a) Te Mana o te Wai must inform interpretation of the NPS and the provisions that will need to be included in regional policy statements and plans and in district plans;

b) Regional councils must adopt an integrated approach to the management of freshwater (ki uta ki tai) and must be explicit (via an objective) as to how the management of freshwater will give effect to Te Mana o Te Wai; and

c) Among other matters local authorities must recognise the

interconnectedness of the whole environment from mountains and lakes down rivers to estuaries and the sea; and must recognise interactions between freshwater, land, water bodies, ecosystems and receiving environments.

[46] The NPSM 2020 also sets out in Appendix 1A "compulsory values" which must be applied to freshwater management units (**FMUs**). Among other requirements, comprehensively described in the Appendices, regional councils must identify an environmental outcome for every value that applies to an FMU or part of an FMU and it must use all the relevant attributes that are identified for the compulsory values in Appendix 2a and 2b. There are four compulsory values in Appendix 1, these being:

a) Ecosystem health, including water quality, water quantity, habitat, aquatic life, and ecological processes, all of the biophysical components being necessary to "sustain indigenous aquatic life expected in the absence of human disturbance or alteration" (before providing for other values);

b) Human contact, in terms of the extent to which an FMU (or part of an FMU) supports people being able to connect with the water, taking into account pathogens, water clarity, deposited sediment and other factors that could affect people;

c) Threatened species, in terms of the extent to which an FMU or part of an FMU supports a population of threatened species, with all components of ecosystem health required to be managed;

d) Mahinga kai in relation to kai being safe to eat but also in terms of the cultural mores involved in the use of kai, its location and the knowledge about how to access and use it, including for long term use and sustainability of the kai and the places where it is found.

[47] The policies and implementation requirements of the NPSFM 2020 are specific and directive. The NPSFM 2020 refers to the outcomes of "no net loss of extent of natural inland wetlands" and "no loss of river extent and values".

[48] While we are not required to implement them in this plan appeal, they are relevant when considering the evidence and the outcome of the RPS appeals and the proposed plan provisions settled previously. In short, they all "pull in the same direction".

[49] We cannot presume the outcome of the consultation planning process and the outcomes that may be achieved given the emphasis on a partnership with tangata whenua. Nevertheless, the NPSFM 2020 reinforces provisions in earlier NPSFM.

[50] This Court discussed the NPSFM in somewhat more detail in its biodiversity decision,[3] but that discussion is equally apposite to this situation dealing with land disturbance. In short, the policies of NPSFM 2020 do not require particular action in this decision but do signal the future approach to be adopted. We conclude that we should insert provisions which are consistent with the NPSFM 2020 and which also achieve and implement the RPS and settled provisions of this Plan. In this case, we see no areas of conflict at all. The current plan provisions are consistent with the NPSFM 2020.

The NES-F

[51] The NPSFM 2020 and NZCPS are both relevant to setback requirements but not to the extent that they direct our decisions regarding setback distances. The NES-F is more directive for this appeal in that it sets out particular requirements including that it:

a) Prevails over any rules in the proposed NRP that are more lenient than those in the NES-F; and

b) Contains provisions that govern activities, including vegetation clearance, in within a 10 metre setback from natural wetlands.

[52] Standard 50 (1) of the NES-F states that:

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[3] *CEP Services Matauwhi Limited v Northland Regional Council* [2021] NZEnvC 39.

> Vegetation clearance outside but within a 10 metre setback from a natural wetland, is a permitted activity if it:
>
> - Is for the purpose of arable land use or horticultural land use in an area that was used for either of those uses at any time between the start of 1 January 2010 and the close of 2 September 2020; and
>
> - Complies with the general conditions on natural wetland activities in regulation 55 (but regulation 55(2) does not apply).

[53] Standard 50(2) makes the same provisions for earthworks or land disturbance vegetation clearance outside but within 10 metres of a natural wetland as a permitted activity. The proposed restrictions on permitted land use within 10 metres of natural wetland under consideration in this decision are more stringent than those in the NES-F. This is permissible under the NES-F Standard 6(1).

[54] The NES-F Standards impose a large number of conditions on the above activities within a 10 metre setback, among them, general conditions on earthworks, land disturbance and vegetation clearance in Standard 55(8)(a) to (d). These conditions require that:

> a) During and after the activity, erosion and sediment control measures must be applied and maintained at the site of the activity to minimise adverse effects of sediment on natural wetlands; and
>
> b) The measures must include stabilising or containing soil that is exposed or disturbed by the activity as soon as practicable after the activity ends;
>
> c) The measures referred to in paragraph (b) must remain in place until vegetation covers more than 80% of the site; and
>
> d) If the activity is for vegetation clearance, it must not result in the earth remaining bare for longer than three months.

A complete copy of Standard 55 is annexed as **A**.

[55] The conditions do not appear to place any constraint on the repetition of such clearance earthworks or disturbance, such that these may be a more or less continuous activity punctuated by periods where vegetation cover is at 80% or more. We conclude that, on their own, in the absence of a setback, the regulations may not provide sufficient protection for the margins of natural wetlands, beds of lakes or the beds of COIF rivers in the manner intended.

[56] NES-F applies to natural wetlands but does not make the distinction found in the NPSFM 2020, between wetlands below mean high water spring tide (**MHWS**) and those in the freshwater environment above. The NPSFM 2020 terms the latter "natural inland wetlands".

Status of NES-F

[57] In our declaration of *Bay of Islands Maritime Park v Northland Regional Council*[4] on whether the NES-F includes the coastal marine area we determined that the NES-F did not apply to the area below the "mouth of a river" as defined in the RMA. Our decision was appealed[5].

[58] It appears that if the outcome of the High Court appeal is the extension of the NES-F into the marine environment this would be of no particular moment in the current case, unless this decision adopts different provisions to those currently proposed by any of the parties.

[59] The parties have agreed in responses to the minute of 31 March 2021 that the proposed Plan provisions are more stringent than the NES-F and there would be no conflict with the NES-F as a result. Land preparation for existing arable and horticultural uses within 10 metres of a natural wetland must comply with the general conditions in Regulation (55) NES-F, so they are not more enabling than the NES-F.

[60] Accordingly, where there is preference for a setback of 5 metres, the Council, Horticulture New Zealand and Federated Farmers agreed that activity must comply with the Horticulture New Zealand guidelines and with Regulations 50(2) and 55 of the NES-F. Thus, both sets of proposals would arguably be more restrictive than NES-F. Certainly, they are not more permissive than the NES-F.

[61] There is a note in the Joint Memorandum of 16 October 2020 (paragraph 12) that says, "within 5 metres of a natural wetland". However, we conclude that is an error as no land preparation activities will be permitted within 5 metres of a wetland

[4] [2021] NZEnvC 006.

[5] Minister of Conservation and Royal Forest and Bird appeal to High Court 3 March 2021.

under the provisions we are considering.

RPS

[62] In the RPS, land preparation was not recognised as being a significant resource management issue but there is a focus on water quality and biodiversity. Relevant objectives are as follows:

a) Objective 3.2 "Region-wide water quality" seeks the overall improvement of fresh and coastal water quality in Northland. Relevantly to Topic 9, that includes increasing the overall Macroinvertebrate Community Index (**MCI**) in rivers and streams and decreasing sedimentation of estuaries and harbours. Policy 4.2 expands on the improvement of water quality; and the reduction of sediment loads from use and development of land through the enhancement of wetlands and riparian margins;

b) Objective 3.4 "Indigenous ecosystems and biodiversity" seeks to safeguard ecological integrity by protecting significant indigenous vegetation and habitat, maintaining its extent and diversity and enhancing where practicable indigenous ecosystems and habitat. Policy 4.4 expands on the objective, focusing on the protection of threatened or at risk indigenous taxa, significant indigenous vegetation, and habitats of indigenous fauna in both the terrestrial and coastal environment, and including consideration of minor or transitory effects, irreversible effects and cumulative effects. It supports restoration and enhancement of ecological integrity; and

c) Objective 3.5 focuses on sustainable management of natural and physical resources for the benefit of Northland's economic well-being.

[63] Of importance to the overall health of wetlands, rivers and lakes is the:

a) Integrated catchment management that is the subject of Objective 3.1;

b) Maintenance of ecological flows and water levels (Objective 3.3); and

c) Active management of the environment through support to landowners, individuals, iwi, hapu, and community groups (Objective 3.15).

Proposed Plan

[64] The proposed Plan has had many appeals settled through mediation. Consent orders were issued by the Court on 20 May 2020 for Topic 7 stormwater discharges and industrial and trade waste discharges and for Topic 9 earthworks, livestock exclusion and land preparation.

[65] Appeal points resolved since then include:

a) Rule C.6.3.1 Farm wastewater discharges to land – permitted activity;

b) Rule C.6.3.2 Horticulture wastewater discharges to land – permitted activity;

c) Rule C.6.3.3 Discharges associated with the making or storage of silage – permitted activity;

d) Rule C.6.3.4 Discharge associated with the disposal of dead animals or offal – permitted activity;

e) Rule C.6.3.8 Farm wastewater discharges to water – non-complying activity;

f) Rule C.6.4.1 Stormwater discharges from a public stormwater network – permitted activity;

g) Rule C.6.4.2 Other stormwater discharges – permitted activity;

h) Rule C.6.8.2 Discharges from contaminated land – permitted activity;

i) Rule C.8.3.2 Earthworks – controlled activity;

j) Rule C.8.4.2 Vegetation clearance in riparian areas – permitted activity;

k) Policy D.4.3 Municipal, domestic and production land wastewater discharges; and

l) Definitions of "sensitive groundwater" and "vegetation clearance".

Unresolved matters

[66] At hearing there were three matters remaining:

a) The definition of "īnanga spawning site" for the purposes of land disturbance;

b) Rule C.8.2.1 Land preparation – permitted activity; and

c) Whether consequential changes were required to Rule 8.3.1 Earthworks.

[67] The matters covered in evidence were:

a) Whether land preparation activities should be set back 10 metres from īnanga spawning sites;

b) How the īnanga spawning sites should be defined for the purposes of C.8.2.1 and C.8.3.1 until mapped by the Regional Council; and

c) How land preparation activities should be managed within wetlands, lakes and COIF rivers.

We deal with each issue in turn before evaluation overall.

The definition of īnanga spawning site

[68] The Council, Minister and Horticulture New Zealand supported the insertion of the following definition for īnanga spawning site:

> "the margins of rivers and estuaries that are inundated during high spring tides".

[69] Federated Farmers were concerned that many of their members would not know if the margins of their properties or rivers or estuaries had īnanga spawning sites or not. Federated Farmers agreed that such sites should be avoided but in practice, the identification of such areas is particularly difficult especially in low lying areas. Mr Gardner for Federated Farmers argued:

a) There was a jurisdiction issue. Such a definition was not part of the original submission and that the Minister is now seeking to define the spawning sites rather than the identification of them that as resolved by the Court of Appeal in *Canterbury Regional Council v Dewhirst Land Company Limited.*[6]

b) The margins of rivers required particular attention relying on the Court's decisions; and

c) That the word margin is not defined in the RMA, but it is nevertheless important and that it is identified in s 6A as part of the preservation of the natural character of lakes and rivers and their margins.

[70] Some spawning sites have been identified and the Council, Horticulture New Zealand and the Minister have agreed that land preparation activities are not to be undertaken within 10 metres of īnanga spawning sites. Īnanga spawn on the margins of the river.

[71] The term 'margins' requires more attention. First, it is not defined in the RMA. Second, it is plainly important as it is referred to in s 6(a) of the Act in which the

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[6] [2019] NZCA 486.

preservation of the natural character of "... lakes and rivers and their margins" are stipulated as a matter of national importance.

[72] Having discussed the decision of the *High Country Rosehip Orchards Limited v McKenzie District Council*[7] the Court of Appeal went on in Paragraph 67 to note:

> Given that the margins of the river Selwyn are not directly relevant to the first question of law, we say nothing further about the meaning of margins.

[73] The Court of Appeal concluded the "the bed of the river" includes the banks of that watercourse. The bed is the river at its fullest flow without overtopping its bank. The bed is the area covered by water during the ordinary raining season. Thus, the margins become particularly apposite for īnanga spawning sites.

[74] The situation as we understand it is that twice a month at full moon high tide, the water level is sufficiently high for īnanga spawning (**Spring High Tide**). The īnanga travel to reach saltwater in the tidal prism during those high spring tides and then spawn on the river margins immediately upstream. This position can change but is relatively consistent. Quite clearly however, areas downstream of the tidal prism and those that are (say more than 50 or 100 metres upstream of it) would not be satisfactory īnanga spawning areas. A rule that defined īnanga spawning sites as being all areas that were inundated at Spring High Tides would likely include large stretches of river and coastal areas that are not suitable for īnanga spawning. But at this point in time the data on the location of īnanga spawning sites are insufficient for such sites to be documented in the Plan.

[75] We agree with the Council and the Minister that failing to act to protect īnanga spawning habitat and allowing land disturbance to proceed near possible sites until the identification of spawning sites is complete is not appropriate. We prefer to adopt a precautionary approach while recognising that the definition should relate to the areas in which īnanga spawning could occur. Adopting a particularly cautious approach, we consider that an area within 100 metres of the upper reaches of the tidal prism during Spring High Tides would adequately cover both the monthly Spring

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[7] [2011] NZEnvC 387 at [138] to [140].

High Tides and also those perigean spring tides that occur less frequently. The tidal prism can vary, and it seems likely that this might vary over a reach of a river on low-lying land, such as Ruakaka River. At this stage, we are not confident that the final wording should read: "The margins of the inundated area within 100 metres of the upper reach of the tidal prism during Spring High Tide". Nevertheless, we consider this forms the basis for further discussion between the parties to find a workable wording for this area.

Setback for īnanga spawning site

[76] The Council, Horticulture New Zealand and the Minister agreed a setback clause for inanga spawning sites should read:

x) the activity is not undertaken within 10 metres of an īnanga spawning site;

[77] Arguments for the 10 metre setback included:

a) The importance of īnanga as indigenous fish that are "at risk: declining" under the New Zealand Threat Classification system and hence demand protection under NZCPS Policy 11(a)(i);

b) That īnanga are sensitive to elevated levels of suspended and deposited sediment in their spawning habitat;

c) Spawning sites are generally limited to the margins of rivers and estuaries close to the level of Spring High Tides. Agricultural and horticultural use of such areas is likely to be limited by other factors such as esplanade reserves, marginal strips and the like or by the saline nature of such environments, thus limiting the aerial extent over which pastoral/horticultural activities are prevented;

d) That the extent and location of all spawning sites has not been mapped and adopting a 10 metre buffer is preferable and reflects a precautionary approach that is appropriate for an "at risk" species;

e) The Regional Council's own data indicate a major pressure on harbours and estuaries from run-off and discharges of contaminants from land, particularly sediment and nutrients;

f) There is scientific evidence that a 10 metre buffer around riparian margins (including stock exclusion, vegetated buffers and setbacks) gives a superior result to 5 metre buffer in terms of the reduction of sediment load to water; and

g) A 10 metre setback is easier to implement, monitor and enforce, will be more likely to reduce fine sediment input to streams and will be effective on all soil types.

[78] Federated Farmers agreed with a 10 metre setback for īnanga spawning sites where the mean slope of the paddock is greater than 10 degrees but proposed a 5 metre setback where the slope is 10 degrees or less. They argued:

a) Where the land is gently sloping the potential for sediment generation is limited, thus minimising the potential effects on īnanga spawning such that a 5 metre buffer is appropriate; but as the mean slope of the ground increases so does the risk of sediment generation and hence a greater setback is needed (no activity occurs within 10 metres of the margin if slope is greater than 10 degrees); and

b) Between 5 metres and 10 metres from the spawning site, wetland, lake or river the NRP requirements of clause C.8.2.2(2)(b) and (c) would be triggered, thus further controlling sediment generation.

[79] The argument was therefore not specific to inanga spawning sites but to all land disturbance areas.

Control of sediment near water

[80] In other NRC topic hearings we have heard about the continuing sediment

deposition within Northlands estuaries/harbours and the effect this has had and will continue to have on wildlife and their habitats as well as on people who use these areas for recreation, collection of kai moana and aesthetic pleasure.

[81] Sediment is washed into streams from all over every catchment, from tributaries to larger streams and rivers and thence to estuaries and the sea. We conclude that past practices of land clearance have led to the current state of our streams, rivers, lakes and wetlands. There is no doubt the RPS and Plan envisage the management of such activities and their outcomes.

[82] Te Mana o Te Wai requires the improvement of water that is degraded. Where human activities make up a large proportion of land use in a catchment, this Plan and the other background documents envisage improvements to minimise sediment inputs to retain or improve īnanga habitat. We accept the evidence that buffers/setbacks will reduce sediment to these water bodies.

Conclusion of setback for īnanga spawning sites

[83] In relation to spawning habitat, the 10 metre setback agreed by three of the parties provides the greatest security for the protection of the breeding habitat of a threatened species, the habitat of which has not yet been mapped. We conclude that the wording proposed by the Council, Horticulture New Zealand and the Minister is appropriate for inclusion of the plan.

[84] Overall, we conclude the extra setback width at any slope is needed to reduce erosion and sediment generation and we will apply a 10 metre buffer at īnanga spawning sites.

Scope for 10 metre setback for lakes and natural wetlands

[85] A 10 metre setback for natural wetlands and lakes would be more restrictive than the NES-F.

[86] Regional rules that are more restrictive than the NES-F standards are permitted

under s 43B.

[87] In the present case, Standard 6(1) of the NES-F provides in 6(1): A district rule, regional rule, or resource consent may be more stringent than the regulations.

[88] There are no further constraints on this provision and on the face of it rules applying control more stringent than the NES-F are effective. Standard 50 provides:

> **50 Permitted activities**
>
> (1) Vegetation clearance outside, but within a 10 metre setback from, a natural wetland is a permitted activity if it –
>
> (a) Is for the purpose of arable use or horticultural use in an area that was used for either of those uses at any time between the start of 1 January 2010 and the close of 2 September 2020; and
>
> (b) Complies with the general conditions on natural wetland activities in Regulation 55 (but Regulation 55(2) does not apply).
>
> (2) Earthworks or land disturbance outside, but within a 10 metre setback from, a natural wetland is a permitted activity if it –
>
> (a) Is for the purpose of arable land use or horticultural land use in an area that was used for either of those uses at any time between the start of 1 January 2010 and the close of 2 September 2020; and
>
> (b) Complies with the general conditions on natural wetland activities in Regulation 55 (but Regulation 55(2) does not apply).

[89] This would permit land disturbance to the edge of a natural wetland. The NES-F is silent on disturbance to the edge of lakes or rivers. It is clear that to meet Standard 50, to allow land disturbance within 10 metres of a natural wetland. Standard 55 NES-F would need to be complied with.

[90] Standard 55 is a long provision and 55(2) may be excluded depending on the meaning "(but regulation 55(2) does not apply)". It is unnecessary to determine the meaning of standard 55(2) currently. The other provisions are very extensive, and many are problematic in practical application i.e.:

a) 55(3)(e) … sediment must not (ii) be allowed to enter any natural wetland;

b) 55(5) … damming, or diversion of water around a worksite, or discharges

of water … if conditions are complied with;

c) 55(8)(a) … minimise adverse effects of sediment on natural wetlands;

d) 55(8)(b) the measures must include stabilising or containing soil that is exposed or disturbed by the activity as soon as practicable after the activity ends;

e) 55(8)(c) the measures referred to in paragraph (b) must remain in place until vegetation covers more than 80% of the site; and

f) 55(8)(d) if the activity is vegetation clearance, it must not result in earth remaining bare for longer than 3 months.

These provisions are generalised and require comparison with original state. We attach as **A** a copy of Standard 55.

Setbacks from natural wetlands and beds of lakes

[91] Horticulture New Zealand, Federated Farmers and the Council felt that a 5 metre setback with these provisions would be appropriate for use in Northland for wetlands, lake beds and rivers. Where these guidelines are not complied with, the setback should be 10 metres.

[92] We note that all parties are agreed that land disturbance to the edge of a wetland, lake, river or īnanga spawning site is not appropriate.

[93] Mr Doesburg relied on s 32(4) of the RMA to support an argument that the "prohibition or restriction is justified in the circumstances… of each region".

[94] We have considered the evidence from the parties about the usefulness of the Horticulture New Zealand guidelines. They were collaboratively developed, based on research trials and on the experience of growers, to provide practical solutions in the field. They are based on looking at the whole farm to understand its hydrology and develop site-specific management practices which include paddock assessment, water

management to reduce water flowing onto paddocks, erosion control measures to keep soil in place and control sediment in runoff from the operation.

[95] For the measures to be effective, we heard a land manager would need to undertake the steps set out in the guidelines comprehensively for each rotation of land preparation for crops and pasture. Such planning would need to be resourced with appropriate sediment control personnel, monitored and enforced. Given the complexity of the Northland environment we conclude this may not be achieved at the scale of every property with waterbody margins in Northland.

[96] We were told that currently around New Zealand setbacks are 5 metres or less with none known to be greater than 5 metres. We also understand that the guidelines were not designed to be applied to agricultural activities such as pasture renewal or fodder crops and may be difficult to implement. They were described as a "toolbox" rather than a standard and lack any mandatory measures or rules to require a specific outcome in terms of water quality at the discharge location(s).

[97] The Minister's view was that there is a lack of clarity and certainty in the Horticulture New Zealand guidelines that does not suit their use in a permitted activity rule. Further, it may be difficult to ensure that the guidelines are complied with and to measure outcomes from their use.

Evaluation of setback for lake beds and natural wetlands

[98] In relation to setbacks from natural wetlands and the beds of lakes the Minister's appeal was for a 10 metre setback. As noted previously there is good evidence that a 10 metre setback better removes fine sediment from runoff and throughflow than a 5 metre setback.

[99] The more static nature and longer residence time of water in wetlands and lakes, with limited flushing flows, compared to that in rivers, is important. We have considered whether a lesser setback could be justified for smaller natural wetlands or lakes, such as those with less than a nominal 0.5 ha area, for example. Our view is that such water bodies are likely to retain much of the sediment that is delivered into

them and hence have as least as much or a greater need to have sediment controlled around their margins than larger water bodies.

[100] We remain concerned at the decline in the number and quality of wetlands in Northland (and in New Zealand). The Northland Regional Plan takes a strong stand on the value and attributes of these water bodies. We conclude methods need to ensure these policies are complied with and the trend towards further depletion of wetland and lake areas halted. Accordingly, we conclude that a 10 metre setback is required for all natural wetlands and the beds of lakes. We conclude a 10 metre setback is justified for these features due to the rarity and susceptibility on a regional and national scale.

Setback from rivers

[101] In terms of the setback required in C.8.2.1(2), there is agreement between the parties that there should be at least a 5 metre setback from the beds of COIF rivers.

[102] The Regional Council, Federated Farmers and Horticulture New Zealand proposed amendments that require compliance with the Horticulture New Zealand guidelines and the NES-F regulations to ensure sediment generation is minimised outside the 5 metre setback. They agree that if the guidelines and NES-F regulations are not complied with the setback would be 10 metres.

[103] The Minister would allow a 5 metre setback from the bed of a COIF river where the slope is less than 10 degrees and a 10 metre setback where the slope is 10 degrees or more but did not agree that compliance with the Horticulture New Zealand guidelines is necessary if the slope constraints are observed and indeed, did not see those guidelines as having merit where a permitted activity is concerned.

[104] We have some concerns about reliance on the New Zealand Horticulture guidelines to control sediment. The Minister's proposed amendments would see a 5 metre or 10 metre setback from COIF rivers, depending on whether the slope is less than or more than 10 degrees. We conclude the inclusion of a slope constraint is important.

[105] We conclude these setbacks and slope constraints give a method for limiting erosion and minimising sediment loss to a COIF river from lower-lying land on which land disturbance via horticultural and agricultural activity may occur. We particularly recognise the short run, high volume nature of many of these rivers. Many catchments have clays that are friable and erodible. Land Disturbance in Northland can often lead to sediment discharge due to unforeseen rainfall or the overwhelming of mitigation measures. Given the high values within many of the catchments and relative rarity of features, we conclude greater restriction is justified.

[106] We would add that sediment control measures should also be installed and maintained in accordance with the Horticulture New Zealand guidelines, along with compliance with the NES-F regulations as proposed by the alternative relief agreed by the Regional Council and Federated Farmers.

Conclusion of setback for COIF rivers

[107] We have concluded that for COIF rivers a graduated approach to setback can be adopted relevant to land slope.

[108] Where:

a) The land is not erosion prone; and

b) The mean slope of the paddock adjacent to the riverbed is 10 degrees or less; and

c) The Erosion and Sediment Control Guidelines for Vegetable Production 2015 (Horticulture New Zealand) are complied with; and

d) The requirements of Standards 50 and 55 of the Resource Management Act (National Environmental Standards for Freshwater) are certified.

the setback can be reduced to 5 metres.

[109] This recognises the particular regional risks but acknowledges that there are situations where these risks can be managed.

Preferred wording

[110] The way the chapeau and the subservient clauses C.8.1.2 and C.8.1.3 are written and the use of double negatives means that it is extremely difficult to make sense of the yellow clauses in the table "Parties' positions on outstanding issues – 26 March 2021".

[111] We prefer the following wording, revising C.8.2.1(3) to sit within C.8.2.1(2).:

C.8.1.2 2)

The setbacks for land shall be:

(a) 10 metres from īnanga spawning sites, beds of lakes and natural wetlands; and

(b) 10 metres from the beds of continually or intermittently flowing rivers unless:

(i) The land preparation area is not on erosion prone land;

(ii) The mean slope of the paddock adjoining the riverbed is 10 degrees or less;

(iii) Sediment control measures are installed and maintained in accordance with the Erosion and Sediment Control Guidelines for Vegetable Production 2015 (Horticulture New Zealand); and

(iv) The requirements of Regulations 50(2)(a) and (b) of the Resource Management (Natural Environmental Standards for Freshwater) Regulations 2020 are compliant

in which case the setback may be reduced to 5 metres.

[112] In the Table of Parties Positions Rule C.8.3.1 Earthworks is on page 3. The Regional Council and the Minister have agreed the wording on the rule to include "īnanga spawning sites" in the chapeau and in "Table 13 Permitted activity thresholds" the addition of "Within 10 metres of an īnanga spawning site" as a location in column 1. The earthworks threshold within 10 metres of an īnanga spawning site was agreed as "200 square metres of exposed earth at any time and 50

cubic metres of moved or placed earth in any 12-month period". Horticulture New Zealand took no position on the changes.

[113] Federated Farmers did not adopt the īnanga spawning site location and did not propose an earthworks threshold for such a site.

[114] Consistent with our finding above the exposure of earth must be minimised to prevent the potential for entrainment of sediment into the water bodies being considered. We conclude that the preferred wording of the Regional Council and the Minister is generally more appropriate.

Analysis under s 32AA

[115] The Court must undertake further analysis as necessary under 32AA to ensure that it is satisfied that the wording to be adopted as the most appropriate. As can be seen, we have concluded that a more conservative approach should be adopted, utilising the 10 metre setback generally with a reduced setback in certain circumstances.

[116] We recognise that there are elements of the environment in these areas which may not be regarded as requiring protection under s 6(a), (b) and (c). However, we are concerned that the natural values both in terms of indigenous taxa and in general terms as habitats for indigenous species (indigenous taxa) warrant particular consideration under the NZCPS, NZPSFM 2020 and RPS to the extent that these are relevant and more generally under s 6(b) and (c).

[117] We agree there needs to be greater certainty around īnanga spawning areas. This is an issue under the plan and greater certainty is required to make the 10 metre setback efficient in protecting this indigenous fauna.

[118] We have suggested wording which minimises impact and cost. We recognise however that the general setback control will assist with īnanga spawning sites. While there may be issues at the margins with the setback, the spawning site is likely to be within a short distance of bank-full. If we focus the definition of īnanga spawning

sites on the position of the inundated margins of the tidal prism at Spring High Tides, this should limit the areas affected while ensuring additional protection for the spawning sites. We encourage the parties to find a workable wording.

[119] These issues are also addressed under the NPSFM 2020 and more particularly under the concepts of Te Mana o Te Wai and the more holistic approach now being adopted towards the interrelationships of the various elements of these ecotones.

[120] We conclude the proposed provisions achieve an appropriate balance between costs and benefits in relation to protections and enabling land use. In relation to īnanga spawning sites, lake beds and wetlands, we have concluded that caution should be exercised because of the potential for small events to have significant consequences on the limited areas of these features.

[121] With the contraction of natural wetlands, introduction of culverts, drainage and the like, as well as the effects of climate change, īnanga spawning sites are under constant and increasing pressure. Here the emphasis needs to be on a formal protection of the īnanga spawning areas.

[122] Balancing the benefits of limited development of the land adjacent to these sites against the benefits to the environment under s 6 RMA we conclude the provisions of s 6 must prevail.

[123] The most appropriate provisions are clearly those which best protect the īnanga spawning sites. In relation to natural wetlands, the beds of lakes, and the beds of COIF rivers, there is a significantly wider variety of environments captured. We take into account that the RPS and other documents seek improvement in water quality in Northland and that the general health indices such as the Macroinvertebrate Community Index (**MCI**) are not demonstrating any distinct or generalised improvement. In those circumstances, we have concluded that a more conservative approach to the separation between land preparation and the various water bodies covered in the rule is appropriate.

[124] The intention is to see an improvement to the various indices of water quality

during the period of this Plan. We take this step not only because of the lack of any detail showing any improvement in terms of the previous plan but recognising that there are increasing pressures on the freshwater environment due to climate change.

[125] Predictions indicate there are likely to be stronger rainfall events with the potential for greater erosion and sedimentation coupled with extended long dry periods which will put stress on all forms of taxa associated with freshwater. We conclude that the purposes of s 6 and the various plans and other documents put an emphasis upon are avoiding adverse effects and improving the status of water quality.

[126] Accordingly, the most appropriate provisions are those which achieve that outcome. Whilst we recognise that these come at some cost in terms of a potential reduction in productive land areas, the significant benefit achieved in improving sediment control will benefit indigenous species, īnanga and other fish stocks may in fact provide for the sustainability of the environment on a more diversified and longer term basis. We conclude this restraint is justified because of the particular issues in Northland.

[127] Overall, we are satisfied that the most appropriate provisions in this case are those which are the more conservative of the options provided. The 10 metre setback in our view is not unreasonable nor will it impinge upon the operation of horticultural or farming practices unnecessarily. On lesser slopes, a 5 metre setback from a COIF river is justified where there is compliance with NES-F regulations (particularly 50) and the Horticulture New Zealand guidelines.

[128] Consent can be sought, and special conditions imposed where a lesser setback is justified, to ensure protection of the environment. We do note that many farms including several we visited had already taken steps to separate īnanga spawning areas and other waterways from the farming operations. We consider those to be examples of good and sustainable practice. It is to be encouraged.

Directions

[129] **The Court tentatively concludes:**

A: The definition of īnanga spawning site should read:

> **"The margins of the inundated area within 100 metres of the upper reach of the tidal prism during Spring High Tides."**
>
> **This definition is to apply for C.8.2.1 and C.8.3.1.**

B: C.8.2.1(2) to be amended as follows:

The setback for land preparation is:

(a) 10 metres from īnanga spawning sites, lake beds and natural wetlands;

(b) 10 metres from the bed of a continually or intermittently flowing river unless:

- **(i) The land preparation area is not on erosion prone land; and**
- **(ii) The mean slope of the paddock adjoining the riverbed is 10 degrees or less; and**
- **(iii) Sediment control measures are installed and maintained in accordance with the Erosion and Sediment Control Guidelines for Vegetable Production 2015 (Horticulture New Zealand); and**
- **(iv) The relevant requirements of standards 50 and 55 of the Resource Management (Natural Environmental Standards for Freshwater) Regulations 2020 are complied with;**

in which case the setback may be reduced to 5 metres.

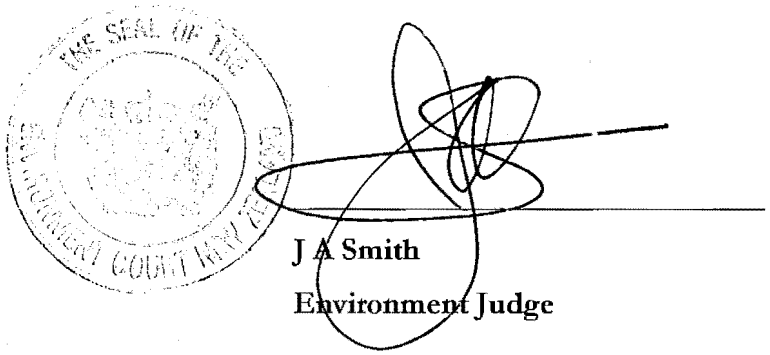
C: There may be consequential amendments to C.8.3.1.

D: These rules prevail over the provisions of the NES-F under s 43B of the Act.

[130] The Regional Council is to prepare its preferred wording of the provisions in accordance with this decision and circulate them to the other parties within 15 working days. Parties are to provide comment to the Council within 15 working days. If wording cannot be agreed the Council is to provide its preferred provisions with the alternative wording and reasons of all parties within a further 15 days. The Court will then finalise the wording on the papers.

[131] Applications for costs are not encouraged. Any application is to be made within 30 working days and any reply 10 working days thereafter.

For the Court:



J A Smith
Environment Judge

A

55 General conditions on natural wetland activities

(1) This regulation applies if a regulation in this subpart refers to the compliance of an activity with the general conditions in this regulation.

General condition for permitted activities: prior notice of activity

(2) If this regulation applies in relation to a permitted activity, the 1 or more persons responsible for undertaking the activity must, at least 10 working days before starting the activity, provide the relevant regional council with the following information in writing:

(a) a description of the activity to be undertaken; and

(b) a description of, and map showing, where the activity will be undertaken; and

(c) a statement of when the activity will start and when it is expected to end; and

(d) a description of the extent of the activity; and

(e) their contact details.

General conditions: water quality and movement

(3) The general conditions relating to water quality and movement are as follows:

(a) the activity must not result in the discharge of a contaminant if the receiving environment includes any natural wetland in which the contaminant, after reasonable mixing, causes, or may cause, 1 or more of the following effects:

(i) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

(ii) a conspicuous change in colour or visual clarity:

(iii) an emission of objectionable odour:

(iv) the contamination of freshwater to the extent that it is not suitable for farm animals to drink:

(v) adverse effects on aquatic life that are more than minor; and

(b) the activity must not increase the level of flood waters that would, in any flood event (regardless of probability), inundate all or any part of the 1% AEP floodplain (but *see* subclause (4)); and

(c) the activity must not alter the natural movement of water into, within, or from any natural wetland (but *see* subclause (5)); and

(d) the activity must not involve taking or discharging water to or from any natural wetland (but *see* subclause (5)); and

(e) debris and sediment must not—

(i) be placed within a setback of 10 m from any natural wetland; or

(ii) be allowed to enter any natural wetland.

(4) Subclause (3)(b) does not apply if the person undertaking the activity—

(a) owns or controls the only land or structures that would be affected by a flood in all or any part of the 1% AEP floodplain; or

(b) has—

(i) obtained written consent to undertaking the activity from each person who owns or controls the land or structures that would be affected by a flood in all or part of the 1% AEP floodplain, after informing them of the expected increase in the level of flood waters; and

(ii) satisfied the relevant regional council that they have complied with subparagraph (i).

(5) Despite subclause (3)(c) and (d), the temporary taking, use, damming, or diversion of water around a work site, or discharges of water into the water around a work site, may be undertaken if the following conditions are complied with:

(a) the activity must be undertaken during a period when there is a low risk of flooding; and

(b) the activity must be undertaken only for as long as necessary to achieve its purpose; and

(c) before the activity starts, a record must be made (for example, by taking photographs) of the original condition of any affected natural wetland's bed profile and hydrological regime that is sufficiently detailed to enable compliance with paragraph (d) to be verified; and

(d) the bed profile and hydrological regime of the natural wetland must be returned to their original condition no later than 14 days after the start of the activity; and

(e) if the activity is damming, the dam must be no higher than 600 mm; and

(f) if the activity is a diversion that uses a pump, a fish screen with mesh spacing no greater than 3 mm must be used on the intake.

(6) In subclauses (3) and (4), **1% AEP floodplain** means the area that would be inundated in a flood event of a size that has a 1% or greater probability of occurring in any one year.

General condition: earth stability and drainage

(7) The general condition relating to earth stability and drainage is that the activity must not create or contribute to—

(a) the instability or subsidence of a slope or another land surface; or

(b) the erosion of the bed or bank of any natural wetland; or

(c) a change in the points at which water flows into or out of any natural wetland; or

(d) a constriction on the flow of water within, into, or out of any natural wetland; or

(e) the flooding or overland flow of water within, or flowing into or out of, any natural wetland.

General conditions: earthworks, land disturbance, and vegetation clearance

(8) The general conditions on earthworks, land disturbance, and vegetation clearance are as follows:

(a) during and after the activity, erosion and sediment control measures must be applied and maintained at the site of the activity to minimise adverse effects of sediment on natural wetlands; and

(b) the measures must include stabilising or containing soil that is exposed or disturbed by the activity as soon as practicable after the activity ends; and

(c) the measures referred to in paragraph (b) must remain in place until vegetation covers more than 80% of the site; and

(d) if the activity is vegetation clearance, it must not result in earth remaining bare for longer than 3 months.

General conditions: vegetation and bird and fish habitats

(9) The general conditions relating to vegetation and bird and fish habitats are as follows:

(a) only indigenous species that are appropriate to a natural wetland (given the location and type of the natural wetland) may be planted in it; and

(b) the activity must not result in the smothering of indigenous vegetation by debris and sediment; and

(c) the activity must not disturb the roosting or nesting of indigenous birds during their breeding season; and

(d) the activity must not disturb an area that is listed in a regional plan or water conservation order as a habitat for threatened indigenous fish; and

(e) the activity must not, during a spawning season, disturb an area that is listed in a regional plan or water conservation order as a fish spawning area.

General condition: historic heritage

(10) The general condition relating to historic heritage is that the activity must not destroy, damage, or modify a site that is protected by an enactment because of the site's historic heritage (including, to avoid doubt, because of its significance to Māori), except in accordance with that enactment.

(11) In subclause (10), **enactment** includes any kind of instrument made under an enactment.

General conditions: machinery, vehicles, equipment, and construction materials

(12) The general conditions on the use of vehicles, machinery, equipment, and materials are as follows:

(a) machinery, vehicles, and equipment used for the activity must be cleaned before entering any natural wetland (to avoid introducing pests, unwanted organisms, or exotic plants); and

(b) machinery that is used for the activity must sit outside a natural wetland, unless it is necessary for the machinery to enter the natural wetland to achieve the purpose of the activity; and

(c) if machinery or vehicles enter any natural wetland, they must be modified or supported to prevent them from damaging the natural wetland (for example, by widening the tracks of track-driven vehicles or using platforms for machinery to sit on); and

(d) the mixing of construction materials, and the refuelling and maintenance of vehicles, machinery, and equipment, must be done outside a 10 m setback from any natural wetland.

General conditions: miscellaneous

(13) The other general conditions are as follows:

(a) the activity must be undertaken only to the extent necessary to achieve its purpose; and

(b) the activity must not involve the use of fire or explosives; and

(c) if there is existing public access to a natural wetland, the activity must not prevent the public from continuing to access the natural wetland (unless that is required to protect the health and safety of the public or the persons undertaking the activity); and

(d) no later than 5 days after the activity ends,—

(i) debris, materials, and equipment relating to the activity must be removed from the site; and

(ii) the site must be free from litter.

56 Restricted discretionary activities: matters to which discretion is restricted

The discretion of a consent authority is restricted to the following matters if an activity is a restricted discretionary activity under this subpart:

(a) the extent to which the nature, scale, timing, intensity, and location of the activity may have adverse effects on—

(i) the existing and potential values of the natural wetland, its catchment, and the coastal environment; and

(ii) the extent of the natural wetland; and

(iii) the seasonal and annual hydrological regime of the natural wetland; and

(iv) the passage of fish in the natural wetland or another water body:

(b) whether there are practicable alternatives to undertaking the activity that would avoid those adverse effects:

(c) the extent to which those adverse effects will be managed to avoid the loss of the extent of the natural wetland and its values:

(d) other measures to minimise or remedy those adverse effects:

(e) how any of those adverse effects that are more than minor may be offset or compensated for if they cannot be avoided, minimised, or remedied:

(f) the risk of flooding upstream or downstream of the natural wetland, and the measures to avoid, minimise, or remedy that risk:

(g) the social, economic, environmental, and cultural benefits (if any) that are likely to result from the proposed activity (including the extent to which the activity may protect, maintain, or enhance ecosystems).

Subpart 2—Reclamation of rivers

57 Discretionary activities

Reclamation of the bed of any river is a discretionary activity.

Subpart 3—Passage of fish affected by structures

How this subpart applies

58 Purpose of this subpart

The purpose of this subpart is to deal with the effects on the passage of fish of the placement, use, alteration, extension, or reconstruction of any of the following structures in, on, over, or under the bed of any river or connected area:

(a) a culvert:

(b) a weir:

(c) a flap gate (whether passive or non-passive):

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2017] NZEnvC 213

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 Leijnen
Environment Commissioner R Bartlett
Environment Commissioner G Paine

Hearing: at Hamilton on 4-12 October 2017 and 30-31 October 2017.

Final closing: 20 November 2017.

Decision reserved: 27 November 2017.

Appearances: S Quinn and E Manohar for applicant
M Mackintosh and S Thomas for Otorohanga District Council and Waipa District Council
J Milne for New Zealand Transport Agency
H Irwin-Easthope for Raukawa Charitable Trust
L Burkhardt for Maniapoto ki Te Raki
H Maniapoto in person

Date of Decision: 21 December 2017

Date of Issue: 21 December 2017

INTERIM DECISION OF THE ENVIRONMENT COURT

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

REASONS

Introduction

[1] The Minister of Corrections, on direct referral to the Environment Court, has applied for an alteration to an existing designation enabling the expansion of Waikeria Prison.

[2] The prison population has undergone rapid growth in recent years, so much so that the capacity of the prison network is at risk of being exceeded. Indeed, the facilities are required as a matter of "urgency" and it is critical that the "designation be confirmed as soon as possible".[1] Presently there is accommodation for around 650 prisoners at Waikeria. The altered designation would house up to 3,000 male and female prisoners. If built, Waikeria will be the largest prison in the country.

[3] The Minister intends on procuring the new facility through a Public–Private Partnership. Under this method of procurement, which was proceeding in parallel with the notice of requirement, the design of the facility was unknown and the effects on the environment of allowing the requirement were difficult to quantify.[2]

[4] To overcome this, the Minister proposed a set of design parameters which, in the court's view, were insufficient to address the scale and significance of actual and potential effects on the environment and second, were insensitive to the direction given in the relevant planning documents. The key issue before the court, therefore, concerned the response under the Resource Management Act 1991 where a notice of requirement is unsupported by a conceptual design or layout of the works that would be enabled.

The burning fires of occupation

[5] Before addressing the law and the parties' interests in the proceeding, we acknowledge the descendants of the owners of the land on which the prison is located. [3]

1 Notice of Motion for proceedings under s 198E of RMA dated 3 July 2017.
2 Notice of Requirement and Assessment of Effects, Vol 1, 6.1 Public Private-Partnership Model at 30.
3 The parties are Waipa District Council, New Zealand Transport Agency, Maniapoto ki Te Raki, Mr Harold Maniapoto and Raukawa Charitable Trust.

[6] The land taken from the former owners in the early 1900s, under the Public Works Act 1908, comprised part of the Tokanui Block. The Tokanui Block encompassed some 10,205 acres situated on the southern bank of the Puniu River. The Block was the remnant of lands occupied by the parties' predecessors[4] extending both north and south of the Puniu River. The land to the north of the Puniu River was confiscated by the Crown following violent conflict in 1864.

[7] With reference to its former land cover, the area was once known as Te Nehenehenui — the Great Expansive Forest.[5] The landcover was modified in part by Māori burning off the forest to establish gardens. The area is also the southern extent of a considerable former eel fishery, particularly long fin eel.[6]

[8] At this hearing, Maniapoto Ki Te Raki (MKTR) represents some of those descendants. While other hapū communities also have interest in the land, these descendants are ahi kā and have mana whenua over the land.[7]

[9] The descendants have been dispossessed from their occupation of the land and therefore the practical exercise of kaitiakitanga. What cannot be taken from them however, is their standing as reinga kaitiaki; the current generation of customary guardians. It is in that capacity that Mr Harold Maniapoto for and on behalf of the Maniapoto whānau and MKTR, Messrs JM Roa, R Bidois, and Ms V Ingley, addressed the generational impact of the land acquisition and its subsequent use.

[10] The descendants cannot seek redress in this court for the land acquisition. Together with Raukawa Charitable Trust, they are concerned that the intensification of land use that would be enabled by the notice of requirement (if confirmed), has the potential to exacerbate the customary and cultural effects consequential upon the original taking.[8]

[11] That said, at the conclusion of the hearing, all parties had resolved, by agreement, their interest in the notice of requirement. The Minister has been proactive in searching

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4 Those persons having primary hapū affiliations aligning with the Te Kanawa and Rereahu sections of the Maniapoto confederation of hapū.

5 Joint brief of evidence of H Maniapoto for and on behalf of himself and the Maniapoto whānau, and Maniapoto ki Te Raki at [29].

6 Transcript at 947.

7 See generally the joint brief of evidence of H Maniapoto for and on behalf of himself and the Maniapoto whānau, and Maniapoto ki Te Raki. Burkhardt, opening submissions, at [3]-[4].

8 Transcript at 972.

for solutions, particularly to matters which arose indirectly through the works enabled by the notice of requirement.

Structure of the decision

[12] We are not in a position yet to confirm the designation subject to any modifications to the conditions. That is because the Minister, after the hearing, filed evidence and supporting conditions that would increase the assessed level of height of buildings across the majority of the land identified as the "Building Zone". The scope for this change under the Notice of Requirement (NoR) was not supported by submissions from counsel.

[13] Instead, we give our preliminary findings on ss 171(a)-(d) RMA and will direct that the Minister address the scope for the amendments to conditions proposed by the landscape expert (Mr J Goodwin).[9] We will also seek clarification on other conditions which we discuss.

[14] A decision on the merits of the relevant provisions will follow once the legal position on scope is determined. The NoR will then be formally considered pursuant to Pt 2 of the Act.

[15] Attached to this Interim Decision is a copy of the proposed conditions for the designation. To assist us, the conditions have been formatted to standardise referencing and to include condition numbers. Unless otherwise indicated, all references in this decision are to the conditions attached and labelled "A".

[16] Parties will see that we have suggested amendments to give effect to what we understand to be their intent. Where we have not given a reason for proposing a change, the change made should be obvious on its face. On occasion, where the meaning of the condition is unclear, we have sought further submissions.

[17] The parties may suggest alternative wording to the court's. It is important that the conditions are clear, certain and enforceable and that the actual effects of the altered designation are in accordance with the levels predicted.

9 Goodwin, Supplementary Evidence dated 10 November 2017.

The law

[18] The Minister of Corrections filed a notice of motion pursuant to s 198E of the Resource Management Act 1991 requesting the Environment Court decide its requirement to alter designation D55 in the Otorohanga District Plan.

[19] A notice of motion having been accepted, s 198K(5) provides that the court in considering the notice of requirement to alter a designation:

> ...
>
> a) must have regard to the matters set out in section 171(1) and comply with section 171(1A)[10] 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 court thinks fit ...

[20] The Court may also waive the requirement for an outline plan to be submitted under section 176A, but the Minister does not request this.[11]

[21] Section 171 states:

> (1A) ...
> (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) ...:
> (ii) ...:
> (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

10 No issue arises under s 171(1A).
11 Quinn, Opening Submissions at [47].

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.

[22] The decision-maker is required under s 171 to consider the environmental effects of the notice of requirement, subject to Pt 2, and having particular regard to the matters listed in sub-sections (a)–(d). Whata J discussed the reference to Pt 2 in s 171 in *Queenstown Airport Corporation v Queenstown Lakes District Council* [2013] NZHC 2347 and at [68-70] he 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 at 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.
>
> [Footnotes omitted]

[23] More recently the High Court decision of *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 (referred to as the *Basin Reserve* decision), considered the phrase "subject to Part 2" in the context of s 171 (1). There the High Court, referencing the Board's decision, said that the Board had understood not only the different nature of its task in considering an application under s 171 but also the implications of the "subject to Part 2" component:[12]

> [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

12 *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [118].

> 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 on that case was required to *give effect to* a higher order planning document which the Supreme Court consider 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.

[24] As the High Court makes clear, the role of Pt 2 in the *King Salmon* context is different to the role it plays under s 171 of the Act as the planning documents do not determine the outcome of a s 171 decision. The High Court went on to say that the phrase "subject to Part 2", as it occurs in s 171, is a specific statutory direction that is not restricted to instances of unresolvable conflict.[13]

[25] Following the *Basin Reserve* decision, in *R J Davidson Family Trust v Marlborough District Council*[14] Justice Cull, having noted the similarities between ss 171 and 104 of the Act in that they both list matters "subject to Part 2," did not explain why she adopted an interpretation of those words that is inconsistent with the *Basin Reserve* decision. It has been suggested that the observation made in *Basin Reserve* as to the different role that planning documents may play in RMA proceedings (in that case comparing and contrasting NoR and plan change proceedings) may be pertinent to the interpretation taken in *RJ Davidson* which was considering an application for resource consent.[15]

[26] *RJ Davidson* has been appealed to the Court of Appeal but regardless of the outcome we distinguish it on the basis that it is a resource consent appeal and we consider we are bound by the *Basin Reserve* decision which is a designation proceeding. We will briefly address s 171(1)(b) & (c) next.

13 *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [354] (HC).
14 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.
15 Re Queenstown Airport Corporation Limited [2017] NZENvC 46 at [67].

Adequacy of consideration given to alternatives (s 171(1)(b))

[27] To the extent that there was concern about the adequacy of consideration given to alternative routes or methods for undertaking the work, this arose in relation to the proposal to use Waikeria Road as the sole access to the Prison. In the past, Wharepuhunga Road provided direct access to the prison but its usage had stopped when the Department of Corrections adopted a policy of allowing prison access through a single point of entry. Once this policy was explained, the parties seeking a return to a dual entranceway withdrew their challenge under s 171(1)(b) RMA.[16]

[28] That said, the issue as to whether the requiring authority has given adequate consideration to alternatives only arises in this case were we to find that the work would likely have significant adverse effects on the environment. While the works, subject to conditions, will generate adverse effects, the effects are not at a level that they could be considered "significant" and so the consideration of alternatives does not arise.

Whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought (s 171(1)(c))?

[29] With reference to s 171(1)(c) of the Act, the objectives of the Minister are as follows: [17]

(a) The long term (up to ten years) demand requirement is met by 2015;
(b) The required prisoner places are delivered at the lowest whole of life costs;
(c) Operational efficiencies are achieved;
(d) An optimal fit for purpose solution is provided to rehabilitate and reintegrate prisoners whereby prisoner places are provided close to prisoner demand and therefore close to prisoner's family and friends;
(e) The prison facility is located sufficiently close to communities large enough to attract and sustain sufficient staff to support a safe and secure custodial operation;

16 Burkhardt, closing submission at [18]-[20].
17 NoR, Executive Summary at ii.

(f) The prison facility is located sufficiently close to communities large enough to attract and sustain service providers to rehabilitate and reintegrate prisoners; and

(g) Significant adverse environmental effects of the development are appropriately avoided, remedied or mitigated.

[30] As for whether the alteration to the existing designation is reasonably necessary, we were told from 2014 prisoner numbers have been increasing in response to a growing number of persons charged with serious violent offences and in persons being remanded in custody prior to sentencing, together with an increase in the length of remand. The Minister does not see the trending growth in the prisoner population decreasing. The Department of Corrections projects a shortfall of 1,450[18] prisoner places in 2025. Indeed, the actual prisoner population in January 2017 is over 800 above the forecast peak for the same month. While the Department is presently managing, overcrowding will increase risk to prisoner safety and to the safety of prison staff. Overcrowding could also lower operational efficiency and reduce the ability to deliver effectively on rehabilitation and employment programs.[19]

[31] Presently, there is accommodation for 650 prisoners housed in several units at Waikeria Prison. The Minister intends on building accommodation and associated facilities to accommodate a further 1,500 male prisoners, perhaps increasing the build to accommodate an additional 500. The balance (350) is reserve capacity, which, for the time being, will not be built.[20] Attached to this decision and labelled "B" is a list of facilities within the secure perimeter that are likely to be required to meet demand.

[32] Given the demand growth for future prisoner accommodation, we accept the works or designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought (s 171(1)(c)).

The receiving environment

[12] We set out next a brief description of the receiving environment. The altered designation will enable the development of a new prison facility at Waikeria, with facilities

18 Lightfoot, EiC at [53] gave the shortfall as 1,700.

19 NoR, 3.2 Necessity for the Proposed Capacity Increase at 16.

20 Lightfoot, EiC at [14].

to be located within a 94 hectare block (Building Zone). Some of the existing prison facilities (known as the "Lower Jail") are situated within the Building Zone and for the time being they will remain.

[13] The Building Zone is part of 1,276 hectare Waikeria Prison site (Prison Site or Site) and is located within a broad rolling valley. The Site is bounded roughly by Waikeria and Mangatutu Streams. These streams drain into the Puniu River which eventually flows into the Waikato River. Active erosion is evident along their deeply incised banks and there is little riparian vegetation cover. Much of the Site is low-lying and is dissected by small natural gullies, watercourses and drainage channels. Some water bodies are ephemeral and others perennial.[21] Two small tributaries of Waikeria Stream flow northward through the Site and a third skirts the western margin. A fourth stream drains from the south-eastern corner into the Mangatutu. Small wetlands are present on these tributaries both within the Site and adjacent to the Waikeria Stream. Scattered on Site are trees and shrubs including occasional native kanuka, tōtara and flaxes; otherwise the land is almost entirely in pasture.

[14] The streams and wetlands in and around the Site are of a quality typical of lowland farmland in the Waipa catchment. Water quality in the streams is degraded by sediment and nutrient inputs, nevertheless both longfin eels (classified "At Risk – Declining") and short fin eels were observed in surveys of the Site. Wetlands along tributaries within the Site provide ecosystem services by retaining sediment and smoothing flood flows but are dominated by exotic grasses and weeds. They support a range of macro-invertebrates but are classified as "poor" or "fair" against Macroinvertebrate Community Indices and have limited indigenous habitat.

[15] Interspersed on the wider Prison Site are rolling hills and small ridges, although these landforms do not follow any particular alignment. The elevation of the Building Zone itself increases gently from RL[22] 42 in the north to RL 60 in the south.

[16] The Building Zone has been modified by buildings and roads associated with an existing prison and by the agricultural activities (predominately dairying) that occurs on the Site. Described by one expert as being of a "pleasant pastoral character typical of

21 Stream network is illustrated in NOR, AEE, "Waikeria Prison Capacity Increase Assessment of Environmental Effects of Earthworks", Appendix 3, dated 14 July 2017.

22 RL means "Reduced Level".

much of the lower Waikato"[23] the Prison Site is surrounded by open rolling countryside, punctuated by the occasional tree, woodlot and shelterbelt. The land surrounding the Waikeria Prison is used for pastoral farming, and towards the north is some lifestyle farming. Pastoral farming underpins the rural character of the valley, including the site of the prison.

[17] There are 10 dwellings located in the valley, the closet of which are two dwellings on Walker Road located 700-1080 m away. Where visible to neighbouring residents and from public places, the view of the Building Zone is mainly from an elevated position.

The effect of the works on the environment considered in the context of the proposed conditions

Acknowledgements

[18] The descendants of the original owners have endured pain and suffering as a consequence of the land acquisition. This is acknowledged by the Minister in the following way:

> **Condition 8(g)(II)**
> 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.
>
> **Condition 8(h)[24]**
>
> (i) To recognise and acknowledge 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 and to recognise and provide for the enduring relationship of mana whenua with the whenua and resources.
>
> (ii) To recognise and acknowledge that the Waikeria Prison site was taken from the whānau, hapū and iwi of Raukawa of the Wharepuhunga rohe; that the continued dispossession from the whenua negatively impacts the whānau, hapū and iwi of Raukawa; and to recognise and provide for the enduring relationship of Raukawa with the whenua and resources.

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23 NoR, AEE, Report 6: Assessment of Landscape and Visual Effects, 3.0 Landscape Context and Wider Prison Site Character at 7.

24 Sub-clause i has been amended to improve grammar.

[19] The recognition and acknowledgements given by the Minister to mana whenua in condition [8(h)] are important, particularly when considered in the broader context of restorative justice. We do not see the acknowledgements as "criteria" for an Outline Plan and Design Report as currently listed. Might the acknowledgements be better situated in the preamble to the Designation?

[20] For persons with mana whenua, the relationship with the land has endured the taking of the land and this is specifically recognised and provided for Maniapoto ki Te Raki in the following condition:[25]

> **Condition 130**
>
> Prior to the end of the operation of the TWLG under condition 116 e),[26] the requiring authority shall invite Maniapoto ki Te Raki (or its successor or assignee) to enter a relationship agreement to recognise and provide for the enduring relationship of mana whenua with the whenua, natural resources and assets comprised within the Waikeria Prison site, including to provide for ongoing exercise by mana whenua of kaitiakitanga. The requiring authority shall not be in breach of this condition if Maniapoto ki Te Raki (or its successor or assignee) do not wish to enter into a relationship agreement.

Wetlands and streams

[21] The parties have agreed to form a Tangata Whenua Liaison Group. This group will comprise Maniapoto ki Te Raki, Raukawa Charitable Trust and Te Roopu Kaumātua o Waikeria. In addition to the important objectives concerned with the implementation of accidental discovery procedures and the facilitation of cultural input into the commemoration and recognition activities, the group is to facilitate cultural input into the development of a Landscape and Visual Mitigation and Monitoring Plan and second, the Ecological Enhancement and Mitigation Plan (condition 116).

[22] These latter two objectives are noteworthy in that they — together with other conditions of the designation — have the capacity to produce a new paradigm (or maybe a return to an older one) when thinking about prospective change and the response to change in the environment. Namely, to regard the use, development and protection of natural and physical resources not as alternatives, but as a cumulative whole. We return to this when we consider the notice of requirement under the planning documents. For

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25 Irwin-Easthope, closing submission, at [4(c)], Raukawa Charitable Trust did not seek a similar condition.

26 A change has been made to correct the cross-reference.

now, we record that during the hearing, the requiring authority moved from conditions addressing discrete elements of the works to a more considered approach, taking account of the interconnected nature of natural and physical resources.

[23] All of the proposed conditions underwent considerable change during the course of the hearing. For the most part, the conditions and the amendments made to the same were not explained by the expert witnesses for the Minister. One important change was the deletion of the following objective: [27]

> Ecological enhancement will contribute to the improvement of water quality and aquatic habitat, particularly for tuna/eel but also other indigenous aquatic species.

[24] This clause was part of a wider provision which sets out to explain the objectives of creating and enhancing wetlands and riparian planting. We have proposed wording bringing this objective, subject to modification, back into the condition set.

[25] It is a condition that the Minister undertake planting of 8.6 hectares of wetland within the designation site and undertake planting along the riparian margin of a 2,010 m stretch of Waikeria Stream. Similar conditions are contained in resource consents granted to authorise earthworks and the diversion of surface water.[28] The designation differs from the resource consent in that a larger area of land is to be enhanced and planted.

[26] The resource consent documentation refers to the planting as "compensation", "off-set" and "enhancement". Likewise, the various iterations of the designation conditions use different terms to encapsulate the reason for the planting, with the Minister eventually landing on "compensation". These changing terms point to an underlying uncertainty or lack of clarity around the purpose of the planting. This matter was tested by the court.

[27] The terms "off-set" and "compensation" are technical terms, the meaning of which has yet to be settled by the senior courts. The terms are not, at least in our minds, synonymous and their meaning can be distinguished in the way described by the Board

27 Proposed Designation Conditions Version dated 24 October 2017, Condition 56.
28 Common bundle Volume 1, Tab 1 and 2, AUTH 138553.04.01 and AUTH 138553.01.01 and RM170041.

of Inquiry in *Transmission Gully*.[29]

> Offsetting which related directly to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.

[28] The High Court decision of *Royal Forest & Bird Protection Society of New Zealand Inc v Buller District Council & Ors* [2013] NZHC 1346, which discusses the two terms, lends support for our view the terms are not interchangeable.[30]

[29] The term "compensation" is significant if it is intended to convey that the conditions pertaining to wetlands and surface water, concern values that are unaffected by the project works. If this is what the Minister intends, the term will affect the interpretation and implementation of the wetland and stream conditions. That is because the term strongly implies that the harm being compensated will remain in the environment. We think this is the antithesis of Raukawa and MTKR submission and the outcome they seek.

[30] Counsel for Raukawa records her client's view that the actions in condition 36(b) respond to ongoing adverse effects on the relationship of Raukawa with the awa and whenua (river and land). These effects will increase with the intensified use of the whenua. Raukawa called no evidence to support a nexus or link between the project works and an effect on the whenua and awa in this location. It may be that Raukawa consider this link axiomatic in that Raukawa believe:[31]

> "... that water is not separate from people, is not separate from its surrounds and therefore cannot be separated, or assessed in isolation, from the environment as a total entity."

[31] As evidenced by the use of language to describe the purpose of the wetland and stream enhancement and the views expressed by more than one expert witness[32] Raukawa's understanding is not necessarily a shared or common view. We repeat what

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29 Final decision of the Board of Inquiry into the New Zealand's Transport Agency's Transmission Gully Plan Change Request (5 October 2011, EPA 0072) at [210].

30 *Royal Forest & Bird Protection Society of New Zealand Inc v Buller District Council & Ors [2013] NZHC 1346* at [49].

31 Agreed Bundle of Planning Documents, Tab 8, Te Rautaki Taiao A Raukawa: Raukawa Environmental Management Plan 2015, Section 2.1, clause 2.1.1 Issue Statement – Water.

32 See for example, Transcript at 667, where we were told that the riparian planting is not in response to the loss of any "value".

we said during the hearing about the need for evidence, lest what is gained in direct negotiations be lost through inappropriate language in the conditions of the designation.

[32] In the absence of any legal argument we will not essay the meaning of the term "compensation". It is sufficient to record our finding that what is proposed in relation to the wetlands and streams described in the Final Condition Set[33] at condition 36(a) is direct mitigation of the effects of the project works. Second, the actions to be taken in relation to that part of Waikeria Stream described in condition 36(b) - to promote restoration of the ecological health of this waterway, are in response to the objectives of the Vision and Strategy Statement[34] and are a positive benefit to the environment.

[33] We elaborate, resource consents granted to the Minister are also subject to conditions that require riparian planting and wetland enhancement. The designation extends this work across a larger area in response to the effects of earthworks and vegetation removal north of Settlers Road and within the land included in the NoR after notification [being an additional 6.37 ha[35]]. The works proposed on the downstream section of the Waikeria Stream are in direct mitigation for the diversion of water from tributaries to the Waikeria and Mangatutu Streams and two wetlands together with the loss of associated wetland services, including the retention of sediment and buffering of surface water flows and the loss of habitat for short and long fin eels.[36] The conditions are also a partial response to future modification to stormwater flow paths through the Site and the potential effects that may arise were there to be an increase in the volume of direct discharge of stormwater into the waterways. The works will improve the stability of stream banks and avoid further loss of sediment into the waterways from bank erosion.

[34] While there is no direct equivalency, the localised positive benefit of improved fish and macroinvertebrate habitat is to be considered alongside the loss of intrinsic values of the ecosystems[37] within the Building Zone, including habitat for lizards, birds and macroinvertebrates. Subject to what we say next in relation to conditions, we are satisfied that the mitigation response and enhancement of the waterbodies and their surroundings

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33 Dated 10 November 2017.

34 In particular Objectives (a) and (h).

35 Goodwin, EiC at [34].

36 Boothroyd, supplementary evidence dated 6 September 2017 at [11ff].

37 Section 2 RMA defines intrinsic values in relation to ecosystems, as meaning those aspects of ecosystems and their constituent parts which have value in their own right, including—
(a) Their biological and genetic diversity; and
(b) The essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience.

may provide habitat for lizards and avifauna. If this occurs there will be a net gain and overall betterment in the ecological values attached to these water bodies and improvement in ecological functioning.

[35] The Minister has endeavoured to address comprehensively the waterways and wetlands in a manner which promotes the integrated management of the land, water and physical resources. This approach accords with sound resource management practice. We are satisfied that the development of new wetlands and the planting of native wetland species has the potential to improve overall habitat value, as well as replacing the services lost as a consequence of diverting surface water from wetlands and streams within the Building Zone.

Amendments to wetland and stream conditions

[36] The parties are directed to consider amendments suggested by the court to the conditions of the designation:

(a) we will not approve the use of the term "compensation" and have suggested alternative wording. The conditions both mitigate the direct effects of the works on the environment and second, promote restoration of stream habitat. We understand the Landscape, Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited — Revision C[38] is the starting point, but not the end-point. Accepting that full "restoration" is not a possible outcome in this highly-modified environment, does the wording proposed by the court better encapsulate what is intended for Waikeria Stream? We have used the terms "restoration" and "restorative" which, while aspirational, resonate with the language used in the Vision & Strategy Statement. We have suggested that similar amendments be made to Condition 37;

(b) condition 8(g)(I) addresses the action required under consents granted by the Regional Council to mitigate the direct effect on the wetland and streams within the Building Zone. The reference to consents in condition 8(g)(I)(i) is superfluous given the criterion in condition 8(g)(I)(vi)(second bullet) and also condition 27 which requires the implementation of the Landscape,

38 Dated 8 November 2017.

Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited — Revision C. It is important not to over complicate the conditions;

(c) condition 8(g)(I)(i), as worded by the parties, also contains a statement that is factually incorrect and this will affect the implementation of the condition. The condition states that wetland compensation will restore some biodiversity values **not** present in the existing wetlands. An important objective for Raukawa and MKTR is to protect the services provided to the river by wetlands and second, the habitat of eels. The existing wetlands have these values, albeit that they are in a degraded state. The court has amended conditions 8(g)(I)(i) and (ii) to address directly the objectives of Raukawa and MKTR;[39]

(d) the provisions that are cross-referenced in condition 8(g)(I)(v) are not criteria, rather they are methods to implement the criteria and their inclusion seems superfluous but in any event repeats condition 8(a)(ii);

(e) the reference to rats and stoats is to be removed from condition 8(g)(I)(vi)(third bullet) as these animals do not directly impact on water quality.[40] A provision for control of these animals has been suggested in condition 36(b);

(f) wetland "enhancement" does not encapsulate the parties' intention that new wetlands be developed. We suggest "wetland development" accords with the parties' intentions and have amended the condition accordingly; and

(g) Condition 28(d) refers to a wetland feature and Stream A2 that is not identified on a plan to be attached to the conditions. We suggest that the parties either amend the condition or produce a plan identifying the named water bodies referred to in the conditions.

Landscape and rural character

[37] In the absence of a preliminary or even conceptual design, the effect of the new facilities on the area's rural character and the visual amenity derived from rural character could not be assessed relative to the distribution, bulk and height of individual buildings and structures or relative to the finished ground level.

39 The wording better encapsulates what was intended by the former objective in paragraph [23] above.

40 Transcript at 1036ff.

[38] To assess effects the Minister adopted a "building envelope" approach, based on the building height not exceeding 12 m and assuming two floor levels at RL45 (northern and majority of the Building Zone) and RL50 (southern and smaller part of the Building Zone).[41]

[39] Earthworks have been separately consented by the Otorohanga District Council authorising the modification of the landform to accommodate building platforms. In saying this, the final landform is not known as no plans were attached to the land use consent application or to the grant. To avoid (or at least minimise) the adverse effects on landscape character and visual amenity, the Minister's landscape expert advised the existing undulating land contours would need to be shaped. The proposed conditions of consent did not, however, make provision for the recontouring of land or for that matter secure the building height relative to a finished ground level or to the assessed reduced levels. Indeed, the Minister's landscape expert said his assumed reduced levels may differ in the final design.[42]

[40] In addition to a control restricting the height of buildings, the Minister proffered two conditions relevant to managing the effect on landscape character and visual amenity. The first of these is a requirement to paint the buildings and structures a recessive colour. The second is a requirement to submit a management plan to the Otorohanga District Council addressing how the project works would be integrated into the environment to mitigate any adverse effects.

[41] The court can give little or no weight to the opinions of the landscape experts where the assumptions informing their opinions as to scale and significance of adverse effects may subsequently be proven wrong.[43] Second, the effect on the environment, specifically rural character and visual amenity, is not a matter to be left for the outline plan process as proposed by the relevant management plan condition. The Otorohanga District Council's landscape expert, Mr D Mansergh, observed that the way the conditions were worded involved professional judgement.[44] We agree and prior to the hearing we alerted the Minister to our view that the condition, as drafted, was simply an unlawful delegation of decision-making power to the District Council.[45]

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41 Common Figure Set, Fig 16.

42 NoR, AEE, Report 6: Assessment of Landscape and Visual Effects, 6.0 Landscape effects at 14.

43 We refer, in particular, to the assumptions made as to the reduced level of land which were used as the basis to evaluate the effect on visual amenity.

44 Mansergh, EiC, at [18].

45 Record of Pre-Hearing Conference dated 11 August 2017.

[42] In response to the court the Minister worked hard to secure the level of effect that the landscape experts predicted while retaining flexibility in the eventual design. The experts made predictions as to the change to rural character and effect on derived visual amenity consequential upon development. When the works are considered in relation to the internal Prison Site (only), the landscape's rural character will be maintained.[46] The effect on the character of the surrounding landscape will be moderate-low after 10 years.[47] This change in view will have a moderate to high adverse effect on the visual amenity of persons who reside at 52 Walker Road even after mitigation planting is established,[48] with a lesser effect on other residents and on views from public places. Having reviewed the evidence, we accept these predictions subject to what we have to say about conditions below.

Proposed new conditions

[43] Prior to the hearing the Minister proposed additional conditions limiting the gross floor area of all new buildings (condition 12ff); site coverage (condition 16); the impervious surface area (condition 17) and incorporating into conditions certain structuring elements of a future design (e.g. conditions 11(d) & 28(c)). Collectively these conditions support a development which, in contrast with the existing prison facilities at the Building Zone, will not appear as a consolidated mass of buildings when seen from external viewpoints outside of the designation site.[49]

[44] A careful distinction has also been drawn between criteria addressing the bulk, location and design of buildings within the Building Zone and landscaping of the Building Zone. The conditions address the effects on rural character and visual amenity from two different, but complementary, perspectives.

[45] The bulk, location and design criteria (condition 8(c)) direct **how** facilities are to be integrated into this landscape. In particular, facilities are not to visually dominate their

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46 We refer here to the "landscape effect" which the NOR, AEE, Report 6: Assessment of Landscape and Visual Effects 6.0 Landscape Effects at 14. Glossary of key terms (at ii) defines as being a change in the physical landscape, which may change its character or value and NOR, AEE, Assessment of Landscape and Visual Effects at 6.0 Landscape Effects at 14. As for the maintenance of rural character within the Building Zone see page 15.

47 NOR, AEE, Report 6: Assessment of Landscape and Visual Effects 6.0 Landscape Effects at 15.

48 NOR, AEE, Assessment of Landscape and Visual Effects 6.0 Landscape Effects at 15 and 7.4.1 Views from the East at 26; Goodwin, Supplementary Statement dated 10 November 2017 at [17]-[18].

49 These structuring elements are also part of the Department of Correction's "Works Requirements" being a document prepared by the Department as part of the tender process for the project works. See Affidavit of AD Robertson affirmed 26 September 2017.

surrounds; the buildings or clusters of buildings are to be separated by open areas and are to be designed and located so that they appear as discrete buildings or clusters when viewed from outside the site and there is a requirement to provide variation in building size, roof form, buildings and façade and colour. Importantly, it is a criterion that "landscape design principles and ecological compensation initiatives" are integral to the design of the new facility. While we will come back to the proposed wording of this condition, this condition is not achieved by soft landscaping sensitive locations in an endeavour to minimise effects by screening or breaking up the view toward/over the new prison facilities. The conditions of the amended designation make clear the Landscape, Ecological Enhancement and Mitigation Plan, Revision C, is not the end-point.

[46] Before considering the effects on rural character and visual amenity, we will comment on a new condition establishing reduced levels.

Reduced Levels

[47] In the absence of a design, the mass of the development was assumed to occupy the entire Building Zone limited only by the controls on height relative to the assumed RLs. Photomontages illustrated the effect on landscape and visual amenity at its "worst" or "most extreme" level.[50] We do not necessarily accept that the relatively benign shading on a series of photographs does illustrate the "extreme" effects of the works and, as it transpired, this was not the "worst" level of effects. Following questions from the court to ascertain the level of certainty around predicted visual effects, the Minister proposed conditions fixing RLs albeit at a higher level than those considered in the Assessment of Environmental Effects attached to the NoR.

[48] Responding to the increasing contours towards the south, three RLs are now proposed for different parts of the Building Zone. Two RLs are for land south of Settlers Road and a third for land north of Settlers Road. Where land is being filled in, the former would increase the height of buildings and facilities by 1 metre and 3 metres when compared to assumed RLs in the NoR. For Walker Road residents, the project works will become more prominent in the view albeit the buildings and facilities will remain below the background landform and vegetation.[51] This visual backdrop may assist in integrating the Prison into its rural surroundings as it allows for the creation of terraces at different

50 Goodwin, EiC at [45]; Supplementary Evidence dated 6 September 2017 at [7].

51 Goodwin, Supplementary Evidence dated 10 November 2017.

elevations, thus enabling the design to respond to the surrounding natural contours. Vertical variation of buildings may also assist in breaking up the massing effect of buildings.[52] Finally, we were told the conditions now preclude the possibility of buildings and structures intruding into the skyline and becoming a focal point or feature, although we think this possibility is somewhat fanciful.

[49] On the other hand, it will take 12-18 months longer for landscaping to mitigate effects (now 10-12 years in total) and for 52 Walker Road the landscaping will be less effective in reducing the level of effects, particularly during the establishment phase.[53] Overall, the level of effect has not substantially changed, but in saying that the level of adverse effect was already high for 52 Walker Road under the NoR as notified.

[50] Some members of the bench have considerable disquiet as to the manner by which this latest change has been introduced. This change has to be considered in the context of the extension of the area of the Building Zone towards the east, and, it follows, towards the Walker Road residences. The photomontages attached to the NoR are not "indicative" representations of the effect on landscape and the change in view. Given our disquiet the Minister and the District Council will be directed to file succinct, but comprehensive, submissions addressing whether the scope for the change to the reduced levels are within the scope of the NoR (as notified).

[51] The change to the RLs, if approved, will not be without amendment. In particular, there will be the additional requirement that condition 33 (or a new condition as appropriate) be amended to require the Minister to consult with the owners and occupiers of 12B & 52 Walker Road over any landscape treatment of their private property that may reduce the visibility of the development and the effect on the residents' visual amenity.

[52] The standards relating to building height are set out in two separate conditions.[54] These standards work together to control height and it is preferable that they are set out in a single condition (we have suggested amendments to condition 11(a)). Further to this:

52 Mansergh, Supplementary Evidence dated 15 November 2017.
53 Goodwin, Supplementary Evidence dated 10 November 2017 at [12-20].
54 Appearing as conditions 11 & 14 in the Final Condition set dated 10 November 2017.

(a) reduced levels are measurements relative to a particular datum.[55] The datum shall be recorded in an Advisory Note and on the plan labelled "Figure 16a: Building Zone with Maximum Building Height R.Ls";

(b) condition 11(a) sets the standard for the maximum building height. At 12 m above finished ground level, the height is that of a two-storey building. The RLs set the overall height of development above which buildings cannot intrude, and this is so regardless of the finished ground level. To make clear the intention that the character of the development will be no higher than the two storey building, the conditions are to be amended state that the lessor of the height above finished ground level or height above RL is to apply; and

(c) the conditions are to confirm the maximum height of the secure perimeter, lighting, light poles, electronic security and communication towers above (we think) the finished ground level.

Other amendments to landscape conditions

[53] In addition to some minor word changes (tracked) better suited to criteria we suggest amendments to the relevant provisions of condition 8 as follows:

(a) condition 8(c) – the provisions that are cross-referenced in condition 8(c)(i) are not criteria, rather they are methods to implement the criteria and their inclusion seem generally superfluous but in any event repeats condition 8(a)(ii). The predicate of the criterion is unclear and consequently its purpose is difficult to divine. We have interpreted what is intended and suggested amendments;

(b) condition 8(f)(iv) – might 'natural character' better encapsulate what is lost when referring to both land and water within the Building Zone?;

(c) condition 8(c)(vi) is important. We understand the purpose is to require the designer of the project works to take expert advice on the subject matter of landscape and water bodies and to integrate that advice as part of the facilities design. We have suggested amendments using language better suited to a criterion.

55 Mansergh, Supplementary Evidence dated 10 November 2017 at [8] appears to give the datum as NZGD2000 datum. The Minister will confirm the datum is that used in NoR, Report 6.

[54] We have suggested amendments to other conditions addressing landscape and visual mitigation, as follows:

(a) condition 27 – the preamble to the condition conflates the Landscape, Ecological Enhancement and Mitigation Plan, Revision C, with the other measures in sub-clauses (a) to (h). The implementation of the Plan is a standalone condition. Is the correct date for the Plan "8 November 2017"?;

(b) condition 28(b) – is the reference to "Figure 17 Proposed Landscape Mitigation Plan Revision A dated 15.08.2017" correct? If it is, the plan will need to be produced and appended to the designation conditions;

(c) condition 28(XXX) – addressing wetlands, we wonder to what extent that the condition is needed at all (it appears to duplicate in part, if not in whole, other conditions). If it is to be retained is it better placed under the Ecological Mitigation provisions from Condition 36?;

(d) condition 28(e) – the purpose of this condition is uncertain:

  (a) the criterion in condition 8(e) and the Landscape and Ecological Enhancement and Mitigation Plan, Revision C make tolerably clear that the tree and block planting using species capable of reaching a minimum height of 8 m are **not** required solely for purpose of mitigating the effect on the visual amenity of the listed dwellings in sub-clause (f). Condition 28(e) appears to contradict this. What is the correct position?; and

  (b) where the tree and block design can incorporate indigenous vegetation while achieving its primary purpose of screening or breaking up the views, this should be considered?

[55] Condition 29 directs a Landscape and Visual Mitigation and Management Plan be prepared, although two issues require clarification:

(a) the purpose of the Management Plan is not stated, but we assume it is to give effect to the relevant criteria in condition 8. That being our working assumption, we have introduced a new condition (condition 30) to record the same. If we are wrong, parties are to state the objective of the Management Plan; and

(b) the parties are to clarify whether the Tangata Whenua Liaison Group that is to have cultural input into the development of the Plan (condition 116((b)) in addition to the "input" of the persons named in condition 29. If not, we

suggest condition 29 refer to the Tangata Whenua Liaison Group rather than the persons named and second, refer to "cultural input". Parties are to comment.

Effect on Housing and Housing Affordability

[56] A key issue for Mr Maniapoto and MKTR concerned the potential social impact on vulnerable low income Māori families arising from a rapid influx of workers and their families.[56] Competition for accommodation, housing or rental properties, with upward pressure on pricing, will bear immediately and directly on this community.[57]

[57] In the NoR the Minister proposed expanding an existing Community Liaison Group to include representatives from the Ministry of Social Development and other social service providers, such as Housing New Zealand, representatives from the education sector and the District Health Board and emergency services and the like. This group was charged with, amongst other matters, identifying workforce skills requirements and localised recruitment and training strategies and second, monitoring the effect of construction activities on the housing and rental market.

[58] The condition was strongly opposed by Mr Maniapoto and MKTR as being ineffective.[58]

Context

[59] Te Awamutu, Kihikihi and Hamilton City are experiencing strong population growth, with areas directly around the Prison Site being projected to have significant population growth. Nearby, the Otorohanga population has been declining over the past two decades, but this trend is predicted to reverse. [59]

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56 NoR, AEE: Report 4: Assessment of social effects of the proposed Waikeria prison expansion, dated 7 April 2017 3.3 at 30, reports on the place of various communities on the New Zealand Deprivation Index. Deprivation (based on relative income, home ownership, employment and other factors) is ranked on a scale of (1) least deprived to (10) most deprived. The average nationwide deprivation average being 5-6. For communities living in proximity to the Prison Site, their deprivation ranking typically exceeded the New Zealand average, with persons living in the towns being most deprived.

57 Maniapoto EiC at [64-69].

58 Burkhardt, Opening Submissions at [27]-[29].

59 NoR, AEE: Report 4: Assessment of social effects of the proposed Waikeria prison expansion, dated 7 April 2017 at [3.2] at 30.

[60] Property and rental prices have increased in the last 12 months, with the median house value and rental price in Te Awamutu and Kihikihi being over 20% higher than 12 months ago.[60]

[61] The communities living in the towns of Te Awamutu, Kihikihi and Otorohanga are ranked well above the average on the New Zealand Deprivation Index. Approximately one-third of the population residing in these towns rent housing.

Predicted effects

[62] The Minister predicted that there will be negative effects on the availability and affordability of accommodation as a consequence of the construction and operation of the Prison.[61] The scale and significance of any effect will depend on the total number of persons moving into these towns and surrounding areas for work.

[63] At full capacity, the Department of Corrections workforce will expand to approximately 1,400 employees. The Minister assumes half of the workforce for the new Prison facility will already live in the area, with the balance likely to move into the area together with their families (being an estimated 970 people). While this is only an assumption, based on the residential location of existing Prison staff, the employees and their families are expected to relocate to Te Awamutu, Kihikihi and Otorohanga.[62]

[64] On the one hand, the local population will benefit from the increased opportunity to gain permanent employment in positions remunerated well above the medium income,[63] however, as the Minister quite properly acknowledges, population growth may negatively affect the supply and affordability of accommodation. The change in supply and affordability, and its consequential effect on the existing local community, is "difficult to judge".[64] That said, for the rental market in particular, the expert for the Minister concluded "many" will be affected.

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60 NoR, AEE: Report 4: Assessment of social effects of the proposed Waikeria prison expansion, dated 7 April 2017, Table 11 at 31.

61 Quigley EiC at [7]. NoR, AEE: Report 4: Assessment of social effects of the proposed Waikeria prison expansion, dated 7 April 2017 at 7.

62 NoR, AEE: Report 4: Assessment of social effects of the proposed Waikeria prison expansion, dated 7 April 2017 at 6.

63 Quigley, EiC at [38].

64 Quigley, EiC a [45].

[65] The price pressure will be greatest on local people on low or fixed incomes for whom it will be more difficult to find suitable rental accommodation; there will be flow on effect of price pressure across the market.[65]

[66] The Department of Corrections staff are not the only persons needing accommodation. Accommodation is also required for released prisoners; this is described as a "constant challenge" by providers of the relevant services for the existing 650 prisoner muster.[66] The majority of the construction force is likely to be recruited from outside the Waikato. We were told these persons would be unlikely to seek permanent accommodation,[67] but would have a high demand for short-term and rental accommodation.[68] Accommodation for the public sectors (i.e. health and education) and Prison service providers (i.e. rehabilitation services) will also be needed as will short term accommodation for prisoners' families.

Conclusions on the scale and significance of the effects on the housing and rental prices

[67] The expert for the Minister advised housing determines many other "social and health outcomes".[69] We would go further than that; access to adequate housing is a basic human right.[70] There will be a change in the availability and affordability of housing accommodation.[71] The scale of change and therefore the level of effect, particularly on low income families, was not (and we think probably cannot) be quantified.

[68] It is therefore imperative that the conditions be robust so as to enable both the prediction and then early detection of change in the accommodation market. The Minister will need to bring to bear the influence he has on the residential location of the construction and operational workforce. It is acknowledged that the Minister has the capacity to influence (but not control) market demand.

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65 NoR, AEE: Report 4: Assessment of social effects of the proposed Waikeria prison expansion, dated 7 April 2017 at 32-33.

66 NoR, AEE: Assessment of social effects of the proposed Waikeria prison expansion, dated 7 April 2017 at 48.

67 Transcript at 778.

68 NoR, AEE: Assessment of social effects of the proposed Waikeria prison expansion, dated 7 April 2017 at 27-28.

69 NoR, AEE: Assessment of social effects of the proposed Waikeria prison expansion, dated 7 April 2017 at 27-28.

70 Universal Declaration of Human Rights 1948, Article 25.

71 NoR, AEE: Assessment of social effects of the proposed Waikeria prison expansion, dated 7 April 2017 at 28 & 31 described likelihood of an effect arising from the construction and Department of Corrections workforce as being "almost certain".

Amendments to housing and housing affordability conditions

[69] The latest draft conditions are a significant improvement on earlier iterations. We have suggested changes based on our understanding of the Minister's objectives. The parties will say if we have not correctly understood the purpose and content of the conditions.

[70] Note that we have suggested amendments to the conditions distinguishing between:

(a) the process to set-up the Community Impact Forum and the Forum's objectives;

(b) the roles of the independent technical specialists and the Community Impact Forum; and

(c) a "change" to housing availability and housing affordability and the "adverse effect" on the local population consequential upon a change in housing availability and housing affordability.[72]

[71] The Final Conditions Set[73] referred to the effect of change for both the Waikato Region and the "local area"[74]. We have amended the conditions assuming that the context is the "local area" and the effects are on the "local population". The parties are to confirm whether our assumption is correct.

[72] We have suggested wording reflecting the fact that the Minister has the capacity to influence the market. This is in addition to those matters which are said to be within the Minister's "responsibility", a term which we find ambiguous.

Earthworks

[73] The District Plan's standards for permitted earthworks[75] have been set to:

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72 Referred to in the Minister's conditions as an adverse effect on housing availability and housing affordability, we consider it accurate to refer to "change" and not "adverse effect". The change in housing availability and housing affordability may have an adverse effect on the local population who may be unable to secure adequate housing.

73 Dated 10 November 2017.

74 Final Condition Set, condition 66.

75 Earthworks are permitted under the District Plan when they:

- are undertaken more than 5m from natural waterbodies and involve exposing an area less than 5000m^2
- involve the movement of soil and/or rock of less than 1000m^3 any 12-month period and have a cut or fill height of more than 2m or

> ... control earthworks to ensure that the erosion potential is taken into account and minimised by developers, that disturbance to indigenous vegetation, natural landforms, high amenity value areas and environments is avoided or minimised.

[74] The amended designation will enable substantial earthworks north of Settlers Road and within the approximately 6 ha extension to the area of land originally encompassed on the NoR.[76] Despite that, the NoR contained no information which would allow the court to understand the effect of earthworks on the environment.

[75] The Minister has now proposed conditions managing the effects of earthworks. These conditions are consistent with the outcomes for the environment set out in the assessment criteria (section 24.5 of the District Plan). The conditions address the practical management of the effects of earthworks - including dust, sediment and vibration, on the environment. The in-stream effect of earthworks and the effect on surface and sub-surface flows are left to be addressed under a future application with the Regional Council. Part of an integrated set of provisions, the reduced levels (when fixed) will ensure that earthworks do not elevate buildings above the height considered by the court. The earthworks conditions appropriately interface with the conditions for the Building Zone (bulk and location); Landscape and Visual Mitigation Management Plan and the conditions for construction traffic and noise.

Amendments to the conditions for earthworks management

[76] The designation will authorise earthworks north of Settlers Road and within the 6 ha extension.[77] No conditions were proposed to limit noise from earthworks. The parties will confirm whether the relevant standards are those set out in NZS6803:1999 Acoustics – Construction? Assuming that is the correct position we have suggested amendments to the conditions.

Vibration

[77] Save in one respect we are satisfied with the level of effect on the environment. In respect to vibration the Minister has relied on the NZ Transport Agency State Highway

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- involve the movement of soil and/or rock of less than 5000m^3 any 12-month period and have a cut or fill height of less than 2m.

76 We record that no party suggested there was a scope issue to the extension, which also saw a commensurate reduction in land on the western side of the Building Zone.

77 No other earthworks are authorised.

Construction and Maintenance Noise and Vibration Guide (Version 1.0, 2013).[78] No explanation has been given as to why these standards should apply to the construction of the new prison facilities. The Minister and District Council are to consider the standard proposed and either confirm, providing an explanation for its adoption or propose an appropriate standard.

[78] Note that we have suggested some minor amendments to condition 44.

Traffic

[79] At the commencement of the hearing the parties did not agree on measures required to reduce the medium to high level of risk of serious injury or death predicted at the intersection of Waikeria Road and State Highway 3 (SH3). The New Zealand Transport Agency's position was that this risk of serious injury or death was unacceptable.[79] The unacceptable increase in the crash risk at the intersection is triggered by the increase in Prison traffic and with it delay to and length of traffic queuing on Waikeria Road to take a right-hand turn onto the state highway.[80]

[80] In addition, the road formation along Waikeria Road does not meet the standards in the relevant District Plans. While the performance of the road may be adequate for the volume and type of vehicles currently using the road, it would cease to be so when construction of the Prison commences.

[81] The risks were known, but the experts did not agree on the works required to minimise the risk to an acceptable level or the timing of those works. The court directed the experts to conferencing facilitated by an Environment Commissioner; this resulted in a comprehensive set of conditions to manage risk and the timing of the required works.

[82] The methods to reduce risk to an acceptable level are set out in comprehensive conditions. Careful attention has been given by the experts to the methods to manage risk prior to the works on the state highway intersection being completed. The works at the Prison Site will commence before roading improvements on the state highway are completed, however we are satisfied the crash risk will be managed at an acceptable

78 See Condition 43(e).

79 Gray, EiC at [5(d)].

80 The design of the existing intersection, including the sightlines on the approach to the intersection, does not facilitate safe movement across the state highway.

level under the proposed conditions.

[83] One minor matter, we have deleted the term "offset mitigation" from condition 66(a), as unnecessary.

Lighting

[84] The recommendations of the lighting experts[81] have now been properly secured in the conditions of designation.

[85] The assessment of environmental effects attached to the NoR noted residents' concerns with glare from Prison lights. As we discovered on a site visit one evening, those concerns are well founded, with members of the bench finding it difficult to look directly towards the Prison due to the intensity of glare from pole mounted lights.

[86] In saying that, the existing Prison lighting "generally satisfies" the conditions of the designation. The existing designation has a glare limit set at a luminous intensity of 50,000 candelas, which is well beyond the limit recommended in the relevant Standard of 500 candelas.[82] In response, the existing lighting within the Building Zone will be upgraded and all new lighting associated with the works will implement the recommendations in the Standard.[83] On that basis we are satisfied that spill light, glare and sky glow (being the effects considered by the lighting experts) will not be obtrusive.

[87] The one outstanding matter concerns whether landscaping can ameliorate the change in night-time amenity, particularly for residents at 12B & 52 Walker Road. This is an issue because the prison, together with its lighting, is set to expand and fill nearly the entire valley. While we raised our concern during the hearing regarding the effect on visual amenity we did not receive a reply.

[88] The concerns are not such that the NoR should not be confirmed, nevertheless the effect on visual amenity of lighting at the Prison is the second reason supporting the direction earlier given that the Minister approach directly the owners and occupants of 12B and 52 Walker Road and consult with them on the landscape treatment of their

81 Messrs JE Bretherton & JK McKensey.
82 AS4287-1997 Australian Standard: Control of the obtrusive effects of outdoor lighting.
83 McKensey, EiC at [10(c)].

elevated properties.

Stormwater and wastewater management

[89] Consents from the Regional Council will likely be required to authorise the diversion and discharge of stormwater. Were this an application for resource consent, those Regional Council applications would be before the court.

[90] Nevertheless, the District Plan requires consideration of the adverse effect on rural character associated with stormwater (and wastewater) management[84] and consideration of natural hazards.[85] Notwithstanding the policy direction the NoR did not address stormwater or natural hazards and so the court directed the Minister and District Council to produce further evidence in order that we could satisfy ourselves as to the effects on rural character associated with stormwater management[86] and second, to satisfy ourselves that the project works will not contribute to, or be adversely affected by, any existing or potential natural hazard. This evidence was produced. In addition to addressing the above matters the evidence also demonstrates the Minister can deliver on the ecological enhancement of wetlands and waterbodies agreed to with MKTR and Raukawa, which are likely to require hydrological works to create and sustain new wetlands.

[91] We record that while the requiring authority's existing resource consent authorises the discharge of wastewater into the waterways of the Puniu catchment, the Minister will not rely on that consent and instead will construct a pipeline[87] to the Te Awamutu Municipal Wastewater Treatment Plant for disposal. The removal of wastewater from the stream will improve water quality and addresses a key concern for Māori.

Amendments to stormwater and wastewater conditions

[92] In the Final Condition Set at condition 8(d),[88] there are two criteria for "Site

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84 Otorohanga District Plan objective 3.2.3 & policy 3.3.7.

85 Otorohanga District Plan objective 4.2.

86 We hasten to say the court did not direct the production of a design of the stormwater management systems.

87 If the pipeline is not constructed then provision has been made to transport wastewater to the facility.

88 Original numbering.

Servicing." We understand "site servicing" to be concerned with stormwater and wastewater. The criterion addressing the finished land contours and land stabilisation is not concerned with site services *per se*. The criterion states the sediment loadings from the site into watercourses shall be "no greater than those existing prior to the works being undertaken". While that may be true for land contour and land stabilisation works, this is not the outcome predicted for the new site services, which are expected to deliver a reduction in existing sediments loadings. To avoid confusion as to the intended outcome, the two criteria now appear under separate sub-headings.

[93] Condition 26(c) is not clearly expressed and reads:

> Stormwater shall be managed so that ..... stormwater increases in peak flows from the Building Zone are managed by employing hydrologic neutrality principles.

[94] We understood hydrologic neutrality principles will be employed when designing stormwater systems. The "systems" referred to are those designed to retain run-off for discharge at a later point-in-time,[89] rather than natural features such as wetlands, which may also buffer run-off.[90] Parties are to confer and include a definition of "hydrologic neutrality" in the definitions section and suggest wording requiring the adoption of these principles in the design of the stormwater systems, if this is what is intended.

[95] Condition 19(b) – an interim provision for the disposal of wastewater, the wording is somewhat disjointed and its ambit is uncertain duplicating in part an unnumbered provision that follows. Assuming we have interpreted the purpose of the condition correctly, would the condition be better expressed as:

> "Following primary treatment, on-site wastewater will be transported off-site to a reticulated wastewater network that is connected to a consented municipal wastewater treatment plant. 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."

The parties will need to consider deleting or amending the duplicated provision which follows.

89 Transcript at 618.
90 Transcript at 628.