[96] Condition 23 – addresses the effect on residents arising from the transportation of wastewater. We have reinstated the words deleted as this requires action on the Minister's part to address the effect on amenity arising from the transportation of wastewater. In the first instance the Minister should seek to avoid adverse effects on those residents and, if this is not practicable, then to mitigate those effects.

Noise

[97] Given the separation distances from the residential dwellings and the Building Zone we are satisfied the evidence demonstrates that construction and operational noise, if audible, will not be at a level that causes an adverse effect on amenity.

[98] The court directed that the Minister and District Council produce evidence on the predicted change in ambient noise level along Waikeria Road north of the bridge. There are a number of dwellings situated in close proximity to the road carriageway and the court wished to understand the change in ambient noise and effect on amenity arising from a four-fold increase in Prison traffic and from construction traffic and other heavy goods vehicles.

[99] The effect of road noise was a matter raised by MKTR and Mr H Maniapoto when giving notice under s 274 RMA and by Ms C Lolesi (a submitter on the NoR).

[100] The noise expert engaged by the Minister did not consider the effect of road noise on residents relevant as it is not controlled at source (that is to say by imposing noise limits on the road carriageway). While District Plans may not impose limits on the road carriageway, we are aware of Plans that do address the effect of noise from road traffic on the amenity of adjoining properties. Indeed, although it is not relevant to the NoR, the Otorohanga District Plan has an objective that addresses the adverse effects of noise generated by traffic on State Highways and Railways (objective 3.2.6). The District Plan is less directive when addressing the effect of noise on amenity in other contexts. The objective to "avoid, remedy or mitigate" any adverse effects on rural character and the amenity values constituting that character (objective 3.2.3) is not prescriptive as to the source of "excessive noise" addressed in policy 3.3.7(h). The health effects emanating from noise are plainly relevant under s 171(1) and the consideration, subject to Pt 2, as are the effects on the environment.

[101] Environmental sound along Waikeria Road is characterised by birdsong, wind in

the trees and road traffic; with the influence of traffic on noise levels increasing in proximity to the state highway. There are around 775 vehicle movements per day along the road, the majority of which are associated with the Prison and occur during the daytime (6:00am to 10:00pm). We were told the pattern of daytime and night time movements will not change.

[102] Three residences closest to the road enjoy a night time ambient noise level of 23 dB L_{Aeq} increasing to a daytime ambient noise level of between 53-54 dB L_{Aeq}.[91] The daytime ambient noise level at the façade of the dwellings is predicted to increase by 3-4 decibels during the construction period and by 6-7 decibels once the maximum capacity for prisoners is reached.[92] In consequence, the internal noise level of these dwellings may exceed 40 dB $L_{Aeq\ (24hour)}$, being the level recommended by the noise experts as establishing a good standard of acoustic amenity within a dwelling.[93] The level of adverse effect of noise within the dwelling was assessed as moderate for these residents. Were the prison to operate at its maximum capacity, an additional seven dwellings[94] would fall within the 55 decibel contour with the same consequential effect on the internal amenity of the dwellings.

[103] Referring to research conducted in 2001 the expert called by the District Council supported the selection of an external noise level of 55 dB $L_{Aeq\ (24\ hours)}$ and an internal noise level of 40 dB $L_{Aeq\ (24\ hours)}$ for habitable rooms.[95] He described the predicted change in the noise level as a "stepwise increase in the level of noise that the community will experience".[96] What will also increase markedly is the 'busyness' of what is presently a quiet no-through road.

[104] The noise experts recommended conditions to mitigate the effect of noise within habitable homes. Where internal sound levels are predicted to exceed 40 dB $L_{Aeq\ (24\ hours)}$

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91 44, 407 & 425 Waikeria Road.

92 Initially the prison will accommodate up to 2,650 prisoners, with a maximum capacity of 3,000. See Robinson, Supplementary Evidence dated 24 October 2017 at [42]-[43]. At maximum capacity, the ambient noise levels would be between 59-61 decibels.

93 The noise expert called on behalf of the District Council, Mr NR Lloyd, considered 40 dB $L_{Aeq\ (24hour)}$ an appropriate limit even though there is little or no night-time noise from prison traffic. While the 24 hour criterion assumes a regular diurnal noise distribution, the lack of night-time noise would be of a "benefit" in this case (Lloyd, EiC at [25]). We understood him to mean the standard was conservative of residential amenity.

94 195, 292, 299, 299a, 322, 374a, 374b Waikeria Road.

95 Lloyd, EiC at [27]. The report addressed noise from new roads, for reasons that he gives Mr Lloyd considered it reasonable to refer to its recommendations. The recommendations are in in line with those made by the Minister's expert Mr C Robinson, Supplementary Evidence dated 24 October 2017.

96 Lloyd, EiC at [31].

in habitable rooms, subject to the home owners' agreement, the Minister will implement the mitigation measures recommended by an acoustic engineer.

[105] We note that the requirement to undertake noise mitigation remains open for a period of two years after the date that the first prisoner is accommodated at the new facilities. However, it is unclear whether the prison will be developed to full capacity by that time. We have amended the condition to require the acoustic engineer to assume the prison is at fully capacity (3000 prisoners) when reporting on mitigation measures in order that all residences that may be exposed to a moderate level of adverse effects are identified. The parties may suggest alternative conditions which achieve the same end, but are to be mindful of Mr Lloyd's evidence that it is advisable to put the mitigation in place before the noise becomes a nuisance.[97]

[106] The parties have agreed on conditions addressing the effects of noise on outdoor living amenity. We have amended the wording slightly to be consistent with the objective for the noise conditions.

[107] Subject to the above, we record our finding that the rural amenity currently enjoyed by these residents will change, and unmitigated there will be a moderate adverse effect on aural amenity. There are a range of mitigatory measures that, with the homeowners' agreement, are capable of reducing the actual or perceived effect of noise to an acceptable level. These are in addition to measures which may be taken by the Road Controlling Authorities in relation to the road including the reduction of the posted speed limit to 80 km/hr and resurfacing of the carriageway with smooth asphalt.

Impervious Surface Area

[108] Condition 17 has been amended to restrict the impervious surface area of land located south of Settlers Road. We heard no evidence as to the purpose and effect of this condition. We will decline to confirm the designation subject to this condition.

Other clauses and conditions

[109] With regard to the preamble to the designation, we are unsure what "The ODP is listed as Designation D55 in Schedule 16 – Designations" means. If ODP is a reference

97 Transcript at 1069.

to the District Plan this would make no sense and so we have suggested replacement wording. If that is incorrect, "ODP" will need to be defined.

[110] As to the purpose of the designation (clause 1 (1)) the designation does not authorise the activities described in the resource consent RM 170041 (broadly, earthworks and vegetation removal south of Settlers Road).

[111] Condition 9(b) – is there a word missing after "performance"? If not, the parties are to rephrase "ongoing whole of life environmentally sustainable performance."

[112] Condition 11(d) is unclear. Interpolating, we have suggested amendments.

[113] Condition 96 – the Ministry is changing the terms of reference and composition of the Community Liaison Group. The preamble 'fudges' this, and it is simpler to delete.

[114] Condition 124(b) – are the words "Karakia for" required? Do not the words "appropriate cultural recognition or commemoration" contemplate a Karakia? If so, it may not be necessary to include this in the condition as the other occasions listed in (a)–(g) do not state what the appropriate recognition or commemoration will be.

[115] Condition 124 – Advice note. We are unsure what is meant to be conveyed by "there is no requirement that the delivery of carvings...". If this refers to a private agreement with some of the parties it may be better left out, but if not then it requires elaboration.

Planning Framework (s 171(1)(a))

Introduction

[116] We heard from five planning witnesses, namely Mr C Dawson for the Otorohanga District Council, Ms S Dines, Mr P Hall and Dr P Mitchell for the Minister and Mr M Crisp for NZTA. We will not discuss their evidence at any length but concentrate instead on those provisions that the witnesses alerted us to as being of particular importance when considering the notice of requirement and submissions on the same.

[117] The court was concerned to understand how integrated management of natural and physical resources is to be achieved within the Prison Site and for the Prison Site

within its rural setting. We were not satisfied that the few high-level parameters set out in the proposed conditions would constrain the environmental effects to the level predicted by the various experts.

[118] The planning regime to which we are to have particular regard proved challenging for the planning witnesses for several reasons. There is an emphasis on integrated management of the Region's resources under the Vision and Strategy for the Waikato River (which has the status of a National Policy Statement) and Regional Policy Statement; these documents address the environment in a holistic fashion. On the other hand a NoR is, by definition, principally concerned with the use of land.

[119] A second challenge arose because there is not a conceptual design or layout of the works. Compounding this, the finished ground levels for preliminary earthworks are not stipulated even though the works are authorised by a resource consent.

[120] The third and final challenge centred on translating into conditions the technical recommendations of the other expert witnesses so that the outcomes they were advising upon are properly secured.

[121] Subject to what we say about conditions in this decision, having had particular regard to the planning instruments, for the most part these issues have now been – or can be, satisfactorily addressed. That said, we turn next to the planning instruments.

Planning instruments

[122] We must have particular regard to two National Policy Statements, being:

(a) National Policy Statement for Freshwater Management; and
(b) the Vision and Strategy for the Waikato River (Vision and Strategy).

[123] For completeness, we also received evidence on the National Environmental Standard for Assessing and Management Contaminants in Soil to Protect Human Health (NES Soil). The Minister has been granted resource consent to disturb the contaminated land within the Building Zone and this activity is not considered part of the works that are the subject matter of this NoR.

[124] The relevant regional planning documents have given effect to the National Policy Statement for Freshwater Management.

[125] The Vision and Strategy for the Waikato River (which, as we have noted, has the status of a National Policy Statement) is contained in three Acts of Parliament. It is deemed part of the Waikato Regional Policy Statement[98] and the Regional Policy Statement has been reviewed to give effect to the same.[99] The Waikato Regional Council has also reviewed its Regional Plan and has promulgated Change 1 the Regional Plan with the purpose of giving effect to the Vision and Strategy.[100] The Otorohanga District Plan is yet to give effect to the Vision and Strategy.

[126] We have also had particular regard to the:

(a) Waikato Regional Policy Statement;
(b) Waikato Regional Plan;
(c) Otorohanga District Plan (**ODP**); and
(d) Waipa District Plan[101].

[127] And, to the extent that counsel or witnesses referred to them, we have had regard to the following Environmental Management Plans:

(a) Te Rautaki Taiao a Raukawa – Raukawa Environmental Management Plan 2015;
(b) Ko Ta Maniapoto Mahere Taiao – Maniapoto Environmental Management Plan; and
(c) Tai Tumu, Tai Pari, Tai Ao – Waikato Tainui Environmental Management Plan.

[128] We commence our discussion with the objectives and policies pertaining to the integrated management of resources.

Integrated management

[129] Objective 3.1 of the Regional Policy Statement is that natural and physical

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98 Milne, Memorandum dated 30 August 2017 at [5]. The deeming provisions being s 11(2) Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010; s 14(3) of the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 and s 8(2) of the Nga Wai o Maniapoto (Waipa River) Act 2012.

99 Milne, Memorandum dated 30 August 2017 at [8].

100 Section 198D Planning Report 30 June 2017 at [8.2]; Milne, Memorandum dated 30 August 2017 at [9].

101 Waikeria Road lies within both Waipa and Otorohanga Districts and therefore is managed by two road controlling authorities. The Waipa District Plan is relevant to this extent and as we are satisfied with the conditions have addressed the relevant objective and policies pertaining to the effects arising from road traffic and will not discuss the Plan directly.

resources are managed in a way that recognises:

a. the inter-relationships within and values of water body catchments, riparian areas and wetlands, the coastal environment, the Hauraki Gulf and the Waikato River;
b. natural processes that inherently occur without human management or interference;
c. the complex interactions between, air, water, land and all living things;
...
e. the relationships between environmental, social, economic and cultural wellbeing;
...
f. the interrelationship of natural resources with the built environment.

[130] This objective is implemented through several policies including Policy 4.1 which states that an integrated approach to resource management **will** be adopted that:

a) recognises the inter-connected nature of natural and physical resources (including spatially and temporally) and the benefits of aligning the decisions of relevant management agencies across boundaries;
b) maximises the benefits and efficiencies of working together;
c) recognises the multiple values of natural and physical resources including ecosystem services;
d) responds to the nature and values of the resource and the diversity of effects (including cumulative effects) that can occur;
e) maximises opportunities to achieve multiple objectives;
f) takes a long-term strategic approach which recognises the changing environment and changing resource use pressures and trends;
g) applies consistent and best practice standards and processes to decision making; and
h) establishes, where appropriate, a planning framework which sets clear limits and thresholds for resource use.

[Emphasis added]

[131] The above is reinforced by another objective (Objective 3.12) which states that "development of the built environment[102] and associated land use occurs in an integrated, sustainable and planned manner which enables positive environmental ....outcomes ...".

[132] While Mr Hall found no equivalent policies in the Otorohanga District Plan, [103] the District Plan nonetheless acknowledges that environmental issues can seldom be

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102 Defined as "buildings, physical infrastructure and other structures in urban, rural and the coastal marine area, and their relationships to natural resources, land and people" in Regional Policy Statement at [Glossary].

103 Hall EIC at [55]. We are unsure whether he means the District Plan has not given effect to the Regional Policy Statement.

compartmentalised by geographical or administrative boundaries.[104] If confirmed, the designation would be enabling large scale, bulky works which, without careful design, will appear out of scale with the surrounding environment and have the potential to dominate the countryside.

[133] Instead, the conditions are sensitive to the rural context in which the new prison facilities will be set. The conditions make clear that the integration of the new prison facilities into the surrounding landscape is not an afterthought where a typical approach might be to propose soft landscaping to screen or breakup the view of a development.[105] Rather, the Minister must demonstrate that the proscribed outcomes for the landscape and natural environment, including wetlands and streams, are integral to the design of the new prison facilities. The inter-connected nature of natural and physical resources is recognised by conditions which enable an increase in the prison muster while, at the same time, improving the quality of the catchment water;[106] improving the aquatic habitat of Waikeria Stream; reducing glare from prison lights; upgrading the carriageway of Waikeria Road to achieve the standards in the District Plans; and improving intersection design at SH1. There are different lenses through which these actions may be viewed, not least being responses to ensure that land use and development avoids (in the first instance) or mitigates adverse effect on the amenity of persons living in the area.[107] The actions are not wholly attributable to the alteration to the designation; the actions will benefit the environment generally.

[134] Finally, the conditions require the various management plans to "talk to" each other and in this way, avoid compartmentalising the use, development and protection of resources.

Resource use and development and sustainability and the built environment

[135] Next, the Regional Policy Statement contains a high-level objective to "recognise and provide for the role of sustainable resource use and development and its benefits in enabling people and communities to provide for their economic, social and cultural wellbeing".[108] Again, we were told there was no equivalent provision in the District

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104 Otorohanga District Plan, Section: Introduction at "Cross Boundary Issues" p 4.

105 We are not suggesting that in this case the landscape plan was simply an "afterthought." The evidence demonstrates care and attention being brought to bear on the landscape's values (including amenity values).

106 Wastewater will no longer be discharged into the catchment.

107 Otorohanga District Plan, Objectives 3.3.1 and 3.3.2.

108 WRPS, Objective 3.2

Plan.[109]

[136] With the prison network operating close to its available capacity, in meeting the demand for additional accommodation at an existing site, the NoR is a response to risks associated with overcrowding. This includes risk of harm to prisoners and prison staff arising from overcrowding together with lower operational efficiency and reduced ability to deliver effective on rehabilitation and employment programs. Further, the new prison facilities would meet a regional shortfall in prisoner places over the next 10 years.[110]

[137] Subject to the appropriate conditions, the increased intensification of land use at the Prison Site is beneficial to both prisoners and staff at the Prison Site and to the wider regional population.

Health and wellbeing of the Waikato River

[138] Addressing the Vision and Strategy head-on, it is an objective of the Waikato Regional Council in its Regional Policy Statement that:

> **Objective 3.4**
> The health and wellbeing of the Waikato River is restored and protected and Te Ture Whaimana o Te Awa o Waikato (The Vision and Strategy for the Waikato River) is achieved.

[139] Of the 23 policies that implement this objective, seven are directly relevant. To achieve the strong direction that the health and wellbeing of the Waikato River be "restored" and "protected", decision-makers are to adopt an integrated approach to resource management. These policies are listed at paragraph [130] a)–g) above.

[140] Going forward, positive indigenous biodiversity outcomes are promoted and the full range of ecosystem types are to be maintained or enhanced so that they achieve healthy ecological functioning. This requires decision-makers have a particular focus on:

> **Policy 11.1**
> a) working towards achieving no net loss of indigenous biodiversity at a regional scale;
> b) the continued functioning of ecological processes;
> c) the re-creation and restoration of habitats and connectivity between habitats;
> d) supporting (buffering and/or linking) ecosystems, habitats and areas identified as significant

109 Hall, EiC at [64].
110 NoR, at [3.3 Location of Demand for Prisoner Places] p19.

indigenous vegetation and significant habitats of indigenous fauna;

e) providing ecosystem services;

f) the health and wellbeing of the Waikato River and its catchment;

g) contribution to natural character and amenity values;

h) tāngata whenua relationships with indigenous biodiversity including their holistic view of ecosystems and the environment;

i) managing the density, range and viability of indigenous flora and fauna; and

j) the consideration and application of biodiversity offsets.

[141] While not noted by the planning witnesses, the methods in the Regional Policy Statement direct Regional and District Plans to maintain or enhance indigenous biodiversity by:

Method 11.1.1

(a) providing for positive indigenous biodiversity outcomes when managing activities including subdivision and land use change;

(b) ...

(c) creating buffers, linkages and corridors to protect and support indigenous biodiversity values, including esplanade reserves and esplanade strips to maintain and enhance indigenous biodiversity values.

[142] The Regional and District Plans are also to recognise:

Method 11.1.2.

... that adverse effects on indigenous biodiversity within terrestrial, freshwater and coastal environments are cumulative and may include:

a) fragmentation and isolation of indigenous ecosystems and habitats;

b) reduction in the extent and quality of indigenous ecosystems and habitats;

c) loss of corridors or connections linking indigenous ecosystems and habitat fragments or between ecosystems and habitats;

d) the loss of ecological sequences;

e) loss or disruption to migratory pathways in water, land or air;

f) effects of changes to hydrological flows, water levels, and water quality onecosystems;

g) loss of buffering of indigenous ecosystems;

h) loss of ecosystem services;

i) loss, damage or disruption to ecological processes, functions and ecological integrity;

j) changes resulting in an increased threat from animal and plant pests;

k) effects which contribute to a cumulative loss or degradation of indigenous habitats and ecosystems;

l) ...

[143] Importantly all parts of the Regional Policy Statement work together and we have

had regard to the same because at the end of the hearing we remained unclear to what extent the relevant provisions of the Regional Policy Statement (as amended by the Vision and Strategy), has been given effect to by the Otorohanga District Plan.

[144] As we have noted the streams and wetlands in and around the Prison Site are of a quality typical of lowland farmland in the Waipa catchment. The water quality of the streams has been degraded by sediment and nutrient inputs from dairying taking place on the Prison Site and elsewhere and also by the discharge of prison wastewater. The extent and quality of indigenous ecosystems and habitats on the Site are limited when compared to the range of ecosystem types and indigenous vegetation assemblages that existed prior to European occupation.[111] The Minister would modify the environment further by diverting water from wetlands and streams within the Building Zone.

[145] The removal of wetlands and sections of streams from the Site appears, at first blush, insensitive to the policy direction to recognise the inter-connected nature of natural and physical resources (including spatially and temporally)[112] or the promotion of positive outcomes including the continued functioning of ecological processes; and the re-creation and restoration of habitats and connectivity between habitats.[113] While the Minister will directly mitigate the loss of those streams and wetlands by developing wetlands and enhancing riparian vegetation within the catchment, it is not a foregone conclusion that these water bodies will be modified or destroyed. The conditions of the designation require the Minister to, amongst other measures:

(a) Ensure finished land contours and land stabilisation measures are such that sediment loadings from the site into watercourses running through the site will be no greater than those existing prior to the works being undertaken;[114]

(b) Demonstrate that the outcomes for the landscape and natural environment, including wetlands and streams, have been an integral part of the design of the accommodation and associated facilities;[115]

(c) Minimise the ongoing adverse effects on the relationship of Raukawa and Maniapoto with the awa and whenua through the intensification and

111 Hall, EiC at [85].
112 Policy 4.1.
113 Policy 11.1.
114 Condition 8(d)(i).
115 Condition 8(c)(vi).

expansion of the use of the whenua for a prison and the degradation of the original ecology and the land and the water bodies;[116] and

(d) Retain stormwater from the Building Zone to the extent practicable in its existing tributary catchments to provide sustenance flows to existing water courses and wetlands.[117]

[146] The NoR reflects a desire to adopt an integrated approach to the use, development and protection of natural and physical resources within the Site and to take action that, given the scale of the project works, is commensurate with the objective to restore and protect the Waikato River (into which the water bodies of this catchment drain). For completeness, we record that the reticulation of the wastewater, and retirement of pasture through the establishment of the Building Zone, will positively contribute to the outcomes sought by proposed Change 1 to the Regional Plan in terms of water quality.

Landscape and amenity

[147] At a high level the Regional Policy Statement seeks that the qualities and characteristics of areas and features, valued for their contribution to amenity, are maintained or enhanced (Objective 3.21). The natural character of wetlands and rivers and their margins are to be protected from the adverse effects of use and development (Objective 3.22).[118] While the landscape and natural features here do not qualify as significant from a regional perspective, the Otorohanga District Plan provides clear guidance as to the expected outcome in respect of this Site under "Issue 3 - Rural Character" and the objectives and policies that follow.

[148] The District Plan identifies as a significant issue the potential loss of rural character and amenity values. This includes losses arising from the cumulative effects of development; restrictions on outlooks and views, and inappropriate design, size, height, location and/or use of buildings.[119] We record that our consideration of amenity values was not limited to visual amenity.

[149] Two objectives in the District Plan address these potential losses. Rural character

116 Condition 8(g)(II).
117 Condition 26(b).
118 WRPS Part A objective 3.22.
119 Otorohanga District Plan at [3.1.1].

and amenity values are to be retained by managing land use and development (Objective 3.2.1) and more specifically:

> **Objective 3.2.3**
> To ensure that land use, subdivision and development activities in the Rural Effects Area avoid, remedy or mitigate any adverse effects including cumulative effects, upon the rural character of the area where they are located, or the amenity values which constitute this character. Rural Character includes:
>
> (a) small scale and low density and intensity of development;
> (b) scenic vistas;
> (c) high proportion of natural open space;
> (d) areas of indigenous vegetation and habitats of indigenous fauna;
> (e) natural features, including rolling hills, mature vegetation and water bodies;
> (f) agricultural working landscapes;
> (g) lawfully established activities and structures.

[150] This is achieved by retaining rural character by managing activities in a way which recognises, provides for and enables the continuation of lawfully established activities (Policy 3.3.1) and by managing the scale and intensity of activities so they are compatible with the rural character of the area in which they are to be located (Policy 3.3.5).

[151] Further direction is given in Policy 3.3.7 which we set out next:

> **Policy 3.3.7**
> In the Rural Effects Area, avoid, remedy or mitigate against the adverse effects, including cumulative effects, on rural character associated with:
>
> (a) density / intensity of development;
> (b) altering visual amenity values from public places including roads;
> (c) ...
> (d)...
> (e) built form, building site and coverage, building setbacks, height and design;
> (f) ...
> (g) traffic generation and insufficient roading capacity;
> (h) excessive noise and vibration;
> (i) ...
> (j) objectionable dust generation;
> (k) earthworks;
> (l) glare and light spillage;
> (m) ...
> (n) compromising the relationship of Māori and their culture and traditions with their ancestral lands,

water, sites, waahi tapu and other taonga;
(o) ...
(q) stormwater and/or wastewater management; and
(r) ...

[152] Policy 3.3.10 also provides:

Subdivision, building and development should be located and designed to:
(a) be sympathetic to and reflect the natural and physical qualities and characteristics of the area;
(b) ensure buildings have bulk and location that is consistent with buildings in the neighbourhood and the locality;
(c) avoid buildings and structures dominating natural features, adjoining land or public places;
(d) encourage retention and provision of trees, vegetation and landscaping;
(e) ...
(f) maintain adequate daylight and direct sunlight to buildings;
(g) promote the use of energy efficient design, orientation and layout, where appropriate;
(h) ensure adequate supply of potable water;
(i) enable the continued operation and maintenance of existing lawfully established activities;
(j) ...

[153] The NoR concludes by stating that the rural character of the area surrounding the Prison Site and amenity values derived from the same will be retained.[120] This is a surprising conclusion given that the new prison facilities will expand to potentially occupy 93 ha. This will change the physical landscape, altering its character and altering also the mostly elevated views which are valued by people living and working in the area. Indeed, the assessment of environmental effects found **after** mitigation had established over 8-10 years, the adverse effects on visual amenity of some residents would remain.[121] In addition there will be adverse amenity effects including those arising from increased busyness and noise from traffic on Waikeria Road.

[154] There is little by way of direct support in the District Plan for the scale and intensity of the development proposed (Policy 3.3.7(a)) and it cannot be said that the buildings will be of a bulk consistent with other buildings in the neighbourhood, including – we find, the Lower Jail (Policy 3.3.10(b)).

[155] It is not unusual for there to be a lack of direct policy support for a NoR. The

120 NoR at [9.5.3], p 116. Compare Dines, EiC at [170] and Hall, EiC at [165] differing opinions.
121 NoR, Report 6: Assessment of Landscape and Visual Effect, Table 1, at 19-25.

planning instruments are not determinative of a NoR even though they are documents to which we are to have particular regard. What is required here is that the NoR take cognisance of the existing rural character and the amenity that derives from the same, so that the design of the new prison facilities is sympathetic to and integrates with the surrounding area. In short, the requiring authority is to ensure that the adverse environmental effects are avoided, remedied or mitigated (Otorohanga District Plan, Objective 11.2.1). There were a number of methods identified in the evidence and during the course of the hearing that could promote this outcome, which have now been carried over into the conditions. Even so, the physical works will change the rural character and will, we acknowledge, have an adverse effect on the visual and aural amenity of some residents and in response the court has suggested further conditions for the benefit of 12B and 52 Walker Road.

Relationship of Tāngata Whenua with the environment

[156] Finally, and to be considered alongside the foregoing, Objective 3.9 of the Regional Policy Statement states:

> The relationship of tāngata whenua with the environment is recognised and provided for, including:
>
> a) the use and enjoyment of natural and physical resources in accordance with tikanga Māori, including mātauranga Māori; and
>
> b) the role of tāngata whenua as kaitiaki.

[157] In the context of the Otorohanga District Plan, decision-makers are to ensure that land use does not compromise the relationship of Māori cultural values to, and with, their ancestral lands, water, sites, waahi tapu and other taonga (Objective 3.2.5) by addressing adverse effects that may compromise the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga (Policy 3.3.7(n)).

[158] The Minister, who has been responsive to the continuing hurt of mana whenua dispossessed from their land, acknowledges their enduring relationship with the whenua and resources.[122] The effect on the relationship of Raukawa and Maniapoto with the awa and whenua as a consequence of intensification and expansion of land use, and the

122 Condition 8 (h).

degradation of the original ecology and land and waterbodies, is to be minimised.[123] Prison wastewater will no longer be discharged into Waikeria Stream. The recognition and enhancement of tāngata whenua relationships with indigenous biodiversity, including their holistic view of ecosystems and the environment, will be better aligned to the NoR through input from Puniu River Care Inc.[124] The enduring relationship of mana whenua (MTKR specifically) with the Prison site by providing for ongoing exercise by mana whenua of kaitiakitanga will be recorded formally in an agreement as between the parties. Finally, a Tāngata Whenua Liaison Group will be formed to promote the relationship with the requiring authority and to facilitate cultural input into the development and implementation of mitigation measures and management plans and to develop a Recognition and Commemoration Plan.[125]

Outcome

[159] As recorded, the court is not in a position to confirm the NoR as the Minister is yet to establish whether there is scope to introduce the reduced levels in condition 14 [Final Condition Set]. The late change is not an insignificant matter, given the intensifying effects on residential neighbours. But for this change we would have confirmed the NoR, subject to conditions, based on the reduced levels in the NoR's Assessment of Environmental Effects.

[160] In light of the urgency of the matter we have endeavoured to assist the parties by suggesting amendments to the conditions. The parties may propose alternative wording which addresses the issues we have raised. The parties are to provide **reasons** for any alternative wording.

[161] Finally, the Minister is to review the conditions to ensure any internal cross-references are correct (they will have changed with the court's renumbering) and second, there is consistent use of macrons.

123 Condition 8 (g)(II).
124 Hall EIC at [99-101].
125 Condition 116ff.

Directions

[162] We direct:

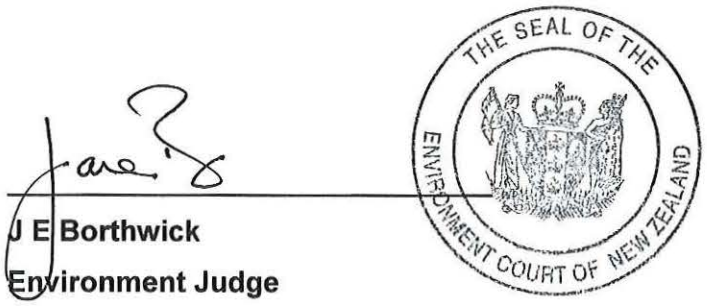
(a) by **Friday 26 January 2018** counsel for the Minister and Otorohanga District Council are to file legal submissions substantiating scope for the proposed Reduced Levels; and

(b) by **Wednesday 31 January 2018** the parties:

(i) confer and file an agreed memorandum succinctly, but comprehensively, responding to the matters raised in this interim decision; and

(ii) file an amended set of conditions and plans.

For the court:



J E Borthwick
Environment Judge

Attachment A: draft designation conditions

Notes
Changes to proposed conditions made since that date are shown in underlining / ~~strikeout~~ format, and shaded yellow for ease of reference.

Grammatical changes, principally corrections made to semi-colons and full-stops, are not shown.

The court has adopted its own paragraph numbering and sequencing standards. The court has not corrected internal cross-referencing

1. Amendments to Designation in Otorohanga District Plan

~~The ODP is listed as Designation D55 in Schedule 16 – Designations.~~

The designation is listed as Designation D55 in Appendix 16 to the Otorohanga District Plan (ODP) – Requiring Authorities, Designations and Heritage Orders.

~~The NOR sought two changes to the above schedule:~~

1. ~~Alteration of the designated~~ Purpose ~~as follows~~:

   Construction (excluding the activities described in the resource consent RM170041 issued by Otorohanga District Council on 25 September 2017 for land south of Settlers Road), operation and maintenance of Prison and associated activities to accommodate up to 3,000 prisoners ~~(subject to condition).~~

2. ~~Update to the~~ Legal Description ~~as follows~~:

   ~~Sections 1 & 2 SO 60097~~ Section 2 SO 60097 and Sections 1 and 3 SO 455234 comprised in Computer Freehold Register 647680 (South Auckland Land Registration District).

Definitions

AEP — Annual exceedance probability.

Active Traffic Management — is defined in the Code of Practice for Temporary Traffic Management (COPTTM), 4th Edition published 1 November 2012: Part 8 of the Traffic Control Devices manual which includes Manual Traffic Controllers using stop/go paddles, portable traffic signals, and pace vehicles (pilot).

Associated facilities — for the purposes of Conditions 10 and 11 include the following:

Facilities within secure perimeter

- surveillance equipment and lighting;
- gatehouse;
- prison management, security and operations support;
- prisoner receiving centre;

- specialised units including special treatment, at-risk and drug treatment unit;
- prisoner visits area;
- health centre;
- workshops / industries facilities;
- kitchens/laundries;
- cultural buildings;
- sports hall/gymnasium and sports field; and
- programme facilities such as classrooms, meeting rooms and staff offices.

Non-Secure Facilities

- surveillance equipment and lighting;
- prison access control point (boom gate);
- visitors reception centre;
- external deliveries store;
- internal roading;
- staff and visitor car parking;
- administration and staff amenities;
- facilities management and trade parking;
- prisoner Control Point; and
- LPG storage facilities.

Building Zone — ~~is~~ the area of the Waikeria Prison site shown within the yellow outline on Figure 1.

CLG — Community Liaison Group.

CIF — Community Impact Forum.

Construction works — includes the laying of foundations, installation of infrastructure and all other activities associated with building the facility up to the point of all Code Compliance Certificates under the Building Act being issued by the Otorohanga District Council.

Event – for the purpose of Condition 3 "event" means

Hydraulic Neutrality [insert definition]

New prison facilities — **are** ~~is~~ facilities constructed after [date of confirmation of NOR] within the Building Zone shown on Figure 1 to accommodate prisoners.

Queue — the queue length for the purposes of day to day monitoring shall be the maximum observed queue. The queue length for the purposes of monitoring and reporting under conditions 47, 49, 51, 52 and 53 is the 95th percentile back of queue.

Secure perimeter [insert definition]

Waikeria Prison site — ~~is~~ the 1,276 hectare designation area described as Section 2 SO 60097 and Sections 1 and 3 SO 455234 comprised in Computer Freehold Register 647680 (South Auckland Land Registration District).

Table of Contents

Commented [BJ1]: Page references are to be reviewed.

PRISON OPERATIONS

1. All buildings on the site which are designed to hold prisoners overnight shall be contained within secure perimeters.

2. No additional vehicle entrances or road intersections with Waikeria Road or Wharepuhunga Road shall be permitted without Otorohanga District Council's consent (as road controlling authority) for the location, design and construction of the vehicle entrances or road intersections.

3. The Prison Manager shall ensure that the following minimum-security event performance standards are met:

   (a) notification of those persons included on the notification list shall commence within 15 minutes of the control room being notified of a significant security event;
   (b) 24-hour prison hotline is provided for the community to ask questions during incidents, report concerns and/or provide information to the prison; and
   (c) all persons on the notification list, as defined below, are provided with the number of the prison hotline.

   The notification list and those persons to be provided with the prison hotline number will be determined by the CLG and updated, as necessary, from time to time.

4. No building or group of buildings larger than 120 m^2 floor area and capable of accommodating prisoners overnight shall be located within 200 metres of any residential dwelling beyond the Waikeria Prison site existing as at 26 November 1998, without consent of the dwelling's owner.

5. There shall be no maximum security prisoner accommodation on the Waikeria Prison site and total prisoner numbers shall not exceed 3,000 at any one time.

OUTLINE PLAN

6. Prior to undertaking any construction related activities authorised by this designation, the requiring authority shall have submitted an Outline Plan to the Otorohanga District Council, prepared in accordance with section 176A of the Resource

Management Act 1991 ("RMA"); and finalised that Outline Plan in accordance with the process set out in section 176A of the RMA.

DESIGN REPORT

7. The Outline Plan required by Condition 6 shall be accompanied by a Design Report, the purpose of which is to demonstrate that the works identified in the Outline Plan will comply with the conditions of this designation.

The Design Report is to be accompanied by a written statement, prepared by appropriately qualified and experienced independent expert(s):

(a) confirming that in their opinion(s) the works identified in the Outline Plan will comply with the conditions of this designation; and

(b) setting out their analysis of how, in their opinion(s), the requirements of Condition 8 have been satisfied.

OVERARCHING REQUIREMENTS

8 Notwithstanding any other condition of this designation, the Outline Plan and Design Report required by Conditions 6 and 7 shall satisfy the following criteria:

(a) Integration

(i) the development authorised by this designation integrates with the existing rural environment and landscape; and

(ii) Conditions 9–29 are implemented as one complementary suite of conditions that collectively satisfy the criteria of this Condition 8.

(b) Sustainability

new prison facilities are designed and constructed in accordance with sustainable design principles;

(c) Building zone, bulk, location and design

(i) Building heights, shape and bulk are such that adverse effects on rural character and rural amenity values from locations beyond the boundary of the Waikeria Prison site will be minimised to the extent necessary to ensure compliance with Conditions 9 – 29.

the design of the accommodation and associated facilities has minimised the adverse effects on rural character and rural amenity values when viewed from dwellings, houses and public places beyond the boundary of the Waikeria Prison site;

(ii) new prison facilities constructed after [date NoR confirmed] are of ~~an appropriate~~ a size, design and colour so as to not be visually dominant in the context of the surrounding rural environment;

(iii) buildings or clusters of buildings are separated by open areas and are not a large consolidated mass;

(iv) ~~Read buildings as separate elements and have multiple buildings that are on different parts of the site seen as a series of buildings.~~
buildings are designed and located so that they appear to be separated into discrete buildings or clusters, when viewed from outside the site, rather than being viewed as a single uninterrupted mass.;

Commented [BJ2]: An agreed change proposed by the District Council

(v) there is variation in building size, roof form, building façade and colour at Waikeria Prison; and

(vi) ~~Landscape design principles and ecological compensation initiatives are an integral part of the design of the new facility.~~
the outcomes for the landscape and natural environment, including wetlands and streams, are demonstrated to have been an integral part of the design of the accommodation and associated facilities.

(d) Finished land contours and land stabilisation

(i) finished land contours and land stabilisation measures are such that sediment loadings from the site into watercourses running through the site will be no greater than those existing prior to the works being undertaken;

(e) Site servicing

(i) the Waikeria Prison capacity increase advances the Vision and Strategy for the Waipa River and the improvement of water quality in the Puniu River through the removal of a direct discharge of treated sewage through the reticulation of wastewater from Waikeria Prison to the Te Awamutu Wastewater Treatment Plant and the resultant reductions in contaminants discharged;

(f) Landscape and visual mitigation

(i) site landscaping is sufficient to ensure that the adverse effects of activities authorised by this designation on scenic vistas and the proportion of open space, both as viewed from neighbouring dwellings, will be minimised to the extent necessary to ensure compliance with Conditions 9–29;

(ii) the adverse landscape and visual effects of the prison facility within the designated site are minimised to the extent necessary to ensure that the development of the new prison facilities is integrated with the surrounding environment and maintains rural character;

(iii) the adverse visual effects of the new prison facilities on the residents of 12B Walker Road, 52 Walker Road and 29A Wharepuhunga Road, 44 Wharepuhunga Road and 164 Wharepuhunga Road are minimised; and

(iv) the loss of ~~rural~~ natural character within the Building Zone is mitigated ~~compensated for through~~ by planting (including riparian planting) within the Waikeria Prison site.

(g) Ecological mitigation ~~compensation measures~~ for works undertaken in the Building Zone

(I) ~~that ecological mitigation compensation works to be undertaken on the site, including any works undertaken in accordance with Condition 11 of the Waikato Regional Council consent AUTH 138553.01.01 dated 14 September 2017, or any subsequent variation or replacement of that consent, will be sufficient to ensure: the following~~.

The ecological mitigation will be sufficient to ensure the following:

(i) ~~Wetland development compensation will provide for the loss of wetland function and restore some biodiversity values that are not currently present in the existing wetlands~~.

wetland development will remediate the services performed by any wetlands removed from the Building Zone including sediment retention and the buffering of surface water flows;

(ii) the area of tuna (eel) habitat is improved;

(iii) ecological benefits will be derived from the integration of ecological ~~compensation with~~ landscape and visual mitigation, and stormwater management within the Building Zone;

(iv) ~~Wetlands and streams removed within the Building Zone will be mitigated by: compensated for~~

the Landscape, Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited - Revision C, dated 8 November 2017 is implemented;

(v) ~~So that compliance with Conditions 22 - 29 is achieved; and~~ ~~So that~~ 70% canopy closure (or shade) across the stream channel surface is achieved; and

(vi) water quality in the Puniu River catchment is improved by:

- where practicable, avoiding or if not practicable minimising transportation of sediment to the waterbodies;
- developing wetlands within the wetland enhancement area shown on the Landscape, Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited – Revision C, dated 8 November;
- fencing riparian areas, removing stock and managing browsing animals ~~pests~~ such as ~~rats, stoats,~~ possums and goats;
- providing shading of Waikeria Stream to moderate stream water temperature and prevent excessive pest plant growth; and
- staged removal of willows and replacement with native riparian species to improve bank stability and retain sediment.

(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.

(h) Mana whenua recognition

(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~~owners~~; and to recognise and provide for the enduring relationship of mana whenua with the whenua and resources; and

(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.

SUSTAINABILITY

9. In the design, construction, and operation of the new prison facility, the requiring authority shall:

(a) ensure efficient and sustainable design principles are incorporated in relation to the use of energy, water, resources, materials, stormwater, wastewater and transportation;
(b) consider the ongoing whole of life environmentally sustainable performance in all aspects of the design;
(c) maximise the use of natural light and use energy efficient lighting and control systems; and
(d) operate the facility in a manner that is energy efficient.

BUILDING ZONE, BULK, LOCATION AND DESIGN

10. All prisoner accommodation and associated facilities constructed after [date NoR confirmed] shall be located in the Building Zone shown in Figure 1: Local Context Plan – Revision A prepared by Boffa Miskell Limited, dated 14 August 2017.

11. The following development controls shall apply to all prisoner accommodation and associated facilities constructed in the Building Zone after [date NoR is confirmed].

(a) the height of buildings and structures shall not exceed the lesser of the following standards:

Height of buildings and structures above finished ground level

(i) the maximum building height (excluding structures for lighting, light poles, electronic security and communications towers) shall not exceed 12 metres above the finished ground level;

(ii) the maximum height of the secure perimeter shall not exceed 6 metres above the finished ground level;

(iii) the maximum height for structures for lighting, electronic security and communications towers shall not exceed 20 metres above the finished ground level; and

Height of buildings and structures relative to a Reduced Level

(iv) the maximum height of any building within the Building Zone on which it is located, shall not exceed those shown on Figure 16a: Building Zone with Maximum Building Height R.Ls – Revision 0, prepared by Boffa Miskell Limited dated 6 November 2017.

Advice Note [establish datum]

(b) the buildings and structures within the Building Zone shall be finished with a recessive colour scheme. As a minimum:

(i) the exterior walls of facilities (excluding architraves and trims) shall be restricted to the following hue and greyness values contained in Groups A and B of the BS 5252: 1977 colour chart – 00 neutral, 06 yellow-red, 08 yellow-red, 10 yellow, and 12 yellow green with a maximum (colour) weight value of 29, and the following hue and greyness values contained in Group C of the BS 5252: 1977 colour chart – 08 yellow-red, 10 yellow, and 12 green-yellow with a maximum (colour) weight value of 39. The maximum light reflectivity value (LRV) for greyness groups A or B shall be 60%. The maximum LRV for greyness group C shall be 40%;

(ii) the roofs of facilities shall be constructed with non-reflective materials and have a colour with a reflectivity value of no more than 40% for groups A, B or C; and

(iii) non-reflective glass shall be used in glazing.

(c) natural light is provided to all staff member spaces to ensure connection with the exterior is maintained during the working day, except where required for security purposes;

(d) ~~Within the secure perimeter vehicle access provision shall ensure there is~~ the internal design of the secure perimeter access shall ensure:

(i) access and turning for all vehicles, including B-Trains, to industries, kitchens and laundry key delivery points, without the need to reverse;

(ii) vehicle access and turning space to the front door of each accommodation unit for pickup and delivery of goods, rubbish, meals and prisoners; and

(iii) ~~The provision for~~ emergency vehicles ~~to~~ can travel directly via internal roadways to any building in the facility;

(e) there is suitable screening and separation between prisoner accommodation units to ensure that lines of sight between accommodation unit cell windows and from the prisoner accommodation unit to the walkways are blocked;

(f) lighting shall comply with the technical principles of AS 4282 – 1997 (Control of the Obtrusive Effects of Outdoor Lighting) and will include:

(i) only luminaires with full cut-off optics; and

(ii) luminaires that will be aimed to ensure light is directed below the horizontal.

Gross Floor Area

12. The Gross Floor Area (GFA) for all new buildings in the Building Zone established after [date the NOR is confirmed] shall not exceed a total of 220,000 m^2.

13. For the purposes of this condition, GFA is defined as follows: ~~means the following:~~

> GFA is the sum of the gross area of the several floors of all buildings on a site, measured from the exterior faces of the exterior walls, or from the centre lines of walls separating two buildings or, in the absence of walls, from the exterior edge of the floor.

14. Except as otherwise provided, where floor to floor vertical distance exceeds 6 metres, the GFA of the building or part of the building so affected shall be taken as the volume of that space in cubic metres divided by 3.6. In particular, GFA includes:

(a) basement space except as specifically excluded by this definition;

(b) elevator shafts, stairwells and lobbies at each floor unless specifically excluded by this definition;

(c) interior roof space providing headroom of 2.4m or more where a floor has been laid;
(d) floor spaces in interior balconies and mezzanines;
(e) floor space in terraces (open or roofed), external balconies, breezeways, porches if more than 50% of the perimeter of these spaces is enclosed, except that a parapet not higher than 1.2m or a railing not less than 50% open and not higher than 1.4m shall not constitute an enclosure; and
(f) all other floor space not specifically excluded.

15. The GFA of a building shall not include:

(a) uncovered steps;
(b) interior roof space having less than 2.4m headroom;
(c) interior roof space more than 2.4m headroom where no floor has been laid;
(d) floor space in terraces (open or roofed), external balconies, breezeways or porches if not more than 50% of the perimeter of these spaces is enclosed and provided that a parapet not higher than 1.2m or a railing not less than 50% open and not higher than 1.4m, shall not constitute an enclosure;
(e) pedestrian circulation space;
(f) space for stairs, escalators and elevators servicing a floor or that part of a floor used only for carparking or loading;
(g) required off-street parking and/or loading spaces; and
(h) carparking in basement space (including manoeuvring areas, access aisles and access ramps).

Site Coverage

16. Site coverage for all new prison buildings in the Building Zone established after [date the NOR is confirmed] shall be no more than 160,000 m^2.

For the purposes of this condition, the area used to calculate 'site coverage' means that area of the Building Zone covered by buildings. Included in the term 'buildings' for the purpose of this definition are accessory buildings, and those parts of the site covered by overhanging buildings, but not fences or walls, eaves, pergolas, slatted open decks, or similar structures of a substantially open nature.

~~**Finished Building Levels**~~

Commented [BJ3]: Condition relocated to [11].

Impervious Surface Area

17. The impervious area for all new prison buildings in the Building Zone south of Settlers Road established after [date of the NOR is confirmed] shall not exceed a total of 221,000m^2. ~~and in the Building Zone north of Settlers Road established after [date of the NOR is confirmed] shall not exceed a total of 135,000m^2~~

    For the purposes of this condition, the impervious area is an area with a surface which prevents or significantly retards the soakage of water into the ground and includes:

    - Roofs;
    - paved areas including footpaths, driveways and sealed/compacted metal parking areas,
    - sealed and compacted metal roads; and
    - layers engineered to be impervious such as compacted clay.

The following surfaces shall not be included:

- grass and bush areas;
- gardens and other vegetated areas;
- porous or permeable paving and living roofs;
- permeable artificial surfaces, fields or lawns;
- slatted decks;
- ponds and dammed water; and
- rain tanks

SITE SERVICING

18. Prison facilities constructed after [date NoR confirmed] shall not be occupied by prisoners unless adequate servicing is in place for:

    (a) wastewater disposal;
    (b) water supply; and
    (c) storm water treatment, diversion and discharge.

19. For the purpose of condition 18 a), adequate servicing means either:

(a) the Prison will be connected to the Te Awamutu Municipal Wastewater Treatment Plant; or

(b) ~~Primary treatment followed by transport off-site to a reticulated wastewater network connected to a consented municipal wastewater treatment plant and there being no discharges to the Puniu catchment.~~
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.

~~For the purpose of Condition 18 a), Following accommodation of the first prisoner in the new prison facilities, no wastewater from Waikeria Prison will be discharged to the waterways of the Puniu catchment.~~

Commented [BJ4]: Repetition

20. As soon as possible following [date NoR confirmed] wastewater from Waikeria Prison will be reticulated to the Te Awamutu Wastewater Treatment Plant for treatment and disposal.

Wastewater management

21. All wastewater transported off site in accordance with condition 16 (ii), shall be managed in accordance with a Wastewater Transportation Management Plan (WTMP) prepared in accordance with Condition 19.

22. All truck movements associated with the offsite transportation of wastewater in accordance with condition 16 shall be via Waikeria Road.

23. The requiring authority shall prepare a WTMP and submit it to Otorohanga District Council for approval in a technical certification capacity. The WTMP shall be submitted no later than 20 working days prior to the commencement of the wastewater transportation activities. The WTMP shall, as a minimum, demonstrate how the required traffic movements will be managed to avoid peak staff movements along Waikeria Rd and to mitigate adverse effects on the amenity of residents on Waikeria Rd. ~~ensure compliance with Condition 36.~~

24. The WTMP shall:

(a) detail the process for collection and transportation of wastewater from the Waikeria Prison site to the disposal facility including evidence of the approval of the territorial authority that is accepting the wastewater and the facility at which the wastewater would be disposed of;
(b) identify the number, frequency and type of required truck movements;
(c) demonstrate how truck movements will be managed to avoid peak staff movements along Waikeria Road;
(d) identify the duration of the proposed activity;
(e) identify potential effects on other road users and Waikeria Road residents and measures to be implemented to minimise those effects;
(f) provide a communication plan for notifying residents of Waikeria Road and other members of the community that may be potentially affected by the traffic of the nature, timing and duration of that traffic;
(g) provide a complaints procedure for community members to report traffic issues. The complaints procedure will include:
    (i) the process for members of the community to report issues;
    (ii) the process to be followed by the requiring authority to investigate and then take action to address issues identified; and
    (iii) the process used to report to the CLG and the complainant regarding the outcome of the investigation and the actions taken to address the issue identified.

25. The WTMP approved in accordance with condition 19 shall be implemented prior to the transportation of wastewater off-site occurring and adhered to until wastewater from the Prison is connected to the Te Awamutu Municipal Wastewater Treatment Plant.

Stormwater management

26. Stormwater shall be managed so that:

    (a) The 10% and 50% AEP flows in watercourses outside the Building Zone are no greater than that which existed prior to the development of the site to construct the new prison facility;

(b) Stormwater from the Building Zone is retained to the extent practicable in its existing tributary catchments to provide sustenance flows to existing water courses and wetlands;

(c) Increases in peak flows from the Building Zone are managed by employing hydrologic neutrality principles; and

(d) Stormwater from contaminant generating areas of the site will be treated in accordance with best practice (for example Auckland Regional Council Technical Publication 10) using water sensitive design principles in preference to hard engineering solutions.

LANDSCAPE AND VISUAL MITIGATION

27. The landscape and visual mitigation shall be established and maintained in accordance with ~~the approved Landscape and visual mitigation measures shall be implemented in general accordance with~~ the Landscape, Ecological Enhancement and Mitigation Plan Revision C prepared by Boffa Miskell dated 8 November 2017. ~~15 August 2017~~.

28. ~~and shall, as a minimum, include the following:~~

(a) All existing trees as at [date NOR is confirmed] greater than 8 metres in height that are located within:

(i) the Building Zone south of Settlers Road shall be retained, unless they are located within 10m of any new facility, required earthworks, building or road; and

(ii) the Building Zone north of Settlers Road and west of Waikeria Road shall be retained for not less than 10 years, provided that any trees removed after that date are identified and addressed in the Landscape and Visual Mitigation and Management Plan ("LVMMP").

(iii) any tree posing a security or safety risk shall be exempt from this condition.

(iv) where a tree is removed for security or safety purposes under this condition, the ~~-~~LVMMP required under condition 23 shall be reviewed to ensure its objectives are still being met and if necessary amended.

(b) the vegetation blocks identified on Figure 17 Proposed Landscape Mitigation Plan Revision A dated 15.08.2017 shall be managed to retain their size and

function as a screening and integrating element within the prison site. This may include planting of vegetation adjacent to these existing vegetation blocks and/or in alternative locations, provided that the planting performs the same screening and integrating function.

(c) the design and construction of landscape features and open space shall ensure that:

(i) amenity planting around the visitors' car park, visitors' reception centre and administration, staff training and staff amenities is predominantly comprised of native species;

(ii) exercise yards have unobstructed views to an immediately adjoining planted outdoor environment;

(iii) a rugby field is provided; and

(iv) two horticultural areas each of 2,400 m^2 are provided.

(d) existing hydrological features within the Building Zone (and in particular wetland C and Stream A2) shall be retained to the extent practicable;

xxx ~~Wetland mitigation initiatives shall be undertaken in areas that include an array of existing wetland features and substrates, provide opportunities to modify artificial drainage channels to reinstate a more natural wetland hydrology, and provide benefits to the Waikeria and Mangatutu Streams and Puniu River receiving environment~~.

(e) tree and block planting species used to satisfy (f) below, shall be capable of reaching a minimum height of 8 metres within 10 years, except for those components of the planting that are proposed for landscape and visual mitigation purposes in accordance with these conditions, in which case this provision will not apply;

(f) between 50% and 80% of the new facilities within the Building Zone are screened from the dwellings located at 12B Walker Road, 52 Walker Road and 29A Wharepuhunga Road; 44 Wharepuhunga Road; and 164 Wharepuhunga Road within 10 years of [date of NoR confirmed]; and

Commented [BJ5]: Amend to 12 years, subject to scope.

(g) finished earthworks shall be ~~are~~ blended or shaped so as to integrate into the adjacent existing contours.

29. The requiring authority shall, following input from Maniapoto ki Te Raki, Raukawa Charitable Trust and Te Roopū Kaumātua o Waikeria, prepare the ~~a~~ Landscape and Visual Mitigation and Management Plan (LVMMP). ~~and submit it to Otorohanga District Council for approval in a technical certification capacity no later than 3 months after [date NOR is confirmed].~~

30. The objective of the LVMMP is to ensure the works achieve the overarching requirements of the designation set out in condition 8.

31. The LVMMP shall be submitted no later than 3 months after [date NOR is confirmed] to the District Council for certification that it achieves the above objective.

32. The LVMMP shall, as a minimum, include the following:

(a) earthworks and building platform design (including finished ground levels and the location and treatment of batters and retaining walls if any);
(b) building design and location (including site plan and elevations for all buildings);
(c) visual simulations for VP01, VP03, VP06, VP08, VP10, VP13 and VP19. At each viewpoint the following will be shown:
- the existing view;
- a visual simulation depicting the three dimensional model of the actual building design and location in the view; and
- a visual simulation depicting the three dimensional model of the actual building design and location in the view with mitigation planting in place after 10 years.

Commented [BJ6]: Amend to 12 years, subject to scope.

(d) building materials, reflectivity levels and colour;
(e) carpark design and configuration;
(f) alignment and configuration of all internal roads;
(g) internal and external security fencing/wall design and locations;
(h) light tower design and locations (including height and luminaire configuration);
(i) identification of existing specimen trees within the Building Zone and within the designated site that are to be retained (for mitigation/amenity purposes);
(j) the name (including botanical name), numbers, location, spacing and size of the plant species, details on the timing of planting and details of the existing planting to be retained;

(k) proposed fencing and pest control measures;

(l) proposed site preparation and plant establishment;

(m) ongoing vegetation maintenance and monitoring requirement;

(n) details of how the LVMMP is integrated with the Ecological Enhancement and Mitigation Plan and Enhancement Plan; and

(o) details of how the LVMMP has incorporated the cultural input provided in accordance with Condition 74.

33. The parties listed below shall be given an opportunity to review and comment on the draft LVMMP at least 20 working days prior to its submission to Otorohanga District Council for approval:

- owners of 12B Walker Road
- owners of 52 Walker Road
- owners of 29A Wharepuhunga Road
- owners of 44 Wharepuhunga Road
- owners of 164 Wharepuhunga Road

The requiring authority shall not be in breach of this condition if one or more of the above parties do not wish to review the LVMMP or provide comment.

Comments provided by the parties and any changes made to the LVMMP as a consequence, shall be documented and provided to the Manager – Environmental Services.

34. The requiring authority shall complete the planting required by the LVMMP within 3 years of [date NOR is confirmed], and shall thereafter maintain all specified works and plantings to the satisfaction of the Manager – Environmental Services.

ECOLOGICAL MITIGATION ~~AND COMPENSATION~~

35. The requiring authority shall, following input from Puniu River Care Incorporated, Maniapoto ki Te Raki, Raukawa Charitable Trust and Te Roopū Kaumātua o Waikeria, prepare an Ecological Enhancement and Mitigation Plan ("EEMP") and submit it to Otorohanga District Council for approval in a technical certification capacity within six months of the [date NOR is confirmed].

36. The purpose of the EEMP is to:

(a) mitigate the loss of wetlands and streams within the Building Zone, and shall, as a minimum, include:

(i) in combination with any other ecological mitigation or restorative ~~or compensation~~ works undertaken, ~~mitigation and compensation~~ planting of 8.6 hectares of enhanced wetland area within the designation site generally in accordance with the Landscape, Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited - Revision C, dated 8 November 2017;

(ii) in combination with any other ecological mitigation or restorative ~~compensation~~ works undertaken, ~~mitigation and compensation~~ planting of 2,010 metres of riparian stream ~~compensation~~ with the designation site generally in accordance with the Landscape, Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited - Revision C, dated 8 November 2017; and

(iii) include the establishment of a native plant nursery within the designation site. Where practicable, plants for riparian revegetation will be sourced from within the ecological district.

(b) enhance the riparian margins of the streams of the Waikeria Prison site, and shall, as a minimum, include:

(i) identification and revegetation ~~appropriate~~ riparian margins ~~for revegetation and restoration~~ of ~~on~~ permanent waterbodies within the designation site. Riparian margins at least 3 metres wide and up to 20 metres wide with an average width of 10 metres on each side of the Waikeria Stream, where the streambank is located within the Waikeria Prison site, generally in accordance with the Landscape, Ecological Enhancement and Mitigation Plan prepared by Boffa Miskell Limited - Revision C, dated 8 November 2017; ~~will be revegetated and restored; and~~

(ii) ~~Include~~ the ongoing use and operation of a native plant nursery within the designation site. Where practicable, plants for riparian revegetation will be sourced from within the ecological district; and

(iii) measures to control mammalian predators such rats and stoats.

(c) the EEMP shall demonstrate how the mitigation activities ~~and compensation planting~~ are to ~~will~~ be carried out, and:

- be integrated with the LVMMP required by Condition 23;
- detail hydrological works for creating, and planting proposals for, wetlands;
- detail planting proposals for the wetland areas to be developed; ~~enhanced;~~
- detail proposals for riparian enhancement of streams;
- detail the name (including botanical names), numbers, location, spacing and size of the plant species, details on the timing of planting, and details of existing planting to be retained;
- detail plant and animal pest control measures including fencing of waterbodies to exclude stock and measures to control rats, stoats, possums and goats to be implemented for a minimum of 8 years following the completion of planting;
- detail the maintenance programme for the riparian revegetation
- promote the use of eco-sourced species; and
- provide details of how the EEMP is integrated with the LVMMP and the Ecological Enhancement and Mitigation Plan required by Condition 11 of Waikato Regional Council consent AUTH 138553.01.01 dated 14 September 2017
- detail how the EEMP has incorporated the cultural input provided in accordance with condition 74.

37. The requiring authority shall complete the planting required by Condition 26 a) within 5 years after [date of confirmation of NoR].

38. The requiring authority shall complete the planting required by Condition 26 b) within 8 years after [date of confirmation of NoR].

39. Where practicable, implementation of the EEMP shall be undertaken by prisoners as part of the prison's rehabilitation and training programmes.

Accidental Discovery Procedure

40. The Requiring Authority shall, following consultation with with Maniapoto ki Te Raki, Raukawa Charitable Trust and Te Roopū Kaumātua o Waikeria, prepare and

implement an accidental discovery procedure (ADP). The ADP will set out the actions and responses to an archaeological find, which shall, as a minimum include, closing down the immediate site of discovery within a 20m radius, communication with iwi and kaumatua representatives, opportunities for conducting appropriate rituals and ceremonies, verification and assessment, determination of actions and statutory processes such as Heritage NZ Pouhere Taonga Act and the Protected Objects Act 1975, implementation of any actions, and resuming site works.

The ADP required by this condition shall be based on, and be in general accordance with, the following:

EARTHWORKS MANAGEMENT

~~**Earthworks Management Plan**~~

41. The requiring authority shall provide the Otorohanga District Council with an Earthworks Management Plan ("EMP"), at least 20 working days prior to the proposed commencement of earthworks within the Building Zone.

42. The objectives of the EMP are:

    (a) to document earthworks management measures relating to: erosion and sediment control to minimise loss of sediment into water courses from the earthworks site; dust control measures to minimise nuisance on neighbouring properties; and noise and vibration control~~s~~ ~~measures~~ to minimise ~~vibration~~ nuisance and adverse effects on amenity on ~~to~~ surrounding properties; and
    (b) to ensure these measures are implemented for the duration of the earthworks.

43. The EMP shall set out the measures to be undertaken such that:

    (a) erosion and sediment control measures are in accordance with the Waikato Regional Council's Erosion and Sediment Control Guidelines for Soil Disturbing Activities: dated January 2009.
    (b) earthworks are stabilised against erosion as soon as practicable and in a progressive manner as earthworks stages are completed.
    (c) the site is monitored and maintained until vegetation is established or the site grassed to such an extent that it prevents erosion and prevents sediment from entering any watercourse.
    (d) all earthworks activities are carried out so that all dust and particulate emissions are kept to a practical minimum to the extent that there are no dust discharges beyond the boundary of the site that cause an objectionable effect.
    (e) vibration levels at neighbouring properties do not damage the buildings or chattels, nor cause unacceptable effects on amenity, as assessed using the NZ Transport Agency State highway construction and maintenance noise and vibration guide (version 1.0, 2013).

Advice Note: the noise controls for earthworks are set out in condition 47.

44. As a minimum the EMP shall include:

(a) the proposed start date of the earthworks and a schedule of the earthworks program (including the expected timing and duration of works);
(b) A ~~schedule/programme and plans of earthworks activities and expected timing/duration of works;~~ the dimensioned cut and fill plans of earthworks and earthworks activities including stockpiling;
(c) the proposed earthworks methodology, including staging;
(d) finalised methods for dealing with any potential adverse environmental effects including but not limited to effects arising in relation to sediment, dust, noise and vibration;
(e) methods to clean up any debris on roads;
(f) monitoring procedures and responsibilities;
(g) methods for dealing with any complaints generated by the activities including reporting of any complaints to Otorohanga District Council; and
(h) the principal contact person for the duration of the earthworks.

45. The EMP shall be approved in writing by the Otorohanga District Council in a technical certification capacity prior to the works commencing.

The requiring authority shall undertake all earthworks activities associated with the construction of new prison facilities in accordance with the EMP.

NOISE

Objectives

~~The objective of the noise conditions is as follows:~~

A. Noise shall be managed to ensure noise from the earthworks, construction and operation (including road noise) of the new prison facilities does not cause sleep disturbance and is at levels ~~is~~ conducive to the residents' enjoyment of their homes and gardens.

Earthworks and Construction Noise

46. Construction noise shall be managed and controlled in accordance with NZS6803:1999 Acoustics – Construction and the following noise limits shall not be

exceeded at the façade of any dwelling existing at [date NOR confirmed] throughout the construction of the new facility:

Time of week	Time period	Noise limit (dBA)	
		Leq	Lmax
Weekday	630am-730am	55	75
	730am-6pm	70	85
	6pm-8pm	65	80
	8pm-630am	45	75
Saturdays	630am-730am	45	75
	730am-6pm	70	85
	6pm-8pm	45	75
	8pm-630am	45	75
Sundays and public holidays	630am-730am	45	75
	730am-6pm	45	75
	6pm-8pm	45	75
	8pm-630am	45	75

Advice note: these limits have been taken from NZS6803:1999 Acoustics - Construction Table 2: Recommended upper limits for construction noise received in residential zones and dwellings in rural areas, with the long-term duration limits applying due to the proposed length of construction works.

47. The requiring authority shall ensure that construction noise, including both noise from on-site construction activities and noise from construction related traffic along Waikeria Road, shall be managed in accordance with an approved Construction Noise Management Plan (CNMP) that is consistent with NZS6803:1999 Acoustics - Construction.

48. The requiring authority shall prepare and submit a CNMP to Otorohanga District Council for approval in a technical certification capacity. The CNMP shall be submitted no later than 20 working days prior to the commencement of construction activities. The CNMP shall, as a minimum, demonstrate how construction noise will be managed in accordance with NZS6803:1999 Acoustics - Construction and define the measures to be employed for each construction phase or stage of the construction period.

49. The CNMP approved in accordance with condition 33 shall be implemented prior to the construction period commencing and adhered to for the duration of construction.

Operational Noise

50. The following noise limits will apply at the designation boundary for the Waikeria Prison:

Monday-Friday	7am-10pm	50dB LA10
Saturday	7am – 7pm	50dB LA10
Sunday and Public Holidays	8am – 5pm	50dB LA10
All other times	40dB LA10/70 dB LAmax	

Sound levels shall be measured in accordance with the provisions of NZS 6801:2008 Acoustics – Measurement of Environmental Sound and assessed in accordance with NZS 6802:2008 Acoustics - Environmental Noise.

Noise Mitigation

51. For dwellings existing at [date NoR is confirmed] that have direct access to Waikeria Road and within one month of [date NoR is confirmed], the requiring authority shall consult with those resident(s) and, where requested obtain, as soon as is practicable, an acoustic consultant's report undertaken by a suitably qualified acoustic engineer to ascertain any required mitigation measures at that receiving point. Where noise levels inside habitable spaces of an existing dwelling are predicted to exceed 40 dB $L_{Aeq\ (24\ hours)}$ ~~LAEQ (24hr)~~ due to Waikeria Prison vehicle movements along Waikeria Road and where agreed to by the affected resident(s) the requiring authority shall implement measures recommended in the report. The requiring authority shall implement such measures as soon as is practicable.

52. The requirements to undertake mitigation under this condition shall remain in force for the period of 2 years from the date the first prisoner being accommodated in the new prison facilities.

53. For the purpose of this condition the required mitigation measures are to be assessed:

(a) with the windows open during the assessment where they are required for ventilation, unless alternative mechanical ventilation is provided; and

(b) assuming the prison can accommodate 3,000 prisoners.

54. In addition, if a resident(s) considers that noise external to a dwelling referred to in this condition is required to be mitigated in order to allow the reasonable enjoyment of their garden~~, and use of the dwelling's external amenity features,~~ the requiring authority shall obtain, as soon as is practicable, an acoustic consultant's report undertaken by a suitably qualified acoustic engineer, to ascertain the options for mitigating those effects together with the recommendation of a preferred option. The requiring authority shall implement the preferred option as soon as is practicable, provided they are agreed to by the affected resident. In the event the affected resident(s) disagrees with the recommended preferred option contained in the acoustic consultant's report, it shall be peer reviewed by a second suitably qualified acoustic engineer appointed by the Otorohanga District Council. The recommendations of the peer review shall be binding on the requiring authority.

TRAFFIC

Objectives

~~The objectives of the traffic conditions are as follows:~~

A. The safe and efficient construction and operation of the Prison is enabled.

B. The adverse effects of traffic related to the Waikeria Prison capacity increase on the safe and efficient operation of the Waikeria Road-State Highway 3 intersection, Waikeria Road and the surrounding road network are avoided or minimised to the extent needed to ensure compliance with Conditions 37 - 53.

C. The adverse traffic effects, including construction traffic effects, on the amenity of residents of Waikeria Road are minimised as far as practicable.

Construction Traffic

55. The requiring authority shall ensure that construction traffic associated with the construction of the new prison facilities at Waikeria Prison is managed to ensure that the following standards are met, unless Waikeria Road or the State Highway 3

Waikeria Road intersection is being controlled under active traffic management under an approved Temporary Traffic Management Plan:

(a) the average delay for vehicles turning right out of Waikeria Road shall not exceed 35 seconds; and
(b) the queue length on Waikeria Road shall not exceed 50 metres.

The requiring authority shall undertake continuous monitoring of the Waikeria Road-State Highway 3 intersection to ensure compliance with this condition.

56. The requiring authority shall ensure all prison related traffic parks within the Waikeria Prison site.

Construction Traffic Management Plan

57. Construction traffic associated with the preliminary site earthworks and construction works at the Waikeria Prison site shall be managed in accordance with a Construction Traffic Management Plan (CTMP) that is submitted to the ODC for approval in a technical certification capacity. The CTMP shall be consistent with the Code of Practice for Temporary Traffic Management (COPTTM) 4th Edition Published 01 November 2012. The purpose of the CTMP is to:

(a) manage traffic associated with preliminary site earthworks and construction works in accordance with the COPTTM during the construction period of the new prison facilities;
(b) ensure that the compliance with condition 37 is achieved; and
(c) minimise the effects of construction traffic on amenity for the residents of Waikeria Road during the construction works.

58. The CTMP shall, as a minimum, demonstrate how the construction traffic will be managed by way of approved Temporary Traffic Management Plans in accordance with the COPTTM.

59. The CTMP shall provide details of:

(a) the Traffic Management Co-ordinator for the preliminary site earthworks and construction works;

(b) the proposed construction programme identifying the sequence and timing of construction phases for new prison facilities;

(c) the traffic generating activities and vehicle types expected during the construction programme;

(d) material source locations;

(e) construction transport routes;

(f) daily and peak hour traffic volumes for each construction phase;

(g) driver and tradesperson inductions;

(h) Waikeria Road improvements;

(i) construction site access and parking arrangements;

(j) potential effects on other road users and Waikeria Road residents including information regarding private property access during periods of traffic disruption on Waikeria Road, dust, noise, vibration, safety and convenience;

(k) The Temporary Traffic Management Plans (TTMP) to be employed for each construction phase or stage of construction until construction of the new prison facilities is complete;

(l) The construction travel demand management measures to be employed on site where the construction traffic volume is more than 800 vehicles per day, to ensure the performance standards in Condition 37 are met. This will include, as a minimum, the following measures:

~~The preparation of the CTMP shall include, As a minimum, consideration of the following measures:~~

(i) variable work start and end times for contractor staff

(ii) bus services for contractor staff

(iii) carpooling for contractor staff

The requiring authority shall implement mandatory barrier arm control of vehicle departure from the Waikeria Prison site in the event that these measures do not achieve the standards in condition 37.

(m) methods of continuous monitoring of vehicle departure from the Waikeria Prison site during peak hours and queue length measurement on Waikeria Road at SH3 intersection to ensure standards in condition 37 are not exceeded;

(n) a communication plan for notifying residents of Waikeria Road and other members of the community who may be potentially affected by construction traffic of the nature, timing and duration of the different construction phases of

the construction works, including noise mitigation options and their implementation inside and/or outside the dwelling;

(o) a complaints procedure for community members to report construction traffic issues. The complaints procedure will include:

(i) the process for members of the community to report issues;

(ii) the process to be followed by the requiring authority to investigate and then take action to address issues identified; and

(iii) the process used to report to the CLG and the complainant regarding the outcome of the investigation and the actions taken to address the issue identified.

(p) Process for review of CTMP.

60. The requiring authority shall finalise the Construction Traffic Management Plan (CTMP) and submit it, together with evidence of how the requirements of the relevant road controlling authorities have been met, to Otorohanga District Council for approval in a technical certification capacity. The CTMP shall be submitted no later than 20 working days prior to the commencement of preliminary site earthworks and construction works.

61. The CTMP approved in accordance with condition 39 shall be implemented prior to the preliminary site earthworks and construction works commencing and adhered to for the duration of those works.

Waikeria Road upgrade

62. The upgrade of Waikeria Road required by this condition shall be completed by 31 March 2018.

63. Physical works on the part of Waikeria Road that is located in Waipa District shall be designed in accordance with Appendix T4 of the Waipa District Plan.

64. Physical works on the part of Waikeria Road that is located in Otorohanga District shall be designed in accordance with Appendix 4 and Appendix 5 of the Otorohanga District Plan.

65. The design of the proposed works shall be submitted to Otorohanga District Council for approval in a technical certification capacity no later than 20 days prior to

undertaking the works, together with evidence demonstrating that the road controlling authority's requirements have been met.

66. The physical works shall include the following as a minimum:

(a) vehicle entrance visibility improvements at 90, Tanker 35, Tanker 74, 195, 196, 233, 234-1, 234-2, 299, 382, 425 and 463 Waikeria Road to achieve a sight line visibility at each location of 170m where practicable within the public road reserve. ~~Other offset mitigation~~ Measures such as localised road widening, and warning signs, may be required subject to Otorohanga District Council Road Asset Manager's approval where compliance with the minimum sight distance cannot be achieved;

(b) carriageway widening works to provide a minimum sealed width of 8.0 m with unsealed shoulder widths of at least 0.6m on both sides of Waikeria Road from the intersection of State Highway 3 and Waikeria Road to the northwest abutment of the single lane bridge on Waikeria Road across the Waikeria Stream;

(c) trimming of trees and banks within the road reserve to achieve road corridor sightline improvements along the length of Waikeria Road;

(d) shape correction to the approach to the bridge across Waikeria Stream and contouring to the embankment on the roadside at this location;

(e) painted edge lines to delineate 0.5 m wide shoulders on both sides of the road over the full length of Waikeria Road;

(f) road resealing and new line markings at the intersection of Waikeria Road and Walker Road to confirm that Walker Road traffic gives way to Waikeria Road traffic; and

(g) installation of barriers where roadside hazards exist that have the potential to cause serious injury.

67. Following the upgrade of Waikeria Road required by condition 41, the requiring authority shall ensure that all traffic associated with the construction of the new prison facilities at Waikeria Prison shall use Waikeria Road to access the site.

Waikeria Road Bridge Upgrade

68. The Waikeria Stream bridge on Waikeria Road shall be upgraded to a minimum width of 8.0m. The construction of this upgrade shall commence as soon as practicable but shall be completed no later than 31 March 2019.

69. The bridge upgrade shall be designed in accordance with NZTA Bridge Manual and relevant standards as set out in NZ Transport Agency's Register of Network Standards and Guidelines ISBN 978-0-478-38032 (Online) and the design shall be submitted to Otorohanga District Council for approval in a technical certification capacity no later than 20 days prior to undertaking the works.

SH3/Waikeria Road intersection upgrade to include a right turn bay from SH3 into Waikeria Road

70. The intersection of State Highway 3-Waikeria Road shall be upgraded to improve sight distances and accommodate a right turn bay on State Highway 3 in general accordance with the design shown in the plan titled Department of Corrections Waikeria Prison Development SH3/Waikeria Road Intersection – Option 1 Figure 27A, DWG NO:14029A12A, prepared by TDG dated 11 August 2017. The construction of this upgrade shall commence as soon as practicable and shall be completed no later than 31 March 2020.

71. The improvements shall be designed to the relevant standards as set out in NZ Transport Agency's Register of Network Standards and Guidelines ISBN 978-0-478-38032 (Online) and the Waipa District Council Subdivision and Development Manual Version 2.5 May 2015 and submitted to Otorohanga District Council for approval in a technical certification capacity no later than 20 days prior to construction of the right turn bay commencing together with evidence to demonstrate that the requirements of the relevant road controlling authorities have been met.

SH3/Waikeria Road intersection upgrade to a grade separated junction

72. The requiring authority shall prepare a preliminary design plan set for the upgrading of the State Highway 3-Waikeria Road intersection to a grade separated junction form of intersection in general accordance with the design shown in Department of

Corrections Waikeria Prison Development SH3/Waikeria Road – grade separated junction – Option 1 – Revised (overbridge) (DWG NO: 14029A13B), or an equivalent underpass.

73. The grade separated junction shall be designed to the relevant standards as set out in NZ Transport Agency's Register of Network Standards and Guidelines ISBN 978-0-478-38032 (Online) and the Waipa District Council Subdivision and Development Manual Version 2.5 May 2015 and the design shall be submitted to Otorohanga District Council for approval in a technical certification capacity no later than 3 months following [date NOR confirmed]. The preliminary design shall be sufficient to satisfy a Stage 2 Preliminary Design Road Safety Audit.

74. The upgrade designed in accordance with condition 45 shall be constructed and operational no later than 2 years following the accommodation of the 1st prisoner in the new prison facilities on the Waikeria Prison site.

Operational Traffic Demand Management

75. From twenty working days prior to the first prisoner being accommodated in the new prison facilities and until the grade separated junction required by condition 46 is operational, average vehicle delay for vehicles turning right out of Waikeria Road shall not exceed 35 seconds and the queue length on Waikeria Road shall not exceed 50 metres unless Waikeria Road or the SH3/Waikeria Road intersection is being controlled under active traffic management under an approved Temporary Traffic Management Plan.

76. The requiring authority shall implement travel demand management measures as part of the Operational Travel Demand Management Plan ("OTDMP") required by condition 49 to achieve compliance with condition 47. Travel demand management measures shall include:

    (a) the use of variable staff shift changeover times; and
    (b) continuous monitoring of the Waikeria Road -State Highway 3 intersection;
    - to ensure compliance with condition 47 is achieved.

Operational Travel Demand Management Plan

77. The requiring authority shall finalise the draft OTDMP for Waikeria Prison and submit it to Otorohanga District Council for approval in a technical certification capacity, at least forty working days prior to the first prisoner being accommodated at the new prison facilities. At that time, the requiring authority shall provide evidence that the requirements of the road controlling authorities have been met.

78. The purpose of the OTDMP is to minimise the risk of Death and Serious Injury Crashes at the SH 3 / Waikeria Road intersection by specifying the measures to be implemented to ensure that the average delay of vehicles turning right out of Waikeria Road onto State Highway 3 does not exceed 35 seconds per vehicle or a queue length of 50 metres on Waikeria Road at the SH3 intersection.

79. To achieve this purpose the OTDMP shall include:

(a) target outcome
   (i) no crashes at the SH 3 / Waikeria Road intersection associated with prison related traffic.

(b) site context and current travel patterns
   (i) current and expected road traffic volumes, and intersection turning volumes at SH3 / Waikeria Road intersection.

(c) stakeholders, roles and responsibilities

Stakeholders:

   (i) prison management
   (ii) staff at Access Control Point
   (iii) other stakeholders
   (iv) Community Liaison Group (CLG)
   (v) NZTA
   (vi) Waipa DC
   (vii) Otorohanga DC

Personnel responsible for:

   (i) management of the OTDMP. Nominate a TDM 'Champion'

(ii) communicating the OTDMP to stakeholders
(iii) implementing the OTDMP
(iv) monitoring the OTDMP
(v) escalation and Resolution of performance issues

(d) travel demand management targets and methods for the Waikeria Prison site which as a minimum, includes consideration of the following measures:

- bus services and carpooling;
- use of a prison visitor booking system; and
- management of prison visiting times.

And must include measures to:

- manage peak departure traffic flow from the Prison using variable staff shift change times or egress control; and
- provide continuous monitoring on Waikeria Road at the SH3 intersection.

(e) day to day monitoring measures which shall include:

- how daily monitoring will occur (access control point flow rate, intersection queue measure);
- by whom;
- frequency i.e. hourly or 5 minute intervals at shift change times;
- recording/reporting; and
- actions if delays or queue limits are exceeded.

(f) Other monitoring measures which shall include:

- monitoring methods and responsibilities to meet condition 52;
- methods of measuring and evaluating the effectiveness of the OTDMP, for example, the effectiveness of (including but not limited to):
  (i) car park occupancy
  (ii) bus use
  (iii) average staff vehicle occupancy (i.e. success of car-pooling/ride sharing)

(g) any traffic control measures to be implemented on State Highway 3 and a description of the co-ordination required with Waipa District Council and NZTA to implement these measures.

80. Application of OTDMP shall be during prison operation. The separate Construction Traffic Management Plan contains the TDM measures to be implemented during the construction phases.

81. The OTDMP referred to in condition 49 shall be implemented twenty working days prior to the first prisoner being accommodated in the new prison facilities and will remain in force until the grade separated junction required by condition 46 is operational.

82. Unless active traffic management is in place, if the average delay per vehicle exceeds 35 seconds or the queue length on Waikeria Road exceeds 50 metres in the period between twenty working days prior to the first prisoner being accommodated in the new prison facilities and the completion of the grade separated junction required by condition 46, the requiring authority shall review the OTDMP and amend it to achieve compliance with condition 47.

83. The revised OTDMP shall be submitted to Otorohanga District Council for approval in a technical certification capacity in accordance with condition 49 and thereafter shall supersede any earlier OTDMP and be implemented in accordance with condition 50.

Traffic Compliance Reporting

84. The requiring authority shall engage a suitably qualified traffic engineer to prepare monitoring reports analysing the continuous monitoring data collected in accordance with condition 39 and 49 to determine whether compliance with the standards in condition 37 and condition 47 is achieved. These monitoring reports shall be prepared during construction and from commencement of the new prison operations as follows:

Construction:

(a) one month after construction works commence; and thereafter; and
(b) every three months until the first prisoner is accommodated in the new prison facilities.

Operation:

(a) at least one month prior to the first prisoner being accommodated at the new prison facilities; and

(b) at least monthly for nine months after the first prisoner is accommodated at the new prison facilities and thereafter at least every three months until the grade separated junction required by condition 46 is operational.

85. The requiring authority shall provide the monitoring reports to Otorohanga District Council, Waipa District Council and NZTA within 10 working days of the report being completed. In the event of any non-compliance the report shall advise the actions to be taken to remedy the situation to achieve compliance. Raw data will be made available to Otorohanga District Council, Waipa District Council and NZTA on request.

Monitoring Surveys

86. The reporting required by condition 52 shall occur over a total of six consecutive weekdays (excluding Mondays) collected over a two-week period 1.5 hours either side of afternoon shift change(s) on each monitoring day. Surveys will not be undertaken between 15 December – 10 January and shall include observation and recording of:

(a) total traffic volumes; and

(b) average vehicle delay over the survey period

LIGHTING

Objectives

~~The objective of the lighting conditions is as follows:~~

A. Lighting across the designation site achieves recognised obtrusive lighting amenity standards such that glare and light spillage will not create a nuisance for neighbours and light fall is generally confined to the designation site.

Construction Lighting

87. The requiring authority shall prepare a Construction Lighting Management Plan (CLMP), confirming how the Construction Lighting will satisfy the requirements of Condition 59 and will minimise obtrusive light effects beyond the site. At least 20 working days prior to construction commencing, the requiring authority shall submit the CLMP to Otorohanga District Council for approval, in a technical certification capacity

88. The CLMP approved in accordance with condition 54 shall be implemented prior to the construction period commencing and adhered to for the duration of the construction period.

Exterior Lighting

89. The following Lighting Pre-construction requirements shall apply for operational lighting installations:

    (a) as part of the Outline Plan of Works, the requiring authority shall submit to Otorohanga District Council, a detailed lighting design and associated calculations confirming that the exterior lighting, will satisfy conditions 57 and 59.
    (b) calculations shall be computer based using an NZ industry standard software package to confirm compliance with all requirements. Calculations shall be worst case using initial lumen values and an overall design maintenance factor of 1.0, ignoring the screening effects of foliage.
    (c) light Spill shall be calculated at 5m intervals over the entire designation boundary

90. Light levels from fixed lighting at the prison site measured at a height of 1.5m above ground level at or beyond the boundary of the designated site shall not exceed 10lux.

91. Except for emergency and security incident lighting, all existing exterior lighting installations outside the Building Zone shall comply with the following obtrusive light limitations.

Sky Glow	Light Spillage	Glare Source Intensity I	Building Luminance
UWLR (Max %)	Ev (Lux)	(kcd)	L(cd/m2)
5	5	50	5

Advice notes:

(a) UWLR (Upward Waste Light Ratio) = Maximum permitted percentage of luminaire flux that goes directly into the sky.

(b) Ev = Maximum vertical illuminance at the boundary in Lux.

(c) I = Light intensity in Candelas.

(d) L= Luminance in Candelas per square metre.

(e) Source Intensity – This applies to each source in the potentially obtrusive direction, outside of the area lit. The figures given are for general guidance only and for some medium to large sports lighting applications with limited mounting heights, may be difficult to achieve. However, if the aforementioned recommendations are followed then it should be possible to lower these figures to under 10kcd (kilocandela).

(f) Building Luminance – This should be limited to avoid overlighting, relate to the general district brightness.

(g) Exterior lighting within the Building Zone, and all new lighting installed outside the Building Zone following [date NoR is confirmed], is managed in accordance with condition 59 of this designation.

92. Except for emergency and security incident lighting, all exterior lighting located within the Building Zone and all new lighting installed outside the Building Zone after [date NoR is confirmed] shall be designed and constructed to comply with the obtrusive light limitations in the Table below.

Luminous Intensity	Threshold Increment	Sky Glow	Light Spillage	Building Luminance
I (cd)	TI (%)	UWLR (Max %)	Ev (Lux)	L(cd/m2)
500	20	5	5	5

Advice notes:

(a) Luminous Intensity (I) limits are proposed based on curfewed hours of 11 pm – 6 am to limit potential impacts to neighbouring residents.
(b) Threshold Increment (TI) is based on adaptation luminance (L) of 0.1cd /m2.
(c) UWLR (Upward Waste Light Ratio) = Maximum permitted percentage of luminaire flux that goes directly into the sky.
(d) Ev = Maximum vertical illuminance at the boundary in Lux
(e) I = Light intensity in Candelas
(f) L= Luminance in Candelas per square metre
(g) Building Luminance – This should be limited to avoid overlighting, relate to the general district brightness.
(h) Exterior lighting outside the Building Zone is managed in accordance with conditions 56 and 57 of this designation.

Upgrade of Existing Lighting in the Building Zone

93. Lighting within the Building Zone existing at [date of confirmation of NOR] shall be upgraded to comply with the standards in the Table in Condition 59.

94. The upgrade required by condition 60 shall be completed no later than the completion of the lighting for the first new prison facilities constructed in the Building Zone.

95. Within 30 working days of the completion of the new prison facilities, the requiring authority shall submit to Otorohanga District Council a report from a lighting engineer confirming that the lighting has been installed in accordance with the approved design and that it complies with the requirements of this condition.

COMMUNITY CONSULTATION

Objectives

~~The objectives of the community consultation conditions are toas follows:~~

A. The objectives of the Community Liaison Group (CLG) are to: ~~For the CLG to provide a forum for discussing:~~

(i) promote a positive relationship between the prison and the surrounding community;
(ii) monitor the effect of the prison on the surrounding community;
(iii) monitor the effectiveness of any measures adopted to mitigate adverse effects on the surrounding community of the prison facility;
(iv) monitor and review the effectiveness of notification procedures during significant security events at the facility;
(v) review any changes to prison management, practices and procedures insofar as they may affect the surrounding community; and
(vi) respond to any concerns raised by the surrounding community or the CLG.

B. During the construction works for the CLG ~~to also~~ is to be a forum for discussing:

(i) opportunities for training of local residents for the construction / operation of the prison;
(ii) monitoring the effect of construction works for the expansion of the prison on the surrounding community;
(iii) monitoring and reviewing demands of release and reintegration services expected from the expanded prison operations; and
(iv) identifying options, processes or response planning to address issues identified in respect of the above.

96. ~~The requiring authority shall retain the already established CLG and shall consult on a continuing basis with the established CLG in accordance with the following:~~

97. At a minimum, the following parties shall be invited to be part of the CLG, irrespective of whether or not they are involved with the established CLG as at [date the NoR is confirmed]:

(a) one elected and one senior officer level representative from each of the Otorohanga District Council and Waipa District Council;
(b) local iwi representatives who shall be confirmed through the governance structure of the relevant iwi organisation, and Mana Whenua representatives, including Maniapoto ki Te Raki;
(c) residents from Walker Road, Ngahepe Road, Wharepuhunga Road and Waikeria Road;

(d) representatives from the local communities of Kihikihi, Otorohanga and Te Awamutu including Korakonui School;

(e) local business owners or business representatives from Kihikihi, Otorohanga and Te Awamutu;

(f) the Prison Manager or his/her designated representative (who shall be the chair unless otherwise agreed by the CLG);

(g) Waikato District Health Board and Community Mental Health and Alcohol and Other Drug services within Otorohanga District, Waipa District and Hamilton City;

(h) representatives of NZ Police; and

(i) representatives of NZ Transport Agency (NZTA).

98. The requiring authority Waipa District Council and Otorohanga District Council shall agree on the selection of those parties identified in (iv) and (v). Additional members may be appointed with the agreement of the requiring authority and Otorohanga District Council.

(a) meetings of the CLG shall be held at least once every six months. Additional meetings may be held at any other time as agreed between the requiring authority and the Otorohanga District Council;

(b) subject to the CLG objectives set out above, the CLG will be responsible for the formulation of its Terms of Reference, but could include defined roles and responsibilities of its members, procedural matters for the running and recording of meetings, including quorums for meetings;

(c) the Prison Manager or his/her designated representative shall personally attend the meetings with the CLG;

(d) the requiring authority shall not be in breach of condition 63 if any one or more of the named groups listed in condition 63 a) do not wish to be members of the CLG or to attend any meetings;

(e) as soon as practicable following each CLG meeting, the Requiring Authority shall provide copies of the meeting minutes to the Otorohanga District Council and the Waipa District Council;

(f) in the event that the Otorohanga District Council or any member of the CLG considers that the group is not operating effectively then this issue may be addressed to the Department's Chief Executive or delegated authority. The requiring authority will act to reinstate the Group in the event that the Department has not met the obligations to run the CLG as set out herein.

COMMUNITY IMPACT FORUM

99. The process to establish the Community Impact Forum and the Forum objectives:

~~The objectives of the Community Impact Forum (CIF) conditions are as follows:~~

A. ~~During the period~~ Prior to construction commencing (including the activities authorised by consent RM170041 issued by Otorohanga District Council on 25 September 2017) the Requiring Authority shall establish a Community Impact Forum (CIF) in accordance with ~~is created as set out in~~ condition 65.

B. The overarching objective of the Community Impact Forum is to review and make recommendations to the requiring authority on:

(i) the likelihood and significance of adverse effects of the expansion of the prison on housing stock and housing affordability; and

(ii) the measures to lessen the likelihood of a reduction in the available housing stock or a decrease in housing affordability. ~~And, if required, the management plan(s) prepared.~~

C. During construction and operation of the new prison facilities, the specific objectives of the Community Impact Forum shall be to:

(i) identify opportunities for training of local residents for the construction / operation of the prison; and ~~are identified.~~

(ii) determine the likelihood and significance of adverse effects of the expansion of the prison on housing stock and housing affordability in the local area and the responses to address the same. ~~is determined.~~

(iii) ~~Implement the options, processes or response initiatives required to be implemented to address issues identified in (i)–(ii).~~

100. Within one month of [date NOR is confirmed], the following persons ~~parties~~ or their representatives will be invited by the requiring authority to join them on the Community Impact Forum: ~~a CIF comprising the following additional parties:~~

(a) one elected and one senior officer-level representative from each of the Otorohanga District Council and Waipa District Council;

(b) local iwi representatives who shall be confirmed through the governance structure of the relevant iwi organisation, and Mana Whenua representatives, including Maniapoto ki Te Raki;
(c) representatives of the early childhood, primary and secondary education sector within the affected communities;
(d) regional representatives of the Ministry of Social Development and local/regional social service providers;
(e) Housing New Zealand, real estate and other social housing services;
(f) representatives of tertiary education and training services;
(g) representatives of NZ Police; and
(h) representatives of the prison construction contractors for the new prison facilities at the Waikeria Prison site.

101. The requiring authority shall not be in breach of condition 64 if any one or more of the named persons ~~groups~~ listed above do not wish to be members of the CIF or to attend any meetings.

102. Meetings of the Community Impact Forum ~~CIF~~ shall be held at least once every three months until 5 years after the accommodation of the first prisoner in the new prison facilities, unless otherwise agreed by the majority of the participants.

103. The minutes of Community Impact Forum ~~CIF~~ meetings shall be provided annually to the Otorohanga District Council.

Housing Information for Waikeria Prison Operations Staff

104. The requiring authority shall prepare (and keep updated) a housing information package that promotes all local areas to assist staff moving to the area, providing a copy of the information package to prospective employees ~~and shall make it available to potential staff~~ as part of the recruitment process for the new prison facilities. The objective of the housing information package shall be to [insert].

Housing and Housing Affordability Assessment

105. Within 3 months of the [date NOR is confirmed] the requiring authority shall engage suitably qualified independent technical specialists to work with the Community Impact Forum to advise on ~~assess~~ the likelihood and significance of any change in ~~adverse effects on~~ the availability of housing stock or change in housing affordability ~~for existing residents~~ in the local area ~~Waikato Region~~ during the construction and operation of the new prison facilities.

106. The role of the independent technical specialists ~~group~~ will be to:

(a) develop a set of ~~significance~~ criteria that shall be used to assess the likelihood and significance of any change in the availability of housing stock or housing affordability and to report to the requiring authority on the likelihood and significance of any change; ~~and~~

(b) identify any potential response(s), including if necessary a management plan with the objective of decreasing the likelihood and minimising the impact of any change on the local population; and

(c) to address the following matters:

(i) the likely availability and location of workforce supply;

(ii) the available housing stock and predicted housing growth in the Waikato Region and other relevant influences on housing affordability;

(iii) the requiring authority's potential local recruitment scenarios assuming low, medium and high levels of recruitment from the local area; and

(iv) the resulting number of houses required to house the additional workforce required for the construction and operation of new prison facilities at Waikeria Prison and the likely distribution of those houses within the local area.

107. The requiring authority shall provide a copy of the above report to the Community Impact Forum for their consideration.

108. The Community Impact Forum shall review the report of the independent technical specialists and make recommendations to the requiring authority on measures to lessen the risks associated with a reduction in the available housing stock or a

decrease in housing affordability and to advise on opportunities for training of local residents in construction and operational work.

Housing Stock and Housing Affordability Risk Management

109. The requiring authority shall, as soon as practicable, take all reasonable steps to ensure that the adverse effects on the local population consequential upon a change in housing stock and housing affordability identified as being attributable to the Waikeria Prison (in whole or in part), and which are within the requiring authority's ~~ties'~~ capacity to influence or responsibility to address (whether in whole or in part), are minimised. ~~are discussed with the CIF.~~

110. If the independent technical specialist or Community Impact Forum recommend that a management plan be prepared and implemented, the requiring authority shall engage a suitably qualified expert(s) to prepare the plan. The measures that will be included in the management plan and implemented by the requiring authority, if required, are:

During the Construction Phase

(a) specific transport initiatives (such as use of buses and car pooling) to get workers to the construction site; and
(b) provision by the requiring authority of temporary construction housing in Kihikihi, Te Awamutu, Otorohanga, or on the Waikeria Prison site.

During the Operational Phase

(a) additional local employment initiatives to encourage more local residents to seek employment with the requiring authority at Waikeria Prison;
(b) facilitation of additional training programmes to provide the required skills for work at the Waikeria Prison; and
(c) working with Otorohanga District Council, Waipa District Council and Government to escalate land release and/or housing development programmes.

111. To the extent that any change to ~~effects on~~ housing stock and housing affordability identified ~~as being~~ attributable to the Waikeria Prison (in whole or in part) is outside

the capacity of the requiring authority to influence or the responsibility ~~of the requiring authority~~ to address, the Minister of Corrections will request appropriate Ministers, or any other relevant person ~~party~~, to take such measures as are necessary to avoid or remedy (in the first instance) or mitigate the adverse effects on the local population. ~~of these matters.~~

112. Within one month of [date of NoR being confirmed], the requiring authority shall establish a fund of $500,000 to be held by the Waipa District Council and administered jointly by Maniapoto ki Te Raki and Waipa District Council. The purpose of the fund is to provide for or assist in the establishment of housing or accommodation related projects for the benefit of the local hapū communities. The initiatives, and how the contribution is used, shall be at the discretion of Maniapoto ki Te Raki and Waipa District Council and the requiring authority acknowledges that Maniapoto ki Te Raki and Waipa District Council may choose to work with any other iwi and hapū, the Otorohanga District Council and/or established community or affordable housing providers as part of any initiative.

Advice Note: The requiring authority has offered Condition 70 and agrees to be bound by it pursuant to the Augier principle.

Local Area Recruitment and Training

113. The requiring authority shall work with the Community Impact Forum and the prison construction contractors to develop and implement a recruitment and training programme. The objective of the recruitment and training programme is to, where practicable, recruit the prison and construction staff required for the new prison facilities ~~Waikeria Prison capacity increase~~ from the Waikato Region.

114. When recruiting new employees, the requiring authority shall initially target recruits residing in the Waikato Region. ~~This shall involve~~ The requiring authority shall hold ~~holding~~ a minimum of 10 recruitment events in the Waikato Region in advance of undertaking national / international recruitment drives if suitable candidates are not identified from within the Waikato Region.

115. Where the requiring authority identifies a particular skills shortage within the Waikato Region it will notify the Community Impact Forum of that identified shortage, or if ~~where~~ the Forum is no longer operating, notify the Ministry of Social Development as

well as the local/regional social service providers and representatives of tertiary education and training services that were previously part of the Forum.

Advice Note: The requiring authority shall not be limited by this condition when determining the suitability of candidates. Nothing in conditions 72 – 73 shall derogate from the requiring authority's responsibilities under New Zealand employment legislation.

TANGATA WHENUA LIAISON GROUP

Objective

~~The objective of the Tangata Whenua Liaison Group conditions is as follows:~~

A. To promote the relationship between the requiring authority and tangata whenua of Waikeria, and the relationship of tangata whenua with the land, by facilitating cultural input into:
   (i) the development and implementation of mitigation measures; and
   (ii) the development, implementation and monitoring of management plans.

   ~~proposed through this designation.~~

116. The requiring authority shall establish a Tangata Whenua Liaison Group (TWLG) within one month of [date of NoR being confirmed].

The purpose of the TWLG is to recognise and provide for:

- the partnership between the requiring authority and tangata whenua of Waikeria;
- the relationship of tangata whenua with the land within the Waikeria Prison designation; and
- active involvement in the development, implementation and monitoring of the management plans referred to in this condition.

In particular, the TWLG will:

(a) facilitate cultural input into the appropriate commemoration and recognition activities during the construction and operation of new prison facilities. This is to be primarily achieved through the preparation and implementation of a Recognition and Commemoration Implementation Plan in accordance with Conditions 83 - 88;

(b) facilitate cultural input into the:

  (i) implementation of accidental discovery procedures referred to in condition 30;

  (ii) development of the Landscape and Visual Mitigation and Monitoring plan referred to in condition 23; and

  (iii) development of the Ecological Enhancement and Mitigation Plan referred to in condition 26.

c) the plans in b) above will be prepared by the requiring authority to reflect the cultural input provided. Where any aspect of the cultural input cannot be incorporated in the plans referred to in b) above then reasons will be provided for this. In those circumstances the TWLG may decide to engage an independent expert to further review and advise on those matters;

(d) facilitate the monitoring of the implementation of the plans referred to in 73 b); and

(e) operate for a period of 10 years from the [date of NoR being confirmed].

117. Two representatives from each of the following groups will be invited by the requiring authority to join the TWLG:

(a) Raukawa Charitable Trust;

(b) Maniapoto ki Te Raki; and

(c) Te Roopu Kaumātua o Waikeria.

Two representatives of the Department of Corrections, one of whom will be the Prison Director, shall attend and participate in the meetings of the TWLG but will not be members of the TWLG.

118. The TWLG will prepare their own terms of reference and elect their chairperson within one month of [date of NoR confirmed]. The terms of reference will be reviewed

no later than two years after the date the TWLG is first established. The terms of reference will reflect the designation conditions and include as a minimum:

(a) purpose and responsibilities;
(b) the members and composition and record the ability of members to replace its representatives and for the member's representatives to seek input and direction from their constituent group;
(c) frequency of meetings (but not less than at least once every 6 months);
(d) chair and facilitation;
(e) administrative support;
(f) decision-making processes; and
(g) remuneration.

119. If requested by the TWLG, the requiring authority shall assist the TWLG to prepare its terms of reference.

120. The requiring authority shall not be in breach of conditions 74 - 77 if any one or more of the parties specified either do not wish to be members of the TWLG or do not attend meetings.

121. The establishment and operation of the TWLG does not replace existing relationships between the requiring authority and whānau, hapū and iwi of the whenua on which Waikeria Prison is situated.

122. The requiring authority shall ensure that all TWLG representatives have sufficient time and resources to prepare for agenda items to be discussed at each TWLG meeting by the:

(a) development of an annual program of activities;
(b) provision of sufficient time and resources to seek input and direction from their constituent group; and
(c) provision of cultural, landscape or ecological expertise necessary to provide input into the plans referred to in condition 74 a) and b).

123. The requiring authority shall meet the actual and reasonable costs incurred as a result of the commitments made under Conditions 74 - 77 and 80 above.

Recognition and commemoration implementation plan

124. The TWLG will prepare a Recognition and Commemoration Implementation Plan ("RCIP") within 6 months after [date of confirmation of NoR] that, as a minimum, will provide for appropriate cultural recognition or commemoration for:

(a) the turning of the first sod;
(b) ~~Karakia for~~ the start of earthworks;
(c) commissioning of carvings, monuments and/or commemorative plaques;
(d) unveiling of the name of the new prison facility and any carvings, monuments and/or commemorative plaques;
(e) the use of bilingual signage within the new prison facility;
(f) naming of the new prison facility and significant rooms and spaces within it; and
(g) opening of the new prison facility.

Advice note: There is no requirement that the delivery of carvings, monuments and/or commemorative plaques be undertaken by prisoners unless agreed by the TWLG.

125. The TWLG may identify in the RCIP where matters are unable to be finalised within the 6 month timeframe, and set a new timeframe for completion and approval of these matters.

The processes and timeframes for approval by the requiring authority and the resolution process in the event approval is not given as set out in conditions 84 - 86 also apply to these matters.

126. Within 20 working days of receipt of the RCIP from the TWLG, the requiring authority shall provide, in writing, either its approval to the RCIP or the reasons why it does not approve the RCIP. The requiring authority's approval shall not be unreasonably withheld.

127. Where the requiring authority does not approve the RCIP it shall request a meeting with the TWLG at the same time it provides the written response required by condition 84. The purpose of the meeting is for the parties to try to agree on the contents of the RCIP.

128. In the event the requiring authority and the TWLG are unable to agree on the contents of the RCIP:

(a) the requiring authority shall engage a suitably qualified independent cultural expert, agreed by the TWLG, to consider the draft contents of the RCIP and the views of the parties and make a binding recommendation on the appropriate contents of the RCIP having had regard to the objectives, purpose, and minimum requirements of the RCIP and whether the contents are reasonable and proportionate in that context; and

(b) the independent expert shall consult directly with the TWLG and/or its members and the requiring authority as necessary in order to fulfil his or her functions under these conditions before making a recommendation.

129. For the avoidance of doubt, the requiring authority shall fund the preparation of the draft RCIP and implementation of the approved RCIP.

MANA WHENUA RECOGNITION ~~**ana whenua recognition**~~

130. Prior to the end of the operation of the TWLG under condition 116 e), 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.

CONDITIONS IMPLEMENTATION OFFICER (CIO) ~~**Conditions Implementation Officer (CIO)**~~

131. The Department of Corrections shall appoint an appropriately qualified Conditions Implementation Officer to have oversight of and be responsible for the implementation of the conditions of designation. The CIO shall prepare and submit a compliance report to Otorohanga District Council annually on [date that the NOR is confirmed].

Attachment B: New Prison Facilities[1]

The activities and facilities likely to be undertaken within the secure perimeter as part of the further development of the prison site include:

- surveillance equipment and lighting;
- gatehouse;[2]
- management, security and operations support;
- receiving centre;
- prisoner accommodation;
- specialised units including special treatment, at-risk and drug treatment unit;
- prisoner visits area;
- health centre;
- workshops/industries facilities;
- kitchens/laundries;
- cultural buildings;
- sports hall/gymnasium and sports field; and
- programme facilities such as classrooms, meeting rooms and staff offices.

The facilities and activities that are likely to be located outside of the secure perimeter include:

- additional surveillance equipment and lighting;
- prison control point (boom gate);
- visitors' reception centre;
- external deliveries store;
- internal roading;
- staff and visitor car parking;
- administration and staff amenities; and
- facilities management and trade parking.

The secure perimeter may include a secure three-layer perimeter barrier, external perimeter road, internal perimeter road and camera posts.

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1 Described in the NoR at [6.2 Site Layout and Design].

2 The gatehouse accommodates all functions associated with the processing and controlling of all movements into and out of the secure area. The gatehouse includes a sally port(s) which provides vehicle/pedestrian access/egress to the secure part of the facility.

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2014-425-000077
[2015] NZHC 1041

UNDER	the Judicature Amendment Act 1972
IN THE MATTER	of a decision made pursuant to the Resource Management Act 1991
BETWEEN	OWEN GEORGE NASH Plaintiff
AND	QUEENSTOWN LAKES DISTRICT COUNCIL First Defendant
	WOODLOT PROPERTIES LIMITED Second Defendant

Hearing: 4 February 2015

Appearances: G Todd and K Pfeffer for plaintiff
N Whittington for first defendant
N Soper for second defendant

Judgment: 18 May 2015

JUDGMENT OF CLIFFORD J

Table of Contents

Introduction

[1] This is an application to declare resource consents for a multi-unit residential property development near Queenstown invalid on the basis that the consent authority, the first defendant the Queenstown Lakes District Council (QLDC), acted unlawfully when deciding that the applications for those consents did not need to be publicly notified.

Facts

[2] Mr Owen Nash, the plaintiff, owns a property above Lake Wakatipu at Larch Hill Place, near Frankton. Woodlot Properties Ltd (Woodlot), the second defendant, is developing a multi-unit residential property on land it owns at Larch Hill Place (the Woodlot Development). Neither Mr Nash's property nor the Woodlot Development has road access from Larch Hill Place. Rather access to those properties is off the nearby Andrews Road which is, in turn, accessed from SH6A, the Frankton to Queenstown highway.

[3] Mr Nash is concerned that the Woodlot Development will adversely affect traffic movement on Andrews Road and, in particular, at the intersection of Andrews Road and SH6A.

[4] The Woodlot Development was initially consented, on a non-notified basis, in December 2007.[1] Woodlot's plans were subsequently affected by the adverse economic circumstances that followed the global financial crisis. In response, the development was delayed and Woodlot changed the details of the development on a number of occasions. Since December 2007 QLDC has issued, again each time on a non-notified basis, a further six resource consents for the Woodlot Development reflecting those changes. The following table summarises the details of the various consents:

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[1] RM070741 (Queenstown LDC numbers applications for resource consents and issues resource consents by year and sequentially. Thus RM070741 refers to the QLDC's decision in respect of the 741st resource consent applied for in 2007).

Issue Date	No.	Nature
3 December 2007	RM070741	Consent for construction of two blocks each containing 6 x 2 bedroom units, a total of 12 units.
25 January 2008	RM080009	Variation to RM070741 to allow staging.
3 December 2008	RM081340	Consent for construction of two blocks containing a total of 14 units (6 x 4 bedroom; 8 x 2 bedroom).
24 August 2011	RM110460	Variation to RM081340 to remove one block, subdivide the site and to increase the number of 2 bedroom units from 8 to 10 in remaining block.
16 October 2012	RM120496	Consent for construction of two blocks containing a total of 14 units (12 x 2 bedroom and 2 x 7 bedroom).
28 November 2013	RM130600	Consent for construction of two blocks containing a total of 20 units (12 x 2 bedroom and 8 x 2 bedroom).
8 October 2014	RM140739	Variation to RM 130600 relating to outdoor areas and car parks.

[5] Mr Nash applies for judicial review of QLDC's decisions, under s 95 of the Resource Management Act 1999 (the RMA), not to publicly notify the applications which resulted in RM081340 (12 December 2010), RM120496 (16 October 2012) and RM130600 (28 November 2013) (the Challenged Non-notification Decisions).

[6] Mr Nash says that when making the Challenged Non-notification Decisions QLDC acted unlawfully in either not considering adverse traffic effects or deciding that they were minor or not more than minor. Mr Nash says this Court should declare the relevant consents invalid. Recognising, however, that his challenge is only based on QLDC's alleged failure to consider traffic effects when making the Challenged Non-notification Decisions, any relief should be fashioned to require QLDC to reconsider the relevant resource consent applications on a notified basis as regards those effects alone.

[7] QLDC says it acted lawfully at all times.

[8] Woodlot supports QLDC's position, but says that if QLDC did act unlawfully in any way, relief should be denied due to Mr Nash's delay in bringing these proceedings.

[9] By the time this application was heard, the Woodlot Development was virtually complete. In his affidavit Mr Broomfield stated it was on track for completion in late February of 2015. I can only assume that it is, in fact, now complete. For some time, however, Woodlot carried out little or no work at Larchhill Place. By the time of the third Challenged Non-notification Decision, in November 2013, Woodlot had undertaken the majority of the required earthworks pursuant to RM120496. I was not told when that work commenced. Construction work began once that non-notification decision was made and RM130600 was granted.

The planning context

[10] The planning rules for all of Woodlot's applications are found in the current Queenstown Lakes District Plan (the District Plan).[2]

[11] The Woodlot Development was originally characterised in accordance with the District Plan as a residential development located in the Low Density Residential Zone. The District Plan establishes rules for that zone on the basis, among other things, of site and zone standards. The significance of site and zone standards is described in the District Plan in the following terms:[3]

> The District Plan adopts a two-tier system of standards in each zone.
>
> **Site Standards** are specified in relation to matters which tend to impact on the use of the particular site or adjacent areas. While these standards are important, they are not considered fundamental to the integrity of an area as a whole and so are specified in a way that if development does not comply with these standards the Council will consider the matter of non-compliance by way of a resource consent for a discretionary activity. This enables the Council to consider the implications of non-compliance on the use and enjoyment of the site involved and on neighbouring sites.

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2 The Queenstown Lakes District Plan was made partially operative in 2003 and fully operative in 2009. While only partially operative in 2007 and 2008, the parts that apply with respect to RM 07041 and RM 081340 were operative at the time.

3 Queenstown Lakes District Plan DP, r 1.4 [DP].

> **Zone Standards** are standards which are fundamental to environmental standards or character which are to be attained for a zone or area. Because of their importance all activities which fail to meet these standards are non-complying activities which face a more rigorous assessment if they are to obtain a resource consent (as compared with a discretionary activity.

[12] As relevant, a residential development in the Low Density Residential Zone:

(a) that complies with all relevant zone and site standards, is a permitted activity;[4]

(b) that complies with all zone standards but does not comply with one or more site standards, is a restricted discretionary activity;[5] and

(c) that does not comply with one or more zone standards, is a non-complying activity.[6]

[13] As first proposed in December 2007 the Woodlot Development, in very large measure, complied with the zone and site standards for the Low Density Residential Zone. It was not, however, a permitted activity. It was a restricted discretionary activity as regards two site standards: the extent of the earthworks required and the size of the blocks' balconies. It was a non-complying activity because at its highest point it exceeded, by 2.31 metres, the zone standard height limit of seven metres.

[14] As eventually proposed in November 2013, the Woodlot Development was a comprehensive residential development located in the Low Density Residential Zone. It was a comprehensive residential development, rather than simply a residential development, due to a change in the number of units proposed to be built. That change, from 14 to 20, had resulted in the site density (the area of the site divided by the number of units) "increasing" from 533m^2 per unit to 320m^2 per unit.[7] As such the Woodlot Development was a discretionary activity.[8] The Woodlot

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4 DP, r 7.5.3.1.
5 DP, r 7.5.3.4(vi).
6 DP, r 7.5.3.5.
7 See table at [4]. The minimum site density for a residential development is 450m^2, for a comprehensive residential development it is 200m^2.
8 DP, r 7.5.3.4(v).

Development still exceeded the zone standard seven metre height limit. It remained, therefore, a non-complying activity.

[15] The District Plan specifies "assessment matters" for the various zones it creates: these are matters which, on a non-exclusive basis, the Council shall have regard to in deciding whether or not to grant consents or impose conditions. As relevant for (discretionary) comprehensive residential developments in the Low Density Residential Zone these include:[9]

> **vi Discretionary Activity – Comprehensive Residential Development**
>
> (a) Any adverse effects of the activity in terms of:
>
> …
>
> (iii) Level of traffic congestion or reduction in levels of traffic safety which are inconsistent with the classification of the adjoining road.
>
> …
>
> (v) Any cumulative effect of traffic generation from the activity in conjunction with traffic generation from other activities in the vicinity.
>
> …

[16] Woodlot therefore had to apply to the QLDC for resource consents for the Woodlot Development. Once an application for a resource consent is received, a consent authority has 10 working days to decide whether the application is to be publicly notified, or notified to affected parties on a limited basis.[10]

[17] Before 1 October 2009, and hence when the first Challenged Non-notification Decision was made, there was a presumption of public notification. Until then s 93(1) of the Resource Management Act 1991 (RMA) had provided:

> **93 When public notification of consent applications is required**
>
> (1) A consent authority must notify an application for a resource consent unless—
>
> (a) the application is for a controlled activity; or

---

9 DP, r 7.7.2(vi).

10 Resource Management Act 1991, s 95 [RMA].

(b) the consent authority is satisfied that the adverse effects of the activity on the environment will be minor.

[18] That is no longer the case. As from 1 October 2009 s 95A of the RMA has provided:

> **95A Public notification of consent application at consent authority's discretion**
>
> (1) A consent authority may, in its discretion, decide whether to publicly notify an application for a resource consent for an activity.
>
> (2) Despite subsection (1), a consent authority must publicly notify the application if—
>
> (a) it decides (under section 95D) that the activity will have or is likely to have adverse effects on the environment that are more than minor; or …

[19] Given that the Woodlot Development was a non-complying activity – albeit by reference to the zone standard height limit alone – when making its decision whether to notify Woodlot's first resource consent application QLDC was required to, and did, consider the Woodlot Development as a whole as a non-complying activity. As relevant, its 27 November 2007 non-notification decision:

(a) On the height issue, found:

> This height intrusion can be absorbed into the existing environment and is largely an internalised effect. The site forms part of a gully, and therefore ground level is lower than some of the surrounding sites, and the height will be less intrusive than if the general area was level and flat.

(b) Considered that any risks associated with the non-conforming earthworks were controlled or mitigated by the terms of the proposal.

(c) Concluded the adverse effects of the (slightly) smaller balconies were less than minor.

[20] On that basis QLDC concluded that notification was not required as regards those issues. RM070741 was based on similar conclusions. Similar conclusions were reached on those matters (height, earthworks, outdoor areas) in the Challenged

Non-notification Decisions. Those matters do not concern Mr Nash, and are not referred to again.

[21] On the matter of concern to Mr Nash, traffic, the initial 27 November 2007 non-notification decision concluded:

> **Traffic generation**
>
> The proposed development is anticipated to increase the number of vehicle movements to and from the site and increase the traffic generated in the area.

[22] However the adverse effects of this have been considered nil as the level of the development proposed is anticipated by the District Plan.

[23] A similar conclusion was reached as regards building coverage density:

> The subject site is [6400] square meters. The proposal has a site coverage of approximately 26%, and a site density of 533m^2 per unit. This is well within the permitted allowances for the Low Density zone, therefore the adverse effects are considered to be nil.

[24] In other words, QLDC[11] concluded that District Plan allowed for the density of the Woodlot Development, and the associated effects on traffic, and on that basis there were no relevant adverse effects to be considered. Mr Nash does not challenge that decision.

The Challenged Non-notification Decisions

[25] In the first and second Challenged Non-notification Decisions the possible adverse effects of the Woodlot Development were assessed by reference:

(a) first, to the extent of the adverse effects associated with the Woodlot Development as previously consented, as part – QLDC reasoned – of the "permitted baseline"; and

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[11] A number of the decisions challenged in these proceedings were made by delegates of QLDC, including a council-controlled entity, Lakes Environmental Ltd. There is in these proceedings no challenge to any of those delegations and, accordingly, I refer to all decisions as being those of QLDC.

(b) secondly, to the extent of the additional (if any) adverse effects of the Woodlot Development as then proposed in terms of:

(i) building density/coverage; and

(ii) traffic generation and vehicle movement.

[26] In the third Challenged Non-notification Decision in November 2013, as regards RM130600, a different approach was taken. The adverse effects of the development consented by RM120496 were considered to be already part of the environment. On that basis, the adverse effects whose impact were to be considered were those additional effects "above and beyond those arising from RM120496".

[27] QLDC's approach can be seen from the following brief extracts from the first and third of those decisions:

First – 3 December 2008

- The development granted under RM070741 and subsequent variation is considered to form part of the permitted base line and will be considered in the assessment of effects, accordingly.
- The effects in terms of building coverage and density have been previously considered under land use consent RM070741. However, the internal layout of the building has been amended such that now there are 14 units instead of 12 as originally consented under RM070741. There are no additional adverse effects over and above what has already been consented.
- Lakes Environmental's engineer has not raised any other issues with regard to traffic generation and vehicle movements.

Third – 28 November 2013

- **4.2 FUTURE ENVIRONMENT**

  The environment which this proposal will be assessed against includes unimplemented resource consent RM120496 that is likely to be implemented. The applicant has undertaken the majority of the required earthworks in accordance with that consent and there is no reason to consider the RM120496 development would not proceed should the current proposal be unsuccessful. The Consent Authority must therefore consider the environment within which this development is proposed to include the currently unimplemented resource consent RM120496. As such only adverse effects that would

arise above and beyond those arising from RM120496 will be considered below.

- **4.3 ASSESSMENT: EFFECTS ON THE ENVIRONMENT**

  …

  The primary adverse effects arising from the proposed development relate to traffic generation and specifically the effects of the increased traffic on the intersection between Andrews Road and State Highway 6A (SH6A). These are considered to be effects on the environment (people using the State Highway) and effects on people (the New Zealand Transport Agency (NZTA) as administrators of the State Highway and responsible for any required upgrade of the Andrews Road / SH6A intersection). The effects on the environment will be discussed here and effects on people will be discussed later when effects on persons are being considered.

  The NZTA have provided affected party approval for the development. Therefore no adverse effects on users of the SH6A will be considered as the NZTA assessed effects on the public prior to giving affected party approval.

  …

- **5.3 ASSESSMENT: EFFECTS ON PERSONS**

  …

  The NZTA has provided approval for the proposal therefore no effects on that party will be considered.

  In terms of effects on Council roading an assessment was undertaken by Council's traffic engineers, MWH, and that report (attached as appendix 4 of this report) concludes that adverse effects on users of Andrews Road (apart from the intersection with SH6 discussed earlier) will be less than minor. This is accepted.

The errors asserted by Mr Nash

[28] As helpfully summarised by Mr Whittington for QLDC, the essential elements of Mr Nash's argument are that, in making the Challenged Non-notification Decisions:

(a) QLDC erred and acted **unlawfully** by

(i) failing to apply correctly the "receiving environment" and "permitted baseline" in its assessment of the effects of the various applications;

(ii) failing to conduct its own assessment of traffic effects beyond NZTA's affected party approval; and

(iii) failing to base its decisions on adequate information.

(b) QLDC acted **unreasonably** by failing to consider that there were special circumstances in terms of s 95(4) of the RMA to justify notifying the applications.

[29] I now consider the substance of Mr Nash's application by reference to each of those matters in turn.

Illegality – misapplication of permitted baseline and the receiving environment

[30] Mr Nash's principal argument is that QLDC wrongly assessed the significance of the resource consents which already existed for the Woodlot Development when it considered the significance of the associated adverse traffic effects. That error, he argues, arose because QLDC misapplied the concepts of the "permitted baseline" and the "receiving environment" when making those decisions, allowing undesirable "environmental creep" to occur.

[31] The concepts of permitted baseline and receiving environment reference the provisions of the RMA under which the Challenged Non-notification Decisions were made.

[32] At the time the first of those decisions was made ss 94A and 94B, as relevant, provided:[12]

[12] Emphasis added.

94A Forming opinion as to whether adverse effects are minor or more than minor

When forming an opinion, for the purpose of section 93, as to whether the adverse effects of an activity *on the environment* will be minor or more than minor, a consent authority—

(a) *may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect;* and

…

94B Forming opinion as to who may be adversely affected

(1) Subsections (2) to (4) apply when a consent authority is forming an opinion, for the purpose of section 94(1), as to who may be adversely affected by the activity.

…

(3) A person—

(a) may be treated as not being adversely affected if, in relation to the adverse effects of the activity on the person, the plan permits an activity with that effect;

…

[33] At the time of the second and third Challenged Non-notification Decisions, ss 95D and 95E provided to equivalent effect:[13]

95D Consent authority decides if adverse effects likely to be more than minor

A consent authority that is deciding, for the purpose of section 95A(2)(a), whether an activity will have or is likely to have adverse effects *on the environment* that are more than minor—

…

(b) *may disregard an adverse effect of the activity if a rule or national environmental standard permits an activity with that effect*; …

95E Consent authority decides if person is affected person

(1) A consent authority must decide that a person is an affected person, in relation to any activity, if the activity's adverse effects on the person are minor or more than minor (but are not less than minor).

(2) The consent authority, in making its decision,—

[13] Emphasis added.

(a) may disregard an adverse effect of the activity on the person if a rule or national environmental standard permits an activity with that effect;

…

[34] Those concepts also reference the provisions in s 104 of the RMA, which governs the substantive decision as to whether or not a consent should be granted.

[35] Prior to the 2009 amendments s 104 provided, again as relevant:[14]

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national policy statement:
> (ii) a New Zealand coastal policy statement:
> (iii) a regional policy statement or proposed regional policy statement:
> (iv) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
>
> (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority *may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect*.

Section 104 now, as relevant, provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—
>
> (a) any actual and potential effects *on the environment* of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
> (ii) other regulations:
> (iii) a national policy statement:
> (iv) a New Zealand coastal policy statement:
> (v) a regional policy statement or proposed regional policy statement:

[14] Emphasis added.

(vi) a plan or proposed plan; and

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

(2) When forming an opinion for the purposes of subsection (1)(a), a consent authority *may disregard an adverse effect of the activity on the environment* if a national environmental standard or *the plan permits an activity with that effect.*

…

[36] The concept of permitted baseline is reflected in the "may disregard" provisions of ss 95D(b) and 104(2), and in the similar provisions of the old ss 94(A)(a) and 104(2). The concept of the receiving environment is essentially a reference to "the environment" as referred to in those provisions.

[37] The concept of the permitted baseline, and the "may disregard" provisions, have their origins in the Court of Appeal decision of *Bayley v Manukau City Council*.[15] In order to assess Mr Nash's arguments, I have found it necessary to consider *Bayley*, and the various decisions which have followed it, in some detail.

[38] *Bayley* involved an appeal from a decision of the High Court refusing to grant judicial review of a decision made by the Manukau City Council not to notify a resource consent application. The application was to undertake a multi-unit terraced housing complex in a business area. The complex was a restricted discretionary activity, due to the extent it encroached on the side yard that was required for a compliant business use. The Court of Appeal found that the Council had failed to consider the possibility of consequential effects arising from the way in which the site layout may have been made possible by the use of the side yard in a non-complying way.

[39] The Court recognised that, for a restricted discretionary activity, the words "activity for which consent is sought" in what was then s 94(2) did not:[16]

> … extend to an activity which is able to be undertaken without that consent and, more importantly, is unable to be considered by the Council. … Under the proviso to s 105(1)(6) the authority may refuse consent or impose conditions only on the basis of those matters. It would make little sense to require a consent authority to notify an application because it may involve

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15 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA).

16 At 577 lines 33-42.

> effects which the authority must then disregard at the hearing of the application. That would provide false hope for objectors and be wasteful of time and money.

[40] But, the Court of Appeal reasoned, the restriction on the Council's discretion was expressed in very broad terms. Under that restriction the consent authority was obliged by its rules to consider and assess:[17]

> Whether the site layout ensures a relationship of buildings and other structures on the site, carparking, access, manoeuvring, and landscape elements which is as satisfactory as the relationship envisaged by the yard rule. Whether the site layout is compatible with the site development of adjoining residential, public open space and future development zones.

[41] Moreover it was possible that:[18]

> … by designing a structure intruding into space which the plan requires to be a yard, an applicant may have been able to utilise other portions of the property in a manner which in itself complies with the plan but actually has a greater impact on the environment of the neighbourhood because, for example, it is a more intense use than could have been achieved on the site without the yard intrusion. In other words, in this case by taking up part of the yard the applicant may have gained a consequential advantage detrimental to the neighbours and their enjoyment of their properties even by comparison with such commercial activity as is permissible as of right.

[42] The Court found that, as a matter of fact, the Council had not considered those types of consequential effects when making its non-notification decision. Accordingly that decision was invalid.

[43] It was in that context that the Court of Appeal observed:[19]

> Before s 94 authorises the processing of an application for a resource consent on a non-notified basis the consent authority must satisfy itself, first, that the activity for which consent is sought will not have any adverse effect on the environment which is a more than minor effect. The appropriate comparison of the activity for which consent is sought is with what either is being lawfully done on the land or could be done there as of right.

[44] Activities that were "being lawfully done on the land or could be done there as of right" came to be known as the "permitted baseline".

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17 At 578 lines 1-5.
18 At 576 lines 29-37.
19 At 576 lines 1–6.

[45] In *Smith Chilcott Ltd v Auckland City Council* the Court of Appeal held that the *Bayley* permitted baseline approach could be applied to substantive grant decisions, as well as non-notification decisions.[20]

[46] The activities which formed part of the permitted baseline were qualified by the Court of Appeal in *Smith Chilcott* so that permitted, but fanciful, development possibilities were to be excluded.[21]

[47] In *Arrigato Investments*[22] the Court of Appeal considered whether baseline activities extended to activities permitted by unimplemented consents. In that context, the Court described the permitted baseline in the following way:

> [29] Thus the permitted baseline in terms of *Bayley*, as supplemented by *Smith Chilcott Ltd*, 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 ss 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.

[48] The Court first reasoned unimplemented consent, by definition, did not reflect activities which could be undertaken as of right[23] – and hence did not come within the *Bayley* permitted baseline by dint of the decision in *Bayley* itself.[24] The Court went on:

> [34] There remains, however, the second issue, whether *Bayley* should be extended so as to include unimplemented resource consent activities within the permitted baseline. Mr Brabant argued that following the granting of a resource consent, the holder has an equal right to do what is allowed as would have been the case had the plan allowed it. That is so but, as Mr Burns and Mr Loutit submitted, there is a material difference between what is allowed under a plan and what is allowed under a resource consent. The plan represents a consensus, usually after very extensive community and regional involvement, as to what activities should be permitted as of right in the particular location. There is therefore good reason for concluding, as was done in *Bayley*, that any such permitted activities should be treated as part of the fabric of the particular environment.

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20 *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 at [24].
21 At [26].
22 *Arrigato Investments v Auckland Regional Council* [2002] 1 NZLR 323, [2001] 7 ELRNZ 193.
23 For if they were, no consent would have been required.
24 At [33].

[49] On the particular question of unimplemented consents the Court reasoned:

> [35] Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baselines, but equally there may be circumstances in which it would not be appropriate to do so. For example implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.

[50] The Court of Appeal also commented on the phenomenon of "environmental creep", which – as noted – Mr Nash asserts has happened here:

> [37] We have given careful attention to the submissions made in respect of what was described as "environmental creep". This expression describes a process whereby having achieved a resource consent for a particular building or activity, a person may seek consent for something more and try to use their existing consent, as yet unimplemented, as the base from which the effects of the additional proposal are to be assessed. In physical terms consent might be obtained for a 10 storey building and then before any work is done an application made for 2 extra floors. On the basis posited by Arrigato [the appellant] effects would be limited on the second application to the extra 2 floors, rather than to the whole building comprising 12 floors. Mr Burns and Mr Loutit expressed concern about the position consent authorities would be in if the 10 floor structure had become part of the permitted baseline. Mr Brabant argued that if such tactics became prevalent, consent authorities could amend their plans or reject the second application as going too far.
>
> [38] Reflecting on the competing contentions in this area has reinforced us in the view that there should be no rigid rule of law either way. That conclusion should relieve consent authorities of the anxieties expressed by counsel while also allowing applicants for consent to seek a factually realistic appraisal. What is permitted as of right by a plan is deemed to be part of the relevant environment. But, beyond that, assessments of the relevant environment and relevant effects are essentially factual matters not to be overlaid by refinements or rules of law. …

[51] The enactment in 2003 of the former s 94A(a) and (b) modified and partially codified the effect of the *Arrigato* decision. That is:

(a) It provided that, as relevant, a consent authority may, rather than must, regard activities "permitted by the plan" as part of the permitted baseline. After *Arrigato*, that approach had been regarded as mandatory.

(b) It did not, however, as the Court of Appeal had done in *Arrigato*, allow such a discretion as to activities permitted by unimplemented consents, but rather limited the scope of the permitted baseline to what is "permitted by the plan".

[52] Aspects of the new provisions were considered in a number of subsequent High Court and Environment Court cases.[25] As a result a degree of confusion arose, including as to the status of effects of activities permitted by non-implemented consents, and the relationship between the permitted baseline (activities whose effects had been "accepted" by the plan) and the environment on which the impact of the other effects of the proposed activity were to be assessed (sometimes described as the "receiving environment").

[53] The Court of Appeal considered these issues in *Queenstown Lakes District Council v Hawthorn Estate Ltd*,[26] a case about a consent given by QLDC for a subdivision of 32 residential lots in Queenstown. The proposed subdivision was in an area where there were unimplemented resource consents for significant development. Consent was required as the subdivision was a non-complying activity under the district plan and a discretionary activity under the proposed district plan. The key issue for the Court was whether the Council, when considering whether to grant consent, had been *obliged* to restrict its consideration of effects to effects on the environment as the environment existed at the time of the decision, or whether the Council had been right – as it had done – to consider the future state of the environment as it might be affected as and when those consents were implemented.

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25 *Rodney District Council v Eyres Eco-Park Ltd* [2007] NZRMA 1 (HC); *Tairua Marine Ltd v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006; *O'Connell Construction Ltd v Christchurch City Council* [2003] NZRMA 216 (HC); *Wilson v Selwyn District Council* [2005] NZRMA 76 (HC); *Freilich v Tasman District Council* [2005] NZRMA 410 (Env C); *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

26 *Queenstown Lakes District Council v Hawthorn Estate Ltd*, above n 25.

[54] Having reviewed the definition of the word "environment" in, and the overall structure of, the RMA, the Court of Appeal concluded that the Council had been right to take a "futuristic" approach. In doing so it said:[27]

> [57] In summary, all of the provisions of the [RMA] to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and would often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects would occur.
>
> …
>
> [84] … In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the subsequent implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.

[55] It did not, however, extend to include the effects of resource consents that might in the future be granted. The Council's approach had earlier been upheld in both the Environment Court and the High Court, on the basis however that such future effects could be considered as part of the permitted baseline. In that context, the Court of Appeal in *Hawthorn* observed:

> [27] One of the questions that has been raised on the appeal concerns the adequacy of the Environment Court's consideration of the application of what has come to be known as the "permitted baseline". Although that expression was used by Fogarty J in [74], we doubt that he was using the term in the sense that it is normally used, that is with reference to developments that might lawfully occur on the site subject to the resource consent application itself. Rather, Fogarty J appears to have used the expression to refer to the likely developments that would take place beyond the boundary of the subject site, utilising existing resource consents. Nothing turns on the label that the Judge used to refer to lawfully authorised environmental change beyond the subject site. However, it would be prudent to avoid the confusion that might result from using the term other than in its normal sense, addressed in *Bayley v Manukau City Council*, *Smith Chilcott Ltd v Auckland City Council* and *Arrigato Investments Ltd v Auckland Regional Council*. As we will emphasise later in this judgment the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to a resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment beyond the site.

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[27] At [57].

[56] The Court later said:[28]

> It is as well to remember what the "permitted baseline" concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, the effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application.

[57] What is clear from the earlier passage is that, where at [65] the Court refers to "effects of activities on the environment", it is referring to the effects from activities that occur or may occur on the "subject site". What is also to be remembered is that, by the time of the Court of Appeal's decision in *Hawthorn*, Parliament had – through the way in which s 104 had been enacted – confirmed that, for want of better words, what can be described as the "permitted baseline" approach was discretionary, and not mandatory.

[58] These issues were further considered by the Court of Appeal in *Far North District Council v Te Runanga-a-iwi o Ngāti Kahu*,[29] a case challenging non-notified consents to subdivide land in respect of which a land use consent had already been granted to build residential units.

[59] In the High Court, the relevant issue was whether the Environment Court was correct in law when it held that it was *obliged* to include the effects of the consented residential units on the future environment. The Environment Court had found that it was. It said:[30]

> [98] We consider that it is clear from *Hawthorn* that we are required to make a factual determination as to whether or not it is *likely* that effect will be given to an unimplemented resource consent [the land use consent]. If we determine that it is likely then the environment against which we assess the effects of a proposal will include the environment as it might be modified by implementation of the unimplemented resource consent in question. We do not consider that we have a discretion to ignore that factual finding as to the future state of the environment.

[60] The High Court was of the view that that conclusion was an error of law, reasoning that because the adverse effects of the consented residential units were

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28 At [65].
29 *Far North District Council v Te Runanga-a-iwi o Ngāti Kahu* [2013] NZCA 221.
30 *Te Runanga-a-iwi o Ngāti Kahu v Far North District Council* [2010] NZEnvC 372.

within the "subject site", they were part of the permitted baseline. As such, the High Court found the Environment Court had – as confirmed by s 104D(1) – a discretion whether to consider those effects or not.[31] But it was not required to do so. That distinction mattered because the Environment Court had recorded that if it did not have to include the adverse effects of the residential units in the permitted baseline, it would have concluded that the proposal would have been contrary to the relevant statutory objectives and policies, and would therefore have allowed the appeal.

[61] The Court of Appeal rejected that approach. In doing so it adopted the reasoning of *Arrigato* set out at [47] above. As the Court had done in *Hawthorn*, it emphasised the exclusionary nature of the permitted baseline test and confirmed that the statutory purpose of the "may disregard" formulation was to vest a consent authority with a discretion to ignore the permitted baseline where previously it had been a mandatory consideration.[32] It did so in the following terms:

> [88] We do not accept this distinction. The qualification noted by this Court in *Hawthorn* was in the context of pointing out the limitation of the permitted baseline test to the site itself where the appellant had attempted to give it a more expansive application. What is decisive is the exclusionary nature of the permitted baseline test. In essence, as this Court observed in *Arrigato*:
>
> > [29] Thus the permitted baseline … is the existing environment overlaid with such relevant 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 ss 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.

[62] Having emphasised the discretionary power as regards whether or not effects permitted by the plan are taken into account or not it went on to observe:

> [91] In the RMA context, the environment and the permitted baseline concepts are critically different. Both are discrete statutory considerations. The environment refers to a state of affairs which a consent authority must determine and take into account when assessing the effects of allowing an activity; by contrast, the permitted baseline provides the authority with an optional means of measuring – or more appropriately excluding – adverse effects of that activity which would otherwise be inherent in the proposal.

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31 *Te Runanga-a-iwi o Ngāti Kahu v Far North District Council* (2011) 16 ELRNZ 708 at [105].

32 *Far North District Council v Te Runanga-a-iwi o Ngāti Kahu* [2013] NZCA 221 at [88]–[90].

[63] The High Court has, in a number of recent decisions, emphasised the importance of the overall approach of the Court of Appeal in *Hawthorn,* and the need to place the observation in [84] of that decision – relating to the significance of resource consents that might be granted in the future – in context.[33] In declining leave to appeal one of those decisions, the Court of Appeal has recently said:[34]

> [16] As noted earlier, the High Court dismissed the applicant's appeal from the Environment Court. The High Court Judge, Fogarty J, warned against treating the observation of this Court in *Hawthorn* at [84] as if it were legislation, and highlighted the need to consider the whole of the decision in *Hawthorn*, rather than just the summary contained at [84]. He determined that the Environment Court had concluded that a coal mining licence was not equivalent to a permitted activity under a District Plan. We agree that that is the case. He also concluded that the Environment Court's alternative analysis based on *Hawthorn* turned on its finding of fact that the possibility of Solid Energy using its coal mining licence at the Sullivan Block was speculative. He found, correctly in our view, that that was a finding of fact that was not amenable to appeal in a jurisdiction in which the appellate court is limited to revisiting only matters of law. He found no error by the Environment Court in its application for *Hawthorn*, and determined that its findings of fact were not amenable to appeal. (footnotes omitted)

[64] In my view the rule is that what is permitted as of right by a plan may be considered by a consent authority to be part of the permitted baseline. By the same token, a consent authority might decide not to adopt that approach: it might do so, for example – to adopt the phraseology from *Smith Chilcott* – where developments were permitted but, in the reality of the situation, fanciful. Beyond that, the assessment of the relevant environment and relevant effects are essentially factual matters, not to be overlaid by refinements or rules of law. That factual assessment, as acknowledged in the *Far North Council* case, is one that is required as a matter of law to be undertaken taking account of the future state of the environment, including as affected by other resource consents that the consent authority is satisfied are likely to be put into effect.[35] That assessment is, of course, to be undertaken applying the effects-based approach fundamental to the RMA.

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33 For example, *Royal Forest and Bird Society of New Zealand Inc v Buller District Council* [2013] NZHC 1324, [2013] NZRMA 273 at [20]-[23]; *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817.

34 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council & Anor* [2013] NZCA 496 (footnotes omitted).

35 *Far North District Council v Te Runanga-a-iwi o Ngāti Kahu* [2013] NZCA 221 at [94].

[65] Moreover, when that exercise is undertaken, there may not be a lot of difference between considering a particular adverse effect as part of the permitted baseline or as part of the receiving environment. If, as a part of the permitted baseline, the adverse effect is disregarded when assessing the effects of a proposed activity on the receiving environment, it is difficult to see how, in practice, a different result would arise if that adverse effect were considered already to be part of the receiving environment. After all, taking that approach would again simply mean that that effect was not one that had to be counted as impacting "on the environment".

[66] The Court of Appeal in *Arrigato* recognised that possibility:[36]

> There are two possible ways of looking at the issue. The first is to ask what effects qualify as adverse and the second is to inquire what comprises the relevant environment. Adverse effects already inherent in an unimplemented resource consent can be argued to be irrelevant because they are effects which the holder of the consent already has a right to impose on the environment. On the approach which inquires what comprises the environment, Arrigato's proposition is that the environment is already in substance subject to any adverse effects inherent in the granting of a resource consent. In practical terms it is unlikely to matter which of these approaches are taken. They are both apt to lead to the same conclusion.

[67] Using the *Far North* factual situation as an example, and accepting the emphasis in that case on the centrality of the plan, not resource consents, to the permitted baseline approach, nevertheless if the Council and the Environment Court had considered the effects of the unimplemented land use consent as part of the permitted baseline, then the effects of the dwellings would have been ignored just as they were by reason of the fact that that consent was considered as part of the receiving environment. An alternative way of expressing that proposition is that if a consent authority does not exercise its discretion to ignore permitted base line effects, it may well nevertheless have to consider the environment as having been impacted by those effects. Were it not to do so, it could fail to make its decision by reference to the appropriate factual context.

[68] Against that background I consider Mr Nash's illegality arguments.

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[36] *Arrigato Investments & Ors v Auckland RC & Others,* above n 22, at [26].

[69] The essential point here is that, to a large extent, the Woodlot Development is a permitted activity. Possible adverse effects on traffic of the increased density of dwelling units in the Low Density Residential Zone that might arise when compliant, and hence permitted, residential developments are built have already been determined acceptable in the process of setting the District Plan in place. The purpose of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of the RMA. The preparation of a district plan therefore requires consideration and application of the Part 2 purposes and principles of the RMA.

[70] Because the Woodlot Development was from the outset both non-complying (height) and restricted discretionary (outdoor areas and earthworks), resource consents were necessary. In assessing whether to notify those consents, what I think the Council was required to do was to consider whether, as regards the otherwise complying aspects of the proposal, the matters which meant resource consent was required might have consequentially increased any adverse effects of the proposal. That is the approach taken in *Bayley* to the significance of the intrusion into the side yard. It was also the approach taken by the Court of Appeal in the slightly different context of overlapping consents in *Body Corporate 97010 v Auckland City Council*.[37]

[71] There is no suggestion here that those matters had or were likely to have any flow-on effects on the issue that is of concern to Mr Nash, namely site density and associated traffic generation.

[72] Putting aside the question of the significance of previously granted consents, for each of RM070741, RM081340 and RM110460 the density of the proposed development met the relevant zone standard. On that basis, I do not see how there can be a challenge to QLDC's decision that possible traffic effects did not mean that the applications needed to be publicly notified.

[73] For Mr Nash, Mr Todd submitted that, when considering the question of notification and consent, the Council should not only consider the matters that led to

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[37] *Body Corporate 97010 v Auckland City Council* [2000] NZRMA 529.

consent being required, but all the effects of the activity, to determine whether they were not more than minor. Mr Todd referred me to the discussion in *Bayley* at pages 576 and 577, where the decision of Cooke J in *Locke v Avon Motor Lodge Limited* and that of Salmon J in *Arley v North Shore City Council* are discussed, and to the decision of the High Court in *McPherson v Napier City Council*. In effect, and as I understood it, Mr Todd was arguing that *Locke* was, as so discussed by the Court of Appeal, authority under the Resource Management Act for the same proposition that it had been authority for under the old Town and Country Planning Act. So, in this instance, QLDC was required to determine whether the traffic effects of the Woodlot proposal as a whole were "not more than minor", even though they were – as the Council realised – anticipated and accepted by the District Plan. I am not persuaded by that argument. In *Bayley* the Court of Appeal acknowledged that the approach taken in *Locke* may be inappropriate under the RMA albeit, I acknowledge, in assessing restricted discretionary activity.[38] More significantly, I am guided by the conclusion of the Court of Appeal in *Arrigato*, referred to at [50] above, that:

> What is permitted as of right by a plan is deemed[39] to be part of the relevant environment.[40] But, beyond that, assessments of the relevant environment and relevant effects are essentially factual matters not to be overlaid by refinements or rules of law.

[74] Here, the fact is that the District Plan anticipated and accepted the traffic density consequences of residential developments up to a certain density, as measured by the area of the site divided by the number of proposed units. Moreover, in making that provision the District Plan can be seen as reflecting an anticipation that that level of development is likely to occur. Those are essentially factual assessments and fact conclusions. It is that type of assessment that, in my view, *Arrigato* and *Far North* recognised a consent authority was required to make. As the authors of *Environmental and Resource Management Law* observe:[41]

> [I]f a proposed non-complying activity is likely to generate the same amount of traffic as would a permitted activity, then the effects of that traffic generation may be disregarded in assessing whether the effects of the proposed activity are more than minor.

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38 *Bayley v Manukau City Council*, above n 15, at 577 lines 45-46.

39 Now, "may be deemed by a consent authority".

40 That is, somewhat confusingly, within the permitted baseline.

41 Derek Nolan (ed) *Environmental and Resource Management Law* (5th ed, LexisNexis, Wellington, 2015) at [4.53].

[75] For essentially similar reasons, I do not think it can be argued – as it was for Mr Nash – that the Council did not have adequate information when it made those decisions.

[76] The situation would be different, including for the non-challenged initial consent RM070741, if those non-complying and restricted discretionary aspects of the Woodlot Development could reasonably have been seen as possibly causing consequential effects on density and associated traffic generation. If that were the case, then those matters should have been considered in the context of RM070741. In that context, I think QLDC's conclusion that the Woodlot Development was "likely to be implemented" is one that was open to it, in terms of its factual assessment of the receiving environment, if not, as a matter of law, as regards its discretionary assessment of the permitted baseline.

[77] The real issue here is whether traffic effects were properly considered when that was no longer the case, as occurred in late 2013 when the number of units in the Woodlot Development increased from 14 to 20.

[78] In that context, and as recognised by QLDC, the increased density of the 2013 Woodlot Development was capable – by definition – of generating traffic effects that were greater than those anticipated by the District Plan. It was for that very reason it had become a discretionary activity not, significantly I note, a restricted discretionary activity. On that basis, QLDC was required to assess whether the adverse traffic effects of the proposed development – at the point the non-notification decision was made – were not "more than minor".[42] Rule 7.7.2(vi) of the District Plan explicitly confirms that.

[79] In assessing the legality of the third Challenged Non-notification Decision, and on the basis of the *Far North* decision, I cannot accept Mr Nash's argument that

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[42] I have not considered in this decision whether the provisions which now give consent authorities discretion whether to publicly notify an application have any material effect on the way a non-notification decision may be made. The case was argued on the basis that the relevant legislative changes had had no material effects. The Court of Appeal in *Coro Mainstreet v Thames District Council* [2013] NZRMA 73 has questioned that assumption. I have taken the point no further.

the Council was not correct when it regarded "the environment" as including the then unimplemented RM120496.

[80] But, as I said, the real issue is whether those possible adverse traffic effects were properly, that is in this context lawfully, considered.

[81] QLDC had three sources of information when it made its assessment:

(a) the traffic generation assessment report prepared for Woodlot by Bartlett Consulting;

(b) the similar report prepared for QLDC by MWH New Zealand Ltd; and

(c) the "affected persons' approval" letter from the New Zealand Transport Agency (NZTA).

[82] Bartlett Consulting concluded that the traffic effects of the 20 apartment development would, by comparison with the previous 14 unit development, have less than minor increased traffic effects or, in fact, reduced traffic effects. It is not clear, however, that QLDC relied on the Bartlett Consulting reasoning, as that reasoning was doubted by its own advisers MWH.

[83] MWH Ltd, the Council's advisors, took a different approach. They said:

> While the calculation by Bartlett Consulting has merit, the traffic generation in the approved resource consent is the correct base for comparison of the proposal.
>
> The previously consented base traffic generation is 112 [vehicles per day], comprised of Block One having 12 apartments and Block Two 2 apartments and each generating eight vehicles per apartment per day.[43]

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[43] MWH had earlier commented:

> Traffic generation for the permitted Block One activities are calculated with reference to the NZ Transport Agency research report 453 appendix C, which is appropriate. The Land Use Activity selected as Residential Dwelling (Outer Suburban), which has a generation per unit of 8.2 vehicles per unit per day, and is consistent with clause 3.3.2.1 of the QLDC amendments to the NZS440:2004 that requires assessments of residential traffic loading to be based on eight vehicles per apartment per day and with the previously approved resource consents.

I did not receive any submissions or affidavit evidence explaining these aspects of the information on which QLDC based its decisions.

[84] Comparing consent RM120496 with proposed RM130600, MWH concluded:

> It is proposed to modify Block Two by replacing the two apartments each containing seven bedrooms with the eight apartments each containing two bedrooms. Traffic generation has been calculated as per Block One, which is appropriate, and results with 164 vpd for Block One and Two combined.
>
> Comparing the base traffic (112 vpd) to the proposal (164 vpd) shows a 43% increase in daily traffic is expected to be generated by the total proposal, and for Block Two the increases from 16 vpd to 64 vpd, an increase of 300%. The peak hour traffic volume will increase from 12.6 vph to 18 vph, which is an increase of 43%.
>
> While the percentage increases are high, the absolute increase in traffic volume over the day and peak hour are unlikely to be noticed by road users. For example, the peak hour traffic increases by 5.4 vph, and assuming an 80/20 out/in trip distribution this calculates as an additional 4.3 vph out of Andrews Road, or one vehicle every 14 minutes.
>
> Based on the above analysis, the increased traffic generated by the proposal is considered to be less than minor.

[85] In terms of the effect on the Andrews Road/SH5A intersection, MWH observed:

> **Effect on Andrews Road and the Frankton Road intersection**
>
> Based on the traffic generation evaluation above there will be a small traffic volume increase from the proposal that will use Andrews Road and the Frankton Road intersection.
>
> The existing movement deficiencies are unchanged, and are summarised below:
>
> 1. Restricted tracking paths for all vehicle types in and out of Andrews Road.
>
> 2. Left turn out of Andrews Road appears to cross onto the Frankton Road central flush median, with potential for conflict with right turn in vehicles.
>
> 3. It appears a vehicle cannot turn into Andrews Road if a vehicle is waiting to exit Andrews Road.
>
> With increased traffic volumes on Andrews Road as a result of currently permitted activities, the frequency of potential conflicts will increase and therefore the likelihood of a crash increases.
>
> The intersection requires improvements to cater for the expected traffic movements anticipated by the current land zoning of all Andrews Road properties.

> The impacts on Andrews Road users as a result of this proposal, from the intersection to cul-de-sac head, are considered to be minor. The existing carriageway appears to be 5.0m to 5.5m wide (measured from Google earth) with parking banned on one side and no footpaths. This is not compliant with the QLDC District Plan (DP), however the increase in traffic (including estimating traffic generation from all properties on Andrews Road) does not change the required traffic provisions with reference to Table 3.1 – Road Design Standards – Urban of the QLDC amendments to the 4404:2004.
>
> It is expected that the NZTA will be contacted regarding the proposal for their comment as an effected party.

[86] NZTA's consent letter was to the point. It read:

> **Woodlot properties Limited – Residential Units – SH 6A – Frankton**
>
> Thank you for forwarding details of the above-mentioned land use proposal for our consideration and comment. We understand the applicant proposes to increase the number of residential units in an approved apartment block (Block 2) at Andrews Road, Queenstown. The proposal seeks to alter the internal configuration from the approved 2 apartments containing 7 bedrooms to 8 apartments containing 2 bedrooms.
>
> We are satisfied that the proposed activity is unlikely to have an adverse effect on the safety and functionality of the State highway adjacent to the subject site. Accordingly, please find enclosed the NZTA's written approval for your information and further action.

[87] As can be seen, both MWH and NZTA compared the effects associated with RM130600 with those associated with RM120496. That is, they assessed the adverse effects associated with the increment, or increase, of adverse effects of RM130600's 20 units as opposed to RM120496's 14 units. The issue is, therefore, whether that approach was lawfully correct or whether QLDC was required to consider whether the overall effect of the increased traffic associated with the Woodlot Development on the environment was "more than minor". That is the proposition that, in a variety of ways, Mr Nash advances.

[88] There is, I accept, some support for that proposition in the wording of the District Plan, where relevant assessment matters are specified. Section 7.7.2(vi)(a)(v) refers to the adverse effects of "Any cumulative effect of traffic generation from the activity in conjunction with traffic generation from other activities in the vicinity". Section 7.7.2(vi)(c) refers to "Any adverse effects of the proximity or bulk of the buildings, in terms of visual dominance by buildings of the

outlook from adjoining sites and buildings, which is out of character with the local environment". That "assessment matter" can be compared with that specified in Section 7.7.2(vi)(h): "The extent to which the *increased* building coverage would have any adverse effect on adjoining properties in terms of dominance by buildings, loss of privacy, access to sunlight and daylight and loss of opportunities or views". Although the relevant provisions of the District Plan were not addressed during oral argument, and Mr Nash's written submissions did not refer to them at all, it can clearly be argued that "any adverse effects" means what it says, as confirmed by the reference to "increased" building coverage.

[89] In my view, however, and by reference not only to the concepts of permitted baseline and environment, as developed by the Court of Appeal subsequent to the *Bayley* decision, but also to the overall scheme of the RMA, I think the approach taken by QLDC was a legally correct one. As a matter of principle, district plans, agreed for a district following the processes of public consultation called for by the RMA, and fitting within the hierarchy of planning documents found in the RMA as most recently discussed by the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*,[44] reflect a given community's assessment of how to give effect to the purposes and principles of the RMA. Thus, s 9(3) of the RMA provides:

> (3) No person may use land in a manner that contravenes a district rule unless the use—
>
> (a) is expressly allowed by a resource consent; or
>
> (b) is allowed by section 10; or
>
> (c) is an activity allowed by section 10A.

[90] Where, following that process, various uses and activities are provided for as complying activities those uses and activities have been accepted as being "appropriate". That collective decision has been reached pursuant to a public process in which the Part 2 purposes and principles will have been applied. If the approach called for by Mr Nash was required, it would – in effect – call that assessment into question. That is, the increased traffic generated by a complying activity may well have an effect on the environment that is "more than minor". But

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[44] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [11].

that effect, or the reasonable possibility of it, has been agreed to. But if those (accepted) effects have to be included in the "adverse effects" by reference to which the "not more than minor" determination is to be made, that acceptance would have to be revisited, or at least notice given on the basis that it could be. But, as Tipping J explained in *Arrigato*:[45]

> Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessment. 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.

[91] Furthermore, with reference to the various matters specified in Section 7.7.2(vi) of the District Plan, the adverse effects of the Woodlot Development, in terms of the minimum site density for a complying development, have been determined to be not incompatible with the levels acceptable in a low density residential environment, not out of character with the local environment and not incompatible with the scale of other buildings in the surrounding area.

[92] The Judge-made concept of permitted baseline activities and the "may disregard" provisions of the RMA are confirmation, in my view, of that basic principle. Therefore when – as here – an activity is discretionary on the basis, among other things, that it allows for a density of development greater than that permitted as of right, the adverse effects to be assessed are those which arise consequentially because of and to the extent of that "greater" density. Specifically, the District Plan represents a decision as to an acceptable level of development within the Queenstown area. That acceptable level of development is reflected in the District Plan in the minimum site density ($450m^2$) for complying residential development. The discretionary status of comprehensive residential development reflects the fact that, beyond that a decision of acceptability has not been made. In my view, therefore, what QLDC had to assess was, as it did, whether the increase in density associated with the proposal could have adverse effects that, by comparison to the adverse effects associated with a complying development, were not more than minor.

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[45] *Arrigato Investments Ors v Auckland Regional Council and Ors*, above n 22, at [29].

[93] The factual matters at issue here are quite different to the *Arrigato* example of a consented 10 storey building, to which it is proposed to add two storeys. In that situation what has to be assessed is not the incremental two storeys, but the difference between the height of the development the plan would have allowed (if any) as of right. Moreover, that difference also has to be assessed in the context of the specific terms of the relevant district plan. A height limit may be set to expressly balance the need for development against the need to preserve existing amenity values. By definition almost, in that context, any higher development than that permitted as of right could have a more than minor effect. In my view, however, the density rules at issue here are not of that type. The increased traffic effects caused by complying residential developments have not been calibrated in that way. Rather, they represent an acceptable level of traffic density for the local environment. The "more than minor" decision in this context is, in my view, properly made therefore by reference to the incremental effect on traffic that the density of a comprehensive residential development as a discretionary activity will have.

[94] I conclude, therefore, the approach taken by the Council was one lawfully available to it.

[95] There is, I recognise, a proper concern with the phenomenon of "environmental creep". But I think that concern is addressed by the Court of Appeal in *Arrigato*. What is permitted by law (i.e. the plan, as subsequently emphasised in *Far North*) may, under the Judge made rubric of the "permitted baseline" approach, as now legislated by s 104(5), be disregarded by a consent authority when making non-notification or consent decisions. Beyond that, what is required are factual assessments made against the background of the relevant District Plan and a proper, futuristic, assessment of the environment. In that context, it is one thing to start with a proposed development that will, as regards a particular matter, have effects that the plan regards as acceptable. It is another to obtain a consent for an activity which has effects which are not anticipated by the District Plan, and then to apply for a further consent which adds to those unanticipated effects. In my view, the flexibility provided by the *Arrigato* approach as confirmed by the Court of Appeal in the *Far North* case, enables that type of concern to be addressed.

[96] An example of the application of that approach is described by the Court of Appeal in *Hawthorn* in the following terms:

> [79] The Environment Court dealt with the implications of the existing resource consents in the present case in a manner that was consistent with that approach. It will always be a question of fact as to whether or not an existing resource consent is going to be implemented. If it appeared that a developer was simply seeking successively more intensive resource consents for the same site there would inevitably come a point when a particular proposal was properly to be viewed as replacing previous proposals. That would have the consequence that all of the adverse effects of the latter proposal should be taken into account, with no "discount" given for consents previously granted. We are not persuaded that the prospect of "creep" should lead to the conclusion that the consequences of the subsequent implementation of existing resource consents cannot be considered as part of the future environment.

[97] Again, I think this emphasises the essentially factual nature of the inquiry called for. The effect of the decision in *Far* North is to confirm the non-discretionary nature of that inquiry.[46]

[98] I also consider QLDC did have adequate information in terms of the MWH report and the NZTA consent letter. Mr Nash argued, on the basis of the Court of Appeal decision in *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council*, that QLDC should not have regarded the NZTA consent as "signing off" on the adverse impacts on traffic at the Andrews Road/ SH6A intersection.[47] In *Royal Forest and Bird* the Court of Appeal, reflecting the approach it had taken in *Arrigato* in commenting on the risk of environmental creep, observed that ss 94A(c) and 104(3)(b) required a purposive – necessarily nuanced – approach, including as to the significance of affected party consents given to a

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[46] The Supreme Court has granted leave to appeal from the decision of the Court of Appeal in the *Far North* decision (*Te Rūnanga- Ā-Iwi O Ngāti Kahu v Far North District Council* [2013] NZSC 134). One of the questions to be determined is:

> In relation to the subdivision consent application, whether or not the unimplemented land use consent should have been taken into account, when determining the application for the subdivision consent, as part of: (i) The "environment" under s 104(1) of the Resource Management Act 1991; or (ii) The permitted baseline under s 104(2).

The issues discussed in this judgment about the relationship of the permitted baseline, the receiving environment and environmental creep may therefore be considered by the Supreme Court in the relatively near future.

[47] *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council* [2009] NZCA 73, [2009] NZRMA 302.

particular proposal.[48] The Court did not hold, as Mr Nash submitted, that an affected party approval from the administrator of a particular environment was not a substitute for a consent authority's own assessment of effects on that environment. Rather, it held that, "a particular piece of land may be of such importance in terms of Part 2 that it would be inappropriate to treat the current owner or administrator of it as the sole arbiter of the effects on that piece of land".[49] There is a considerable difference between the two propositions.

[99] Mr Nash further submitted that the State Highway network fell within the scope of matters protected by Part 2 of the RMA, in that it was fundamental to the enablement of people and communities to provide for their social and economic wellbeing,[50] and for the efficient use of resources and energy.[51] QLDC therefore needed to make its own assessment of the effects of RM130600 on SH6A. It also needed to consider the effects on the Andrews Road intersection as they impacted on itself.

[100] Those rather conclusory submissions were not supported by any analysis of the role of NZTA under the Land Transport Management Act 2003, and the relationship of that act to the RMA.

[101] For QLDC, the submission was that the position of the Department of Conservation in the *Royal Forest and Bird* case was quite different to that of NZTA in this case. Here the matter involved a technical issue on which NZTA plainly (again a conclusionary proposition) has unique expertise (traffic generation on its own highways). Those considerations, it was submitted, distinguish this case from *Royal Forest and Bird*.

[102] Both the Land Transport Management Act and the Government Roading Powers Act 1989 establish what are, on the basis of my brief review, complex legislative schemes. In that context, and unwilling to embark unguided on what is plainly a complicated statutory interpretation, I have nevertheless briefly considered

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48 At [26].
49 At [27].
50 RMA, s 5(2).
51 RMA, s 7(b)–(ba).

the provisions of the Land Transport Management Act, and NZTA's statutory role. I note that it is the function of NZTA "to manage the State Highway system, including planning, funding, design, supervision, construction, and maintenance and operations, in accordance with this Act and the Government Roading Powers Act 1989".[52]

[103] In these circumstances, I am not prepared to conclude that QLDC acted unlawfully when it concluded that NZTA's affected persons' consent meant it could be satisfied that the adverse effects of the Woodlot Development of 20 residential units on the Andrews Road/SH5 intersection were not more than minor.

Unreasonableness

[104] Mr Nash argues that QLDC acted unreasonably by failing to give active consideration to whether the applications for RM120496 and RM130600 should have been notified on account of there being special circumstances under s 95A(4) of the RMA. That section provides:

> Despite subsection (3), a consent authority may publically notify an application if it decides that special circumstances exist in relation to the application.

[105] On each occasion, QLDC decided that special circumstances did not exist. Mr Nash submits that QLDC merely stated that conclusion, and did not actively engage itself in the necessary consideration.

[106] He argued particularly that the history leading to RM130600 was that the developer applied for resource consent for a succession of gradually more intensive developments on the same site relying on the previous consents, though none had been implemented. I do not accept that submission as made. There was not, in my view, a material "intensification" up until the 20 unit RM130600 proposal. Then, and as I have analysed above, QLDC acted lawfully when it considered adverse effects. It therefore follows that I do not consider it acted unreasonably in deciding not to notify under s 95A(4).

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[52] Land Transport Management Act 2003, s 95(1)(c).

Delay

[107] The other argument that received some attention before me was whether, if Mr Nash succeeded in establishing that QLDC had acted unlawfully, relief should nevertheless be denied because of the delay in bringing these proceedings. I do not need to consider that argument now. However, I note that if Mr Nash had so succeeded, I do not consider that delay would have been a reason to grant him relief. The 20 unit proposal arose relatively late in the overall history. My reading of the affidavits suggests that, once that proposal was on the table and consented, Mr Nash – and I take it others – raised the concerns which led to these proceedings. In many ways, the overall delay that is the successive iterations of the proposal and the period of time that elapsed from the first consent granted in 2007 has been of Woodlot's making. In that context, any delay that may have been associated with the issue of these proceedings is not, in my view, material.

Result

[108] I therefore decline Mr Nash's application for judicial review of the Challenged Non-notification Decisions.

[109] I did not receive submissions on costs. However, I see no reason why costs should not follow the event on a 2B basis. If the parties cannot agree, brief submissions may be filed no later than four weeks from the date of this judgment.

[110] I make a final comment. As MWH acknowledged, there is a sound basis for Mr Nash's concerns – the implications of the Woodlot Development aside – with the safety of the Andrews Road/SH6A intersection. To the extent that Mr Nash attempted, through these proceedings, to have that matter addressed immediately in the context of consents applied for for the Woodlot Development, he has not

succeeded. But that does not mean that matter will not have to be considered by QLDC, and NZTA, in a timely fashion in terms of their relevant statutory obligations.

Clifford J

Solicitors:
GTODD Law, Queenstown for the plaintiff.
Meredith Connell, Auckland for the first defendant.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2014-485-11253
[2015] NZHC 1991

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under s 149V(1) of the Act against the Report and Decision of the Board of Inquiry into the Basin Bridge Proposal dated 29 August 2014
BETWEEN	NEW ZEALAND TRANSPORT AGENCY Appellant
AND	ARCHITECTURAL CENTRE INCORPORATED & ORS Parties to the appeal under s 302(1) of the Act

Hearing: 20-24, 27-31 July 2015

Counsel: M Casey QC, A F D Cameron, F Wedde and A Cameron for Appellant
K M Anderson and E Manohar for Wellington City Council (Interested Party)
P Milne for Architectural Centre Incorporated (Interested Party)
T Bennion for Mount Victoria Historical Society (Interested Party)
M S R Palmer QC for Save the Basin Campaign (Interested Party) and Mount Victoria Residents Association (Interested Party)

Judgment: 21 August 2015

JUDGMENT OF BROWN J

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Overview

[1] On 17 June 2013 the appellant (NZTA) lodged a Notice of Requirement (NoR) and applications for incidental resource consents for what is commonly referred to as the Basin Bridge Project (Project). The Project was to construct, operate and maintain a two lane one-way bridge on the north side of the Basin Reserve in Wellington City as part of State Highway 1 between Paterson Street and Taranaki Street.

[2] The key aspects of the Project were summarised in NZTA's submissions in this way:

> (a) The Basin Reserve is a key transport node within the Wellington network. [NZTA's] assessment is that the Project area is subject to congestion, delay and journey time variability, particularly during peak periods and weekends, and also has a high accident rate. These problems are predicted to get worse in the future as travel demand grows in the area for all transport modes, and changes in land use occur in the immediate vicinity (Adelaide Road) and the wider Wellington area (Wellington airport and the southern/eastern suburbs).
>
> (b) The Project provides essential infrastructure by grade separating the westbound traffic movements at the Basin Reserve. Grade separation would be provided by way of a bridge (the Basin Bridge), located in the north of the Basin Reserve. The Basin Bridge would carry westbound traffic from the Mt Victoria tunnel to Buckle Street/Arras Tunnel. This would remove that traffic from the roads around the Basin Reserve, which frees up capacity on those roads for public transport improvements and north-south local traffic.
>
> (c) The Project also includes a dedicated pedestrian/cycling path and enables improvements for those transportation modes around the Basin Reserve by reducing conflict between those modes and vehicular traffic.

[3] On 7 July 2013 the Minister for the Environment referred the Proposal to a Board of Inquiry appointed under s 149J of the Resource Management Act 1991 (RMA) to hear and determine the merits of the application. The Minister's reasons for directing the Proposal to a Board of Inquiry were as follows:

National significance

I consider the matters are a proposal of national significance because:

- The proposal is adjacent to and partially within the Basin Reserve Historic Area and international test cricket ground; in the vicinity of other historic places including the former Home of Compassion Crèche, the former Mount Cook Police Station, Government House and the former National Art Gallery and Dominion Museum; and is adjacent to the National War Memorial Park (Pukeahu). The proposal is likely to affect recreational, memorial, and heritage values associated with this area of national significance (including associated structures, features and places) which contribute to New Zealand's national identity.

- The proposal is likely to result in significant and irreversible changes to the urban environment around the Basin Reserve. In particular, the proposed elevating of westbound traffic on SH1 [State Highway 1] is likely to compete with the open space aspect that exists for the current ground level layout of the Basin Reserve roundabout.

- The proposal has aroused widespread public interest regarding its actual or likely effects on the environment, including on heritage values and experiential values associated with the Basin Reserve. This includes on-going media and public attention on the options for traffic improvement around the Basin Reserve, including local, national and international coverage.

- The proposal is intended to reduce journey time and variability for people and freight, thereby facilitating economic development. The proposal is also likely to provide for public transport, walking and cycling opportunities; reduce congestion and accident rates in the area; and improve emergency access to the Wellington Regional Hospital. If realised, these benefits will assist the Crown in fulfilling its public health, welfare, security, and safety functions.

- The proposal relates to a network utility operation (road) that, although physically contained within the boundaries of Wellington City, as a section of the Wellington Northern Corridor Road of National Significance will affect and extend to more than one district and region in its entirety.

[4] Section 149P(1) provides that the Board of Inquiry must have regard to the Minister's reasons for making a direction to refer the Proposal to the Board for decision.

[5] The scope of the hearing was described by the Board in its Final Report in this way:

> [79] The hearing took place in Wellington. It commenced on 3 February 2014 and finished on 4 June 2014. The hearing took 72 sitting days over four months. The length of the hearing was occasioned by the

> volume of material and the strength and perseverance of the opposition to the Project. No stone was left unturned. We make no apology for the length of the hearing. It was necessary to give the Applicant and the Parties the opportunity to fully present their cases.

[6] Having released a Draft Decision on 22 July 2014 in accordance with s 149Q(1) of the RMA, the Board released its Final Report and Decision on 29 August 2014 (Decision). The essence of the determination of the majority of the Board[1] is captured in the final few paragraphs:

> [1324] In the final outcome, we are required to evaluate the significant adverse effects taken together with the significance of the national and regional need for and benefit of the Project. In carrying out this evaluation, we are conscious of the dicta of the Privy Council in *McGuire* that relevantly Sections 6 and 7 are strong directions to be borne in mind, and if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that.
>
> [1325] This tension between the anticipated benefits and the anticipated adverse effects is the crux of the issues that have been debated before us. It reflects the tensions in Part 2. It reflects the tensions inherent in the statutory documents.
>
> [1326] We are conscious of our findings as to the manner in which the Project would be consistent with the integrated planning instruments and documents relating to transportation. We are also conscious of our findings on adverse effects, which are contrary to the themes in the planning instruments on heritage, landscape, visual amenity, open space and amenity. As the planners agreed, the statutory instruments give no guidance on how this conflict should be resolved.
>
> [1327] While the RMA does not require that an (sic) NoR must set out to achieve the best quality outcome, in our view, there are compelling landscape, amenity and heritage reasons why this Project should not be confirmed. The Basin Bridge would be around for over 100 years. It would thus have enduring, and significant permanent adverse effects on this sensitive urban landscape and the surrounding streets. It would have adverse effects on the important symbol of Government House and the other historical and cultural values of the area.
>
> [1328] Government House, like the Basin Reserve, has the important quality of rarity (there is only one such main residence of the Crown in New Zealand). The sensitivity of the area derives not just from Government House and the Basin Reserve but the overall national significance of the whole area from Taranaki Street to Government House.
>
> [1329] The adverse effects are occasioned by the dominance of the Basin Bridge, resulting from its bulk and scale in relation to the present environment, and the future environment, which does not anticipate such a

[1] Retired Environment Judge G Whiting, D Collins and J Baynes: an alternate view was provided by D J McMahon.

> substantial elevated structure in this significant open space. The carefully crafted design of the Basin Bridge, together with the meticulously crafted landscape and amenity measures, while offering some offset, do not mitigate the bulk and scale of the Basin Bridge, exacerbated by the Northern Gateway Building.
>
> [1330] The ultimate criterion is whether confirming the NoR for the Project would promote the sustainable management purpose of the RMA. On that criterion, we judge that, even with its transportation and economic benefits, confirming the NoR would not promote the sustainable management purpose described in Section 5. It follows that the requirement should be cancelled. The resource consents, being ancillary to the requirement, are declined.

Scope of appeal

[7] A right of appeal to the High Court against the Board's decision is provided in s 149V "but only on a question of law".

[8] NZTA filed an appeal on 24 September 2014 and the following parties (the respondents) gave notice under s 301 of the RMA of their wish to appear on the appeal:

(a) the Architectural Centre Inc (TAC);

(b) Mt Victoria Historical Society Inc (MVHS);

(c) Mt Victoria Residents' Association Inc (MVRA);

(d) Save the Basin Campaign Inc (STBC); and

(e) Wellington City Council (WCC).

[9] As noted in a Minute of MacKenzie J dated 12 November 2014, some of the respondents contended that aspects of the appeal were not focused on questions of law but related to factual conclusions or the weight which the Board had placed on certain evidence. Although NZTA did not accept those criticisms, it elected to review its notice of appeal in the light of the matters raised. MacKenzie J directed:

> [9] … The appellant should be given an opportunity to consider the issues raised by the respondents and, if thought appropriate, to amend the notice of appeal. If the parties are then still at odds over whether the issues

> raise (sic) in the appeal do all involve questions of law, a hearing on that question might assist in focusing the issues on appeal, in a way which could potentially save considerable time at the hearing itself.

Timetable directions were made for the filing of an amended notice of appeal and an interlocutory application challenging the scope of the notice of appeal.

[10] On 27 November 2014 NZTA filed an amended notice of appeal together with a memorandum summarising the changes in tabular form. Although the respondents continued to have concerns about the appropriateness of what they described as the "extensive factual related grounds", they advised that they would not be pursuing an interlocutory application because of their limited resources as local community groups.

[11] The scope of the appeal is conveyed in the first paragraph of the amended notice of appeal which divides the appeal into eight issues:

> Issue 1: Misapplication of s 171(1)(b) of the Act (adequacy of consideration given to alternatives);
>
> Issue 2: Inquiring as to the outcome rather than the process of considering alternatives;
>
> Issue 3: Misapplication of s 171(1) of the Act (requirement to have particular regard to matters in paragraphs (a) to (d));
>
> Issue 4: Incorrect approach to the assessment of enabling benefits;
>
> Issue 5: Incorrect approach to the assessment of transportation benefits;
>
> Issue 6: Failure to have particular regard to s 171(1)(a) and (d) matters in assessing heritage and amenity effects;
>
> Issue 7: Incorrect approach to the assessment of the environment; and

> Issue 8: Failure to consider options within the scope of the application to address amenity and heritage related effects of the Northern Gateway Building.

Issue 1 is divided into seven subissues and Issue 5 is divided into three subissues. In total 34 questions of law were specified in the amended notice of appeal. However each specified question of law was preceded by alleged "errors of law" and followed by "grounds of appeal". As a consequence of cross-references to those other parts, the number of questions of law expanded.

"A question of law"

[12] As noted above, the right of appeal provided by s 149V is "only on a question of law". Hence this appeal is not a general appeal. It is not the role of the High Court to conduct a rehearing of the application to the Board or to undertake an "on the merits" consideration of whether the Board's conclusion was correct. Nor is it the role of the High Court to determine whether or not the Project would be the best outcome to address the congestion problem at the Basin Reserve.

[13] To adapt the observation of Blanchard J in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* the questions for this Court are the more limited ones of:[2]

> (a) has the Board misinterpreted what was required of it by the RMA and in particular under s 171?
>
> (b) if not, are the Board's conclusions nevertheless so misconceived that they are unlawful conclusions?

[14] The nature of that more limited role was explained by the Supreme Court in *Bryson v Three Foot Six Ltd*:[3]

> [24] Appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion. If the Court were, for example, to misinterpret the requirements of s 6 – to misdirect

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2 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50].

3 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

itself on the section, which incorporates the legal concept of contract of service – that would certainly be an error of law which could be corrected on appeal, either by the Court of Appeal or by this Court …

[25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.

[26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test …

[27] It must be emphasised that an intending appellant seeking to assert that there was no evidence to support a finding of the Employment Court or that, to use Lord Radcliffe's preferred phrase, "the true and only reasonable conclusion contradicts the determination", faces a very high hurdle. It is important that appellate Judges keep this firmly in mind. Lord Donaldson MR has pointed out in *Piggott Brothers & Co Ltd v Jackson* the danger that an appellate Court can very easily persuade itself that, as it would certainly not have reached the same conclusion, the tribunal which did so was certainly wrong:

> "It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. To answer that question in the negative in the context of employment law, the appeal tribunal will almost always have to be able to identify a finding of fact which was unsupported by *any* evidence or a clear self-misdirection in law by the Industrial Tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option …"

[28] It should also be understood that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on "no evidence". It could nonetheless lead or contribute to an outcome which is insupportable.

[15] In *Vodafone*, after reference to *Bryson*, Blanchard J elaborated on the point with particular reference to the nature of the interpretative problem:[4]

> [54] The nature of the interpretative problem in the present circumstances and the caution which must be exercised before it can be said that an interpretation is in error, or before it can be said that a statutory provision has been misapplied, is well illustrated in the judgment of Lord Mustill, speaking for the House of Lords in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd*. What was in issue was much less complicated than "net cost" in the present case. It was the construction of the words "a substantial part of the United Kingdom" in statutory criteria applying to the investigation of mergers of transport services. Lord Mustill drew attention to the "protean nature" of the word "substantial", ranging from "not trifling" to "nearly complete". He cautioned against taking an inherently imprecise word and "by redefining it thrusting on it a spurious degree of precision". Accordingly, he concluded that the area referred to as "a substantial part" must only be "of such dimensions as to make it worthy of consideration for the purposes of the Act". Applying that test (the criterion) to the facts involved asking, first, whether the Monopolies Commission had misdirected itself, and, second, whether its decision could be overturned on the facts.
>
> [55] His Lordship said that it was quite clear that the Commission had reached an appreciation of "substantial" which was "broadly correct". Speaking generally about how a question of the nature of the second question should be approached, his Lordship said:
>
> > Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v Bairstow* [1956] AC 14.
>
> Lord Mustill said that *South Yorkshire* was such a case:
>
> > Even after eliminating inappropriate senses of "substantial" one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment.

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4 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 2.

> [56] The issue about "net cost" involves an imprecise criterion where "different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case".
>
> [57] Some guidance is also to be obtained from this Court's decision in *Unison Networks Ltd v Commerce Commission*. That case was about a statutory regime for controlling electricity line companies. The Commission's task was to set thresholds for declarations of control. It differs from the present case because it involved the use of a broadly expressed power designed to achieve economic objectives, rather than, as here, the calculation of an amount of net cost. But it was alleged in *Unison* that the Commission had misconstrued the requirements of Part 4A of the Commerce Act 1986 and applied the wrong legal test when exercising its power. As to that, this Court said that the statute contemplated that the Commission, as a specialist body, would exercise judgment in constructing the thresholds. That requirement, the Court said, could have been lawfully tackled in one of two ways. Both approaches were within the terms of the provisions in the relevant subpart of Part 4A. The Commission chose one of them and that was lawful. Importantly, it can be added that if the Commission had chosen the other, it too would have been lawful.
>
> [58] So there are two stages. First, whether the Commission has misinterpreted the language of the statute. This in part turns on its appreciation of the function of the word "unavoidable". And, secondly, whether, if its interpretation was correct, it has nonetheless exercised its judgment about what was "net cost" in a way that contradicts the true and only reasonable conclusion available on the facts and has thereby committed an error of law in terms of *Edwards v Bairstow*.

[16] Several of the questions of law in the amended notice of appeal utilise the formulation whether the Board made findings to which "it could reasonably have come on the evidence".[5]

[17] I recognise that in identifying the circumstances in which it is permissible to interfere with a tribunal's decision a number of High Court judgments have included the formula "a conclusion [the tribunal] could not reasonably have come to".[6] However I consider that there is significant potential for confusion when such a formulation is reframed without the inclusion of a negative with the consequence that the question becomes: is the conclusion one to which a tribunal could reasonably have come on the evidence?

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5 For example, the questions of law listed as 4(b), 7(b)(i)–(iii), 19(a) and (d), 22 and 36(b).

6 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC); *Ayrburn Farms Estate Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [34].

[18] The potential for confusion is compounded when the ground of appeal is expressed as was ground 5(d) in the amended notice of appeal:

> … the finding that sufficiently careful consideration had not been given to alternatives was not a reasonable finding on the evidence.

In similar vein in NZTA's written reply it was contended that:

> A question of law can arise where a decision-maker has reached a finding without any reasonable evidential foundation.

[19] It is useful, I suggest, to recall why Lord Radcliffe preferred his third description in *Edwards v Bairstow*, namely one in which the true and only reasonable conclusion contradicts the determination:[7]

> … Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

[20] In my view paraphrasing the established tests by reference to "not a reasonable finding on the evidence" or "without any reasonable evidential foundation" does not advance the analysis and has the potential to extend the inquiry beyond the proper boundary of what constitutes a question of law.

[21] In the context of an appeal against the exercise of a discretion (which the present appeal is not) it has long been recognised that on the same evidence two different minds might reach widely different decisions without either being appealable.[8] The same point has been made employing the word "reasonably":[9]

> The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any one of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong.

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7 *Edwards v Bairstow* [1956] AC 14 (HL) at 36.
8 *Bellenden v Satterthwaite* [1948] 1 All ER 343 (CA) at 345.
9 *G v G* [1985] 2 All ER 225 (HL) at 228.

[22] However in the third of Lord Radcliffe's descriptions in *Edwards v Bairstow* where "reasonable" appears, it is quite clear that only one possible conclusion was in contemplation as being reasonable:

> one in which the true and only reasonable conclusion contradicts the determination.

[23] Consequently, in the interests of clarity, when addressing those questions of law in NZTA's amended notice of appeal which adopt the "could reasonably have come to on the evidence" formula, I propose to reframe the question to align precisely with Lord Radcliffe's third description.

[24] From time to time there was reference in the course of NZTA's submissions to another formula, namely a conclusion "where there is no reliable, probative evidence to support the determination". Authority for that formula as demonstrating an error of law was said to be found in *Chorus Ltd v Commerce Commission*.[10] Kós J there remarked:

> [177] Thirdly, I find the Commission did not fail to determine what inferences could reliably be drawn from the benchmark data about the likely cost of providing the UBA service in New Zealand. This was very much a tertiary argument to the two primary arguments. Had the Commission had reason to believe that the benchmark evidence was not reliable, probative evidence or that the proposed IPP outcome, based on the benchmark evidence and allowing for consideration of s 18, was irrational and likely to produce an outcome substantially removed from the likely ISLRIC found under the FPP, the Commission would have had a duty to inquire further. But those were not the circumstances here. The benchmark evidence was reliable and probative. The IPP outcome was not evidently irrational, however unpalatable it may have been to Chorus. The mechanism to correct the IPP price lay not in further protracted analysis to produce a more perfect IPP price. It lay in the statutory mechanism, under s 42, to obtain a full pricing review using the FPP.

[25] On appeal the Court of Appeal[11] endorsed the High Court's finding that there was no reason to believe that the benchmark evidence that the Commission obtained through its questionnaire was not reliable, probative evidence.[12] However I do not consider that the Court of Appeal's judgment is to be read as extending the grounds

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10 *Chorus Ltd v Commerce Commission* [2014] NZHC 690 at [154] and [177].
11 *Chorus Ltd v Commerce Commission* [2014] NZCA 440. References omitted.
12 At [121].

upon which a judgment may be challenged as wrong in law. Indeed it is apparent that the Court of Appeal was reiterating the traditional approach.

[26] The introductory paragraphs bear repeating. Having noted that the appeal was not a general appeal against the merits of the Commission's determination and that Chorus did not challenge the Commission's interpretation of any of the relevant statutory provisions, the Court said:

> [109] Instead Chorus challenges the Commission's determination on the basis that the proper application of the law required a different answer. Chorus does this by alleging, in the first five questions of law, that the Commission made factual errors and thereby erred in law.
>
> [110] It is well-established, however, that to succeed on the basis of allegations of this nature Chorus must show that the Commission has exercised its judgment about the application of the IPP:
>
> > … in a way that contradicts the true and only reasonable conclusion available on the facts and has thereby committed an error of law in terms of *Edwards v Bairstow*.
>
> [111] This is a high hurdle for Chorus to surmount. It is well-established that unless the Commission's application of the statutory provisions is factually "unsupportable" it will not have erred in law. It is for the Commission, as a specialist body, to exercise judgment in carrying out the requisite "benchmarking" exercise and in weighing up the relevant facts in that context. It will therefore having erred only if there is no evidence to support the factual findings it made in reaching its determination.
>
> [112] In the absence of a right of general appeal, it is not the role of the Court in an appeal on a question of law to undertake a broad reappraisal of the Commission's factual findings or the exercise of its evaluative judgments. Care should also be taken to avoid a technical and overly semantic analysis of the Commission's determination in an endeavour to create a question of law. In making factual findings it is for the Commission, and not the Court, to decide what weight should be given to the relevant evidence and what inferences, if any, should be drawn from the evidence. An inference must be logically drawn from proven facts and not be mere speculation or guesswork. At the same time, as counsel for the Commission acknowledged, if the Commission has made a factual error that makes its application of the statutory provisions "unsupportable" it will have erred in law.

Section 171

[27] The Board was required to consider the NoR under s 149P(4) which provides:

(4) A board of inquiry considering a matter that is a notice of requirement for a designation or to alter a designation—

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

(b) may—

(i) cancel the requirement; or

(ii) confirm the requirement; or

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

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

[28] Consequently the Board was required to make its decision on the NoR by applying s 171(1) which provides:

(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—

(a) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment; and

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

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

[29] Issues relating to the interpretation of s 171(1) comprised a significant part of the appeal. In this portion of the judgment I briefly traverse the legislative history of s 171 together with some relevant authorities. In the course of doing so I identify a number of the primary interpretation issues in contest. However it is convenient first to draw attention to s 171(1)(c), relating as it does to the objectives of a requirement.

Section 171(1)(c)

[30] NZTA's objectives for the Project were:[13]

> **Objective 1**: To improve the resilience, efficiency and reliability of the State network:
>
> (i) By providing relief from congestion on SH1 between Paterson Street and Tory Street;
>
> (ii) By improving the safety for traffic and persons using this part of the SH1 corridor; and
>
> (iii) By increasing the capacity of the SH1 corridor between Paterson Street and Tory Street.
>
> **Objective 2**: To support regional economic growth and productivity:
>
> (i) By contributing to the enhanced movement of people and freight through Wellington City; and
>
> (ii) By, in particular, improving access to Wellington's CBD employment centres, airport and hospital.
>
> **Objective 3**: To support mobility and modal choices within Wellington City:
>
> (i) By providing opportunities for improved public transport, cycling and walking; and
>
> (ii) By not constraining opportunities for future transport developments.
>
> **Objective 4**: To facilitate improvement to the local road transport network in Wellington City in the vicinity of the Basin Reserve.

[31] The Board found that the works were reasonably necessary to achieve those objectives.[14] The Board also recorded that there was no real dispute that the NoR (i.e. designation) was reasonably necessary for achieving the objectives.[15]

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13 Final Decision, at [1225].
14 At [1230].

Original form of s 171(1)

[32] Section 171 as originally enacted in 1991 included Part 2 of the RMA as one of five matters to which a territorial authority was required to have particular regard:

> **171 Recommendation by territorial authority**–
>
> (1) When considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to–
>
> (a) Whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought; and
>
> (b) Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; and
>
> (c) Whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method; and
>
> (d) All relevant provisions of national policy statements, New Zealand coastal policy statements, regional policy statements, regional plans, and district plans; and
>
> (e) Part II.

Section 104 concerning resource consent applications and s 191 concerning requirements for heritage orders had a similar structure.

1993 Amendment

[33] The reference to Part 2 was relocated in 1993[16] when the words "Subject to Part II" were placed at the commencement of the subsection. An equivalent amendment was made to both ss 104 and 191.

[34] The 1993 Amendment also introduced s 168A providing for the public notification of requirements. Under s 168A(3) a territorial authority was to have regard to the matters set out in s 171.

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15 At [1218] –[1219].

16 Resource Management Amendment Act 1993, s 87.

[35] The speech of the Minister of the Environment on the second reading of the bill explained the motivation for the amendments. Having noted that the RMA seeks to provide certainty to all parties and that the law must provide a clear framework for the courts and others to work with, the Hon Rob Storey said:[17]

> The Bill, therefore, addresses those sections of the Resource Management Act in which at present there is a lack of clarity. There are some who believe that the Act should be left untouched until case law demonstrates that, because of ambiguous wording, Parliament's intent has not been exactly converted into the law.
>
> If Parliament intends a particular policy direction, I think that direction has to be clearly expressed. To do otherwise would be a dereliction of the trust placed in us as members of Parliament. It is one thing to use language that allows a flexibility of outcomes, when Parliament probably knows what it intends as the result; it is quite another matter to have language that allows a variety of outcomes, when there is meant to be only one.
>
> Sorting out the ambiguities in a legal setting also puts a very large cost on everybody – citizens, local government, central government, and potentially on the environment itself. I think that the House would want to do better than that, and therefore it has to remove the necessary ambiguities and costs.

[36] Specifically in relation to references within the RMA to Part 2, the Minister said:

> As I said, the Bill makes a number of technical amendments and I certainly do not intend to go through all of them. Part II of the Resource Management Act sets out the purpose of the Act. The current references in the Act to Part II have been in danger of being interpreted as downgrading the status of Part II. Amendments in the Bill restore Part II to its proper overarching position.

[37] The significance of the "subject to" drafting method had been the subject of direct consideration some four years earlier in *Environmental Defence Society Inc v Mangonui County Council*.[18] Section 3 of the Town and Country Planning Act 1977, the predecessor of the RMA, related to matters of national importance which were in particular to be recognised and provided for in the implementation and administration of district schemes. Section 36, which related to the contents of district schemes, included the phrase "subject to section 3".

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17 (17 June 1993) 535 NZPD 15920.

18 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 260.

[38] With reference to the significance of the inclusion of that phrase Cooke P said:

> The decision of the Tribunal now in question contains no discussion of the relationship between s 3 and the other sections, but Chilwell J observes in his judgment that the Tribunal has consistently held that the change in wording making certain sections subject to s 3 does no more than make explicit what was previously implicit and that the *Waimea* decision applies to the present Act. The High Court Judge also adopted that view and it may fairly be said, I think, to have been both an express basis of his decision and an underlying assumption of the Tribunal's decision. Read as a whole, their reasoning appears to involve an overall balancing of the various considerations in ss 3 and 4 on the lines approved in the *Waimea* judgment.
>
> With respect, I am unable to agree that this is a correct view. Rather I agree with the view taken by Dr K A Palmer in his *Planning and Development Law in New Zealand* (2nd ed, 1984) vol 1 at p 202 that the 1977 change was significant. **The qualification "Subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict.** This Court had occasion to say so expressly in a reported case the year before the 1977 Act: *Harding v Coburn* [1976] 2 NZLR 577, 582. **There was no need nor reason to insert those words in ss 4 and 36 of the 1977 Act if the legislature had intended that the s 3 matters were no more than matters to which regard was to be had, together with district considerations, in preparing a district scheme.** The explanation of the insertion of the words that leap to the eye, as it seems to me, is that the argument for the Minister of Works rejected in *Waimea* was henceforth to prevail. There is an analogy with the legislative guidelines provided by declaring a special object for the amending Act considered by this Court in *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1988] 1 NZLR 78, 87-88; see also per Bisson J at pp 94–95 and per Chilwell J at pp 97–99.
>
> (emphasis added)

[39] Section 171 in its 1993–amended form was considered in a number of noteworthy judgments. Delivering the advice of the Privy Council in *McGuire v Hastings District Council* Lord Cooke of Thorndon said:[19]

> [22] … By s 171 particular regard is to be had to various matters, including (b) whether adequate consideration has been given to alternative routes and (c) whether it would be unreasonable to expect the authority to use an alternative route. …; but, by s 6(e), which their Lordships have mentioned earlier, [Hastings] is under a general duty to recognise and provide for the relationship of Maori with their ancestral lands. So, too, Hastings must have particular regard to kaitiakitanga (s 7) and it must take into account the principles of the Treaty (s 8). **Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that**

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19 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.

> **the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.**
>
> (emphasis added)

[40] While strictly speaking those observations in relation to the operation of s 171 were obiter dicta, as *Auckland Volcanic Cones Society Inc v Transit New Zealand* recognised, they were "very strong obiter dicta".[20] The High Court there added:

> [59] … The specific considerations in s 171 (alternative methods or routes in particular) are subject to Part II of the RMA. Parties involved in the administration and application of the RMA are very familiar with the requirement to have regard to other considerations subject to Part II. On an application for resource consent, consent authorities and on appeal the Environment Court must have regard to the considerations in s 104 of the RMA. The s 104 considerations are expressed to be subject to Part II. There is a well-established body of case law confirming the primacy of Part II and how that is applied in relation to the s 104 considerations. The drafting technique used in s 171 to provide the considerations in that section are subject to Part II is not unique to s 171.
>
> [60] In the present case the effect of ss 171 and 174 is to require Transit and the Environment Court on appeal to have particular regard to the matters at s 171(1)(a), (b), (c) and (d) but always subject to Part II of the RMA.

2003 Amendment

[41] Section 171 was substantially redrafted in the 2003 Amendment.[21] One change was the relocation of the reference to "subject to Part II" from its location at the commencement of the subsection:

> 171 **Recommendation by territorial authority**
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part II, consider the effects on the environment of allowing the requirement, having particular regard to–
>
> …

Although a similar change was made to s 104(1), there was no equivalent amendment to s 191(1) and consequently the phrase "Subject to Part 2" remains at the commencement of that subsection.

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[20] *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 316 (HC).

[21] Resource Management Amendment Act 2003, s 63.

[42] Section 186A(3) was substantially redrafted in terms identical to s 171(1).

[43] One of the contested points of interpretation turns on the fact of that relocation of the phrase within s 171(1). Whereas TAC contended that the phrase continued to render the totality of the consideration of effects as being subject to Part 2, NZTA argued that the relocation had the consequence that the phrase related to the consideration of effects rather than to the (a) to (d) matters.

[44] Most recently s 171 was considered in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council*.[22] Citing *McGuire*, Whata J said:

> [68] It will be seen that the focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. **The import of this is that the purpose, policies and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Indeed, in the event of conflict with the directions in s 171, Part 2 matters override them.** Paramount in this regard is s 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.
>
> [69] Part 2 also requires that in achieving the sustainable management purpose, all persons exercising functions shall recognise and provide for identified matters of national importance; shall have regard to other matters specified in s 7 and shall take into account the principles of the Treaty of Waitangi.
>
> [70] The reference at s 171(1)(d) to "any other matter" is qualified by the words "reasonably necessary". Given the Act's overarching purpose, however, the scope of the matters that may legitimately be considered as part of the effects assessment must be broad and consistent with securing the attainment of that purpose.
>
> (emphasis added)

Sections 171(1) and 104(1) compared

[45] It is convenient at this juncture to note the different structure of s 104 following the 2003 Amendment:[23]

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[22] *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 [*Queenstown Airport*]. References omitted.

[23] Section 104(1)(b) was replaced on 1 October 2009 by s 83(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

104 **Consideration of applications**

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

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

(b) any relevant provisions of–

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

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

[46] Two points of difference between ss 104 and 171 material to the statutory interpretation arguments in this case are:

(a) in s 104 the effects on the environment comprises one of the matters to which regard is to be had whereas in s 171 it is the focus of consideration;

(b) s 171 requires that the matters listed are to be the subject of "particular" regard.

[47] Having noted what it described as the "subtly different language" in the two sections, the Board concluded that the difference in wording did not require a substantively different approach to considering effects on the environment arising from NoRs from that for determining consent applications.[24] That conclusion is also in issue in contest on this appeal.[25]

[24] At [194] of the Final Decision.
[25] Question 28A: see [72] below.

The relevance of King Salmon

[48] The Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*[26] was released on 17 April 2014 part way through the hearing before the Board.[27] *King Salmon* involved an application for a change to the Marlborough Sounds Resource Management Plan under s 66 of the RMA. It did not concern s 171. The relevance of *King Salmon* to the present appeal arises from the Court's discussion of Part 2[28] and the decision-making process known as the "overall judgment" approach.

[49] NZTA's submissions stated that *King Salmon* has significantly modified the approach to decision-making under the RMA and in particular the meaning of "subject to Part 2". The respondents rejoined that the ratio of *King Salmon* was confined to plan changes and that the decision was of little moment in relation to designations.

Sequence of consideration of the Issues

[50] As earlier noted[29] the amended notice of appeal grouped the questions of law under eight broad issues by reference to subject matter.

[51] In its written submissions NZTA stated that it had "further refined" the questions of law comprised in Issues 3 and 6. Although these submissions were presented as filed, the redefinition provoked some debate which led to NZTA filing a memorandum on the fourth day of the hearing formally recording the intended "restatement" of the questions of law relevant to Issues 3 and 6 and summarising the principles relating to the Court's power to amend a notice of appeal.[30]

[52] The Issue 3 questions, being Q 28(a), (b) and (c), were refined as five questions which I will refer to as Q 28A to 28E. The Issue 6 question, being Q 45

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

[27] At [91] of the Final Decision.

[28] A change to a regional plan under s 66 must be "in accordance with [inter alia] the provisions of Part 2": s 66(1)(b).

[29] At [11] above.

[30] Memorandum of counsel for the Appellant in relation to questions of scope and the Court's power to amend (if necessary) dated 23 July 2015.

(albeit with the cross-reference to the errors of law listed in para 44 of the amended notice of appeal), was refined as five questions which I will refer to as Q 45A to 45E.

[53] It is convenient to set out the refined Issue 3 questions of law:

> 28A Does the difference in wording between s 104 and s 171 require a substantively different approach to considering effects on the environment arising from notices of requirement as that for determining consent applications?
>
> 28B Was the Board in error by considering the effects of the environment of allowing the requirement without having particular regard to the matters listed in s 171(1)(a)–(d)?
>
> 28C When considering a requirement under s 171(1) RMA, how are the words 'having particular regard' to be interpreted?
>
> 28D When considering a requirement under s 171(1) RMA, how are the words 'subject to Part 2' to be applied (in particular, following the recent Supreme Court decision in King Salmon)?
>
> 28E As a consequence of those errors, did the Board make findings of fact that it could not otherwise have come to on the evidence?

[54] That "refinement" of the Issue 3 questions of law was particularly significant as it introduced in an explicit way as Q 28C and 28D[31] fundamental questions concerning the interpretation of s 171(1). The answers to, or more accurately the discussion of, those two questions has significance for a number of the other specified questions of law.

[55] Consequently, although the structure of the parties' submissions helpfully tracked the sequence of the Issues in the amended notice of appeal, I propose to first address the key issues of statutory interpretation and the arguments concerning the implications of *King Salmon*. Having done so, the judgment will then traverse the remaining questions of law in the sequence of the identified Issues.

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[31] Q 28(a), (b) and (c) in the amended notice of appeal remained as Q 28A, 28B and 28E.

The meaning of "having particular regard to" in s 171

[56] NZTA's intention to call into question the interpretation of the phrase "having particular regard to" was arguably implicit in Q 28(a) and Q 28(b) in Issue 3. However the issue was squarely raised in the restated Q 28C:

> When considering a requirement under s 171(1) RMA, how are the words "having particular regard" to be interpreted?

The 23 July 2015 memorandum[32] explained that it was necessary to address Q 28C when determining the Q 28 questions in the amended notice of appeal.

[57] The phrase is used not only in s 171(1) (and relatedly in s 168A(3)) but it also appears in 191(1) and notably in s 7 in Part 2. By contrast what is usually viewed as the lesser obligation of "have regard to" is employed in s 104(1) and in a variety of other sections.[33]

[58] A curious interface between the two phrases is highlighted in s 149P which concerns the matters to be considered by a board of inquiry. As noted earlier a board is required to "have regard to" the Minister's reasons.[34] In the case of a notice of requirement for a designation or for a heritage order a board is required to "have regard to" the matters set out in s 171(1)[35] and s 191(1)[36] respectively. However both ss 171(1) and 191(1) direct that such matters are to be the subject of "particular regard". I raised with counsel the possibility that, given the terms of s 149P, the obligation on a board might be only to "have regard" to the matters in s 171(1). That would have the consequence of equality of treatment between the s 171(1) matters and the Minister's reasons. However neither side was attracted to that interpretation.

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32 At [51] above.
33 Resource Management Act 1991, ss 131(1), 138A and 142.
34 At [4] above.
35 Section 149P(4)(a).
36 Section 149B(5)(a).

"have regard to"

[59] Taking the phrase "have regard to" as the starting point, in *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* Wylie J (sitting with Mr R G Blunt) said:[37]

> We do not think there is any magic in the words "have regard to". They mean no more than they say. The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function[.]

[60] It follows that the phrase "have regard to" does not mean "to give effect to". In *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* Cooke P agreed with and adopted the following analysis of McGechan J at first instance:[38]

> … He is directed by s 107G(7) to 'have regard' to any submissions made. Such submissions are to be given genuine attention and thought. That does not mean that industry submissions after attention and thought necessarily must be accepted. The phrase is 'have regard to' not 'give effect to'. They may in the end be rejected, or accepted only in part. They are not, however, to be rebuffed at outset by a closed mind so as to make the statutory process some idle exercise.
>
> Section 107G(7) in its direction that the Minister 'have regard' to five stated criteria does not direct that any one or more be given greater weight than others. In particular it does not direct that (a) value of ITQ is to have greater or lesser regard paid than (b) net returns and likely net returns. Weight, in the end and provided he observes recognised principles of administrative law, is for the Minister.

[61] Specifically in an RMA context John Hansen J took a similar approach in *Foodstuffs (South Island) Ltd v Christchurch City Council*:[39]

> I do not consider the term "shall have regard to" in s 104 RMA should be given any different meaning from the cases referred to above. In my view, the appellant is seeking to elevate the term from "shall have regard to" to

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37 *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC) at 612.

38 *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551. Similarly see *R v Police Complaints Board, ex parte Madden* [1983] 2 All ER 353 (QBD) at 369–370 where a number of English decisions are discussed.

39 *Foodstuffs (South Island) Ltd v Christchurch City Council* (1999) 5 ELRNZ 308, [1999] NZRMA 481 (HC) at 487.

> "shall give effect to". The requirement for the decision-maker is to give genuine attention and thought to the matters set out in s 104, but they must not necessarily be accepted.

[62] One of the authorities cited by John Hansen J was *R v CD*,[40] a judgment of Somers J who expressed the view in the context of the Costs in Criminal Cases Act 1967 that the expression "shall have regard to" is not synonymous with "shall take into account". However I note that in a number of subsequent decisions in Australia the two phrases have been treated as equivalent.[41]

[63] In my view the expression "to take into account" is susceptible of different shades of meaning. I consider that the two phrases can be viewed as synonymous if the phrase "to take into account" is used in the sense referred to by Lord Hewart CJ in *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Maryleborne* "of paying attention to a matter in the course of an intellectual process".[42] The key point is that the decision-maker is free to attribute such weight as it thinks fit to the specified matter but can ultimately choose to reject the matter.

"having particular regard to"

[64] Plainly the phrase "shall have particular regard to" conveys a stronger direction than merely "to have regard to". Section 7 (which includes the phrase) is one of the four sections in Part 2 which *McGuire* described as being "strong directions".[43]

[65] The issue is most recently informed by the discussion of Part 2 in *King Salmon*.[44] Having observed that s 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA, which is given further elaboration by the remaining sections in Part 2 (ss 6, 7 and 8), Arnold J writing for the majority of the Supreme Court said:

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40 *R v CD* [1976] 1 NZLR 436 (SC) at 437.

41 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 25 ALR 497 (HCA); *Queensland Medical Laboratory Ltd v Blewett* (1988) 84 ALR 615 (FCA) at 623; *Minister for Immigration and Ethnic Affairs v Baker* (1997) 45 ALD 136 (FCA) at 142; *Friends of Hinchinbrook Society Inc v Minister for the Environment* (1997) 147 ALR 608 (FCA) at 627.

42 *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Maryleborne* [1923] 1 KB 86 (CA) at 99.

43 At [39] above.

44 *King Salmon*, above n 26.

> [26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. **As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters.** The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. **The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).**
>
> [27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the sense that the principles of the Treaty may have an additional relevance to decision-makers.
>
> (emphasis added)

[66] While NZTA submitted that the (a) to (d) matters in s 171(1) were to be carefully weighed in coming to a conclusion, no submission was advanced in the course of argument on the interpretation issue to the effect that the matters to which particular regard was to be had were required to be the subject of extra weight.[45] On that issue I share the view of Sir Andrew Morritt V-C in *Ashdown v Telegraph Group Ltd*:[46]

> It was submitted that the phrase 'must have particular regard to' indicates that the court should place extra weight on the matters to which the subsection refers. I do not so read it. Rather it points to the need for the court to consider the matters to which the subsection refers specifically and separately from other relevant considerations.

[67] In the event NZTA and the respondents appeared to be on the same page on the interpretation of the phrase. Both sides cited the decision of the Planning

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[45] However NZTA's submissions argued that the Project's enabling effect for future projects was a highly relevant effect that ought to have been considered and "given sufficient weight" by reason of the requirement to have particular regard in s 171(1).

[46] *Ashdown v Telegraph Group Ltd* [2001] 2 All ER 370 (Ch) at [34] where the phrase "must have particular regard to" in s 12 of the Copyright Act 1988 with reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms was considered.

Tribunal in *Marlborough District Council v Southern Ocean Seafoods Ltd* where the following view was expressed:[47]

> The duty to have particular regard to these matters has been described in one case as "a duty to be on inquiry" *Gill v Rotorua District Council* (1993) 2 NZRMA 604, 2 NZPTD Part 5. With respect in our view it goes further than the need to merely be on inquiry. To have particular regard to something in our view is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion.

[68] I agree that that is an appropriate interpretation provided that the reference to "take the matter into account" is understood in the sense explained at [63] above.

Did the Board adopt the correct approach?

[69] NZTA's real complaint was that the Board failed to adhere to the identified standard. It placed particular reliance on the Board's comments at [175]:[48]

> [175] What is required (subject to consideration of the *King Salmon* decision, which we address next) is a consideration of the effects on the environment of allowing the requirement having particular regard to the matters set out in sub-sections (a)–(d). This means that the matters in (a)–(d) need to be considered to the extent that our finding on these matters are to be heeded (or borne in mind) when considering our findings on the effects on the environment.

[70] I would agree with NZTA that merely to heed or bear in mind matters would fall below the requisite level of attention which the phrase "have particular regard to" imports. However I do not consider that the comments at [175], which were introductory in character, accurately reflect the Board's approach which is more evident at [181]–[182]:

> [181] By contrast, in considering the NoR we are required to have *particular regard to* the relevant instruments.
>
> [182] The phrase have *particular regard to* has been interpreted as requiring that we specifically turn our mind to each of the listed matters, and give them some greater weight than those to which we are only required to have *regard*. This is a different and lesser test than the requirement to *give effect to*, as was being considered in *King Salmon*. The Supreme Court interpreted *give effect to* as simply meaning *implement*, and considered that this requirement was *intended to constrain decision makers*.

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47 *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 at 228.

48 Attention was also drawn to the use of the verb "informed" in [196].

[71] That such turning of their minds was required separately in respect of each of the listed matters was acknowledged in the Board's subsequent endorsement at [194] of a passage from the Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project (NIGUP).[49]

[72] It is convenient at this point to address Q 28A which states:

> Does the difference in wording between s 104 and s 171 require a substantively different approach to considering effects on the environment arising from notices of requirement as that for determining consent applications?

[73] This ground of appeal was directed to the Board's statements at [193]–[194]:

> [193] … We acknowledge (as [NZTA] noted) that the obligation to assess effects with respect to NoRs under Section 171(1) is expressed in subtly different language from the equivalent obligation arising with respect to resource consents under Section 104(1). Specifically, Section 171(1) requires consideration of the effects on the environment having particular regard to the matters in sub-sections (a)–(d). Whereas under Section 104(1), the activity's actual and potential effects are instead listed as one of the matters to which a decision maker must *have regard*, alongside those in Section 104(1)(b) and (c). Both Sections 104(1) and 171(1) though, are subject to Part 2.
>
> [194] However, we do not consider that difference in wording requires a substantively different approach to considering effects on the environment arising from NoRs as that for determining consent applications, as counsel for [NZTA] claimed. Indeed in our experience, it does not. To the contrary, we adopt the findings of the *Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project*, that Section 171(1) is to be applied as follows:
>
> [a] The language … *consider the effects … having particular regard to …* expresses a duty to do both together, without necessarily giving one primacy over, or making one subordinate to, the other;
>
> [b] The language *having particular regard* expresses a duty for us to turn our mind separately to each of the matters listed, to consider and carefully weigh each one. The words do not carry a meaning that the matters listed in (a)–(d) are necessarily more or less important than the effects on the environment of allowing the requirement; and

[49] At [73] below.

> [c] We must make our own judgment, based on the evidence and in the circumstances of the case, about the effects on the environment, about the matters listed in (a)–(d), and about the relative importance of each in all the circumstances.

[74] NZTA's objection to that analysis was directed both to the equivalence of treatment of the two sections and to the issue of "subject to Part 2". That latter issue is addressed below in the context of my consideration of Part 2.

[75] NZTA's argument was that the Board misapplied s 171(1) by in effect inserting the word "and" into the subsection (presumably before the phrase "having particular regard to") so that it read to the same effect as s 104(1). As its written submissions stated:

> 28.7 … By inserting 'and' into s 171(1), the Majority has given it a different meaning. On the Majority's interpretation of s 171(1) a decision-maker is required to:
>
> a Make its own judgment, through Part 2, concerning the effects on the environment of allowing the requirement; and
>
> b Make a separate judgment concerning the matters listed in paragraphs (a)–(d); and
>
> c Make its own overall judgment, subject to Part 2, regarding the relative importance of each in all the circumstances.
>
> 28.8 This is not what s 171(1) requires. The correct approach to s 171(1) is to consider the effects of the proposed requirement 'having particular regard to' (in the sense of 'through the lens' of) the (a) to (d) matters and then come to a decision on the basis of that assessment of effects. Where there is a conflict in the (a) to (d) matters, the decision-maker will have recourse to Part 2 (we return to the meaning of 'subject to Part 2' in the section below).

[76] I accept the respondents' submission that, while there is a difference in wording between ss 104 and 171, in its analysis of those sections at [193]–[194] the Board has not misinterpreted s 171 in the manner suggested by NZTA. As noted above, in discharging the obligation to have "particular" regard to the specified matters the Board has recognised that each specified matter is to be the subject of separate attention.

[77] The Board transparently stated its intended decision-making process at [199]:

> [199] We therefore propose to structure this part of our decision (appropriately applying the guidance from *King Salmon*, as just identified) as follows:
>
> [a] To identify and set out the relevant provisions of the main RMA statutory instruments that **we must have particular regard to under Section 171(1)(a)**, and the relevant provisions of the main non-RMA statutory instruments and non-statutory documents that **we must have particular regard to under Section 171(1)(d)**;
>
> [b] To consider and evaluate the adverse and beneficial effects on the environment informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents;
>
> [c] **To consider and evaluate the directions given in Section 171(1)(b)** as to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work;
>
> [d] **To consider and evaluate the directions given in Section 171(1)(c)** as to whether the work and designation are reasonably necessary for achieving the objectives for which the designation is sought; and
>
> [e] In making our overall judgment subject to Part 2, to consider and evaluate our findings in (a) to (d) above, and to determine whether the requirement achieves the RMA's purpose of sustainability.

[78] I do not consider that that formulation is susceptible to challenge so far as the appropriate consideration of the 171(1)(a) to (d) matters is concerned.

[79] It is convenient at this point to address the contention at ground of appeal 29(b) that the matters listed in s 171(1)(a) to (d) ought to have been determined prior to the Board's substantive consideration of the Proposal's effects. This complaint is directed to the observation in the Decision at [197]:

> [197] In applying Section 171(1) of the RMA, there is also no explicit obligation that our determination regarding the matters in Section 171(1)(b) must be made in advance of our substantive consideration of effects.

[80] The Board proceeded to note that the Wiri Prison Board[50] had undertaken a substantive effects assessment, and determined that that project would result in some significant effects, before moving on to consider the s 171(1)(b) matters. The Board favoured that approach:

> [198] We adopt the same approach, as we consider it:
>
> [a] Allows us to fully consider all mitigation being offered by [NZTA], and whether there actually will be significant adverse effects remaining once that mitigation is taken into account;
>
> [b] Would be consistent with the High Court's comments in *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* that the greater the impact on private land (or similarly, the more significant the project's adverse effects), the more careful the assessment of alternative sites, routes and methods will need to be. We will have a better understanding of the significance of the Project's adverse effects (and therefore the robustness of the alternatives assessment required), if we undertake our substantive effects assessment before considering the adequacy of the [NZTA's] alternatives assessment; and
>
> [c] Would appropriately reflect the fact that as Section 171(1) is subject to Part 2, some consideration of the relevant matters from that Part is required in terms of forming a view on potential effects. As such, we consider we need to have some understanding of the evidence/effects assessments to reach a view on whether effects are in fact likely to be significant.

[81] Having made the argument at [75] above, on this issue NZTA's submission was:

> 28.21 The Majority was required to assess the effects having particular regard to the (a) to (d) matters as something important to be considered and carefully weighed in coming to a conclusion, rather than simply as matters that needed to be borne in mind. It was therefore necessary (inter alia) to have addressed the (a) to (d) matters before then considering the effects 'having particular regard to' those matters.

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[50] Final Report and Decision of the Board of Inquiry into the Proposed Men's Correctional Facility at Wiri, September 2011.

[82] I do not accept that the sequence of consideration is required to be as NZTA maintains. The Board's reasoning in [198] appears to me to be sound. As Burchett J remarked in *Friends of Hinchinbrook Society Inc v Minister for the Environment*:[51]

> … What is the effect of a requirement that "[i]n determining whether or not to give a consent … the Minister shall have regard only to the protection, conservation and presentation … of the property"? An instant's reflection shows that these words just cannot be applied mechanically. The minister must consider the application made to him and ascertain what it involves before he can have regard to the protection, conversation and presentation of the property in relation to it.

The effect of the phrase "subject to Part 2" in s 171

[83] The only question of law in the amended notice of appeal which specifically raised Part 2 was Q 13 [subissue 1D] which states:

> Does s 171(1)(b) require the requiring authority's consideration of alternatives to incorporate Part 2 considerations; including (in particular) the weight given to particular evaluation criteria.

[84] However the fundamental nature of NZTA's Part 2 argument emerged more clearly in the further refinement of the Issue 3 questions, in particular restated Q 28D:

> When considering a requirement under s 171(1) RMA, how are the words 'subject to Part 2' to be applied (in particular, following the recent Supreme Court decision in *King Salmon*)?

The issue of the capacity for the Board to "resort to Part 2" was also implicit in restated Q 45E:

> What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

[85] As noted in the brief discussion of legislative history,[52] two primary arguments were advanced by NZTA concerning the role played by Part 2 in the s 171(1) consideration:

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51 *Friends of Hinchinbrook Society Inc v Minister for the Environment*, above n 41, at 627.

52 At [43] and [49] above.

(a) did the relocation of the phrase within s 171(1) have the consequence contended by NZTA that the phrase related to the consideration of effects rather than to the (a) to (d) matters?

(b) did *King Salmon* change the approach to the application of this phrase in s 171(1)?

The relocation of the phrase within s 171(1)

[86] It was not apparent either from NZTA's submissions to the Board or in the Board's Decision whether this line of argument had prominence. However the argument as developed before me is conveniently summarised in NZTA's written reply as follows:

> 11.22 The 2003 amendment separates the (a)–(d) matters from the overriding 'subject to Part 2' direction that was clear in the previous drafting. It is well established that differences in wording between repealed provisions and those enacted is an aid to statutory interpretation and may throw light on the intended meaning. It is submitted that if Parliament intended the whole of the s 171(1) assessment still to be 'subject to Part 2', it would have retained more of the previous wording, such as follows:
>
> > *(1) Subject to Part 2, when considering a requirement and any submissions received, a territorial authority must consider the effects on the environment of allowing the requirement and shall also have particular regard to–*
>
> 11.23 Parliament did not do this. Instead, it moved the position of the 'subject to Part 2' direction to relate to the assessment of effects and used the words 'having particular regard to' to qualify the consideration of effects such that the (a)–(d) matters are not directly made subject to Part 2.

[87] There appears to have been no judicial consideration of the implications of the relocation. Nor do the *travaux preparatoires* throw any express light on the question. If the implications of the movement of the phrase were as significant as NZTA's argument suggests, then one would have expected that there would have been some sign on the legislative trail. One would also expect that the same change as made to ss 104(1), 168A(3) and 171(1) would also have appeared in s 191(1).

[88] The first manifestation of the relocation was in the Resource Management Amendment Bill[53] which was the culmination of a review of the RMA which started in August 1997. The bill had its first reading on 13 July 1999 and was referred to the Local Government and Environment Committee. The bill made changes to ss 104, 168A and 171 but not to s 191 which may account for the fact of the current point of difference.

[89] Because the form of s 171 proposed in 1999 was different from the section in its ultimate form in 2003, I set out its original terms:

> 171(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part II, consider the effects on the environment of allowing the requirement, having regard to–
>
> (a) Any relevant provisions of the plan or proposed plan; and
>
> (b) If the requiring authority does not own the land or it is likely that the designation will have a significant adverse effect on the environment, whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work; and
>
> (c) Whether the designation is reasonably necessary for achieving the objectives of the requiring authority; and
>
> (d) Any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.
>
> (2) A requirement must not conflict with any relevant provisions of a national policy statement or a New Zealand coastal policy statement.

An equivalent amendment was proposed as s 168A(3) and (4).

[90] However the structure of s 104 was substantially different, particularly inasmuch that a distinction was made in relation to the consideration of resource consents for controlled activities, restricted discretionary activities and discretionary activities. Only in relation to discretionary activities was there a reference to "Part II": that reference appeared in the first subparagraph:

> 104(3) When considering an application for a resource consent for a discretionary activity and any submissions received, a consent authority–

[53] Resource Management Amendment Bill 1999 (313–2) (Select Committee Report).

(a) Must, subject to Part II, consider the effects on the environment of allowing the application, having regard to–

(i) Any relevant provision in a plan or proposed plan:

(ii) Any other matter the consent authority considers reasonably necessary to decide the application; and

(b) May grant or refuse the application; and

(c) If it grants the application, may impose conditions.

[91] The fact and the implications of the different activities were usefully explored in the judgment of Randerson J in *Auckland City Council v John Woolley Trust*.[54]

[92] The Committee's report to the House on 8 May 2001[55] did not support the proposal that Part 2 of the Act would not be required to be considered in respect of controlled and restricted discretionary activities. While agreeing that s 104 should be simplified, the Committee said:

> … However, we are not prepared to remove explicit reference to Part II and significant planning documents such as national and regional policy statements and relevant or proposed plans. We recommend that a new, overarching subsection be added to new section 104, requiring consent authorities to consider all applications subject to Part II and to have regard to matters that include the above planning documents.

The amendment proposed as s 104(1A) was identical to s 104(1) in the 2003 Amendment.

[93] With reference to ss 168A and 171 the Committee's report said:

> Section 168A specifies the matters a territorial authority must consider on a notice of requirement for a designation in its own district for a work for which that territorial authority itself has financial responsibility. Section 171 specifies the matters a territorial authority is required to consider when assessing a notice of requirement for designation by another requiring authority. Proposed amendments to these two sections are set out in clauses 56 and 58 respectively. As introduced, the new provisions place greater emphasis on environmental effects when considering a requirement, and the need to consider alternatives is reduced. **These clauses also make sections 168A and 171 more consistent with the proposed new wording for the consideration of resource consents**. Finally, the emphasis is shifted

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54 *Auckland City Council v John Woolley Trust* (2008) 14 ELRNZ 106, [2008] NZRMA 260 (HC) at [24]–[29].

55 Above n 52.

> from considering whether a designation is necessary, to whether or not the work is necessary in achieving the objectives of the requiring authority.
>
> (emphasis added)

[94] No further progress was made on the 1999 bill in the House after the Committee had reported and the report was not debated by the House. The order of the day for consideration of the report was discharged on 24 March 2003. The Resource Management Amendment Bill (No 2) was introduced on 17 March 2003 and referred to the Committee on 20 March 2003. An instruction from the House stated that the Bill was referred to the Committee for the purpose only of the Committee receiving a briefing from officials and the Committee was required to report to the House by 28 April 2003.[56]

[95] With reference to s 171 the report stated:

> [it] requires a territorial authority to consider environmental effects when considering a requirement and to have particular regard to various other matters. Alternative sites, routes, or methods will now only need to be considered if the requiring authority does not have a legal interest in the land or it is likely that the designation will have a significant adverse effect on the environment. The application of the "reasonable necessity" test is clarified. This amendment complements the amendment to section 168A.

[96] A consideration of that history leads me to infer that:

(a) the catalyst for the relocation of the phrase was the proposed s 104(3),[57] the structure of which precluded the phrase being located at the commencement of the subsection;

(b) sections 168A(1) and 171(1) were amended for consistency with s 104;

(c) section 191(1) was left unchanged because it was not addressed in the 2003 Amendment.

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[56] Resource Management Amendment Bill 1999 (No 2) (39–2) (Select Committee Report).

[57] At [90] above.

[97] However there is nothing to suggest that the relocation of the phrase within s 171(1) (and similarly within s 168A) was for the significant purpose contended for by NZTA, namely to change the focus of application of Part 2 within s 171. I also note that such an argument could not logically be mounted in relation to s 104(1) given its structure (with effects on the environment being only one of the matters to which regard is to be had). Yet the phrase was also relocated within that subsection.

[98] For these reasons I do not accept that the relocation within s 171(1) of the phrase "subject to Part 2" had the purpose or effect of making any material change to the application of that section. I reject NZTA's contention at [86] above that the consequence of that amendment was that the phrase "subject to Part 2" related only to the assessment of effects and that the (a) to (d) matters were no longer directly subject to Part 2.

The implications of King Salmon

[99] It is fair to say that NZTA's approach to the role of Part 2 with reference to the NoR evolved not only throughout the course of the hearing before the Board but also on the appeal in this Court.

[100] Its opening position was recorded in the Decision in this way:

> [190] In opening, [NZTA] submitted that when considering its NoR, we must (*among other things*):
>
> > [a] Consider the effects on the environment of allowing the NoR; and
> >
> > [b] Have particular regard to the matters in Sections (sic) 171(1) as if we were a territorial authority, namely:
> >
> > > [i] The relevant provisions of planning instruments;
> > >
> > > [ii] Whether adequate consideration has been given to alternative sites, routes and methods of undertaking the work;
> > >
> > > [iii] Whether the work and designation are reasonably necessary for achieving [NZTA's] project objectives, as set out in the NoR;
> > >
> > > [iv] Any other matters we consider reasonably necessary to determine the NoR; and

[v] Above all, consider Part 2 matters.

[101] In closing before the Board NZTA submitted that, notwithstanding *King Salmon*, an "overall judgment" approach remained relevant in the consenting and designation context. It submitted that Part 2 was relevant to the Board primarily because of the presence in s 171 of the phrase "subject to Part 2", drawing attention to that part of *McGuire* highlighted in [39] above. It said:

> 16.12 It is submitted that the position as expressed in *McGuire* above, has not been upset by *King Salmon*. The Supreme Court did not consider sections 104 and 171 of the RMA, or the way in which Part 2 matters are approached in a consenting context.
>
> 16.13 Nonetheless, the Supreme Court's conclusions may in certain respects be taken as impacting on the approach taken to RMA decision-making more broadly. For instance, paragraph 151 of the Court's decision quoted above is noticeably broad in its language (it refers to "*planning decisions*" generally).
>
> …
>
> 16.16 It is submitted that, in the context of … the applications for this Project, and adopting the reasoning of the Supreme Court:
>
> a Sections 104 and 171 are expressly subject to Part 2, and the provisions in Part 2 remain relevant;
>
> b Section 6 elaborates on the guiding principle in section 5. It does not 'trump' it in the way suggested for TAC and NRA;
>
> c Section 5 supports the approval of this Project, but [NZTA] is not relying on this section alone;
>
> d The following discussion of effects will allow the Board to conclude as to each of the elements of Part 2, before undertaking an overall judgment.

[102] In the section of its Decision headed "Overview of the statutory and legal context" the Board recorded its understanding of the established framework for considering s 171(1) before addressing whether that framework had been modified by *King Salmon*. Its analysis commenced in this way:

> [169] We are required to consider the matters set out in Section 171(1) *subject to Part 2*. This has been interpreted as meaning that the directions in Part 2 are therefore paramount, and are overriding in the event of conflict. The relevant Part 2 directions therefore apply to:

[a] Our evaluation of specific effects on the environment; and

[b] Our evaluation in the final analysis.

> [170] The focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. The import of this is that the purpose, policy and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Paramount in this regard is Section 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.

[103] Having set out key passages from *McGuire*, the Decision stated:

> [174] The reference being *subject to Part 2* does not entitle us to ask whether some other project alignment or design better meets the requirements of Part 2, as the Act does not direct a particular use or require the best use of resources. All that is required is a careful assessment of the Project in and of itself to determine whether it achieves the RMA's purpose. A matter that we will consider in detail at the time of our overall judgment.

There then followed [175] previously quoted.[58]

[104] Having recorded its view that, where an evaluation under Part 2 (and in particular s 5) was required or permitted, that should continue to involve an overall broad judgment as held in *NZ Rail Ltd v Marlborough District Council*,[59] the Board stated its understanding of the *King Salmon* decision:

> [177] While the Supreme Court reviewed the previous *overall broad judgment* and *environmental bottom line* jurisprudence around the correct application of Section 5 (where required), it did not go on to substantively consider or evaluate that issue. We accordingly understand that where an evaluation under Part 2 (and in particular Section 5) is required (or permitted), this should continue to involve an *overall broad judgment* as held in *NZ Rail* and outlined above.
>
> [178] The majority of the Supreme Court in *King Salmon* found that the plan change at issue … *did not comply with [Section] 67(3)(b) … in that it did not give effect to the NZCPS.* In doing so, it found that in considering whether the New Zealand Coastal Policy Statement had *been given effect to*, and finally determining the plan change before it, that Board was not entitled by reference to the principles in Part 2, to carry out a balancing of all relevant interests in order to reach a decision. Rather, the plan change should have been dealt with in terms of the New Zealand Coastal Policy Statement, without reference back to Part 2. This was primarily because of what the Court considered to be *strongly worded directives* in two of the New Zealand Coastal Policy Statement policies that were particularly

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58 At [69] above.

59 *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

relevant in that case, which the Board found would not be *given effect to* if the plan change was granted.

[105] The Board then said:

> [179] Again, we consider that properly construed, this aspect of *King Salmon* does not directly affect our determination of [NZTA's] NoR, for the following reasons. *King Salmon* involved consideration of a plan change, and therefore different statutory tests from those applying to [NZTA's] NoR. Importantly, the Supreme Court observed that Section 67(3)(b) provides a *strong directive, creating a firm obligation on the part of those subject to it*, to give effect to the New Zealand Coastal Policy Statement.
>
> [180] Reading the majority decision as a whole, we consider that this specific statutory context was clearly central to the Supreme Court's decision. …
>
> [181] By contrast, in considering the NoR we are required to have *particular regard to* the relevant instruments.

There then followed [182] previously quoted.[60]

[106] NZTA disagreed with the Board's analysis of *King Salmon* and with its reliance on *McGuire*. Its principal written submissions on appeal stated:

> 29.7 *King Salmon* has significantly modified the approach to decision-making under the RMA and in particular, what 'subject to Part 2' means. In other words, when is recourse to be had to Part 2?
>
> …
>
> 29.11 While the decision was in the context of a plan change, the Supreme Court's findings in relation to the planning framework, and the application of Part 2 to decision-making generally, have wider application.
>
> …
>
> 29.13 We submit that the Supreme Court has given a clear direction that it is the planning documents that generally form the basis for decision-making under the RMA. Parliament has provided for a hierarchy of planning documents, relevant to planning decisions under the RMA. These documents are drafted 'in accordance with Part 2' and 'flesh out' the provisions of Part 2 in a manner that is increasingly detailed both as to content and location.

[107] Then, under a heading "Application of *King Salmon* to s 171(1)", NZTA contended:

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[60] At [70] above.

29.16 For the reasons summarised in para 29.13, the planning documents give effect to Part 2. Decisions made in reliance on those documents therefore achieve the sustainable management purpose of the Act, as provided for in Part 2.

29.17 The Supreme Court held that s 5 (the purpose of the Act) is not an operative provision. Nor therefore is Part 2 as a whole given that ss 6, 7 and 8 are a further elaboration of that purpose. Part 2 provisions are particularised (both as to substantive content and locality) by the planning documents, from national policy statements down to district plans.

…

29.22 Section 171(1) directs that when considering a notice of requirement, a decision-maker's assessment of effects on the environment is 'subject to Part 2'. However, on the basis of the principles established by the Supreme Court in *King Salmon*, and consistent with *McGuire*, Part 2 will be relevant if one of the three caveats is established or there is a conflict in the exercise of the statutory duty under s 171(1)(a) to (d). In this case the planning framework did contemplate the Project and therefore there was no conflict so as to bring Part 2 into play.

[108] In response TAC maintained the primacy of Part 2 and criticised NZTA's submission for failing to address how the "subject to Part 2" direction is to be complied with. NZTA's reply submissions were interesting on both those points:

11.15 … We agree with the submissions of TAC to the effect that Part 2 retains primacy.

11.16 The approach by the Appellant to the application of Part 2, assumes primacy, but the question remains as to how that primacy is to be provided for. How it is provided for is cogently summarised at [30] of *King Salmon*. The crucial point is that the Supreme Court has determined that it is the planning documents which give effect to s 5 and Part 2 more generally unless one of the three caveats apply or there is a conflict. Following *King Salmon*, the primacy of Part 2 is maintained and applied through the planning documents; both as to substantive content and the locality to which those documents apply.

11.17 It follows that the phrase 'subject to Part 2' in s 171(1) (or in s 104 for that matter) does not imply the re-litigation of previously settled planning provisions where no caveats or conflict arise. This is why at [151] the Supreme Court determined that s 5 is not intended to be an operative provision in the sense that it is not a section under which particular planning decisions are made. It is the hierarchy (cascade) of planning documents which flesh out the principles in s 5 and the remainder of Part 2, and it is those documents which form the basis of decision-making; in this case being the framework in which effects are to be considered.

[109] It is only proper that I record that, when in the course of his oral reply I explored with Mr Casey QC the issue of the scope of NZTA's argument before the Board on the implications of *King Salmon*, Mr Casey acknowledged that the submission relating to caveats and conflicts had not been developed before the Board to the extent that it had on appeal. In particular para 16.16(a)[61] did not indicate how primacy was to be given whereas NZTA's current stance is that such primacy is via the plan in the absence of any conflict.

[110] While the provisions in Part 2 are not operative provisions (in the sense of being sections under which particular planning decisions are made),[62] they nevertheless comprise a guide for the performance of the specific legislative functions. As *King Salmon* said with reference to s 5:

> (a) [it] states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation;[63]
>
> (b) [it] is a carefully formulated statement of principle intended to guide those who make decisions under the RMA.[64]

The other three sections supplement the core purpose in s 5 by stating the particular obligations of those administering the RMA in relation to the various matters identified.[65]

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61 At [101] above.
62 *King Salmon*, above n 26, at [151]; see also [129].
63 At [24(a)].
64 At [25].
65 At [26].

[111] Consistent with that view, in *John Woolley Trust* Randerson J observed:[66]

> [47] … Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at para [94] of the decision in *Auckland City Council v Auckland Regional Council*, that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. **Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the RMA**.
>
> (emphasis added)

[112] The role of Part 2 is reinforced and reiterated in certain sections (specifically s 104(1), 168A(3), 171(1) and 191(1)) by the presence of the phrase "subject to Part 2". As the Privy Council stated in *McGuire*:[67]

> [22] … Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.

The meaning of the "subject to" drafting method had been previously explained by Cooke P in *Mangonui County Council*.[68]

[113] However the provisions with which *King Salmon* was concerned did not contain that phrase. Furthermore the role of Part 2 in s 66(1) had to be viewed in the light of the direction in s 67(3) which the Supreme Court described as follows:

> [85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) Part 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to Part 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" Part 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

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66 *Auckland City Council v John Woolley Trust*, above n 53, at [47]; the highlighted words were referred to in *Ayrburn Farms Estate Ltd v Queenstown Lakes District Council*, above n 6, at [99] and in *Man O'War Station Ltd v Auckland Regional Council* (2011) 16 ELRNZ 475, [2011] NZRMA 235 (HC) at [20].

67 *McGuire*, above n 19.

68 At [38] above.

[114] In a sense *King Salmon* might be viewed as a case where, to adopt the phrase of Randerson J in *John Woolley Trust*, Part 2 was limited in application by other specific provisions of the RMA although I consider that it would be more accurate to say that its application was provided for in a particular way.

[115] The Board's error in *King Salmon* lay in considering that it was entitled, by reference to the principles in Part 2, to carry out a balancing exercise of all relevant interests in order to reach a decision whereas it was obliged to deal with the plan change application in terms of the NZCPS and failed to do so.[69] The Supreme Court summarised the Board's approach in this way:

> [83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations …

[116] I consider that the Decision in the present case demonstrates that the Board correctly analysed and well understood the ratio of the *King Salmon* decision.[70]

[117] However the Board's task in the present matter was different, as reflected in Mr Palmer QC's submission:

> 8.10 Rather, the Board is required by s 171, "subject to Part 2, to consider the effects on the environment of allowing the requirement", "having particular regard" to various factors including the adequacy of alternatives and the relevant provisions of the planning documents. So consideration of the effects, subject to Part 2, having particular regard to the stated matters is (as the Board said, at [170]) the "focal point of the assessment". Planning documents do not determine the outcome of a s 171 decision, unlike the NZCPS which can determine a plan change decision under s 67.

[118] It is apparent that the Board understood not only the different nature of its task in considering an application under s 171[71] but also the implications of the "subject to Part 2" component:

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69 *King Salmon*, above n 26, at [153]–[154].

70 [179]–[180] of the Final Decision at [105] above.

> [183] Further and perhaps more importantly, as we have already noted, Section 171(1) and the considerations it prescribes are expressed as being *subject to Part 2*. We accordingly have a *specific statutory direction* to appropriately consider and apply that part of the Act in making our determination. The closest corresponding requirement with respect to statutory planning documents is that those must be prepared and changed *in accordance with … the provisions of Part 2*.
>
> [184] For the above reasons, the statutory framework and expectation of Section 171(1) relevant to our current decision can be contrasted with the situation in *King Salmon*. The plan change being considered in that case was required to *give effect to* a higher order planning document which the Supreme Court considered should already *give substance to pt 2's provisions in relation to … [the] coastal environment*. By contrast, here we are required to consider the environmental effects of the NoR, *subject to Part 2* and having *particular regard to* the relevant statutory planning documents.

Consideration of alternative options – an overview

[119] The Decision recorded that NZTA acknowledged that both prerequisites in s 171(1)(b) applied with respect to the Project. In any event the Board concluded that the Project would have significant adverse effects, including heritage, amenity and landscape matters.[72]

[120] Consequently the Board was required in considering the effects on the environment under s 171(1) to have particular regard to whether adequate consideration had been given by NZTA to alternative sites, routes or methods of undertaking the work.

[121] As the Board noted in its introduction to the s 171(1)(b) issue,[73] a feature of the hearing process was the strong assertions by some of the parties that there had not been adequate consideration of alternative options. The Board recorded that an enormous amount of information had been put before it about the methodology of the option selection process and how that process took into account the significant effects of the Project.

[122] Opponents of the application presented alternative options to the Board in order to establish that such options were not suppositious and should have been

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71 [181]–[182] at [70] above.
72 At [1084(c)].
73 At [1082]–[1083].

explored as part of the option evaluation process. The Board's conclusion that there had been a failure to adequately assess non-suppositious options is the focus of Issue 1B.

Chronology

[123] In what the Board described as a "somewhat complex chronology"[74] the Decision provides a thorough review of the historical background and the chronology of the option process spanning [1097] to [1164] under the following headings:

(a) March 2001: Scheme assessment report by Meritec;

(b) 2006 to 2008: Ngauranga to Wellington Airport strategic study and the Corridor Plan;

(c) 2008 to 2009: Basin Reserve Inquiry-By-Design workshop;

(d) January 2011: Feasible Options Report;

(e) July and August 2011: Public engagement and refinement of the preferred option;

(f) Tunnel options;

(g) BRREO option.

[124] At the Inquiry-By-Design workshop five options were selected for further consideration comprising one at-grade option (with a variation) and four grade-separated bridge options. In order that the discussion below of the several Issue 1 questions may be comprehensible to those who may not read the Decision, I set out certain key passages from the Board's chronology:

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74 At [1165].

[1118] Between 2009 and 2010, the five options were subjected to further detailed analysis, which resulted in one of the at-grade variants being discarded. During this process, one more option was uncovered and added. During 2010, as a result of the government signalling a possibility of contributing financially to a tunnel under the proposed NWM Park, a tunnel option (Option F) was added, making six options in all.

…

[1122] The Feasible Options Report on page 67 sets out the conclusions and recommendations:

> Our team recommended options A and B as preferred options if more weight is given to urban design, social impacts, and long term strategic fit. Of those two options, option A is the better of the two when giving more weight to these criteria. Option A requires the relocation of the [former Home of Compassion] Crèche. We acknowledge that while relocating heritage buildings is not favoured, this may be mitigated to some extent by being able to relocate the Crèche building to provide improved connections to Buckle Street or to relocated the Crèche to a larger historic precinct closer to the War Memorial.

[1123] Following development of the options and before the evaluation of the options, the tunnel option (Option F) was removed and the explanation given was:

> Following development of the options the specialists received a data-pack containing a description of Options A to E together with sufficient information to enable them to undertake peer assessment. It is important to note that the specialists are only comparing the options which permit SH1 to be at-grade in front of the War Memorial: Options A to E. **Once the government makes a decision on whether to fund the War Memorial Tunnel, Option F will be assessed with other options which permit SH1 to be located in a tunnel in front of the War Memorial.**
>
> [*our emphasis*]

…

[1125] This suite of five options was assessed against evaluation criteria as reported in Section 5.3 of Technical Report 19. Using a pair-wise comparison and a weighting process, the workshop participants recommended Option A and Option B – both grade-separated bridge options. Option A eventually evolved into the Project.

…

[1138] In mid-2012, the government was exploring whether it would construct the NWM Park in time for the 100th Gallipoli Remembrance in 2015, including the idea of locating Buckle Street under the park. [NZTA] asked the Project team to reappraise the cost of Option F. This review was carried out with respect to both Options F and X. By letter dated

3 July 2012, Opus set out what it termed an *alternate review*. The letter concluded:

> **Conclusions**
>
> 1. NZTA has previously determined that Option F was unaffordable. A decision by the government to underground Buckle Street will not change this decision.
>
> 2. Option X is likely to be more expensive than Option A while having no more (possibly less) transportation benefits. It is unlikely that Option X would prove to be preferable to Option A.
>
> 3. A decision by the government to underground Buckle Street will not change the outcomes of the option evaluation process used to compare alternatives at the Basin Reserve.
>
> 4. Option A remains the preferred option even if the government decides to underground Buckle Street.

[1139] On 7 August 2012, the government announced that the NWM Park would be completed by April 2015 and that empowering legislation would be enacted and that it would be contributing $50m towards the costs of undergrounding Buckle Street.

…

[1132] On 17 August 2012, [NZTA] confirmed and announced Option A as the preferred option. They also confirmed that a pedestrian and cycling facility would be added to the Basin Bridge to provide a link between Mt Victoria Tunnel and Buckle Street.

…

[1151] In January 2013, Richard Reid and Associates supplied to the City Council conceptual drawings for improving the lane configuration around the Basin Reserve roundabout. Before us, Mr Reid produced an enhanced proposal he called the Basin Reserve Roundabout Enhancement Option (**the BRREO Option**). …

[1152] Essentially, but somewhat simplistically, the BRREO Option proposes an upgrading of the existing roundabout by widening Paterson Street westbound up to the Dufferin Street stop line and widening Dufferin Street to between Paterson Street and Rugby Street, in each case to three lanes. This would provide three continuous lanes westbound around the roundabout from the exit from the Mt Victoria Tunnel to Buckle Street. It also proposes to add a third lane on Paterson Street for westbound traffic in the event of the duplication of the Mt Victoria Tunnel.

The Board's general approach

[125] In a section of the Decision spanning [1085] to [1096] the Board directed itself on the proper approach to and the application of s 171(1)(b). After a discussion of aspects of *Queenstown Airport*[75] (which is the focus of the questions in Issues 1A and 1B) and after considering the meaning of adequate consideration, the Board described its task as follows:

> [1090] Subsection 1(b) requires a judgement on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.

[126] The Board's findings on the consideration of alternatives stated:

> [1215] Clearly, the purpose of the statutory direction in Section 171(1)(b) of the RMA is to ensure that the decision to proceed with the preferred option is soundly based and other options (particularly those with reduced adverse environmental effects) have been dismissed for good reason. Adequate consideration becomes even more relevant when the Project, as here, involves significant adverse environmental effects.
>
> [1216] We find the consideration of alternatives has, in the circumstances of this case, been inadequate for the reasons set out above, which include:
>
> [a] A lack of transparency and replicability of the option evaluation; and
>
> [b] A failure to adequately assess non-suppositious options, particularly those with potentially reduced environmental effects.

[127] In Issues 1A to 1G addressed below NZTA challenges various aspects of the Board's approach in coming to the conclusion that NZTA had not given adequate consideration to alternatives to the proposed flyover. The questions of law which NZTA invites the Court to consider include several in the *Edwards v Bairstow* category.

[128] The respondents contend that most of NZTA's points of contention are dressed up in the legal language of "tests" and "thresholds" but are, in effect,

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[75] *Queenstown Airport*, above n 22.

challenges to the Board's view of the facts and hence beyond the proper ambit of this appeal.

Subissue 1A: Relating the measure of adequacy to the adversity of effects

[129] The general requirement in the original s 171[76] to have particular regard to whether adequate consideration had been given to alternative sites, routes or methods of achieving the work was confined in 2003 to two scenarios,[77] namely if:

(a) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(b) it is likely that the work will have a significant adverse effect on the environment.

[130] The former scenario was the subject of consideration in *Queenstown Airport.*[78] Queenstown Airport Corporation wished to provide for the expansion of Queenstown Airport and to achieve that objective it issued a notice of requirement seeking in effect to acquire approximately 19 hectares of land owned by Remarkables Park Ltd. The Environment Court rejected that part of the NoR seeking to provide for a precision instrument approach runway and a parallel taxiway and as a consequence the area of land subject to the NoR was reduced to 8.07 hectares.

[131] In the course of considering s 171(1)(b) on appeal Whata J said:

> [121] The section presupposes that where private land will be affected by a designation, adequate consideration of alternative sites not involving private land must be undertaken by the requiring authority. Furthermore, the measure of adequacy will depend on the extent of the land affected by the designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.

[132] In its closing statement to the Board NZTA contended that *Queenstown Airport* was relevant for three purposes, the first of which was:

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76 At [32] above.
77 At [95] above.
78 *Queenstown Airport*, above n 22.

> … it establishes that the concept of adequacy in section 171(1)(b) is a sliding scale, with the measure of adequacy depending on the extent of private land affected by the designation. The extent of land required for the Basin Bridge Project is shown on the preliminary land requirement plans and schedule (sheets 2A.01–03). These show that, of the 46 titles affected by the NOR footprint, only 8 are privately owned. Expressed in land area, 0.3 ha of the 2 ha to which the NOR relates is privately owned. Applying the reasoning in the *Queenstown Airport Corporation Limited* decision, this would suggest that a less careful assessment of alternative sites is required. However, [NZTA] has not sought to undertake a less careful assessment of alternatives. Instead, it considers that the assessment it has undertaken is thorough and robust.

[133] After setting out para [121] of *Queenstown Airport*, the Board said:

> [1087] In this case, the extent of private land subject to the proposed designation is not significant. However, as we have said, [NZTA] acknowledged (and our assessment confirms) that the work would be likely to have a significant adverse effect on the environment. While Justice Whata's comments applied to the impact on private land, the same logic must apply to the extent of the Project's adverse effects. The measure of adequacy of the consideration of alternatives will depend on the impact on the environment of adverse effects.
>
> [1088] Accordingly, we must be satisfied that the assessment of alternative sites was adequate, in light of our findings as to the Project's effects on the environment. The more significant the adverse effects (as we have found them to be), the more careful the assessment of alternatives that is required.

[134] On appeal NZTA seeks to resile from its stance before the Board, proposing to argue that the Board erred in law by adopting the logic of *Queenstown Airport* and extending it to s 171(1)(b)(ii). It seeks to argue first that different considerations apply according to whether the designation will impose restrictions on private land and secondly that there is no "sliding scale" according to the degree of adverse effect. NZTA accordingly invites the Court to consider the following question of law:

> Does s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

[135] NZTA's change in stance was resisted by Mr Palmer who cited an impressive list of authorities deprecating reversals of position in lower courts.[79] While mindful

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[79] *Ihaka Te Rou v Love* (1891) 10 NZLR 529 (CA); *Grobbelaar v News Group Newspaper* [2002] 1 WLR 3024 (HL); *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501 (HC); *Wymondley against the Motorway Action Group Inc v Transit New Zealand* [2004] NZRMA 162

of the reasons that have been advanced over time, I consider in the circumstances of this case where the issue involved is a question of law that it is in the broader interest to consider the argument which NZTA wishes to advance. In doing so I am particularly influenced by the approach of the Privy Council in *Foodstuffs (Auckland) Ltd v Commerce Commission*:[80]

> Their Lordships gave leave to do so on the basis of this lack of material prejudice and also because they considered it important, albeit the issue is now essentially spent, to determine the case on the correct legal footing. Not only does that accord with justice between the parties, but it also seemed appropriate from the point of view of ascertaining the true intention of Parliament when the amending legislation was enacted.

Q 4(a): Does s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

[136] NZTA's argument was structured as follows:

(a) the two scenarios in s 171(1)(b)(i) and (ii) are thresholds for any consideration of alternatives and do not give rise to a need for "closer" scrutiny;

(b) the RMA does not mandate any "hard-look" or "anxious scrutiny" concept such as have been considered in the context of judicial review and applied where fundamental human rights are at stake;

(c) Whata J erred in introducing the concept of a different measure of adequacy according to the level of impact of the designation on private land;

(d) the Board was equally, if not more, wrong to extend that logic to the degree of adverse effects;

(e) if *Queenstown Airport* was correct in importing a sliding scale of adequacy, then such should only apply to the first limb of s 171(1)(b).

(HC); *New Zealand Meat Board v Paramount Export Ltd (in liq)* [2005] 2 NZLR 447 (PC); *Patcroft Properties Ltd v Ingram* [2010] NZCA 275, [2010] 3 NZLR 681.

80 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2004] 1 NZLR 145 (PC) at [9].

[137] The section requires that where either scenario exists not only must there be consideration of alternative sites but that such consideration should be "adequate". It appeared to be common ground that the meaning of "adequate" was as stated by the Environment Court in *Te Runanga O Ati Awa Ki Whakarongotai Inc v Kapiti District Council*:[81]

> … The word 'adequate' is a perfectly simple word and we have no doubt has been deliberately used in this context. It does not mean 'meticulous'. It does not mean '*exhaustive*'. It means 'sufficient' or 'satisfactory'.

No challenge was made to the Board's analysis of the meaning of adequate at [1089].

[138] It was the respondents' contention that the adequacy (or sufficiency) of consideration in any given case must be circumstances dependent and that that must be so for both scenarios, given that the phrase "adequate consideration" appears in the chapeau to subparagraphs (i) and (ii).

[139] Mr Palmer drew attention to the decision of the Supreme Court in *King Salmon*,[82] in particular to the highlighted part of the following passage:

> [170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that (sic) a particular activity needs to occur in part of the coast environment. If that activity would adversely affect the preservation of natural character in the coast environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, **particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site**. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

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81 *Te Runanga O Ati Awa Ki Whakarongotai Inc v Kapiti District Council* (2002) 8 ELRNZ 265 (EnvC) at [153].

82 *King Salmon*, above n 26.

[140] In my view the analysis in *Queenstown Airport* is correct. I consider that it must logically apply to both the scenarios described in s 171(1)(b). It is simply common sense that what will amount to sufficient consideration of alternative sites will be influenced to some degree by the extent of the consequences of the scenarios in s 171(1)(b)(i) and (ii). That said, I doubt the utility of the expression "sliding scale" as a description of the extent of the consequences because it conveys an unduly mechanical approach to the extent of consideration required.

[141] Accordingly I consider that the Board's approach at [1087] to [1088] is not vulnerable to criticism.

[142] So far as Q 4 is concerned, the word "require" is problematic. A more careful consideration of alternatives may or may not be required: it will be very much circumstances dependent. I would answer in the affirmative either of the following rephrased questions of law:[83]

(a) *May* s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

(b) Does s 171(1)(b) of the Act *permit* a more careful consideration of alternatives when there are more significant adverse effects of allowing the requirement?

[143] In the context of Subissue 1A NZTA poses a second and alternative question of law:

> Q 4(b) In the alternative, was the finding that [NZTA] had not given sufficient careful consideration to alternatives a finding to what the Board could reasonably have come on the evidence?

[144] Mr Casey addressed this question in conjunction with the similarly expressed Q 22 in Subissue 1G. I adopt the same approach.

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[83] Although I have retained the word "careful", because that word is employed in *Queenstown Airport* and hence in the question posed, I suggest that it may be preferable to avoid the notion of degrees of "care". My preference would be a phrase such as "greater scrutiny".

Subissue 1B: The requirement to consider all non-suppositious options with potentially less adverse effects

[145] Following paragraph [121] addressed in Subissue 1A above, Whata J further said:

> [122] It is beyond doubt that the extent of private land subject to the proposed designation is significant. As notified 19 ha would be affected. The modified version still encompasses 8 ha. The Court had to be satisfied that the assessment of alternative sites was adequate having regard to this impact. There is authority however that a suppositious or hypothetical alternative need not be considered. But given the statutory requirement to have particular regard to the adequacy of the consideration given to alternatives, it is not sufficient to rely on the absence of a merits assessment of an alternative or on the assertion of the requiring authority. Provided there is some evidence that the alternative is not merely suppositious or hypothetical, then the Court must have particular regard to whether it was adequately considered.

[146] The third respect in which NZTA contended before the Board that *Queenstown Airport* was relevant concerned this issue:

> 11.2(c) Third, should the Board find that any alternative suggested by a submitter (such as BRREO) is not hypothetical or suppositious, then the Board must have particular regard to whether it was adequately considered.

[147] Specifically in the context of the assessment of alternatives NZTA recorded that the parties were in agreement that:

> Speculative, suppositious or hypothetical alternatives need not be considered. However, provided there is some evidence that an alternative is not merely suppositious or hypothetical, then the Board must have particular regard to whether it was adequately considered.

NZTA's case was that all relevant alternatives had been adequately considered.

[148] Under the heading "Non-Suppositious Options, with Potentially Reduced Environmental Effects" the Board said:

> [1182] Because of the Project's significant adverse environmental effects (as we have found them to be) it was necessary for [NZTA] to give adequate consideration to alternatives, particularly those options with reduced environmental effects. As we have said, the measure of that adequacy would depend on how significant the adverse effects would be. In this case, we have found that there would be significant adverse effects.

> [1183] A number of options were referred to in the evidence. The option evaluation team considered some of them at various stages of the process. The Architectural Centre and Richard Reid and Associates, on behalf of the Mt Victoria Residents Association, put options before us. This was not for the purpose of persuading us that their options were better, but to establish that these options were not suppositious, would potentially have reduced environmental effects than the Project before us, and should have been explored as part of the option evaluation process.
>
> [1184] The evaluation teams considered both tunnel and at-grade options. The tunnel options were synthesised down to a tunnel option known as Option F. The Architectural Centre's Option X, proffered during 2011, was another variant of a tunnel option.
>
> …
>
> [1186] The BRREO Option consisted of improving the lane configuration around the Basin Reserve. When introducing his concept, Mr Reid told us:
>
> > 19. The existing network has sustained NZTA's many attempts to engineer a motorway 'solution' over the past 50 years. These 'solutions' have almost always diverted highway traffic northwards from its current route around the Basin Reserve roundabout and involve a flyover or tunnel structure which invariably destroys the amenity of the Basin Reserve and the urban structure of the city.
> >
> > 20. I believe the existing network will continue to have sufficient flexibility, tolerance and resilience to serve the city well into the future. The objectives to the project can be met without the need for the Basin Bridge proposal.
>
> [1187] We heard a considerable amount of evidence on these options. The evidence reached the threshold of requiring our careful consideration. We propose to consider first the tunnel options and secondly the at-grade options.

[149] In concluding its discussion of certain options the Board then said:

> [1213] As we have said, it is not for us to determine which is the best option. The statutory requirement directs us to have particular regard to the adequacy of consideration of alternatives. Mr Justice Whata said in the *Queenstown* case that, where there is evidence that the alternative is not merely suppositious or hypothetical, then the Court (or in this case this Board) must have particular regard to whether it was adequately considered.

The Board concluded that NZTA's consideration of alternatives had been inadequate for reasons which included a failure to adequately assess non-suppositious options, particularly those with potentially reduced environment effects.[84]

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[84] At [126] above.

[150] NZTA acknowledged that before the Board it had accepted the proposition which is reflected in [1213]. However it submitted that on reflection the proposition at [122] of *Queenstown Airport* goes too far or should be limited to the first limb of s 171(1)(b). NZTA again sought on appeal to reverse its stance before the Board and it proposed for consideration the following question of law:

> Q 7(a) Does s 171(1)(b) require the requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environmental effects?

[151] On this issue also I am prepared to consider the question of law, thereby permitting NZTA to reverse its stance below, for the same reasons as stated in the context of Subissue 1A at [135] above.

Q 7(a): Does s 171(1)(b) require the requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environmental effects?

[152] As is apparent from ground of appeal 8(b), NZTA's contention is that the Board had required NZTA to demonstrate that it had considered every non-suppositious option with potentially less adverse effects. NZTA's argument was that in so doing the Board had elevated the standard of consideration beyond "adequacy".

[153] Referring to what it described as the classic approach, namely that a requiring authority is not required to eliminate speculative alternatives or suppositious outcomes, NZTA submitted:

> 16.7 In *Queenstown Airport* and the Majority's decision, this test has been inverted to require *every* non-suppositious option to have been considered. Indeed, the Majority's decision takes the test a step further and requires other options with potentially less adverse effects to have been dismissed only for good reason.
>
> 16.8 This takes the test of adequacy too far. In any significant project there are likely to be any number of options and variations of options that could be considered. It is unreasonable to expect a requiring authority to give detailed consideration to every permutation of the non-suppositious. That is, there may be any number of permutations of the (for example) at-grade option; [NZTA] does not have to show that it specifically addressed each and every one.

[154] I do not accept that the Board approached its task in the manner suggested by NZTA. On the contrary (as NZTA acknowledged) the Board said:

> [1090] Subsection 1(b) requires a judgement on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.

[155] Mr Palmer neatly captured the point here when he submitted:

> NZTA appears to wish to elide the point that witnesses identified non-suppositious options with reduced environmental effects with the point that NZTA's consideration of alternatives was not adequate, to create a straw man that the Board required NZTA to examine every possible alternative. It certainly did not.

[156] The answer to Q 7(a) is, therefore, in the negative.

[157] While not accepting that s 171(1)(b) creates a duty to consider all non-suppositious options, in section 17 of its primary submissions NZTA mounted a reasonably extensive argument that it had in fact considered the options identified by the Board as non-suppositious and that its consideration had been adequate.

[158] The respondents attacked this argument as being blatantly a disagreement with the Board's assessment of the facts and not a question of law as required by s 149V(1).

[159] As noted in the discussion of "a question of law"[85] the Board's conclusions on fact can only be challenged on an *Edwards v Bairstow* basis. NZTA recognises that reality by the formulation of the questions comprising Q 7(b)(i), (ii) and (iii). I proceed to address them, albeit reframed to align precisely with Lord Radcliffe's third description for the reasons explained at [16] to [23] above.

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[85] At [12]–[15] above.

Q 7(b)(i): Is the case one in which the true and only reasonable conclusion contradicts the determination that BRREO was a non-suppositious option?

[160] With reference to at-grade options (including BRREO) NZTA first submitted that the Board's finding, that such options had not been adequately considered, "was not a finding that it could reasonably have come to on the evidence". That, of course, was not the nature of the *Edwards v Bairstow* question framed in relation to BRREO.

[161] The argument was then developed in this way:

(a) the Majority failed to evaluate the evidence of the independent peer reviewers and to determine whether an at-grade solution, such as BRREO, could meet the Project objectives;

(b) in the absence of a finding from the Majority to the contrary, the Minority's finding that an at-grade option could not meet the Project objectives must stand;

(c) an option that does not meet the Project objectives should be considered to be a suppositious option.

[162] However the issue which I am required to determine is not whether BRREO was or was not a suppositious option but whether the true and only reasonable conclusion contradicts the Board's conclusion. In addressing the reframed question I remind myself of the Supreme Court's direction in *Bryson* that appellate judges must keep firmly in mind that on a challenge of this nature an appellant faces a very high hurdle.[86]

[163] The nature of the Board's consideration of and conclusion on the BRREO option is apparent from the following paragraphs:[87]

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[86] At [14] above.

[87] The issue is also touched on at [1210] and [1214].

> [1162] We do not propose to resolve the apparent conflicts in the evidence relating to BRREO. It is not for us to determine the best option. The question is whether this less-harmful option is hypothetical or suppositious. We bear in mind that BRREO is still at an indicative stage and could be subject to more detailed analysis, such as to geometry and intersection control phasing, by an option evaluation process.
>
> [1163] At its worst, Mr Dunlop acknowledged that general traffic and freight would receive some benefit from the BRREO Option, now and following duplication of the Mt Victoria Tunnel, but he quantifies that the transport benefits (over 40 years) would be approximately 40% less than the benefits the Project can achieve. However, following a detailed assessment, he noted that both the Project and BRREO displayed significant journey time savings over the do-minimum scenario, which includes improvements to the Vivian Street/Pirie Street and Taranaki Street/Buckle Street intersections.
>
> [1164] We are satisfied the BRREO Option, particularly having regard to the adverse effects we have identified with regard to the Project, is not so suppositional that it is not worthy of consideration as an option to be evaluated.

[164] Given the preliminary nature of the Board's appraisal and the material to which it referred I do not consider that it could fairly be said that the Board's finding on the BRREO option was insupportable. The answer to Q 7(b)(i) is No.

Q 7(b)(ii): Is the case one in which the true and only reasonable conclusion contradicts the determination that Option X was an option with potentially less adverse effects?

[165] NZTA's submissions on Option X echoed its BRREO submission in combining different points of complaint:

(a) in the absence of an explicit finding by the Majority, the Minority's finding that Option X had been adequately considered must stand;

(b) a finding that Option X had not been adequately considered was not a finding that could reasonably be reached on the evidence;

(c) there was no evidence to support a finding that Option X was an option with potentially less adverse effects.

Only the third of those points of criticism engages with Q 7(b)(ii).

[166] The genesis of Option X was described at [1135]:[88]

> [1135] During the period from 2007–2009, the Architectural Centre developed a concept that later became known as Option X. It provided for westbound State Highway 1 traffic to travel at grade in front of the Basin Reserve northern entrance. All vehicles travelling between Adelaide Road and Kent and Cambridge Terraces would be diverted around the western sides of the Basin Reserve along Sussex Street. Local traffic would pass over a War Memorial Tunnel providing grade separation. The removal of circulatory traffic on the eastern side of the Basin Reserve would enable the Dufferin/Rugby Street corner to be developed into a park area.

[167] In the course of its conclusions the Board at [1319][89] stated that it was satisfied on the evidence that similar transportation benefits as those from the Project could be achieved by a tunnel option or variant similar to Option X and that such should have been included in a robust option evaluation process.

[168] Mr Palmer contended that the Board did not make a finding that Option X was an option with potentially less adverse effects. Neither the amended notice of appeal nor NZTA's submissions indicated where in the Decision such a finding was made.

[169] While I was unable to identify a specific finding to that effect, I inferred that the basis for the allegation was the second of the two overarching themes which the Board at [1171] described as being worthy of careful consideration, namely "the consideration given to non-suppositious options, with potentially reduced environmental effects".[90] As Option X was discussed in the section which followed, then it could fairly be assumed that it met that description.

[170] It was Mr Milne's submission by reference to several items in the transcript that there was evidence from which it could have been found that Option X or a variant of it, if it had been properly considered within the context of the National War Memorial Tunnel, might have less adverse effects. He also made the point that NZTA had found Option X to have sufficient merit to warrant preliminary and later more detailed consideration, as had WCC. He submitted that that of itself was

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88 It is then discussed at several points in the Board's analysis: [1136]–[1138], [1143]–[1146], [1191], [1195]–[1196], [1199]–[1200].

89 At [234] below.

90 At [178] below. Essentially the same statement was made at [1183].

indicative that both entities accepted that an Option X variant could potentially have lesser environmental effects.

[171] On the basis of that material I consider that there was evidence which warranted the Board including Option X within the category of options which had "potentially" reduced environmental effects. NZTA has not demonstrated that a different view was the true and only reasonable conclusion.

Q 7(b)(iii): Is the case one in which the true and only reasonable conclusion contradicts the determination that a long tunnel option was a non-suppositious option?

[172] Ground of appeal 8(a)(iii) asserted that the evidence showed that NZTA considered the long tunnel option to be unaffordable, that the Board acknowledged at [1206] that affordability is properly a matter for the requiring authority and that consequently the Board could not reasonably conclude that the long tunnel option was non-suppositious.

[173] While cost can be exclusionary, it was apparent the Board had reservations about the consistency in the assessment of cost among the options and the omission to undertake a reassessment subsequent to the government's decision to underground Buckle Street. Under the heading "Affordability" the Board observed with reference to Option F:[91]

> [1204] As we have said, notwithstanding that Option F provided better overall outcomes than Option A in respect of the simplified evaluation criteria, Option F was dismissed on the basis of being unaffordable. Mr Durdin pointed out in the Abey Peer Review Report that the additional weighting given to economic efficiency, when comparing Option A to Option F, was inconsistent with the approach used to identify Options A and B as being preferred to Options C and D, in the evaluation of the initial options. In that instance, the assessment concluded that a difference in Benefit-Cost Ratio of approximately 0.5 was insignificant for a project of this scale, yet the difference in BCR between Option A and Option F is of a similar magnitude given the additional costs of Option F and the similar level of benefits generated by each option. He concluded:

[91] At [1184] the Board noted that the tunnel options were synthesised down to a tunnel option known as Option F.

> The apparent inconsistency and lack of transparency in the underlying process by which options have been compared in different stages of the project is a significant concern of the reviewers.

[1205] In his concise summary of evidence, Mr Durdin again said:

> My concern is that Technical Report 19 provides its recommendation on preferring Option A over Option F on the basis of affordability. The lack of transparency around this process has led me to question the extent to which this can be considered a substantive assessment of alternatives.

[1206] We agree with Mr Cameron that the question of affordability is a matter for [NZTA]. As pointed out by Mr Cameron, the cost of an option could make the option unrealistic. However, affordability is a relative term. In the context of this case, where we have found that there would be significant adverse effects, there is a greater need to test the cost against the adverse effects in a transparent and comparative evaluation against other options. This should have been done at the Feasible Options Report stage. It was not.

[1207] Option F was removed from that process on the grounds of affordability. At the time it was removed there was a clear statement of intent in the Feasible Options Report to assess Option F once the Government made a decision whether to fund the NWM Park and Buckle Street Underpass. This was not done once that decision was made by the Government. Rather, an ex post facto comparison of Options A, F and X was appended as Appendix B to Technical Report 19. At this stage [NZTA] had indicated a preference for the Basin Bridge (Option A) and were preparing to lodge the application documents.

[174] Although a number of items of evidence were cited by the respondents in their opposition on this issue, in my view those observations of the Board suffice to repel the argument that a different determination on the non-suppositious nature of Option F was the true and only reasonable conclusion.

Subissue 1C: Interpreting adequacy as requiring transparency and replicability

Context

[175] To comprehend the nature of NZTA's complaint it will assist to refer in a little more detail to aspects of the chronology of events and the Board's discussion.

[176] With reference to the suite of five options referred to in [1125][92] the Board said:

> [1125] This suite of five options was assessed against evaluation criteria as reported in Section 5.3 of Technical Report 19. Using a pair-wise comparison and a weighting process, the workshop participants recommended Option A and Option B – both grade-separated bridge options. Option A eventually evolved into the Project.
>
> [1126] The option evaluation did not identify whether certain evaluation criteria were given more weight than others until the end of the process. This made following the process to arrive at the preferred option difficult to follow.
>
> [1127] Mr Milne's cross-examination of Dr Stewart focused on this apparent lack of transparency at some length. While it became apparent that weighting was applied at different stages of the process, just how those weightings were applied was not explained. A clear expression of the weighting factors would have made it much easier to follow and would have enabled a replication of the selection process.
>
> [1128] Abley Transportation Consultants, instructed by the Board to peer review aspects of the transportation issues including alternatives, attempted to replicate the selection process used to arrive at the preferred options. Several scoring systems were applied to the negative and positive effects ratings presented in Technical Report 19. By assuming equal weighting for each criteria, their analysis concluded that the at-grade Option D should receive the highest ranking. This highlights the sensitivity of the outcome to the relative weightings of the criteria.
>
> [1129] Of note also are the following comments from page 65 of the Feasible Options Report:
>
> 3. If we give more weight to the built heritage then we should select Options C, D or B but not A.
>
> 4. If we give more weight to social impacts and urban design then we should select Options A or B and not C or D.

[177] After discussing the March 2013 option evaluation recorded in Technical Report 19, the Board referred to the Traffic and Transportation Effects Peer Review of 25 November 2013 by Abley Transport Consultants which concluded with the observation:

> The apparent inconsistency and a lack of transparency in the underlying process by which options have been compared at different stages of the project is a significant concern of the reviewers.

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92 At [124] above.

[178] In turning to address the many criticisms levelled at the process and its underlying methodology, the Board reminded itself of the limitation on its function:

> [1167] At this stage, it is important to remind ourselves that Parliament has stopped short of giving this Board the jurisdiction to direct that any other alternative must be selected. It would thus become an exercise in futility if we were required to examine, in detail, and adjudicate upon, in detail, the merits of the various alternatives.
>
> [1168] While there were numerous criticisms made, we propose to identify those that we consider cogent to an overall appraisal of the process …
>
> [1171] From these criticisms, we distil two overarching themes that we consider worthy of our careful consideration:
>
> [a] The transparency and replicability of the option evaluation; and
>
> [b] The consideration given to non-suppositious options, with potentially reduced environmental effects.

The transparency and replicability of the option evaluation

[179] While [1172] is the primary focus of NZTA's complaint, NZTA's submissions analysed the Board's observations in several subsequent paragraphs. It is useful to record them:

> [1172] It was accepted that any evaluation process needed to be transparent. Dr Stewart acknowledged the need for this during his cross-examination by Mr Milne. Mr Durdin was also of the same view. This is necessary in order that what occurred during the option evaluation process can be fully understood, particularly if weightings are given to evaluation criteria. Mr Durdin also considered it is important that any process be replicable so that its robustness can be tested. Thus, transparency and replicability go hand in hand.
>
> [1173] It was clear from the questioning of Mr Stewart and other witnesses that each specialist applied weighting at various stages of the process. However, this was not explicit and was not documented. We have already expressed our concern about how the option evaluation, particularly as summarised in Technical Report 19, did not identify whether certain evaluation criteria were given more weight than others. This made it difficult to follow.
>
> [1174] The problem manifested itself by the fact that Mr Durdin was unable to replicate the selection process used to arrive at the preferred options in the Feasible Options Report. The November 2013 Peer Review (Report 1) included a test of the decision-making process using a non-weighted multi-criteria analysis approach. As Mr Durdin pointed out in his evidence-in-chief, the test was completed to check the robustness of identifying Option A as the preferred option. That process showed that

> Option A could have been selected, but equally Options B, C or D could have been selected using that approach.
>
> [1175] Dr Stewart has accepted, both in the Joint Witness Statement – Transportation, February 2014 and in cross-examination that:
>
> > Put simply, if a different process was used, a different recommendation may have resulted.
>
> [1176] All of the experts at that conference agreed.
>
> [1177] As Mr Durdin pointed out, this demonstrated the selection is highly reliant on the assessment technique used. He said:
>
> > Ideally, the preferred option would be identified independent of the assessment technique thereby providing greater confidence in the robustness of selecting one option over another. That is not the case in this instance, as Option A was selected using the pair-wise analysis method, Option D would be selected using the NZTA incremental BCR method and Option A, B, C or D could have been selected using multi-criteria analysis.
>
> [1178] This emphasises, or highlights, the need for transparency in explicitly setting out the weightings that are used, and the reason why they have been used, in any multi-criteria analysis. This would enable a decision-maker, in this case this Board, to adequately carry out its statutory functions under Section 171(1)(b). Parliament has directed decision makers to have particular regard to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work. We take that explicit direction seriously.

The issue

[180] NZTA contended that the Board erred in law in finding that, in order to be adequate under s 171(1)(b), the consideration of alternatives must also be "transparent and replicable". It framed the following question of law:

> Q 10 Does the inquiry into adequacy under s 171(1)(b) require that the consideration of alternatives be transparent and replicable; or is it sufficient that the consideration is apparent?

[181] NZTA contended that the paragraphs quoted above demonstrated that the Board descended into a level of enquiry that is neither permitted nor appropriate under s 171(1)(b). It argued that, by requiring "replicability", the Board sought to audit NZTA's consideration of alternatives and in doing so engaged with the outcome as opposed to the process, which is not its role. In its primary submissions NZTA said:

> 18.7 While the consideration of alternatives must be apparent in order for the adequacy of the consideration to be assessed, the Majority erred in law by requiring that the consideration be 'transparent and replicable'. The Majority heard detailed and lengthy evidence regarding the consideration of alternatives, such that the consideration given was readily apparent.
>
> 18.8 The Act does not require that the consideration given to alternatives be replicable, or mandate the Board to conduct an audit of the requiring authority's selection process. It clearly contemplates that the requiring authority will have exercised judgement in selecting the preferred option.
>
> …
>
> 18.11 … the correct approach under s 171(1)(b) … recognises that it is for the requiring authority to exercise judgement and make a policy decision as to which option to pursue. The decision-maker should not seek to ensure that the 'best' option has been selected by auditing the consideration of alternatives, in particular, by seeking to replicate the selection process.

[182] As with some of NZTA's other specified questions of law, I consider that the inclusion of the verb "require" misdirects the inquiry. Certainly the Board did not suggest that in all cases a conclusion on the adequacy of consideration of alternatives will necessitate demonstrating replicability. If the question is viewed as importing such a general requirement the answer would be No.

[183] The issue of replicability has arisen in this case because of the fact that weightings were applied to various evaluation criteria at various stages of the process.[93] The Board's complaint was that the selection process is in effect opaque in the absence of information about the different weightings applied. Given the Board's perception that NZTA's preference for Option A had become entrenched,[94] the Board was not satisfied that the consideration of other non-suppositious options had been adequate. It felt the need to state that it viewed its obligation "seriously".

[184] NZTA's complaint is that the Board took its role too seriously. Both the form of the question and its submissions emphasised that the inquiry is whether the requiring authority's consideration of alternatives is "apparent". Mr Milne's submissions for TAC construed that approach as being:

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93 At [176] above.
94 At [1200].

> trust us … measure adequacy by the volume of paper we produce not the quality of the process.

[185] I do not accept NZTA's submission[95] that the Board was seeking to ensure that the "best" option had been selected by auditing the consideration of alternatives. I consider that the Board had a clear understanding of the confined nature of its role: see [1090][96] and [1167].[97] While I can understand how NZTA might perceive the Board's concern about weightings as approximating to an audit, it is clear in my view that that was not the Board's objective. The Board's concern as expressed at [1181] was that, absent an understanding of the weightings applied, it was not possible to determine that adequate consideration had been given to relevant alternative options.

[186] In my view in some, but by no means in all, cases it may be necessary for the decision-maker to gain access to the weightings in a multi-criteria analysis in order to be satisfied that adequate consideration has been given to alternatives. The cases will inevitably be circumstances dependent. I do not consider that that is an unreasonable approach given the context of s 171(1)(b) where:

(a) as I have held with reference to Issue 1A above, the measure of adequacy of the consideration of alternatives will depend on the impact on the environment of adverse effects; and

(b) the subject of s 171(1)(b) is one of the matters to which particular regard is to be had.

[187] I am unable to discern an error of law in the Board's approach to this question. Indeed I perceive that this is another instance where NZTA is in effect inviting the Court, under the guise of a question of law, to second-guess the Board's conclusions. There is force in Mr Palmer's submission that NZTA's argument at para 18.9 of its primary submissions, that the Board placed "too much weight on the opinion evidence of Mr Durdin", serves to illustrate that NZTA's real complaint amounts to a disagreement about a matter of factual inference and assessment.

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95 At para 18.11 in [181] above.
96 At [125] above.
97 At [178] above.

Subissue 1D: Requiring the assessment methodology to incorporate Part 2 weightings

[188] NZTA's challenge on this issue is directed at the Board's concluding observations following those considered in Issue 1C above, in particular the emphasised words:

> [1180] A failure to explain the reasons for any weighting (if any) can create difficulty for us in exercising our statutory function by making it difficult for us to assess any such weightings against Part 2 and the objectives of the Project. **While we accept that each alternative does not need to be assessed against Part 2, nevertheless, Part 2 considerations should be reflected in any weight given to a particular evaluation criteria (sic) over another, as is clear from the North Island Grid Upgrade Project Board of Inquiry decision, quoted earlier.** Furthermore, as was pointed out in the Feasible Options Report, a key focus of the evaluation process was that the preferred option can be considered as that option that best meets the Project objectives with the least overall social, community and environmental impacts.
>
> [1181] The failure for either the evidence or the reports to explicitly explain what weightings were given at each of the option evaluation stages makes it difficult, if not impossible, to determine if adequate consideration was given to alternative options.
>
> (emphasis added)

[189] The amended notice of appeal at paragraph 12 contended that the Board erred in law by finding at [1180] that considerations under Part 2 of the Act should be reflected in the weight given to particular evaluation criteria, and consequently in finding at [1181] that the failure explicitly to explain the weightings given to criteria made it difficult, if not impossible, to determine if adequate consideration was given to alternative options.

[190] NZTA posed the following question of law:

> Q 13 Does s 171(1)(b) require the requiring authority's consideration of alternatives to incorporate Part 2 considerations; including (in particular) the weight given to particular evaluation criteria?

[191] NZTA criticised the highlighted passage on two counts. First it contended that the second sentence contained inconsistent findings. Secondly it said that the NIGUP decision was not authority for the proposition that Part 2 considerations must

be reflected in any weight given to a particular evaluation criterion over another during the consideration of alternatives.

[192] NZTA submitted that each alternative does not have to be tested against Part 2, citing *Volcanic Cones Society*[98] and *Queenstown Airport*.[99] The Board acknowledged that that is so. Indeed the Board had emphasised that point in the quotation from the NIGUP decision at [1094].

[193] NZTA developed the argument in this way:

> 19.3 The only purpose of requiring Part 2 to be reflected in weightings could be to ensure that the alternative met the requirements of Part 2 – in other words, to test the alternative against Part 2. Thus, by finding that Part 2 considerations should be reflected in any weight given to a particular evaluation criteria over another, the Majority effectively required alternatives to be tested against Part 2 (which the Majority was obliged to acknowledge is not the legal test). These findings are inconsistent.

[194] NZTA's argument was that, by recognising a requirement for evaluation criteria weightings to reflect Part 2 considerations, the Board was in effect requiring each individual alternative to be assessed against Part 2 despite the Board disclaiming such an intention.

[195] The issue is a subtle one. The Board's statement needs to be read in context, namely its consideration of the transparency and replicability of the option evaluation. The passage at [1180] follows the discussion at [1173] to [1177][100] of the significance for the outcome of the weighting of the evaluation criteria and the fact that it was not known whether certain evaluation criteria had been given more weight than others.

[196] That discussion had prompted the Board's observation at [1178] about the need for transparency in explicitly setting out the weightings used in any multi-criteria analysis. All of that had been preceded by the chronology which had

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98 *Volcanic Cones Society*, above n 20, at [61].
99 *Queenstown Airport*, above n 22, at [50].
100 At [179] above.

included the significant paragraphs [1128] and [1129][101] where the sensitivity of the outcome to the relative weightings of the criteria had been noted.

[197] I do not consider that the Board's intention was to subvert the established position, which it clearly recognised, that each alternative does not have to be tested against Part 2. My impression is that the Board was saying that, if a range of alternatives are to be the subject of evaluation by criteria which are to be variably weighted, then the selection of the different weightings should "reflect" Part 2 considerations.

[198] In view of the discussion of the role of Part 2 in both *McGuire* and *King Salmon* I do not view that suggestion as controversial. While each alternative does not need to be measured against Part 2, it is not unreasonable that a mechanism which provides the basis for the comparison of alternatives *inter se* should not be subject to the infusion of Part 2. Consequently I do not consider that the second ("nevertheless") part of the highlighted sentence of paragraph [1180] is erroneous in law.

[199] NZTA's second point was that the Board misapplied the NIGUP decision. The answer to this criticism is simpler. As Mr Palmer acknowledged, the sentence structure is a little puzzling. I agree that the NIGUP decision is not authority for the "nevertheless" proposition. However, as the Board had already recognised at [1094], it is clear authority for the first statement that each alternative does not need to be assessed against Part 2. In my view the Board was intending to say no more than that. Although located at the end of the sentence, its reference to the NIGUP decision was not intended as support for the observation about weightings reflecting Part 2 considerations.

[200] Reverting to Q 13, I do not consider that the question as framed is sufficiently precise to permit an answer reflecting my reasons above. An affirmative answer could be construed as departing from the established position that individual alternatives do not have to be separately tested against Part 2. I consider that a more accurate way of encapsulating my view of this aspect of the Board's decision is to

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[101] At [176] above.

say that, in circumstances where the requiring authority's consideration of alternatives involves the application of evaluation criteria which are variably weighted, the decision to allocate the variable weightings should be subject to Part 2.

Subissue 1E: Conflation of s 171(1)(b) and (c) considerations

[201] The question of law posed under this heading is:

> Q16 Does the test of adequacy under s 171(1)(b) require a requiring authority to select the option that best meets the transportation objectives while minimising environment effects?

[202] In relation to that question the amended notice of appeal at paragraph 15 states that the Board erred:

> (a) By inferring at [1180] that the assessment of alternatives must result in selecting the alternative ("the preferred option") that best meets the project objectives with the least overall social, community and environmental impacts.
>
> (b) By inferring at [961] that the project objectives ought to have included an environmental objective so that the Proposal could be tested against transportation effects and adverse environmental effects.

[203] Paragraph [961] appears in a discussion of the marked conflict of evidence between NZTA's expert witnesses and the witnesses called by the opposing parties. It states:

> [961] Both at the Feasible Options Report stage and at the hearing before us, there appeared to have been an overemphasis on transport and related benefits (which reflects the Project's objectives) rather than an assessment of the relevant amenity and environmental effects of the Project (which are absent from the objectives), assessed by reference to what is sought to be protected, maintained or enhanced in the statutory instruments.

[204] With reference to that paragraph NZTA submitted:

> 20.2 This comment is provided against the context of the Majority's assessment that the urban design and landscape evidence called by [NZTA] was influenced by the transportation objectives of the Project and the acceptance that grade separation by way of a bridge

> is the only way of achieving those objectives. However, it is submitted that this criticism has also permeated the Majority's assessment of the Appellant's consideration of alternatives.

[205] Then, after referring to [1180][102] and [1198], NZTA submitted that, while NZTA's aim throughout the process of considering alternatives was to select the option that best met the project objectives with the least environmental effects, NZTA did not accept that s 171(1)(b) required that test to be applied or met. NZTA argued that the Board's approach unnecessarily conflated ss 171(1)(b) and (c).

[206] I do not consider that the Board made any error of law as suggested. I agree with Mr Palmer that [961], read in the context of the relevant discussion, is simply designed to explain why there might have been a conflict of evidence between the witnesses on the opposing sides. I also accept his submission that the final sentence of [1180] on what NZTA relies is an attribution to NZTA's own Feasible Options Report. I am unable to discern a conflation error of the nature advanced.

[207] While in those circumstances I consider that Q 16 is inapt, the answer is in the negative.

Subissue 1F: Finding that adequate consideration was not given to alternatives following the Government's decision to underground Buckle Street

Context

[208] The short chronology in the overview of the consideration of alternative options referred to the letter from Opus to NZTA dated 3 July 2012.[103] The Decision continued in this way:

> [1196] The five-page document was essentially a brief summary or overview of Option F and Option X. It briefly referred to the decision being made that Option A was preferred over Option B. It touched on other options. It was not a careful evaluation of options in light of the decision by the government to underground Buckle Street. It could not be compared to the rigour of the Feasible Options Report stage. At most it could be called nothing but a cursory review of the situation.

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102 At [188] above.
103 In [1138] at [124] above.

[1197] Following its public announcement on 17 August 2012 that Option A was the preferred option, [NZTA] then proceeded to prepare its documentation for lodging its application with the EPA. The application was lodged on 17 June 2013.

[1198] Our concern is that the playing field changed with the likelihood of the Buckle Street Underpass and the bringing forward of Mt Victoria Tunnel duplication options. These should have resulted in re-evaluation of the options, including Option F, against the Project objectives. The Feasible Options Report, as we have said, itself specifically states the need to reconsider the ability of options to work in with a possible underpass. This was not done. There was no proper reconsideration of options once the underpass became a certainty.

[1199] Nothing further was done until the City Council decided on 19 December 2012 to order an assessment of Option RR (the precursor of the BRREO Option), Option X and Option A. An Option X transportation assessment was prepared by Opus for the City Council and was published on 20 February 2013. The overall assessment was completed on 28 March 2013. It concluded:

> **Overall Conclusions**
>
> From an urban design perspective, the preference would be for an at-grade solution – that is, a solution that does not require any elevated structures. However, it may not be possible to achieve the required transport benefits with an at-grade option.
>
> In that case, the preference is for the simplest structure – one does not make this part of the city harder for people to find their way around, or compromise access to neighbouring facilities.

[1200] It was not until late March that [NZTA] acted. In late March 2013, the Project team carried out an option evaluation of Options A, F and X. According to the introduction of the Comparison of Options, the evaluation was undertaken to confirm the decision previously made by [NZTA] that Option A was the preferred option. The document is dated June 2013, and by this time, the application documents for Option A would have been well advanced, as they would have been in late March when the evaluation commenced. Furthermore, it would appear from the letter dated 19 December from Mr Dangerfield, the CEO of [NZTA], to the CEO of the City Council that [NZTA] had become entrenched with Option A well before November 2012. It had, as we have said, made its decision, making Option A its preferred option on 17 August 2012.

[1201] We were not provided with any documentation or evidence as to why the Project team was asked to do its assessment in March 2013. Nor was any reason given for the failure to carry out a feasible option type assessment soon after the Government's decision to underground Buckle Street, as was foreshadowed in the Feasible Options Report.

> [1202] The chronology of events and the failure to carry out the clear statement of intent to reassess options in the event of the undergrounding of Buckle Street raises doubts as to the adequacy of consideration of alternatives. This is particularly so having regard to Mr Durdin's comments on the March 2013 comparison of options:
>
> > 37. The simplified decision matrix for the comparison between Options A and F consolidates down to four evaluation criteria, mainly Built Heritage, CPTED, Transportation and Visual. That process shows Option A as considered positive against two criteria (CPTED and Transportation) and negative against the other two. In comparison, Option F is considered positive against all four criteria.
> >
> > 38. Given that the decision-making process is premised around selecting the option "… with the least social, community and environmental impacts" it would follow that Option F should have been selected.

Issues

[209] NZTA asserted that in those paragraphs the Board made three errors of law:

(a) By finding at [1196] that the review of alternatives carried out in July 2012 was "cursory".

(b) By inferring at [1200] that NZTA's consideration of alternatives in March 2013 was too late because the application documentation would have been well advanced, and NZTA appeared to have been entrenched with its preferred option by that time.

(c) By finding at [1201] that NZTA was required to carry out a "feasible option type assessment" following the Government's decision.

[210] Those errors translated into four different questions of law:

> 19(a) Was the Board's finding that the review of alternatives carried out in July 2012 was 'cursory' a finding to which it could reasonably have come on the evidence, including in relation to suppositious options (refer Subissue 1B)?
>
> 19(b) In order for the consideration of alternatives to be relevant must the consideration be completed before the application documentation is well advanced?

19(c) Is a requiring authority required to prepare a 'feasible option type assessment' when the environment changes? Or is it entitled to rely on earlier work?

19(d) Was the Board's finding that adequate consideration was not given to alternatives following the Government's decision a finding to which it could reasonably have come on the evidence?

Q 19(a) [recast]: Is this a case in which the true and only reasonable conclusion contradicts the determination that the review of alternatives carried out in July 2012 was cursory?

[211] Referring to the Opus letter and an undated cost estimate for Option F of 19 July 2012, NZTA's short submission was that, while those documents were not a "feasible options type assessment", they reflected a level of consideration appropriate to the circumstances. In particular it was said that the two documents provided expert advice that:

(a) Option F remained significantly more expensive than the Project; and

(b) Option X remained a less desirable option due to cost and other concerns.

[212] The question whether the 3 July 2012 review of alternatives was cursory is to be viewed, as NZTA says, in the context of the circumstances. Those circumstances included the stance earlier taken that Option F was to be assessed with other options which permitted SH1 to be located in a tunnel in front of the War Memorial once the government had made a decision on whether to fund the War Memorial Tunnel.[104]

[213] The Opus letter set out what it termed an alternate review.[105] The Board did not view it as a careful evaluation of options in light of the government's decision to underground Buckle Street, observing that it could not be compared with the vigour of the Feasible Options Report stage. It is apparent that the Board regarded the letter as superficial.

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[104] [1123] at [124] above.
[105] [1138] at [124] above.

[214] It may be that an alternative view was available. However, on the facts as recited in the Decision such an alternative view could not be said to be compelling. There was ample basis for the Board's assessment of the situation. Consequently it cannot be concluded that the true and only reasonable conclusion contradicted the Board's view.

Q 19(b): In order for the consideration of alternatives to be relevant must the consideration be completed before the application documentation is well advanced?

[215] NZTA submitted that s 171(1)(b) does not set a deadline by which alternatives must have been considered in order for that consideration to have been adequate. I agree. However, whether the consideration of alternatives, which occurs comparatively late in the process, will be adequate or not is a matter of fact.

[216] That point is illustrated by the authority cited by NZTA, *Nelson Intermediate School v Transit New Zealand*.[106] As NZTA notes, the Environment Court there did not find that alternatives needed to have been considered prior to a particular date. However it found that Transit's development and consideration of alternatives during an appeal hearing was not adequate.

[217] That was not a finding of law. Nor was the view reached by the Board in the present case, that NZTA had become entrenched with Option A well before November 2012, a finding which contains an error of law. For that reason I do not answer the question which, in any event, is inappropriately vague.

[218] Any attack on the Board's view would need to resort to an *Edwards v Bairstow* type challenge. That is the nature of NZTA's fourth question in Issue 1F to which I now turn.

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106 *Nelson Intermediate School v Transit New Zealand* (2010) 10 ELRNZ 369 (EnvC).

Q19(d) [recast]: Is this a case in which the true and only reasonable conclusion contradicts the determination that adequate consideration was not given to alternatives following the Government's decision?

[219] NZTA's primary submissions stated:

> 22.1 … on 20 February 2013, Opus briefed [NZTA's] specialists to assess Options A, F and X for the purposes of Technical Report 19: Alternative Options Omnibus. The results of that exercise are summarised in Technical Report 19: Alternative Options Omnibus at Appendix B.
>
> 22.2 The Majority gave this exercise little or no weight in its assessment of [NZTA's] consideration of alternatives. No explicit reason for this is given. However, at [1200] the Majority stated that it would appear that [NZTA] was "entrenched with Option A well before November 2012".
>
> 22.3 Absent an explicit finding of bias or predetermination, there was no reasonable basis on the evidence for the Majority to find or infer that [NZTA's] consideration of alternatives in March 2013 was too late.

[220] In my view NZTA falls well short of the high hurdle of establishing that the Board's view was insupportable. Indeed, with reference to NZTA's submission at para 22.3, I consider that there were ample grounds for the Board's view on the basis of the 19 December 2012 letter alone.

[221] Accordingly the answer to Q 19(d) is No.

Q 19(c): Is a requiring authority required to prepare a "feasible option type assessment" when the environment changes? Or is it entitled to rely on earlier work?

[222] In the heading to this issue in its primary submissions NZTA posed the question: was NZTA required to "start again" following the Government's decision? It acknowledged that the Opus letter and the updated cost estimate[107] were not a feasible option type assessment but submitted:

> 21.6 It is appropriate (and economically responsible) for a requiring authority to rely on its earlier consideration of alternatives when the environment for a project changes. It is not required to carry out a new 'feasible option type assessment' whenever the environment for receiving the project changes.

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[107] At [211] above.

[223] The response (it is obviously not an "answer") to this question is: it depends. It is dependent on the nature and extent of the change to the environment and the extent of the reconsideration that such change necessitates. A comparatively minor change would be unlikely to require a requiring authority to "start again". The earlier work could no doubt be relied upon in large part. However a significant change to the environment might require a substantial revisiting of the prior work.

[224] The relevant event here was the government's decision concerning funding of the War Memorial Tunnel. Whether that event was of such significance as to require a more thorough-going reconsideration than was reflected in the 3 July 2012 letter is essentially a question of fact. There is no question of law to be answered.

Subissue 1G: Adequacy of the consideration

[225] In support of an alleged error of law in finding that adequate consideration was not given to alternatives, NZTA advances the following grounds of appeal:

(a) The evidence was of a lengthy, detailed and thorough consideration of a range of alternatives.

(b) For the reasons set out under Issues 1A to 1F, the Board applied the wrong legal tests to what was required of NZTA in its consideration of alternatives. Had the Board applied the correct test it should have found on the evidence before it that the consideration was adequate.

(c) Further, the Board allowed itself to be distracted by the merits of alternatives preferred by submitters (including BRREO, Option X and the long tunnel option) and failed to properly consider the evidence of the consideration given by NZTA to alternatives. Section 171(1)(b) requires decision-makers to inquire as to the process, rather than the outcome of the consideration given to alternatives.

[226] From that footing NZTA proposed the following question of law:

> Q 22 Is the Board's finding that adequate consideration was not given to alternatives a finding that it could reasonably have come to on the evidence?

[227] For the reasons explained at [16] to [23] that question is reframed in this way:

> Is the case one in which the true and only reasonable conclusion contradicts the determination that adequate consideration was not given to alternatives?

As earlier noted[108] that question effectively subsumes the alternative question in Issue 1A which reframed is:

> Is the case one in which the true and only reasonable conclusion contradicts the determination that NZTA had not given sufficiently careful consideration to alternatives?

[228] NZTA's argument relied on Annexure A to its primary submissions which traversed the history of events from the Meritec Scheme Assessment Report in March 2001 to the lodgement of the NoR in June 2013.

[229] Clearly there was a large volume of evidence before the Board which it appears to have diligently considered. Further, given that Mr McMahon, in his alternate view at Part 2 of the Report, accepted that adequate consideration had been given to alternative sites, routes and methods of undertaking the work, it may well be that this is a case where different decision-makers, each acting rationally, might reach differing conclusions.[109]

[230] However the issue for me is whether the Board's decision is within the category of rare cases where its conclusion is so clearly untenable as to amount to an error of law because the proper application of the law requires a different answer.[110]

[231] If the law is as I have found in the course of my consideration of the earlier parts of Issue 1, then I consider that, on the basis of the Board's consideration of the

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108 At [144] above.
109 *Vodafone*, above n 2, at [56].
110 At [52].

dual issues of transparency/replicability and assessment of non-suppositious options, the answer to the questions in their reframed form can only be in the negative.

Issue 2: Inquiring as to the outcome rather than the process of considering alternatives

[232] In the course of considering Issue 1C reference was made to NZTA's contention that the Board had engaged inappropriately with the outcome rather than the process.[111] That theme is developed in Issue 2 where two errors of law are alleged:

> (a) When exercising its overall judgement in accordance with s 5, applying *McGuire v Hastings District Council* [2001] NZRMA 557 to hold that if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that (at [1324]. See also [1319] and [1182]–[1187]).
>
> (b) By assessing the effects of the Proposal by reference to alternatives that the Board considered would have less adverse effects on the environment (in particular, BRREO, Option X and tunnel options). (See [403], [510], [643], [1241], [1319]).

[233] Those dual errors give rise to a single question of law, Q 25, which incorporates two alternatives:

> Q 25 Is a decision-maker (in this case the Board) permitted to compare an option against other alternatives that it considers would have less adverse effects on the environment, either in assessing the effects of the Proposal under s 171(1), or in exercising its overall judgment in accordance with s 5?

[234] In Issue 1B reference was made to the circumstances in which and the reason why various options were put before the Board.[112] Those paragraphs, together with the following two paragraphs from that part of the Decision headed "Exercise of judgment in accordance with Section 5", are referred to in the first of the alleged errors of law:

> [1319] Having said that, we are satisfied on the evidence that similar transportation benefits that would give effect to such integrated management could be achieved by a tunnel option or variant similar to Option X. We are also satisfied on the evidence that an at-grade option, along the lines of the

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111 At [181] above.
112 [1182]–[1187] at [148] above.

> BRREO Option, could facilitate some benefits, albeit not as well as the Project, at least until the Mt Victoria Tunnel duplication and possibly well beyond. We consider such options should have been included as part of a robust option evaluation process.
>
> …
>
> [1324] In the final outcome, we are required to evaluate the significant adverse effects taken together with the significance of the national and regional need for and benefit of the Project. In carrying out this evaluation, we are conscious of the dicta of the Privy Council in *McGuire* that relevantly Sections 6 and 7 are strong directions to be borne in mind, and if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that.

[235] NZTA noted that *McGuire* was focused on Māori land rights and jurisprudence around the Treaty of Waitangi, including the processes in ss 6(e), 7(a) and 8 of the RMA. It said that the Privy Council's reference to "the spirit of the legislation" can only be read as referring to the particular discussion of Treaty jurisprudence and its place in the RMA. It argued that the Board was wrong in [1324] to extend those observations more generally.

[236] NZTA also relied on *Quay Property Management Ltd v Transit NZ*[113] in support of the proposition that a decision-maker should not cross the line into adjudication of the merits of the options and by that measure determine whether the chosen route was reasonable.[114] Hence it submitted:

> 23.6 The Majority therefore erred by comparing the Project to alternatives when assessing the Proposal's effects under s 171(1) or exercising its overall judgement in accordance with s 5. (See [403], [510], [643], [1241], [1319] and [1324].

[237] I do not consider that the Board was purporting or attempting to "cross the line" as described in *Quay Property*. The Board's understanding of the nature of its task is readily apparent from paragraphs to which reference has already been made. I consider that the respondents are correct when they say that a comparison of the relative effects of various aspects of the Project with those of alternatives was a natural corollary of the Board's considering whether NZTA had given adequate consideration to those alternatives.

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113 *Quay Property Management Ltd v Transit NZ* EnvC Wellington W28/00, 29 May 2000 at [152] applied in *Queenstown Airport*, above n 22, at [50].

114 [1090] at [125] above and [1167] at [178] above.

[238] I consider that the analysis of Mr Milne for TAC fairly responds to NZTA's complaint:

> 156. The Board did not assess the overall merits or effects of the alternatives. The Board did not draw a conclusion as to whether the alternatives referred to would have been *better* options overall. Rather, it considered whether Option X-type options, tunnel options and BRREO-type options were non-suppositious and whether it was likely that they might have less impact on heritage and amenity values. It reached the inevitable conclusion that such options would potentially have fewer adverse effects on amenity values and heritage values. It was necessary for the Board to understand the extent to which the various alternatives which submitters claimed had not been properly considered, had the potential to address project objectives with lesser environmental effects; so that it could reach a conclusion as to whether those alternatives should have been adequately considered.

[239] Consequently for these reasons I answer Q 25 in the affirmative.

Issue 3: Misapplication of s 171(1) of the Act

[240] The refined Issue 3 questions of law are recorded at [53] above. Three of those questions have been addressed in the course of the analysis of the statutory interpretation issues, namely:

- Q 28A at [72] to [76];
- Q 28C at [64] to [68];
- Q 28D at [99] to [118].

[241] It remains to address Q 28B which states:

> Was the Board in error by considering the effects of the environment of allowing the requirement without having particular regard to the matters listed in s 171(1)(a) to (d)?

[242] No light is shone on that very general question by reference to the error of law pleaded at paragraph 27(c) of the amended notice of appeal which simply alleges a failure by the Board to assess the effects of the environment of allowing the requirement having particular regard to the matters in s 171(1)(a) to (d).

[243] However some clarification is derived from the following grounds of appeal at paragraph 29:

> (c) In terms of the matters in s 171(1)(a) and (d), the Board failed to have particular regard to the following relevant matters when assessing the Proposal's effects:
>
> (i) the Proposal's consistency with regional/city transportation strategies, as discussed by the Board at [520]–[526], in particular, when considering what weight to give to the Proposal's 'enabling benefits' for future transportation developments (see below under Issue 3); and
>
> (ii) relevant matters in the District Plan when assessing the Proposal's effects on historic heritage and amenity values (see below under Issue 6).
>
> (d) In terms of s 171(1)(b), for the reasons set out above under Issue 1, the Board ought to have found that adequate consideration had been given to alternatives and assessed the Proposal's effects having particular regard to this finding.
>
> (e) In terms of s 171(1)(c), when assessing the Proposal's effects, the Board failed to have particular regard to its finding at [1230] that the work is reasonably necessary to achieve the objectives of the requiring authority.

[244] With reference to the s 171(1)(a), (b) and (d) matters, it will be observed that the grounds of appeal incorporate cross-references to other issues, namely Issues 1, 4[115] and 6. I did not receive discrete argument on these matters in the context of Issue 3 and consequently, like counsel, I treat these matters as addressed in the context of those other Issues. The point concerning s 171(1)(c) is addressed in the context of Q 45B at [356] below.

Issue 4: Incorrect approach to assessment of enabling benefits

A stand-alone project

[245] The Decision notes that a consistent issue during the hearing was the implications of NZTA's having sought approvals for the project separately from those for related parts of the network, particularly the Mt Victoria Tunnel

[115] The reference to Issue 3 in para 29(c)(i) should be a reference to Issue 4 which relates to enabling benefits.

duplication, and in advance of details of the Public Transport Spine Study and its outcomes being finalised.[116]

[246] NZTA's closing statement to the Board of 3 June 2014 explained its reasons for the Project being pursued on a stand-alone basis:[117]

> 12.9 It is for [NZTA], together with WCC and GWRC, to decide when applications for its various projects are lodged, and the make-up of each project. It would be ridiculous to suggest that, in Auckland for example, applications for all Auckland State highway and local roading improvements should be lodged at the same time, so that their inter-relationships can be explored. For Wellington, the Ngauranga to Wellington Airport Corridor Plan signalled in 2008 that the Basin Bridge Project is to be implemented before 2018, whereas the Mt Victoria and Terrace Tunnel duplication projects are described as "*measures that may be implemented (beyond 10 years)*". [NZTA] has structured the Project (and sought approvals for that Project) in a manner which is entirely consistent with that description.
>
> 12.10 Mr Blackmore's evidence is that one of the reasons for separating the Basin Bridge and Mt Victoria Tunnel Duplication Projects was [NZTA's] wish to improve the Basin Reserve road network and thereby facilitate public transport improvements (and increased use) prior to the duplication of the Mt Victoria and Terrace Tunnels. This is supported by the GWRC. In addition, [NZTA's] view was that the environmental and social aspects of both Projects were sufficiently different in nature that there was no need to combine the two Projects for consenting purposes. Mr Blackmore's evidence was that the Basin Bridge Project is a standalone project which is not dependent on the Mt Victoria Tunnel Project proceeding, and will have benefits for north-south traffic regardless of what happens at Mt Victoria. By comparison, the Mt Victoria and Terrace Tunnel Duplication Projects, and the Bus Rapid Transport Project, are reliant on the Basin Bridge Project being in place.

[247] The Board said:

> [232] We accept [NZTA's] submission that this is not a case where the Project itself requires further consents or authorisations under the RMA which are not currently before us. Rather, the issue is the extent to which the Project and its effects, can be properly understood and assessed having regard to the current status of the Public Transport Spine Study, and in isolation from the Mt Victoria Tunnel duplication project in particular.

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116 At [225].
117 Noted at [230].

> [233] The power to defer a matter lodged with the EPA under Part 6AA while other related applications are made lies with the Minister, not the Board. Further, this power is to be exercised before notification of the original applications. The matter now having been referred in accordance with Section 147(1)(a), we are required to make a determination on the Project before us, having regard to the effects of the Project (both positive and negative), and that Project alone. We address the scope of the relevant future state of the environment and effects (including additive and cumulative effects) we can consider (particularly with respect to the Mt Victoria Tunnel duplication) elsewhere in our decision.

[248] The Board accepted TAC's submission that it must take the position "as it is". It said:

> [234] … we must determine whether the project before us meets the Act's sustainable management purpose as a stand-alone Project (i.e. in the absence of the Mt Victoria Tunnel duplication), and on the basis of the information regarding the outcomes of the Public Transport Spine Study available to us. That is the key consequence of [NZTA's] decision to seek approval for the Project as a stand-alone project separate from that of the Mt Victoria Tunnel duplication, and in advance of the Public Transport Spine Study and its outcomes being finalised.

Effects and benefits – terminology and meaning

[249] The fact of the stand-alone nature of the Project was the catalyst for a significant debate about the benefits which could fairly be attributed to the Project, including contingent benefits and enabling effects. As Mr Cameron observed in the course of closing arguments before the Board, these are elusive concepts.[118]

[250] "Effects" are defined in s 3 of the RMA:

> In this Act, unless the context otherwise requires, the term **effect** includes–
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects–

[118] Transcript page 8146 line 27, 4 June 2014.

> regardless of the scale, intensity, duration, or frequency of the effect, and also includes–
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[251] In its written closing statement to the Board NZTA stated that future effects, cumulative effects arising over time or in combination with other effects, and uncertain effects, are all relevant effects. Challenging the opposing contention that contingent benefits (being those benefits reliant on another consenting process or event in order to materialise) should not be taken into account by the Board, NZTA contended that the cumulative and in-combination effects to be considered by the Board included the Project's effects in combination with contingent benefits of works which are yet to receive RMA or another type of approval, citing as examples the Mt Victoria and Terrace Tunnel duplications.

[252] TAC's submissions on appeal argued that NZTA had shifted its emphasis on appeal from "strategic fit" with objectives to "enabling benefits". Although NZTA's closing statement used the phrase "facilitate/enable", as the Decision recognises, in oral submissions NZTA had submitted that "enabling effects" were a separate and identifiable benefit of the Project and that the Board should treat them as such.[119]

[253] In its written reply submissions NZTA maintained that there is a difference between the strategic fit of a project and its enabling benefits. It explained:

> 22.12 To be clear, in response to the submissions of TAC, [NZTA] considers that there is a difference between 'strategic fit' of a project and 'enabling benefits'. An 'enabling benefit' is an effect of a proposal that facilitates or creates an opportunity for the achievement of an outcome. Such an effect is an identifiable positive benefit of a project. Of course, what that might be is dependent on context.
>
> 22.13 In the context of this Project, the positive enabling effect is how the Project facilitates (will not frustrate) the development and potential implementation of related projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study ('PTTS'). [NZTA] is not referring to the benefits from the actual implementation of the wider Roads of National Significance

[119] At [507] in [256] below.

> ('RoNS') programme or the PTSS. Rather, it is the fact that this Project enables/facilitates/provides the opportunity for those other projects to be implemented.

The Board's Decision

[254] The Board accepted as correct NZTA's final analysis of the existing or future state of the environment.[120] In addition it stated that the approved sections of the Wellington Northern Corridor RoNS should appropriately be considered as part of the environment for assessment of the Project, being the Transmission Gully and the Mackays to Peka Peka and Peka Peka to Otaki (Kapiti Expressway) sections of the Wellington Northern Corridor.

[255] At [343] to [346] the Board considered the issue whether contingent benefits, (benefits flowing from related projects which are intended but not consented) should be attributed as flowing from the Project. It recorded that at the end of the hearing it was agreed that the benefits from a second Mt Victoria Tunnel and a third lane as part of the Buckle Street Underpass should not be attributed to the Project because the tunnel duplication had yet to be consented to and the Buckle Street Underpass was part of the existing environment.

[256] At [506] to [519] the Board proceeded to address the issue of "enabling effects", namely the consequence that the Project facilitates (or at least does not frustrate) the development of related projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study. The following paragraphs provide the context for and are referred to in the discussion of the several questions of law posed in Issue 4:

> [506] One of the issues raised before us was whether (and if so, how) we are able to take into account the *enabling effect* of the Project. That is, how should we deal with [NZTA's] argument that the Project facilitates (or at least does not frustrate) the development of related projects, particularly the Mt Victoria tunnel duplication and Public Transport Spine Study.
>
> [507] In closing, Mr Cameron submitted that such effects are a separate and identifiable benefit of the Project, and we should treat them as such. We were not provided with any case law authority to support this submission. Nor are we aware of any.

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120 At [336].

[508] We acknowledge that the Project *enabling* element may arguably be viewed as a potential positive future effect which arises from the NoR before us, and thus is within the scope of what we are tasked to consider under Sections 149P(4) and 171(1). The RMA's definition of effects in Section 3 may also be wide enough to encapsulate or incorporate such effects. In particular, it includes any positive effects – although notably, unless the context otherwise requires. As the High Court held in *Elderslie* in the context of a resource consent application:

> … To ignore **real** benefits that an activity for which consent is sought would bring necessarily produces an artificial and unbalanced picture of the real effect of the activity.
>
> [*our emphasis*]

[509] However, even if we accept (without finally determining the matter) that we can treat the project's enabling element as a separate and identifiable positive benefit, we consider this is largely a moot point. That is because in our view, any such *benefit* can be given little (if any) weight, primarily for the reasons set out below.

[510] Even if we assume that some modifications to the Basin Reserve gyratory are required in order for the Mt Victoria Tunnel duplication and Public Transport Study to proceed, the Basin Bridge Project is only one of potentially several solutions that might be put in place for that purpose. Such solutions could equally (or to a greater or lesser degree) facilitate (or not frustrate) the progression of those projects.

[511] We do not consider the evidence before us sufficiently establishes that the *enabling* element of the Project is something unique to, or which can only be achieved by, [NZTA's] current NoR.

[512] Perhaps more importantly, we have no guarantee that either (or both) of those projects would in fact go ahead. Indeed, as outlined elsewhere in our decision, we are required to make our determination on the basis that the Mt Victoria Tunnel duplication does *not* form part of the future state of the environment, and on the basis of the limited information currently available to us regarding the Public Transport Spine Study outcomes.

[513] That is the key result of [NZTA's] election to seek approval for the Project separately from that for the Mt Victoria Tunnel duplication, and in advance of the Public Transport Spine Study and its outcomes being finalised. In having made that strategic decision, [NZTA] must now accept the consequences of doing so. Put simply, and using the wording from *Elderslie*, we cannot place any significant weight on a supposed (but not quantified) Project benefit which is not real – in that we have no certainty or assurance it would actually materialise.

…

[516] As we have already found, the Mt Victoria Tunnel duplication should not be assumed to occur for the purposes of evaluating the Project. Further, we do not see our approach in this regard as inconsistent (nor do we in any way disagree) with the Environment Court's observations in *Cammack* (cited to us by [NZTA] in opening) that the RMA's:

> … concept of sustainable management does not require the status quo to simply continue. Provided the imperatives contained in s 5(a)–(c) can be justified, RMA contemplates management of use, development and protection, not just retention of the status quo.

[517] Rather, it is a reflection of our view that it would not be sustainable, or provide for sustainable management, to approve projects such as this, primarily because they were necessary to facilitate future developments, which may (or may not) proceed.

[518] Accordingly, we consider the most appropriate way to take into account the Project's facilitating or enabling element is not as an identifiable benefit in and of itself, but in the context of Section 171(1), and particular sub-sections (a) and (d). That is, the extent to which the Project is consistent with the strategies identified and in the context of the other RoNS related projects.

[257] In that part of the Decision headed "Exercise of Judgment in accordance with Section 5" the Board said:

> [1318] The Project would have an enabling element to the extent that it would fit well with the proposed works planned to implement the City Council's Growth Spine form Ngauranga to the Airport. To this extent, it would be consistent with the transportation theme identified by the planning caucus and the integration of land use and transport planning.

There followed [1319][121] which has been discussed already in the context of Issue 2.

[258] On this aspect of the appeal it is appropriate to also note the distinctly different view of Mr McMahon:

> [1510] In my consideration, the Project's *enabling effect* is of considerable importance and should be acknowledged as an important and determinative transportation benefit of the Project.
>
> [1511] For the record, I should clarify that I am not referring to the other benefits that may result from the actual implementation of the wider RoNS programme or Public Transport Spine Study that are not part of this Project. Those are contingent benefits and I wholly accept that these should not form part of the Board's substantive consideration of this Project. Rather, what I am referring to is how the Project facilitates (or at least does not frustrate) the development and potential implementation of related Projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study.

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[121] At [234] above.

The parties' positions

[259] NZTA mounted a comprehensive attack on this aspect of the Decision which is encapsulated in the following extract from its primary written submissions:

> 31.7 There are significant errors of law in this aspect of the Majority's decision, including:
>
> a It has failed to treat enabling benefits as separate and identifiable positive effects of the Project that properly fall within the scope of 'effect' as defined by s 3 RMA.
>
> b It has failed to assess the effects of the Project 'having particular regard to' the fact that the Project is part of a programme of works set out in the relevant statutory and non-statutory documents under s 171(1)(a) and (d).
>
> c It has failed to access the effects of the Project 'having particular regard to' the requiring authority's objectives, which explicitly include 'not constraining opportunities for future transport developments'.
>
> d By requiring that a project's enable effects be 'unique' to the project (and to the particular option), it has failed to assess the effects of allowing the requirement and has instead engaged in a comparative exercise with other alternatives.
>
> e It has required the Appellant to demonstrate the certainty of benefits, when the RMA does not require this standard.
>
> f It has conflated the concepts of 'environment' and 'effects'.
>
> g Although it claims to have taken into account the enabling elements of the Project as a relevant factor under s 7(b) when exercising its overall judgment, the rest of the Majority's decision shows that this effect has been given little, if any, weight.
>
> 31.8 As a result of these errors of law, the Board wrongly attributed little, if any, weight to this highly relevant positive effect of the Project.

Seven questions of law were posed with reference to the Board's consideration of enabling benefits.

[260] While the burden of the opposition on this topic was carried by Mr Milne, Mr Palmer took the fundamental point that the seven different instances of alleged error all suffered from the same difficulty that the Board did treat enabling effects as relevant. He maintained that NZTA's real objection was that the Board did not give those enabling effects sufficient weight, a point which he reinforced by listing the

repeated references to weight in the relevant part of NZTA's primary written submissions.

Q 31(a): Is a project's enabling benefit an effect in terms of s 3 that can and should be taken into account under s 171(1) and/or s 5?

[261] There is no doubt that the Board took into account and gave at least some weight to the enabling element of the Project. NZTA's complaint concerns the manner in which the Board did so, as explained in ground of appeal 30(a):

> (a) At [506]–[519], by failing to treat and/or give weight to the enabling benefits of the Proposal as a positive effect in terms of s 3 and/or s 171(1) of the Act; and instead finding:
>
> (i) at [518] that the most appropriate way to take into account the Proposal's enabling element is by considering the extent to which the Proposal is consistent with the strategies identified in relevant documents identified under s 171(1)(a) and (d);
>
> (ii) at [519] that the enabling component is a matter which could be taken into account under s 7(b) (noting that this did not appear in the Board's reasoning in its draft Decision).

[262] It is apparent that the approach which the Board should adopt was traversed in oral closing submissions before the Board. NZTA's written reply submissions on appeal explained:

> 22.3 TAC submits that [NZTA] has shifted its emphasis from 'strategic fit' with objectives and transport plans, to 'enabling benefits'. This is incorrect. [NZTA's] closing submissions before the Board asked the Board to count the contingent benefits of the Project as relevant effects. This was the subject of some discussion between counsel and the Board. Counsel accepted that the Board may choose to consider the enabling aspect of the project as a relevant matter under s 171(1)(a) and (d), however, in doing so, it was anticipated that this aspect of the Project would be given appropriate weight. However, the effect of the Board's approach is to relegate the enabling benefit to an almost irrelevant 'other matter'.
>
> 22.4 It is of considerable importance that this issue is corrected as a matter of law. As discussed in [NZTA's] Primary Submissions, the Majority has made findings in relation to the 'enabling element' of the Project that [NZTA] says are wrong in law. The Minority has not. This appeal seeks to address those errors.[122]

[122] The reference to the Minority was to [1511] at [258] above.

[263] Both ground of appeal 30(a) and that extract from NZTA's reply submission provide traction for Mr Palmer's criticism that NZTA's real objection concerns the weight which the Board accorded to enabling benefits, a view with which I agree.

[264] However Q 31(a) as framed does appear to raise a question of law, at least with reference to the "can" rather than the "should" component. That said, I do not consider that the Board made an error of law of the nature implied. It did not reject the contention that an enabling benefit could be a potential positive future effect in terms of s 3.[123] In fact, it did not actually determine the point as it expressly acknowledges at [509]. Instead, it proceeded to take the enabling element into account at [518] in the manner which counsel had agreed was acceptable.[124]

[265] The enabling effect or benefits of a project will inevitably be circumstances specific. As the Board recognised in relation to this particular Project, in some cases the enabling element may properly be viewed as a potential positive future effect. In that sense I consider that an affirmative answer can be given to the question whether a project's enabling element "can" constitute an effect to be taken into account under s 171(1) and/or s 5.

[266] However, whether it will be appropriate to do so or instead to proceed as the Board did in this case at [518] will turn on the particular circumstances. The "should" component of Q 31(a) does not raise a question of law and is not susceptible of answer in abstract terms.

Q 31(b): Where a project's enabling benefits are consistent with a programme of infrastructure development that is recognised in relevant documents under s 171(1)(a) and (d), should those enabling benefits be given considerable weight as an effect of the project under s 171(1) and/or s 5?

[267] This question, which is directed to the weight to be given to a project's enabling benefits, does not involve a question of law. In any event a question framed in terms of "considerable" weight is too imprecise to sound in a useful answer.

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123 At [508].

124 In paragraph 22.3 at [262] above.

Q 31(c): In order to be taken into account, must a project's enabling benefits be unique to that project, guaranteed to go ahead, and able to be quantified?

[268] In my view the answer to this question is No. Nor do I consider that the Board made the erroneous finding alleged, namely that in order to be given weight, enabling benefits must be unique to a project, guaranteed to go ahead and able to be quantified.

[269] The Board certainly observed at [511]–[512] that the Project did not incorporate those characteristics. However I do not construe the Board's decision as stipulating that such characteristics were prerequisites to enabling elements being taken into account. If it had viewed such features as necessary pre-conditions, then the Board would not have taken the enabling element into account at all. Yet the Board did so. In my view the Board referred to those matters as bearing on the weight to be attributed to the enabling effects. Because those features were not present, the weight which the Board allocated to enabling elements was correspondingly less.

Q 31(d): Does the definition of the future environment constrain the ability of a decision-maker to consider the enabling benefits of a project?

[270] The concern which prompted this question is revealed in the relevant ground of appeal:

> 30(c) At [512] by wrongly conflating the environment with effects, and thereby finding that because the Mt Victoria Tunnel duplication and Public Transport Spine Study outcomes do not form part of the future state of the environment, the Board is prevented from giving weight to the enabling benefits of the Proposal for those future projects.

[271] Noting that s 171(1) directs a decision-maker to "consider the effects on the environment of allowing the requirement", NZTA drew attention to the direction of the Court of Appeal in *Royal Forest and Bird Protection Society of New Zealand v Buller District Council*[125] that decision-makers are required to distinguish the environment from the effects of a proposal:

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[125] *Royal Forest and Bird Protection Society of New Zealand v Buller District Council* [2013] NZCA 496, (2013) 17 ELRNZ 616 at [23].

> [W]e cannot see how s 3(f) comes into play at all in determining what is the "environment" against which the actual and potential effects of allowing the activity for which consent is sought are to be considered. In determining what the "environment" is, the attention of the consent authority or a court on appeal is directed toward the physical environment as it exists at the relevant time, modified by those considerations required to be taken into account by the Act and applying *Hawthorn*, treating any permitted activity or any activity for which resource consent has been granted and which is likely to be implemented as included in the "environment". None of this has anything to do with the definition of "effect" in s 3. The definition of "environment" is a prior question to consideration of the effects of the proposed activity on the environment.

[272] Submitting that the two exercises must be kept separate, NZTA contended:

> 31.32 The Majority has wrongly conflated the concept of 'environment' with the meaning of 'effect' by determining that the enabling benefit of the Project should not be considered to be/or attributed any weight as an 'effect' because the Mt Victoria Tunnel duplication is not considered to be part of the future state of the environment. In doing so, the Board unduly limited the meaning of 'effect' to the Board's assessment of what constitutes the environment, rather than ensuring that effects of the Project are properly identified and considered. This is a fundamental error of law.
>
> 31.33 With respect, what is considered to be part of the future state of the environment (whether that includes the Mt Victoria Tunnel Duplication or the Public Transport Spine outcomes) has nothing to do with the identification of the effects of the Project. What is important is that the evidence shows that the enabling benefit of the Project (being what this infrastructure project facilitates) is an effect attributable to the Project. As we have submitted, the evidence established that the Project will facilitate planned developments (whatever their final form may take) and that without this Project, future development will be frustrated/not enabled.

[273] Mr Milne observed that NZTA did not take issue with the Board's conclusion that the tunnel duplication process did not form part of the future state of the environment while at the same time it suggested that the Board should have treated the facilitation of such a project as a positive effect on the environment. In his submission the fatal flaw in NZTA's argument was that s 171 is concerned with effects on the environment, and an effect which does not affect the environment is not a relevant effect.

[274] I agree with Mr Milne that the Board decided as a first step what the environment was by resolving the contest about the existing, permitted and reasonably foreseeable future environment and concluding that the Mt Victoria

Tunnel duplication was not part of that environment. I do not consider that it is fair to say, as NZTA contends, that the Board conflated the environment with effects.

[275] The Board recognised the Project's enabling element.[126] However it considered that the most appropriate way to take that enabling benefit into account was in the manner explained at [518].

[276] Reverting to the content of Q 31(d), if "constrain" is given the same meaning as "prevent" (in ground of appeal 30(c)), then, as the Board's Decision demonstrates, a decision-maker is not precluded by the definition of the future environment from considering the enabling effect of a project. However, again as the Board's Decision demonstrates, the decision-maker's conclusion on the state of the future environment may influence the manner in which the decision-maker chooses to take an enabling benefit into account.

[277] Consequently I do not consider that Q 31(d) is susceptible of a simple Yes or No answer. As the explanation above indicates, the finding as to the state of the future environment is likely to be material to, and even influential on, the way in which a decision-maker considers and weighs a project's enabling elements.

Q 31(e): In order for the positive effects of a future development to be taken into account must the approvals for that development be sought at the same time as (or in advance of) the project?

[278] The answer to that question (which refers to the positive effects "of" a future development) must be in the affirmative. On that point I apprehend the Board was unanimous.[127]

[279] The error of law alleged in the amended notice of appeal read:

> 30(d) By finding at [513] that in order for the positive effects of a future development to be taken into account the approvals for that development must be sought at the same time or in advance of a project.

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126 [1318] at [257] above.

127 The majority at [233] at [247] above; Mr McMahon at [1511] at [258] above.

[280] However in the course of presentation of NZTA's submissions Mr Casey indicated that the preposition "of" should in fact have read "on". The consequence of that amendment was to significantly change the meaning of the question. Indeed, to make sense I consider that the question needs to be redrafted to introduce a reference to the project into the subject of the sentence.

[281] In my view a negative answer applies to the following reframed question:

> In order for a prior project's enabling effects on a future development to be taken into account on the prior project, must the approvals for the future development be sought at the same time or in advance of the project?

[282] In any event I do not discern any error in the Board's approach. It clearly did take into account the Project's facilitating or enabling element.[128]

Q 31(f): Is it consistent with sustainable management (in terms of s 5) to approve an infrastructure project because it is necessary to facilitate future developments; and does it make a difference if the project is primarily necessary to facilitate those future infrastructure developments?

[283] This question reflected what was said to be the Board's error in allegedly finding at [517] that it was not sustainable management to approve a project primarily because the project is necessary to facilitate future developments.

[284] Neither this question, nor Q 31(g) below, received attention in NZTA's presentation of its case. It was not a matter included in the list of significant errors of law listed in paragraph 31.7 at [259] above.

[285] The Board's statement at [517] was by way of explanation for its previously expressed view that the Mt Victoria Tunnel duplication should not be assumed to occur for the purposes of evaluating the Project,[129] which also appeared to be the view of Mr McMahon.[130] In [517] the Board stated that that approach was "a reflection" of the view criticised in the current question.

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128 At [518].
129 [234] at [248] above.
130 [1511] at [258] above.

[286] I do not consider that at [517] the Board was purporting to formulate any statement of general principle. It was an expression of view about a particular category of projects, namely those necessary to facilitate future developments which may or may not proceed. I do not discern an error of law in the Board's observation.

[287] In any event I do not consider that Q 31(f) aligns with, and hence is responsive to, the Board's statement at [517]. The question does not incorporate the component that the future development may or may not proceed.

Q 31(g): In the alternative, given its conclusion that the Proposal was necessary primarily to enable future roading projects, did the Board err in law by failing to consider conditions to address this concern?

[288] Although an error of law was alleged at para 30(f) in essentially the same terms as Q 31(g), there was no suggestion in NZTA's submission either that relevant conditions had been proposed to the Board or that the Board had failed to consider conditions which had been proposed. Indeed it is not apparent to me how a condition could be crafted which would address the issues the subject of Issue 4. In those circumstances I do not consider that Q 31(g) requires a response.

Issue 5: Assessment of transportation benefits – an overview

[289] It will be recalled that improvements in transportation featured prominently in the Project Objectives recorded at [30] above.

[290] The subject of transportation is addressed at length in the Decision from [260] to [505]. The breadth and structure of that consideration is conveyed in the opening paragraph:

> [260] The Project is a transport infrastructure project and the transportation effects are central to our consideration. In this part of our decision we set out the central transportation issues, briefly identify the key provisions of relevant statutory and other documents which provide guidance for our consideration of transport effects, then discuss the existing situation and appropriate baseline against which to assess the transport effects. We then discuss those transport effects, and assess them in terms of the stated objectives of the Project and the intended outcomes of the relevant statutory instruments and non-statutory documents, and the purpose of the RMA set out in Part 2 of the Act.

[291] The Board noted that regard had also been had to the fourth matter in the Minister's reasons for referring the Project to the Board:[131]

> The proposal is intended to reduce journey time and variability for people and freight, thereby facilitating economic development. The proposal is also likely to provide for public transport, walking and cycling opportunities; reduce congestion and accident rates in the area; and improve emergency access to the Wellington Regional Hospital. If realised, these benefits will assist the Crown in fulfilling its public health, welfare, security, and safety functions.

[292] NZTA's challenge to this part of the Decision was presented as three subissues:

(a) standard of proof required to demonstrate transportation benefits: subissue 5A;

(b) assessment of immediate transportation benefits: subissue 5B;

(c) requiring the proposal to demonstrate benefits that go beyond NZTA's objectives: subissue 5C.

Subissue 5A: Standard of proof required to demonstrate transportation benefits

[293] The focus of this aspect of the appeal was on two paragraphs in that part of the Decision which addressed underlying assumptions about traffic growth:

> [484] We have no doubt that the assumptions fed into the traffic models are the best estimates of competent and experienced people. The point rightly made by critics however is that these assumptions largely determine the outcomes of the complex modelling exercise. Any errors in the assumptions compound when they are used to project traffic flows beyond the immediate future.
>
> [485] The issue would not be important if we were considering infrastructure improvements with minimal adverse environmental effects. In that situation it would not be important from an RMA perspective if the works proved to be premature or not needed at all. The situation here is that, as discussed later in this decision, the Basin Bridge would have significant adverse effects, so the level of confidence we can have in the modelled need and benefits, which depend on the underlying assumptions, is important.

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131 At [3] above.

[294] NZTA asserted that the Board had erred in law in two respects:

- By inferring at [485] that a higher standard of proof (in relation to transportation modelling) is required if the adverse effects of a project are more than minimal.

- By requiring a higher standard of proof to demonstrate the transportation benefits of the Proposal.

[295] It was apparent from the grounds of appeal that NZTA maintained that the Board had effectively required it to demonstrate the transportation benefits of the Proposal beyond reasonable doubt.

[296] Two questions of law were proposed:

> Q 36(a) Is a higher standard of proof required to demonstrate the transportation benefits of a project where it will have adverse effects that are more than minimal?
>
> Q 36(b) If the Board applied the wrong standard of proof, were the Board's findings regarding the transportation benefits of the Proposal ones that the Board could reasonably have come to on the evidence?

Q 36(a): Is a higher standard of proof required to demonstrate the transportation benefits of a project where it will have adverse effects that are more than minimal?

[297] In support of its contention that the Board erred in law by effectively requiring NZTA to demonstrate the transportation benefits of the Project beyond reasonable doubt, NZTA first referred to the following decisions:

- *Genesis Power Ltd v Manawatu-Wanganui Regional Council*;[132]

- *Shirley Primary School v Telecom Mobile Communications Ltd*;[133]

- *McIntyre v Christchurch City Council*.[134]

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132 *Genesis Power Ltd v Manawatu-Wanganui Regional Council* (2006) 12 ELRNZ 241, [2006] NZRMA 536 (HC).

133 *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 (EnvC).

134 *McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84, [1996] NZRMA 289 (Planning Tribunal).

[298] It will suffice to refer to the decision of the Court of Appeal in *Ngati Rangi Trust v Genesis Power Ltd*[135] which was an appeal from *Genesis Power* above. Although dissenting in the result, the following statement of Ellen France J reflected the view of the Court:

> [23] On [the question of the onus of proof], it need only be noted I see no difficulty with the statement in *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 at para [121] that "[i]n a basic way there is always a persuasive burden" on an applicant for a resource consent. As the Environment Court said in *Shirley*, that approach reflects the requirement that a person who wants the Court to take action must prove his or her case. In addition, as the Court observed, there are also statutory reasons for speaking of a legal burden on an applicant:
>
> > [122] Since the ultimate issue in each case is always whether granting the consent will meet the single purpose of sustainable management, even if the Court hears no evidence from anyone other than the applicant it would still be entitled to decline consent.

[299] It is clear, and I did not understand the respondents to suggest otherwise, that the criminal standard of proof does not apply in RMA matters. The answer to Q 36(a) is plainly No.

[300] I do not accept NZTA's submission that an inference can be drawn that at [485] the Board was applying a standard of proof higher than the recognised standard. I find myself in agreement with Mr Palmer's submission on this point:

> 7.17 The Board simply said the level of confidence it could have in the assumptions of the model is important. So it focussed on them. Witnesses cast doubt on the assumptions (e.g. at [497]) and NZTA kept revising them (e.g. [386]) and the Board commissioned its own review by Abley. The Board simply made its own fair assessment of the assumptions and modelling outcomes. This was an important element of discharging its obligation to consider the effects of the proposed flyover requirement.

[301] In the course of its submission NZTA drew attention to a number of places in the Board's reasons which it said showed that the Board had required NZTA to demonstrate certain matters to a higher standard or to a level of "certainty". However none of those matters suggested to me that the Board was applying anything other than a conventional civil standard of proof.

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135 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZCA 222, (2009) 15 ELRNZ 164.

Q 36(b): If the Board applied the wrong standard of proof, were the Board's findings regarding the transportation benefits of the Proposal ones that the Board could reasonably have come to on the evidence?

[302] Given my view that the Board did not apply the wrong standard of proof, this question is otiose.

Subissue 5B: Assessment of immediate transportation benefits

[303] Under this heading the amended notice of appeal asserted a single error of law:

> The Board erred in law by finding at [517] that the Proposal is *primarily* necessary to facilitate future developments, and thereby failing to have regard to the immediate transportation benefits of the Proposal as a stand-alone project. (See also [466]).

[304] Paragraph [466], which was located in the Board's summary of transportation effects,[136] stated:

> [466] The Project has been put forward on the basis that it is a multi-modal, long term, integrated solution and is part of a sequence of road improvements along the Wellington Northern Corridor, most of which are consented and some of which are under construction. The evidence was that much or even most of the transport benefits from the Basin Bridge Project depend on completion of that sequence of road improvements and can be regarded as *contingent benefits*.

[305] Although paragraph [517] has already been noted in the consideration of enabling benefits it will be convenient to set it out again:

> [517] Rather, it is a reflection of our view that it would not be sustainable, or provide for sustainable management, to approve projects such as this, primarily because they were necessary to facilitate future developments, which may (or may not) proceed.

[306] The question of law framed under this heading contained two limbs:

> Q39 Did the Board fail to have regard to immediate transportation benefits of the Proposal, such that:

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136 [464]–[476].

(a) it failed to take into account relevant matters; and/or

(b) its decision regarding the immediate transportation benefits of the Proposal is not a decision that it could reasonably have come to on the evidence?

Q 39(a): Did the Board fail to take into account a relevant matter in failing to have regard to the immediate transportation benefits of the Proposal?

[307] NZTA submitted that the passages at [466] and [517] showed that the Board decided that the Project did not offer "any significant or worthwhile immediate benefit". It argued that that finding stemmed from the Board's "reductive approach" to the transportation benefits of the Project, which failed to have regard to the following matters said to be relevant under s 171(1)(a) to (d):

– a planning framework that recognises the importance of the Basin Reserve transportation node;

– a planning framework that provides for the immediate implementation of bus priority; and

– NZTA's objectives for the Project.

[308] NZTA advanced this aspect of its case by reference to three matters to which it contended the Board had failed to have regard or given any weight:

– the failure to resolve the critical issue of congestion;

– bus priority; and

– economic criteria.

[309] Each of these matters was addressed succinctly but comprehensively by Mr Palmer. Rather than attempting to paraphrase his responses I believe it is useful to recite them in full:

7.8 First, NZTA says (at 32.7) the Board gave no weight to the relief of congestion from Paterson St to Tory St but "analysed the time travel savings only". But the Board was explicit (at [329]) that is

considered congestion in terms of indicators that the consensus of experts agreed on, including "difficulties getting through controlled intersections in a single phase and major variability in travel times". It considered these benefits extensively, in particular at [305]–[316] and [359]–[381] and in its overall summary at [1242], [1244]–[1247] (noting the time savings were substantially less than originally put forward when the third lane at Buckle Street and the effect of the Mt Victoria tunnel duplication are accounted for). It noted that the proposed flyover requirement would provide a time saving for the west-bound journey of 90 seconds in 2021 (at [330], [365], [1244]).

7.9 Second, NZTA says (at 32.15) the Board failed to have regard to the immediate benefit of providing for bus priority. But one of the paragraphs NZTA cites (at 32.12) in the Board's report ([405]) demonstrates the opposite:

> We are satisfied the improved journey times discussed earlier would improve journey times for buses passing through the Basin Reserve area. [NZTA's] modelling shows that the partial bus lanes proposed as part of the Project would not prevent other vehicular traffic also gaining similar time savings. We can accept that the increased priority for public transport provided by the Project could be viewed as a precursor to BRT promoted by the Regional Council, but we have no evidence about the effect of what is proposed here on mode share, which is an objective of the planning documents.

…

7.11 Finally NZTA says (at 32.16, 32.19) that the Board failed to reference the quantification of economic benefits. The Board did (at [536], [539], [543], [545]–[550] and [552]), noting (at [543]) that "[a] number of Benefit-Cost Ratio figures were presented to us in the application documents and in the evidence". If the Board hadn't referenced specific evidence that would not justify NZTA's complaint. But it did even that, citing (at [542] the evidence of NZTA's expert, Mr Copeland, whose economic assessment of the project relied upon the BCRs developed by Mr Dunlop upon which NZTA now seeks to rely. The Board's conclusion (at [550]) is reached after seeing how contested were the BCR assumptions. Again the objection is to weight.

[310] I accept the respondents' argument on these three points. Mr Palmer made the further point that much of NZTA's complaint concerned the weight accorded to the relevant factors, drawing attention for example to NZTA's submission in the context of bus priority that it was a matter to which the Board should have given "considerable weight". I agree that the Board did not err in the manner asserted. The answer to Q 39(a) is in the negative.

The meaning of Q 39(b)?

[311] Question 39(b) attempts to combine an error in failing to have regard to a matter (immediate transportation benefits) with an *Edwards v Bairstow* type question directed to the conclusion on that same matter. As such, it does not make sense. That can be demonstrated by my attempt to reframe the *Edwards v Bairstow* question by reference to Lord Radcliffe's third formulation:

> Is this case one in which the true and only reasonable conclusion contradicts the determination that there were no immediate transportation benefits of the Proposal?

[312] Once it is accepted, as I have found in relation to Q 39(a), that the Board did not fail to have regard to the immediate transportation benefits of the Proposal, I have difficulty seeing how an *Edwards v Bairstow* type question can be appropriately framed.

Subissue 5C: Requiring the Proposal to demonstrate benefits that go beyond the requiring authority's objections

[313] The question of law posed under this heading is:

> 42 Did the Board err in requiring [NZTA] to demonstrate that the Proposal would achieve specific benefits that were not part of the project objectives (namely, mode shift and providing a long-term solution for eastbound State Highway traffic)?

Mode shift

[314] It will be recalled that Project Objective 3 stated:

> To support mobility and modal choices within Wellington City:
>
> (i) by providing opportunities for improved public transport, cycling and walking; …

[315] With reference to that objective, NZTA's grounds of appeal stated that the project objectives did not include an objective "actually to achieve mode shift" and that the Board erred in requiring NZTA to demonstrate that the Proposal would achieve mode shift/mode share. Two errors of law were alleged:

(a) By finding at [405] that [NZTA] was required to establish (and quantify) the extent and benefits of mode share (or mode shift) that would be achieved by the Proposal when the project objectives were to support modal choices, inter alia, by providing *opportunities* for improved public transport.

(b) By finding at [441] that the Proposal is not a truly multi-modal, integrated long-term solution for cycling and walking in the project area, when the project objectives were to support modal choices, inter alia, by providing *opportunities* for improved cycling and walking.

[316] The two paragraphs to which reference was made stated:

> [405] We are satisfied the improved journey times discussed earlier would improve journey times for buses passing through the Basin Reserve area. [NZTA's] modelling shows that the partial bus lanes proposed as part of the Project would not prevent other vehicular traffic also gaining similar time savings. We can accept that the increased priority for public transport provided by the Project could be viewed as a precursor to BRT promoted by the Regional Council, but we have no evidence about the effect of what is proposed here on mode share, which is an objective of the planning documents.
>
> …
>
> [441] In summary, the Project would make some improvements for circulation of cyclists and pedestrians in the Basin Reserve area, but as these are mostly in the form of shared paths they would introduce potential conflicts between these modes, especially if these modes continue to increase in popularity. We do not see this package of proposals as a truly multi-modal, integrated, long term solution for cycling and walking in the project area. …

[317] Specifically with reference to the provision of "opportunities" in Objective 3(i) NZTA argued:

> 33.7 It is submitted that framing its objectives in this way is appropriate. In this context, [NZTA] has requiring authority status under s 167 RMA for the construction and operation of any State highway or motorway. While [NZTA] has a significant role under the LTMA investing in outcomes for public transport, cycling and walking; in its capacity as requiring authority its role is to provide infrastructure which assists or facilitates such outcomes rather than providing them directly.

[318] To my mind the distinction which NZTA seeks to draw is excessively fine. I consider that the sense of the word "opportunities" (which is the plural) in Objective 3(i) means a state of affairs favourable for a particular action or aim. It was in that sense that I consider that the Board considered the implications for

improved cycling and walking. It noted that, like the shared pathway on the bridge itself, all of the proposed facilities for pedestrians and cyclists were shared paths[137] in relation to which the Board had a general concern about safety.[138]

[319] I do not consider that the Board can be criticised for its consideration (and rejection) at [441] of the package of proposals as amounting to a truly multi-modal, integrated long term solution for cycling and walking in the area when, as recorded in [418], it was NZTA's own case that the proposed pedestrian and cycling facilities would have significant benefits, with the phrase "multi-modal solution" featuring often in submissions and cross-examination.

[320] Finally there is the point made by Mr Milne that the Board was obliged to consider certain RMA and non-RMA documents under s 171(1)(a) and (d). By way of example he pointed to the Wellington RLTS's key outcomes which include increased mode share for pedestrians and cyclists. Mr Milne submitted, and I accept, that consideration of the extent to which the Project would contribute to mode shift was therefore necessary in order for the Board to consider the Project against those documents.

[321] For these reasons I do not consider that the Board erred in law in its consideration of mode shift.

The issue of a long-term solution

[322] The Board's lengthy discussion of transportation issues[139] concluded with the following comments:

> **A Long Term Solution?**
>
> [498] Counsel for [NZTA] made frequent reference to the Project being a *long term* and *enduring* solution. The first objective for the Project is: *To improve the* ***resilience****, efficiency and reliability of the State Highway network*. [our emphasis], although the methods then listed for achieving this refer only to the section of the westbound part of State Highway 1 from Paterson Street to Tory Street. We have a concern about the longer term

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137 At [433].
138 At [1252].
139 At [290] above.

resilience (ability to cope with change) of the eastbound part of State Highway 1 through the central city.

…

[502] The City Council's report: *Basin Reserve – Assessment of Alternative Options for Transport Improvements* notes that if the Project proceeds, in addition to the mitigation measures proposed by [NZTA] there should be:

> Commitment to consolidating state highway traffic away from Vivian Street and into a single east-west corridor.
>
> and:
>
> Consideration of how consolidating state highway traffic away from Vivian Street can be accommodated.

[503] This raises the question of whether the Basin Bridge would facilitate or impede that long term option. Only Mr Reid commented on this and his view was that a bridge in the position proposed would make it more difficult to bring the State Highway one-way pair together into a single corridor.

[504] There is of course no obligation for [NZTA] to convince us otherwise. The evidence is that Vivian Street would have to be revisited in about five years time (to allow time for planning another upgrade), and that the creation of additional eastbound capacity, especially at intersections, can be expected to have significant environmental implications.

[505] Thus we do not consider the Project can be credited with being a long term solution.

[323] With reference to those observations NZTA's ground of appeal stated:

> c The project objectives included 'to improve the resilience, efficiency and reliability of the State Highway network' inter alia, 'by providing relief from congestion on State Highway 1 between Paterson Street and Tory Street'.
>
> d The project objectives clearly related to the westbound section of the State Highway in this location.
>
> e The project objectives did not include providing a long-term solution for eastbound State Highway traffic in this location. The Board erred in requiring [NZTA] to demonstrate that the Proposal would address this issue.

[324] Mr Milne suggested a different interpretation of the relevant objectives. Noting that the identified section of SH1 did not specify a direction of travel, he contended that the objectives identified two roads (Paterson Street and Tory Street) between which two sections of SH1 lie, one eastbound and the other westbound. I

do not accept that interpretation. I note that at [498] the Board construed the objective as referring to the section of the westbound part of SH1 "from Paterson Street to Tory Street".

[325] Consequently I accept NZTA's submission that the project objectives clearly related to the westbound section of SH1 in this location. That view is reinforced by the reference to westbound traffic in the Minister's direction.

[326] However, if the Board had considered the eastbound part of SH1 through the central city to be part of its brief, then I am sure that the topic would have received much greater attention than in the closing paragraphs of the transportation discussion. In my view that very limited discussion was in the nature of a postscript which was responsive to what the Board referred to at [498] as NZTA's frequent references to the project being a long term and enduring solution. At [505] the Board rejected that proposition for the reasons given in that short discussion.

[327] While it may be thought to have been unnecessary for the Board to engage at all with NZTA's "solution" proposition, the fact that it did so does not suggest to me that the Board was requiring NZTA to demonstrate such a "solution" as a prerequisite for the approval of the NoR. Consequently I do not consider that the Board made the error alleged of wrongly interpreting the objective as applying to the eastbound part of SH1.

[328] For these reasons I answer Q 42 in the negative.

Issues 6, 7 and 8: Questions of law relevant to heritage and amenity

The refinement of the questions of law

[329] Issue 6 in the amended notice of appeal contained a single question:

> Q 45 For all or some of the reasons outlined above under paragraph 44, did the Board fail to have particular regard to relevant matters under s 171(1)(a) and (d) in assessing the effects of the Proposal on historic heritage and amenity?

[330] Paragraph 44 recited a series of alleged errors of law and para 46 listed 16 quite detailed grounds of appeal, including the contention at 46(e) that:

> The Board's finding at [782]–[783] that the Proposal constitutes an inappropriate development of historic heritage in terms of s 6(f) of the Act is based on the Board's finding that the environment constitutes a heritage area.

[331] Issue 7 posed questions Q 48(a) and Q 48(b) while Issue 8 specified a single question, Q 51.

[332] Although the amended notice of appeal contained distinct Issues 6, 7 and 8, NZTA's principal written submissions stated at para 35.2 that the questions of law relevant to heritage and amenity identified in those three issues had been refined to six questions which were set out and addressed in the submissions. Those refined questions were revised still further in the memorandum of 23 July 2015[140] as follows:

> In relation to Issue 6, we seek to refine the questions of law as outlined at para 35.2 of [NZTA's] Primary Submissions:
>
> [45A] When assessing the heritage or amenity effects on the environment under s 171(1), must the decision-maker do so 'through the lens' of the relevant plans under s 171(1)(a) and, if relevant, s 171(1)(d) documents? That is, should the effects be assessed 'through the lens' of the recognition and protection provided by those plans and/or documents?
>
> [45B] Further, should the Board have assessed the effects having particular regard to its finding at [1230] that the works were reasonably necessary to achieve the objectives under s 171(1)(c)?
>
> [45C] When there is no 'invalidity, incomplete coverage or uncertainty of meaning' in the relevant plans under s 171(1)(a), is it appropriate for a decision-maker to assess effects against s 6(f) (for historic heritage) and s 7(c) (for amenity values)?
>
> [45D] Did the Board correctly apply the definition of 'historic heritage' under s 2?
>
> [45E] What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

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[140] At [51] above.

Q 45A: When assessing the heritage or amenity effects on the environment under s 171(1), must the decision-maker do so 'through the lens' of the relevant plans under s 171(1)(a) and, if relevant, s 171(1)(d) documents? That is, should the effects be assessed 'through the lens' of the recognition and protection provided by those plans and/or documents?

[333] This question invokes NZTA's *King Salmon* argument. NZTA contends that the effects on the Project of heritage and amenity must be assessed having particular regard to the recognition and protection provided for in the Regional Policy Statement and the District Plan because those documents were prepared in accordance with and to give effect to Part 2. Consequently it argues that the correct approach to the assessment of heritage and amenity effects was:

> not within the framework of Part 2, rather it is through the lens of s 171.

The nub of the respondents' rejoinder is that planning documents do not determine the outcome of a s 171 decision.[141]

The planning framework

[334] The current Regional Policy Statement became operative in 2013 and the District Plan has been the subject of two plan changes in the last decade. Within that process new heritage items were added and the District Plan's objectives, policies and rules were amended in response to heritage becoming a matter of national importance under the RMA.

[335] The heritage items within the vicinity of the Basin Reserve and the wider bounds of the Project listed in the District Plan are:

(a) The Museum Stand;

(b) The Memorial Fountain;

(c) Government House;

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[141] At [117] above.

(d) Former Home of Compassion Crèche; and

(e) The Carillon.

As Mr McMahon noted,[142] neither the Basin Reserve generally nor its surrounds have been recognised in the planning documents as a listed heritage item or area.

[336] The District Plan recognises and provides for the protection of historic heritage in particular ways. Policy 20.2.1.4 is to ensure that the effects of subdivision and development on the same site as any listed building or object are avoided, remedied or mitigated. Other policies are to discourage demolition or relocation and to promote conservation and sustainable use (policies 20.2.1.1 and 20.2.1.3).

The Board's decision

[337] The Board suggested that in terms of heritage issues the case was somewhat unusual in that the Project did not result in the actual loss of any listed heritage fabric. However it considered that the geographical and historical context for the Project contained an unusual concentration of buildings, structures and places of heritage interest.[143]

[338] It recognised that the primary means for giving effect to the recognition of historic heritage is to include items of historic heritage in the District Plan under Schedule 1. However it stated that even if a place or area is not so scheduled, the requirement in s 6(f) would still apply.[144]

[339] The Board proceeded to recognise a "wider heritage area"[145] which it considered could be affected by the Project, which stretched from Taranaki Street in the west through the Basin Reserve and Council Reserve areas to Government House and the Town Belt in the east.[146]

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142 At [1603].
143 At [566].
144 At [556].
145 At [577].
146 At [588].

[340] In its summary of findings on heritage effects across the wider heritage area of interest it said:

> [757] Regarding adverse effects on historic heritage, we find that two issues stand out:
>
> (a) The risk to the status of the Basin Reserve as a venue for test cricket is confounded by the significance of the adverse effects on the heritage setting that arise from the mitigation required to address the risk to test-cricket status; and
>
> (b) The cumulative adverse effects of dominance and severance caused by the proposed transportation structure and associated mitigation structure in this sensitive heritage precinct, particularly on the northern and northeastern sectors of the Basin Reserve Historic Area setting.

[341] It is useful also to record Mr McMahon's different view on which NZTA placed emphasis:

> [1600] In respect of Section 6(f), I fully accept and support that the protection of historic heritage from inappropriate development is inextricably linked with sustainable management practice. In making an overall determination on any particular proposal's ability to fit with this strategic aim, I also find that the significance of the heritage resource(s) relevant in this case must also be factored in. In this respect, the settled provisions of the District Plan provide – for me – a critical filter through which significance is defined; and, in turn through which accordance with Section 6(f) can ultimately be determined.
>
> [1601] In this respect, I reiterate that there was agreement that there is no direct adverse effect arising from the Project on any heritage items currently identified (as significant and worthy of protection) in the operative District Plan. The evidence strongly suggests, therefore, that the Project is most certainly consistent with Section 6(f) as it relates to those listed items.

[342] After discussing the District Plan, the changes made to it and the non-inclusion of the Basin Reserve and its surrounds as a listed heritage item or area, Mr McMahon said:

> [1604] I am inclined, for this reason, not to afford the wider site the same significance that would otherwise be afforded to listed items. To do so would (in my view) undermine the integrity of the District Plan and the inherent effectiveness of the listing method as the primary tool to implement the District Plan's objectives and policies relating to the protection of historic heritage. This implementation role is important as it enables a process to test development against those policies and objectives which have already been deemed to be the most effective provisions to give effect to Section 6(f) and the Act's purpose.

He concluded that the Project did not represent inappropriate development in terms of s 6(f).

The parties' contentions

[343] NZTA submitted that, particularly in light of *King Salmon*, there was no mandate for a decision-maker on either a resource consent or designation to "re-write" the District Plan, citing the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd*:[147]

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed.

[344] NZTA developed that theme in this way:

> 36.15 There is a comprehensive suite of rules and criteria in Chapters 20 and 21 by which the District Plan recognises and provides for the protection of historic heritage from inappropriate use and development. This must be assumed to be a deliberate choice, tested and confirmed by the public participatory process. It is entirely appropriate in a built up, central city environment. Not only has the Majority failed to have particular regard to these provisions when considering the effects of the Project, it has imposed a wholly different regime for the recognition and protection of unlisted historic heritage well beyond what the Plan itself does.
>
> 36.16 Just as it would not have been permissible for the Board to find that any of the listed items was not a historic heritage value, nor is it open to the Board to substantially rewrite the Plan by adding items or, as in this case, whole 'precincts', which the Plan does not contemplate.
>
> …
>
> 36.19 [NZTA] submits that the Majority was wrong to undertake a sand-alone assessment of heritage within the Part 2 framework, as discussed above. Further, the Majority failed to have particular regard to the relevant planning documents when assessing the effects of the Project on historic heritage by finding heritage features in this location requiring protection under s 6(f); these being features

[147] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [10].

> beyond what the District Plan protects. This also led to the Majority finding that the Project was 'inappropriate' in relation to historic heritage without addressing that in the context of the District Plan and its regime for protection against inappropriate use and development.

[345] In his notes for oral reply Mr Casey emphasised that resort to Part 2 is only required in the case of conflict (or where a caveat applies, to which Q 45C relates). The point was made that there is no conflict between the planning documents and Part 2 and no conflict between the Project and the planning documents (including the derivative documents). It was submitted:

> The Board is required (before resorting to Part 2) to first assess effects having particular regard to the (a)–(d) matters and then consider whether a conflict exists that requires resolution. A 'thoroughgoing attempt' to resolve any apparent conflict must be made. If a conflict cannot be resolved, resort to Part 2 will be required.

[346] NZTA's position derived significant support from WCC on whose behalf Ms Anderson presented a thoughtful submission confined to the Issue 6 questions. Although aligned with NZTA's position on the historic heritage issue, WCC's submissions were not partisan in nature but reflected the fact that, as creator and regulator of the District Plan, WCC has a particular interest in how the District Plan is applied and interpreted.

[347] Key points made by WCC were:

- The effects of allowing the requirement must be considered "through the lens" or "in light of" the s 171(1)(a) to (d) matters. That means that the District Plan is a key "filter" of whether the effects that arise from a proposal are acceptable or appropriate;

- That analysis is supported by the requirement in s 171(1) to have "particular regard" to the listed matters which include the District Plan. That is to be contrasted with the lesser obligation to "have regard to" in s 104(1), albeit that both are subject to Part 2;

– Because of the lack of recognition of the Basin Reserve in the District Plan, the Board could not resort to Part 2 as justification for its elevated treatment of unlisted heritage items and views;

– The Board erred in recognising an extended important heritage area which was inconsistent with the significance the District Plan gives to the heritage values in the area.

[348] Although, like NZTA, WCC accepted that simply because the Basin Reserve or the view along Kent and Cambridge Terraces is not listed or specifically identified in the District Plan did not mean that they were not of any heritage value or importance, nevertheless the decision-maker cannot resort to Part 2 as justification for the elevated treatment of unlisted heritage items and views.

[349] WCC's position was that the District Plan is a key basis for decision-making under the RMA and its provisions "must be applied as written". In response to my question whether the District Plan is exhaustive on the topic of historic heritage, Ms Anderson replied in the affirmative.

[350] The respondents' submissions in response were no less comprehensive. In summary they submitted:

(a) NZTA's argument was based on an erroneous application of *King Salmon* to the present circumstances;[148]

(b) the adverse effects which the Board identified at [757][149] were directly relevant to the inquiry not only because they were environmental effects under s 171 but also under s 149P because concerns about them were an important part of the Minister's decision to refer the proposal to the Board;

(c) all that the Board was required to do was to have particular regard to the various plans, and it duly did so;

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148 See at [117] above.
149 At [340] above.

(d) the Board's concern about the adverse effects was consistent with the guidelines in Part 2 to which its s 171 consideration was subject.

Analysis

[351] The extensive argument which I heard convinced me that phrasing the question by reference to "through the lens" or by way of a "filter"[150] is more likely to confuse than to clarify.[151] The search for meaning inevitably invites elaboration of the theme, an example of which appeared in TAC's submissions:

> … Contrary to the Appellant's submissions, s 171 the (a–d) matters do not form themselves into a combined *lens* which magnify the benefit of a proposed designation and diminish or blur its adverse effects.

I prefer to focus on the words of the statute.

[352] It is plain that the Board was required to have particular regard to inter alia the District Plan including the heritage items listed in Schedule 1. As NZTA says, it would not have been permissible for the Board to purport to find that any of the listed items was not of historic heritage value. Nor would it have been permissible for the Board to ignore them. The Board was required to consider the s 171(1)(a) matters specifically and separately from other considerations.[152] That said, the obligation on the Board in a s 171(1) context is to have "particular regard to", not "to give effect to".

[353] How much weight the Board gives to an item to which it is required to have regard or particular regard is a matter solely for the Board in the context of an appeal that is confined to questions of law, subject of course to any *Edwards v Bairstow* challenge. The issue which I am required to decide is whether as a matter of law the Board was permitted to have regard to other areas or items of historic heritage beyond that specified by the District Plan. In other words: Is the Plan exhaustive on the topic?

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150 At [341] and [347] above.
151 Kim Lewison *Metaphors and Legal Reasoning*, The Chancery Bar Association Lecture 2015.
152 See [66] above.

[354] In my view the Board was not so confined. Its consideration of Part 2 considerations was not restricted to instances of unresolvable conflict. Provided it discharged the obligation to have particular regard to the specified matters, in pursuance of its Part 2 obligation the Board was not precluded from also taking into consideration as effects on the environment the adverse effects of the requirement on other items it identified as being of significant historic heritage. In doing so it did not inevitably fail to have particular regard to the Plan as a s 171(1)(a) matter.

[355] NZTA's submission was that the Board had imposed a wholly different regime for the recognition and protection of unlisted historic heritage that went "well beyond what the Plan itself does". However it is not the function of the Court on an appeal such as this to undertake a qualitative assessment. The question to be answered must be confined to whether the Board made an error of law in reaching its conclusion. In my view it did not do so.

Q 45B: Further, should the Board have assessed the effects having particular regard to its finding at [1230] that the works were reasonably necessary to achieve the objectives under s 171(1)(c)?

[356] This question was derived from ground of appeal 29(e) (in the context of Issue 3) which asserted that the Board had failed to have particular regard to the finding at [1230] that the work was reasonably necessary to achieve NZTA's objectives. The 23 July 2015 memorandum described Q 45B as a development of Q 28(b) in its application to the original Q 45.

[357] The answer to Q 45B is plainly in the affirmative. That is simply the statutory obligation.

[358] However the reality is that NZTA's contention is directed not to the nature of the obligation but to whether the obligation was in fact discharged. While such an inquiry could be pursued on a general right of appeal, I do not consider that it is properly the subject of an appeal limited to questions of law only. However, in the event that my analysis is incorrect, I make the following further observations.

[359] I apprehend that at least one of the reasons for the contention that the Board did not have "particular" regard to the finding at [1230] is that in its description of its proposed decision structure at [199][153] the Board did not include the word "particular" in its reference to s 171(1)(c) in subpara (d).[154] NZTA's submissions stated that one of three noteworthy aspects of [199] was:

> 28.5(b) The Majority explicitly separates the s 171(1)(b) and (c) considerations from the consideration of effects. That is, it says that it will consider the effects of the requirement; then consider the (b) and (c) matters separately. It does not say that it will consider the effects of the requirement, having particular regard to whether [NZTA] has adequately considered alternatives (s 171(1)(b)); or whether the designation and the work is reasonably necessary for [NZTA] to achieve its objectives (s 171(1)(c)).

[360] However it is quite apparent that the Board did have particular regard to the s 171(1)(c) consideration. In addition to the discussion spanning [1217] to [1230] under the heading "Reasonably necessary for achieving objectives (s 171(1)(c))", the Board touched again on the issue of [1277] to [1278] and implicitly in the course of its ultimate conclusion at [1317].

Q 45C: When there is no 'invalidity, incomplete coverage or uncertainty of meaning' in the relevant plans under s 171(1)(a), is it appropriate for a decision-maker to assess effects against s 6(f) (for historic heritage) and s 7(c) (for amenity values)?

[361] This question also invokes NZTA's *King Salmon* argument. In essence it asks whether it is appropriate to address Part 2 considerations in the absence of one of the three caveats explained in *King Salmon*,[155] namely:

(a) if the relevant plan is invalid;

(b) if the relevant plan does not "cover the field";

(c) if there are uncertainties as to the meaning of the particular policies in the plan.

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153 At [77] above.
154 The same is true in relation to the reference to s 171(1)(b) in subpara (c).
155 *King Salmon*, above n 26, at [88].

[362] WCC supported NZTA's case on this point, submitting that the key findings in *King Salmon* at [84]–[85] were as applicable to District Plans as to Regional Plans. It contended that *King Salmon* removed the ability for a decision-maker to have recourse to Part 2 when giving effect to or interpreting a plan unless one of the three specific caveats applied. This, it was said, was significantly different from the previous treatment of Part 2 as the "engine room"[156] of the RMA. Its submissions also explained why the second and third caveats were not of application in this case.

[363] I am unable to accept that submission. The role of the caveats identified in *King Salmon* was to address the situation where there was, what one might describe generically as, some inadequacy in the plan. The caveats accordingly qualified the obligation to give effect to such an inadequate plan and preserved the avenue of reference back to Part 2 which the "give effect to" formula had removed.

[364] As explained earlier, the manner of recourse to Part 2 in the context of s 171 (and other sections stated to be "subject to Part 2") is not limited in the manner described in *King Salmon*.[157] Of course the three caveats may still have application in relation to inadequate plans so far as concerns the obligation to have particular regard to them.

[365] I have some reservation about the formulation of the question so far as it incorporates the word "appropriate". As the Supreme Court remarked in *King Salmon*,[158] the scope of that word is heavily affected by context. I tend to think that the words "permissible" or "legitimate" would have been preferable.

[366] However, assuming that the consideration of an application under s 171 does in fact engage historic heritage or amenity values, for the reasons above the answer to Q 45C is in the affirmative.

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156 *Auckland City Council v John Woolley Trust*, above n 54; see also [111] above.
157 At [85] in [113] above.
158 *King Salmon*, above n 26, at [100].

Q 45D: Did the Board correctly apply the definition of 'historic heritage' under s 2?

[367] One of the matters of national importance listed in s 6 as (f) is the protection of historic heritage from inappropriate subdivision, use and development. "Historic heritage" is defined in s 2 of the RMA as follows:

> **historic heritage**–
> (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
> (i) archaeological:
> (ii) architectural:
> (iii) cultural:
> (iv) historic:
> (v) scientific:
> (vi) technological; and
> (b) includes–
> (i) historic sites, structures, places, and areas; and
> (ii) archaeological sites; and
> (iii) sites of significance to Māori, including wāhi tapu; and
> (iv) surroundings associated with the natural and physical resources.

[368] The nature of the Board's alleged error in its interpretation of s 2 was described in ground of appeal 40(c) as follows:

> The Board wrongly applied paragraph (b)(iv) of the definition of 'historic heritage' in s 2 of the Act and thereby extended its consideration beyond the surroundings associated with the natural and physical resources constituting the historic heritage within the project area (being the Basin Reserve and listed heritage items) to conclude that the wider setting to those resources was of itself a heritage area.

The parties' contentions

[369] NZTA's primary written submissions developed the argument in this way:

> 37.3 While the definition includes 'historic' places and areas it does not specifically provide for heritage precincts or landscapes. The fact that there may be a collection of heritage items within the locality does not make it an historic place or area, unless that locality is a place or area of historic significance in its own right. As a matter of law it was not open to the Majority to conclude that the wider Project area is a heritage precinct/landscape.
>
> 37.4 By establishing a heritage precinct at this location, the Majority has developed a heritage landscape construct which it found stretches from Taranaki Street in the west through the Basin Reserve and Canal Reserve areas to Government House and the Town Belt in the

> east and applied it to the wider Project site. It did so on the basis that there is an unusual concentration of heritage buildings, sites and places at this location, such that the Project is contained within what it describes as an important heritage area.
>
> 37.5 By establishing a heritage landscape of this scale in this location, the Majority has purported to confer s 6(f) protection over the entire landscape rather than the particular heritage items within it. This level of protection is not provided for in the District Plan which, as noted, protects scheduled sites and features while ensuring that the diversity of development provided for within the planning framework relevant to this location is not constrained.

[370] NZTA acknowledged that the Environment Court in *Waiareka Valley Preservation Society Inc v Waitaki District Council*[159] had been satisfied that a purposive interpretation of s 6(f) enabled that provision to describe a collection of historic sites, places or areas as a heritage landscape and had concluded that the nomenclature 'landscape' could easily be substituted by 'area' or 'surrounds', depending on the particular context.

[371] However NZTA noted that the Court has since expressed considerable caution regarding the extension of (b)(i) of the definition to include a collection of historic sites, places or areas as a "heritage landscape". In *Maniototo Environment Society Inc v Central Otago District Council*,[160] the Environment Court noted that such usage:

> … may be dangerous under the RMA where the word "landscape" is used only in s 6(b). Further, the concept of a landscape includes heritage values, so there is a danger of double-counting as well as of confusion if the word "landscape" is used generally in respect of section 6(f) of the Act.

Similarly in *Gavin H Wallace Ltd v Auckland Council*[161] the Court also expressed caution over the use of the term and its inclusion in the lexicon of the RMA.

[372] Consequently NZTA submitted, having regard to the definition of "historic heritage", the case law and the District Plan, that the RMA does not envisage protection being extended under s 6(f) to a central city urban landscape of the scale

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159 *Waiareka Valley Preservation Society Inc v Waitaki District Council* EnvC Christchurch C058/2009, 13 August 2009 at [230]–[231].

160 *Maniototo Environment Society Inc v Central Otago District Council* EnvC Christchurch 103/09, 28 October 2009 at [208].

161 *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120 at [66]–[67].

determined by the Board. To do so would result in all activities within that location being "effectively trapped" within a special heritage landscape thereby "locking up" future urban development contemplated by the planning framework.

[373] In brief summary the respondents submitted that:

(a) the definition of "historic heritage" is broad and explicitly "includes" historic sites, structures, place and areas as well as surroundings associated with physical resources;

(b) NZTA's interpretation is unduly narrow and at odds with the text and purpose of the RMA;

(c) the Board examined whether there was an area of historic heritage, as the definition permits, but NZTA wrongly suggests that the Board concluded that there was some formal heritage precinct or landscape.

Analysis

[374] The competing perspectives in the contest before the Board are captured in the following paragraphs:

> [614] Some heritage experts have chosen to focus their assessments on individual heritage items, particularly listed or registered items, while others give attention to considerations of heritage setting as well. With reference to terminology, this is partly a distinction between *built heritage* and *historic heritage*.
>
> …
>
> [616] The Assessment of Environmental Effects prepared by [NZTA] refers explicitly to *Built Heritage* as the title for Section 26 of the document, and Technical Report 12 is similarly entitled *Assessments of Effects on Built Heritage*. [NZTA's] closing submissions confirmed this thematic focus.
>
> …
>
> [617] … The City Council's closing submissions made no reference at all to section 6(f) of the RMA, nor to *historic heritage*, choosing rather to focus on issues related specifically to listed or registered heritage items.
>
> …

> [622] Mr Milne, in his closing submissions, made numerous references to *historic heritage* and argued explicitly that the focus of [NZTA's] case on heritage matters *was wrongly limited to built heritage*. Mr Bennion, in his closing submissions, having cited explicitly the relevant RMA sections, similarly made numerous references to *historic heritage* and argued for the proper recognition of *setting* when assessing effects on historic heritage.

[375] As earlier noted,[162] while the Board recognised the District Plan as the primary means of giving effect to the recognition of historic heritage, it proceeded on the basis that even if a place or area was not scheduled s 6(f) still applied.

[376] There are a number of reasons why it is not easy to attribute to the Board a particular interpretation of the definition of "historic heritage" in s 2. First, the Board's discussion under the heading "Heritage, Cultural and Archaeological" is extensive, spanning [535] to [783], and the evidence is exhaustively analysed. That said, within that thorough review there are certainly references to precincts and landscapes, which are the focus of NZTA's submission.

[377] Secondly, the protection of particular sites or areas is not confined to the District Plan. Although the Basin Reserve is not included in the schedule to the Plan, it is registered as an historic area under the Heritage New Zealand Pouhere Taonga Act 2014.[163] Similarly the Board viewed the fact of the creation of the National War Memorial Park under its own empowering legislation[164] as an indicator of its national significance.

[378] Thirdly, the mosaic which the Board was required to consider was augmented by the Minister's reasons for direction to which the Board was directed by s 149P(1)(a) to have regard. Relevant to the issue of historic heritage those reasons stated:

> • The proposal is adjacent to and partially within the Basin Reserve Historic Area and international test cricket ground; in the vicinity of other historic places including the former Home of Compassion Crèche, the former Mount Cook Police Station, Government House and the former National Art Gallery and Dominion Museum; and is adjacent to

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162 At [338] above.

163 At [562]. The definition of "historic area" in s 6 means an area of land that contains an inter-related group of historic places and forms part of the historical and cultural heritage of New Zealand.

164 National War Memorial Park (Pukeahu) Empowering Act 2012.

> the National War Memorial Park (Pukeahu). The proposal is likely to affect recreational, memorial, and heritage values associated with this area of national significance (including associated structures, features and places) which contribute to New Zealand's national identity.

[379] There is force in the respondents' submission that it is difficult to see how the Board could have complied with its obligation to have regard to the reasons of the Minister in referring the proposal to it without taking the approach it did to the "area" of historic heritage.

[380] Indeed one of the instances of the Board's use of "precinct" was with reference to three of those places of importance when, in relation to an anticipated Anzac Day centenary celebration, it said:[165]

> Such an event would clearly link the NWM Park, the Basin Reserve, and Government House – covering the entire precinct we have described.

[381] In seeking to identify from the Board's broad review the interpretation which the Board placed on s 2, there are three paragraphs which I consider are particularly instructive:

> [557] The protection given by Section 6(f) extends to the curtilage of the heritage item and the surrounding area that is significant for retaining and interpreting the heritage significance of the heritage item. This may include the land on which a heritage building is sited, its precincts and the relationship of the heritage item with its built context and other surroundings.
>
> …
>
> [615] In defining *historic heritage*, the RMA makes a clear distinction between historic sites and historic heritage. At their conferencing, the experts drew attention to *the definition of historic heritage in the RMA – which includes (b)(iv) surroundings associated with the natural and physical (historic heritage) resources.*
>
> …
>
> [623] We agree that we are obliged to consider the effects on historic heritage and that historic heritage includes not only built heritage but the surroundings and setting in which the built heritage exists. In our view, the explicit focus of [NZTA], Wellington City Council and Heritage NZ heritage assessments on *built heritage*, as distinct from *historic heritage*, unduly limited the scope of those assessments.

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165 At [589].

The third of those paragraphs represented the Board's conclusion on the competing contentions in the extracts at [374] above.

[382] While for the reasons in [376] to [379] above Q 45D has proved to be one of the more difficult issues in the case, my conclusion is that there was no error in the Board's interpretation of the definition of "historic heritage". I do not accept NZTA's submission that in its application of the definition the Board "went well beyond the surrounds and setting of historic heritage".[166]

[383] NZTA's submissions further argued that if s 6(f) protection as found by the Board was unobjectionable, then the Board had erred in law "by applying this concept to the Project area without any methodology being identified or followed on which to base such a significant finding". I do not address that submission because I do not consider that it involves either a question of law or an issue sufficiently connected to Q 45D.

Q 45E: What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

[384] The bracketed words in the question reflect the fact that this question is conditional upon an affirmative answer to Q 45C and a rejection of NZTA's argument that it was not appropriate for the Board to assess historic heritage under Part 2.

[385] NZTA's argument in summary form was:

(a) prior to *King Salmon*, "inappropriate" in the context of s 6 was understood as having a wider meaning than "unnecessary" and was to be considered on a case by case basis;

(b) *King Salmon* held that the former approach did not accurately reflect the proper relationship between ss 5 and 6;

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[166] See [757] in [340] above.

(c) *King Salmon* held that "inappropriateness" is heavily affected by context and that the standard relates back to the attributes to be preserved or protected rather than the activity proposed;

(d) *King Salmon* also gave a clear direction that it is the relevant planning documents that provide the basis for decision-making under the RMA. This includes a decision-maker's evaluation of "inappropriateness" in the context of s 6.

[386] Consequently NZTA submitted:

> 38.6 … Therefore, in the absence of any allegation of invalidity, incomplete coverage or uncertainty of meaning; a decision-maker is required to assess s 6(f) matters as particularised by the relevant planning documents before them, from National Policy Statements down to district plans.
>
> 38.7 Even if the Majority was right to go beyond the District Plan in determining what constituted historic heritage, it should still have assessed what was appropriate by having particular regard to the scale and nature of the protection conferred by the District Plan. It did not do so.

[387] Mr Palmer raised the objection that this argument did not appear in the amended notice of appeal. However in my view the proposition advanced is in essence a variation on the theme reflected in Q 45A and Q 45C, in particular the "through the lens" argument.

[388] I first note that the Board explicitly recognised the guidance of *King Salmon* on the meaning of "inappropriate" in s 6(f):

> [558] Importantly, for this matter, we are guided by the Supreme Court in *King Salmon* as to the application of the word *inappropriate* as it is used in Section 6(f). Where the term inappropriate is used in the context of protecting historic heritage, the natural meaning is that inappropriateness should be assessed by reference to what it is that is being protected. That is, within the context of the heritage elements that exist within and around the Basin Reserve area, their value and the effects of the project on those values.

[389] In support of its conclusion at [783] that the Project was not consistent with s 6(f) the Board said:

> [780] Our overall evaluation is not simply a matter of considering effects on listed heritage items or confining our evaluation to a consideration only of the loss or restoration of heritage fabric, although such historic heritage

> effects are part of the cumulative picture. We must consider the character and significance of the whole wider heritage area and the appropriateness of such a structure within it.
>
> [781] We noted in our introduction to this section that the common theme in the relevant statutory documents – the RMA, Regional Policy Statement and District Plan – is to protect heritage from inappropriate use and development. We concluded in our findings from the sub-area analysis reported earlier in this decision two important issues: the inherent conflict in mitigating adverse effects, and the cumulative adverse effects of severance within the heritage setting. It appears to us that those conclusions align clearly with the final assessment of Mr Salmond on *appropriateness* and the findings of Ms Poff from her Part 2 assessment.
>
> [782] Consequently, we find that the evidence of historic heritage supports the conclusion that the Project before us constitutes an inappropriate development within this significant heritage area of the city.

[390] It is apparent in my view from [781] and a number of other paragraphs that the Board did have particular regard to the District Plan and other relevant documents. NZTA's complaint is with the Board's ultimate conclusion, as reflected in the submission:

> 38.8 … the Majority should have concluded that, because there was no direct adverse effect arising from the Project on any heritage items identified as significant and worthy of protection in the District Plan, the Project is consistent with s 6(f) as it relates to those listed items and therefore does not represent inappropriate development in terms of s 6(f).

[391] In effect NZTA's case is that the Board erred in not reaching a conclusion in accordance with (ie by giving effect to) the District Plan. As my earlier findings reflect, I do not agree that the Board's task under s 171(1) was so confined.

[392] I do not consider that there was any error of law in the Board's consideration of inappropriateness in s 6(f). In this context it is desirable to reiterate that this is not a general appeal by way rehearing and I am not sitting in judgment on the merits of the Board's conclusion.

Issue 8: Failure to consider options within the scope of the application to address amenity and heritage related effects to the Gateway Building

[393] Although this item was omitted from the memorandum of 23 July 2015[167] there was no issue that it remained live and the parties' written submissions addressed the following question:

> Q 51 Did the Board fail to have regard to a relevant matter, being options within the scope of the application that could balance the effects of the Proposal on the playing of cricket with other effects (heritage and amenity)?

[394] NZTA's grounds of appeal were:

> 52 The grounds of appeal in relation to this issue are:
>
> (a) The Board found at [965] that the cricketing experts were of the uncontested view that the 65m Northern Gateway Building was necessary to mitigate the effects on cricket when the evidence of Dr Sanderson was that a Northern Gateway Building of 45m would be sufficient to mitigate the risk of visual distraction to batters.
>
> (b) As a consequence, the Board found at [758] to [761] that there is an inherent conflict in mitigating the adverse effects on heritage. In particular, by finding that a Northern Gateway Building of 65m is required to mitigate the effects on cricket, but that mitigation has of itself other adverse heritage-related effects, including effects on views and amenity.
>
> (c) Consequently, the Board failed to consider as a relevant matter, options within the scope of the application to balance the needs of cricket with any other effects (historic heritage or amenity) of a longer structure, in particular by:
>
> (i) failing to consider a Northern Gateway Building of 45m or 55m;
>
> (ii) failing to consider a Northern Gateway Building of 65m together with conditions to ensure that the Building remain a sense of openness between 45 and 65 metres.
>
> (d) In the alternative, by rejecting the evidence of Dr Sanderson, the Board implicitly found that the evidence of the cricketers was more persuasive in assessing the Proposal's effects on the Basin Reserve. The Board therefore could only have reasonably found in accordance with the cricketers' evidence on amenity effects that the Northern Gateway

[167] At [332] above.

> Building would appropriately protect the ambience of the Basin Reserve (contrary to the Board's finding at [653]).

[395] It is quite apparent that the Board was cognisant of the options involving a Northern Gateway Building (NGB) of reduced length. At [36] the Board notes that the key elements of the Project included:

> (f) A new structure, known as the Northern Gateway Building, approximately 65m long and 13m high at or about the northern end of the Basin Reserve, adjacent and to the east of the R.A. Vance Stand. Shorter alternatives to the proposed structure within the same approximate 65m long and 13m high envelope/area are also proposed, together with landscaping;

[396] The primary function of the NGB was to screen the moving traffic on the Basin Bridge from views within the Basin Reserve so as to mitigate the effects of the Basin Bridge on cricket and amenity within the Basin Reserve. NZTA made it clear that it had no interest in developing the building, except as mitigation for the effects of the Basin Bridge.[168]

[397] Hence the longest option was naturally the focus of the Board's consideration because the cricketing experts were of the universal view that that option was necessary to mitigate the effects on cricket. So far as Dr Sanderson's evidence was concerned, Mr McMahon noted:[169]

> [1383] … The cricket evidence from the Basin Reserve Trust is preferred to the evidence of Dr Sanderson for the Applicant, who generously acknowledged that, despite his technical evidence in respect to ophthalmology, he should defer to cricket experts on the extent of the length of screening necessary to avoid distracting movement on the Basin Bridge for cricket players.

[398] I agree with Mr Palmer's submission that it is apparent from the Decision and from the Draft Decision (which included proposed conditions regarding design) that the Board did not fail to have regard to other options or conditions. I note the irony in his closing observation that NZTA appeared to be complaining that the Board did not consider options which would have had an even greater impact on historic heritage than the option it did focus on.

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168 [1424].
169 [1383].

Summary

[399] A decision on an appeal "only on a question of law" which raises more than 35 questions of law is not well-suited to a succinct summary. That is especially so when ten of the questions asked whether the Board's conclusions on various issues were findings to which it could reasonably have come on the evidence, that is, whether those conclusions were so insupportable that they amounted to errors of law.

The judgment finds that the Board's Decision does not contain any of the errors of law alleged. Although it is not practicable to recite each finding, attention is drawn to the following points of general application.

The meaning of s 171(1)

The provision in s 171(1) to have "particular regard to" the matters specified in (a) to (d) required the Board to consider these matters specifically and separately from other relevant considerations but did not indicate that extra weight should be placed on those matters.[170]

The relocation of "subject to Part 2" did not change the meaning of s 171(1).[171] The Board's role under s 171(1) was different from that in *King Salmon* where the obligation under s 67(3) was to give effect to the NZCPS. *King Salmon* did not change the import of Part 2 for the consideration under s 171(1) of the effects on the environment of a requirement.[172]

Adequate consideration of alternative options

Section 171(1)(b):

> (a) permits a more careful consideration of alternatives when there are more significant adverse effects of allowing a requirement;[173] and

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170 [64]–]68] above.
171 [86]–[98] above.
172 [99]–[118] above.
173 [140]–[142].

(b) does not require a requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environment effects.[174]

In some, but by no means in all, cases it may be necessary for the decision-maker to gain access to the weightings in a multi-criteria analysis in order to be satisfied that adequate consideration has been given to alternatives.

Enabling effects

A project's enabling benefit can constitute an effect to be taken into account under s 171(1) and/or s 5.[175] In order to be given weight the enabling benefit need not be unique to a project, guaranteed to go ahead or able to be quantified.[176]

Transportation benefits

Where a project will have more than minimal adverse effects no higher standard of proof is required to demonstrate the project's transportation benefits.[177]

Heritage and amenity

On a s 171(1) application a District Plan is not exhaustive concerning items of historic heritage. The decision-maker's consideration of Part 2 considerations is neither restricted to instances of unresolvable conflict[178] nor confined to situations where one of the three *King Salmon* caveats is applicable.[179]

The Board did not err either in its interpretation of the definition of "historic heritage" in s 2[180] or in its approach to the application of "inappropriateness" in s 6(f).[181]

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174 [156].
175 [265]–[266].
176 [268].
177 [299].
178 [354].
179 [363]–[364].
180 [382].
181 [392].

Disposition

[400] For the reasons above, NZTA has not established that in its Decision the Board made any error of law of the nature reflected in the several questions of law in the amended notice of appeal, as revised by the 23 July 2015 memorandum. Consequently NZTA's appeal under s 149V(1) is dismissed.

[401] The parties requested the opportunity to make submissions on costs. In view of the outcome of the appeal:

(a) the respondents are to file any costs memoranda by 11 September 2015;

(b) NZTA is to file a costs memorandum by 2 October 2015; and

(c) the respondents may file any memoranda strictly in reply by 16 October 2015.

Leave is reserved to apply to amend that timetable if necessary.

[402] Finally I record my appreciation to all counsel for the quality of their submissions and the assistance which they provided to the Court in navigating a course through this complex matter.

_____

Brown J

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BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 109

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal pursuant to s 120 of the Act
BETWEEN	NORSHO BULC LIMITED (ENV-2016-AKL-000168) Appellant
AND	AUCKLAND COUNCIL Respondent
AND	BLACKBRIDGE ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED Section 274 party

Court:	Environment Judge D Kirkpatrick Environment Commissioner I Buchanan Environment Commissioner E von Dadelszen
Hearing:	at Auckland on 22 – 24 May 2017
Appearances:	J M Savage for Norsho Bulc Ltd G C Lanning and M McCullough for Auckland Council J C Brabant and S T Darroch for Blackbridge Environmental Protection Society Inc
Date of Decision:	21 July 2017
Date of Issue:	21 JUL 2017

DECISION OF THE ENVIRONMENT COURT

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

A: The Appeal is upheld.

B: Resource consents are granted subject to conditions.

C: Any application for costs must be made within 10 working days of receipt of this decision and the party against whom costs are sought must respond within a further 5 working days.

REASONS

Introduction

[1] Norsho Bulc Limited applied to the Auckland Council for resource consents to establish a managed fill operation at a site at 294 Blackbridge Road, Pine Valley legally described as Lot 4 DP166787 and Lot 2 DP 422009 (**the site**). Following a hearing before Commissioners appointed by the Council, a decision refusing consent was issued on 18 July 2016. Consent was refused on the following grounds.

(a) Adverse effects on amenity values at adjacent properties.
(b) Adverse effects of operational noise at adjacent properties.
(c) Increased truck movements on Blackbridge Road with associated adverse effects on residents' amenity and the condition of the road pavement.
(d) Cumulative adverse effects from the succession of fill activities in the area.
(e) The proposal was contrary to the relevant provisions of the operative District Plan and the proposed Auckland Unitary Plan relating to the maintenance and enhancement of rural character and amenity.
(f) Neither of the s 104(d) RMA gateway tests were met.
(g) The site did not differ from the generality of sites in the rural zone to an extent that warranted special consideration for consent.

[2] The decision was appealed by Norsho Bulc, seeking consents for the proposal subject to appropriate conditions. The Blackbridge Environmental Protection Society Incorporated (**the Society**) registered an interest in the appeal in support of the Council's decision under s 274 RMA. The Society represents a number of residents who live in Blackbridge Road and the surrounding area. Six members of the Society provided evidence for the hearing, together with expert traffic and planning evidence.

The Proposal

[3] The application to establish and operate a managed fill as notified involved the importation and placement of some 940,000m^3 of managed fill to northern and eastern gullies on the site over a period of ten years. This involved up to 240 truck movements per day, six days per week between the hours of 6 am to 6 pm, Monday to Friday and 6 am to 1 pm on Saturdays. On-site earth bunding was proposed to screen visibility of truck movements on the internal access road and the fill operation areas from neighbouring residences.

[4] Prior to the application being heard by the Council's Commissioners, Stage 2 of

the proposal, involving fill of 340,000m^3 in the eastern gully, was removed from the application leaving 600,000m^3 of fill to be placed in the northern two gullies on the site. The fill is to be used by account holders only with access by prior arrangement to control the number of truck movements. Access to the site is by electronic key with imported fill volumes and composition logged at an internal weighbridge prior to deposition at the tip area. An on-site operator will check fill material prior to tipping and spreading. The operational exposed area is to be limited to 1.0 hectares (**ha**) with additional site preparation and post-fill restoration leaving a further 2.0 ha exposed during the summer earthwork season. During the winter, the maximum exposed area is 1.5 ha. All fill material is to comply with the specific requirements of the Auckland Plan (AUP-OP) for managed fill and this is to be detailed in a site management plan prepared by the Company.

[5] Since the initial Council decision and following mediation, the application has been further modified as follows:

(a) The number of track movements is to be limited to a maximum of 160 per day.

(b) The hours of operation remain from 6 am to 6 pm Monday to Friday, but no trucks are to arrive at the site earlier than 7 am or after 5 pm. No material is to be imported to the site on Saturdays, Sundays or public holidays.

(c) Saturday work is to be limited to machinery maintenance and site preparation maintenance between 8 am and 1 pm.

(d) A 20 metre riparian planting strip is to be fenced either side of the east/west stream north of the landfill and 10 metre riparian buffers established on other streams.

(e) The northern most bund is to be formed and planted in a manner that avoids shading of the adjacent property to the east and to present a natural appearance.

(f) Additional planting is proposed for the lower section of the entrance driveway.

[6] Norsho Bulc did not intend to commence fill operations at this site until similar operations on a neighbouring site operated by Dirtworks had been completed. We were told that this operation has now finished, making this proposed delay redundant.

[7] Additional modifications to the application were proposed by Norsho Bulc following further investigation for the preparation of traffic evidence by Mr Phillip Brown, their consultant traffic engineer. These modifications were to:

(a) Reposition the limit line and marked edged line on Postman Road, opposite the intersection of Blackbridge Road and Dairy Flat Highway and trimming of roadside vegetation at this area.

(b) Upgrade the one-way bridge priority sign.

(c) Implement a pedestrian/cycle/equestrian advanced warning system at the one-way bridge.

(d) Pipe four roadside channel sections to enable improved pedestrian and equestrian access to the adjacent berm along Blackbridge Road. Following caucusing of traffic witnesses, an additional two accessways were agreed to and now form part of the application.

[8] Counsel for Norsho Bulc advised in opening that in addition to the above modifications to the application, the company would seal the full length of the unsealed section of the access road from Blackbridge Road to the northern fill area.

Issues

[9] Following mediation and caucusing of the experts involved in the case, two principal issues remained for determination.

(1) Is the character and amenity of the area around the Blackbridge Road fill site sufficiently compromised by the effects of the proposal to warrant declining the application?

(2) Is a review condition as proposed by the Council appropriate to address any future upgrade of Blackbridge Road pavement that may result from heavy vehicles accessing this site?

The Environment

[10] The site is located in the northern side of Blackbridge Road approximately 2.9 km to the west of Dairy Flat Highway. It comprises approximately 65 ha and is currently used for pastoral farming. There are no buildings on the site. A household unit owned by Norsho Bulc is located on the adjacent lot of 294 Blackbridge Road and the existing accessway to this lot will be shared by trucks accessing the site. The managed fill is to be located in two northern gullies in a central position adjacent to the western boundary of the site. There are a number of watercourses on the site.

[11] The landscape of the site was assessed by Ms Janet Woodhouse, consultant landscape architect for Norsho Bulc, as not having landscape values of significance or as being sensitive and vulnerable to change. It is however a valued landscape, particularly to those residents who live nearby. The site is characterised by pasture

with small areas of indigenous shrubland and wetland vegetation. Gorse has invaded much of the pasture within the proposed fill area. Watercourses within the proposed fill area carry intermittent runoff discharging into an upper tributary of the Rangitopuni Creek. The tributary bisects the property flowing in a westerly direction. No watercourses in the fill area are classified as permanent.

[12] Based on ecological surveys of the site Mr Nicholas Goldwater, consultant ecologist for Norsho Bulc, concluded that overall the terrestrial ecological values of the fill site are very low.[1] This view was shared by the Council ecologist, Mr Rupert Statham.[2]

[13] The surrounding area is characterised as rural in nature, with scattered rural residential subdivision. The area to the north of Blackbridge Road in the general vicinity of the subject site has been zoned Rural - Mixed Rural in the operative Auckland Unitary Plan (**AUP-OP**). The land on the southern side of Blackbridge Road opposite the subject site has been rezoned from General Rural to Rural - Countryside Living under the AUP-OP where subdivision to a minimum average size of 2.0 ha is provided (1.0 ha minimum if a transferable title is used). The eastern end of Blackbridge Road has been zoned as Future Urban under the AUP-OP and is included within the Rural Urban Boundary.

Background to the application

[14] Rapid and continuous growth and development in Auckland, particularly in areas on the North Shore close to the subject site, has generated demand for properly managed fill operations within reasonable driving distance. We were told that on average each residential site development generates 25m^3 of fill that needs to be removed. When considered alongside surplus fill generated by commercial, infrastructure and industrial development it becomes obvious that one of the significant consequences of this development is disposal of clean and managed fill.

[15] Material accepted for managed fills is soil, clay, gravel, sand, rock, concrete or brick that, unlike cleanfill, has or may have certain contaminant or hazardous substance levels that are higher than natural background levels, but where adverse environment and health effects remain less than minor. It is expected that with the history of land use in the Auckland area much of the fill generated by development will fall into the category of managed fill rather than cleanfill.

1 Goldwater EIC at para 31.
2 Statham EIC at para 51.

[16] Counsel for Norsho Bulc submitted that the proposed site was well-suited to contribute to meeting the demand for this type of facility due to its large size, ability to control access and deposited material, and separation distance from adjacent residences. He described this proposal as "an essential part of the fill disposal regime supporting development, particularly in this part of the Auckland region".[3]

Statutory Planning

[17] The Commissioners' decision was made under the then operative Auckland Council District Plan: Rodney Section where managed fill operations in the General Rural zone had non-complying activity status. Relevant sections of the Auckland Unitary Plan became operative on 19 August 2016. It was common ground with the planning witnesses that it is only these AUP-OP provisions that now apply to the application before the Court.

[18] The site is zoned Rural – Mixed Rural. Consents are required under the following provisions of the AUP-OP:

(a) Discretionary activity consent for the managed landfill (Rule H19.4.1).
(b) Restricted discretionary activity consent for land disturbance within the settlement control area one (Regional Rule E11.4.1).
(c) Restricted discretionary activity consent for earthworks greater than 2,500m^2 in area and 2,500m^3 in volume (District Rule E12.4.1).
(d) Controlled activity consent for discharge from managed fills (Rule E13.4.1).
(e) Non-complying activity consent for stream filling (Rule E3.4.1).

It was not in dispute that, on a bundled basis, the proposal was to be considered as a non-complying activity, triggering consideration under s 104D RMA.

Statutory Instruments

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

[19] This NES is relevant. It was not in dispute that the methodology proposed for managing discharges from the fill site from both surface and sub-surface water is appropriate as are proposed erosion and sediment control measures. Adherence to acceptance criteria and acceptance management practices would result in less than minor effects on the freshwater environment.

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3 Mr Savage opening at para 20.

National Policy Statement for Freshwater Management 2014

[20] It was not in dispute that this Policy Statement was relevant and that the proposal was in accordance with the NPSFM.

Auckland Unitary Plan

[21] Sections H19.2.1 - 6 set out the objectives and policies related to all Rural zones. These recognise the importance of rural character and amenity values as well as rural areas being a place for production activities.

[22] Policies H19.2.5 and H19.2.6 relate to rural industries, rural commercial services and non-residential activity.

[23] These objectives and policies recognise the need to provide for non-rural industries, including cleanfills and managed fills in Rural Production, Mixed Rural and Rural Coastal zones.

[24] Section H19.4.1 sets out the purpose of the Mixed Rural zone to provide for rural production generally on smaller rural sites and non-residential activities of an appropriate scale. The objectives and policies of the zone are set out in sections H19.4.2 and H 19.4.3.

[25] Chapter E3 relates to lakes, rivers, streams and wetlands. Of particular relevance to the application are Objective 6 and associated policies 1 to 4, 9 and 13, covering permanent removal of streams and corresponding offset mitigation measures, and disturbance and depositing of substances.

Effects on Character and Amenity

[26] The RMA defines "amenity values" as those natural or physical qualities in and characteristics of an area that can contribute to people's appreciation of its pleasantness, aesthetic coherence and cultural and recreational attributes.

The positions of the parties

[27] Counsel for Norsho Bulc submitted that the proposal addresses potential effects from visual landscape changes, traffic, dust and noise to the extent that no unacceptable adverse effects on the character and amenity of the area will be experienced. The subject site is located in a rural zone where a range of rural productive activities occur. The effects of the proposal will be no more than that generally expected from other appropriate activities. Counsel noted that the fill operation is located on the northern side of a ridge separating it from the Countryside Living zone along the southern side of Blackbridge Road.

[28] Counsel for the Council submitted the Council accepted that the modified proposal as described in the Applicant's evidence and included in the revised conditions of consent would ensure that effects on general amenity, including dust, landscape, noise and traffic effects, were adequately addressed and would be no more than minor. The only outstanding issue for the Council related to road pavement effects, which we deal with later.

[29] Counsel for the Society submitted that the concerned residents of the area considered that, in combination, the effects of the application would "impose in a significant and adverse way upon their amenity and environment".[4] This community attitude had developed from experience with a succession of similar but smaller fill operations in the Blackbridge Road area over many years.

[30] We now turn our attention to specific aspects of the proposal that have the potential to affect amenity values.

Dust

[31] The Company proposed to seal the full length of the access road not already sealed and to implement a range of on-site dust suppression management techniques at the active fill area. In addition, a dust monitoring device is to be installed at an appropriate boundary position with a monitoring threshold set above which further on-site management will be triggered to reduce dust emissions to acceptable levels. Conditions of consent have been developed to give effect to these dust management proposals which in the opinion of Ms Diana Bell, planning consultant for Norsho Bulc, would result in any adverse effects from dust being no more than minor.

[32] The other planning consultants who gave evidence, Mr Robert Scott for the Council and Dr Mark Bellingham for the Society, agreed with Ms Bell that adverse effects from dust generated on the fill site would be managed to an acceptable level by operating to the proposed conditions of consent. Of particular importance in this regard was the sealing of the access road.

Landscape and visual

[33] Norsho Bulc relied on the evidence of Ms Woodhouse to describe the landscape around the site and assess any effects that may be generated by the proposal on the site. Ms Woodhouse's landscape assessment concluded that "although this landscape is not regarded as having landscape values of significance or as being sensitive or

4 Mr Brabant opening at para 6.

vulnerable to change, it is still a valued landscape".[5] Ms Woodhouse considered that the proposed earth mound bunding at the operational fill area and along the access road, together with screen planting, would avoid or mitigate visual effects of the operation from the immediate neighbouring residences. In her opinion the visual change to the fill area at any given time would not be incongruent within the landscape and that any change in landscape character from alteration to landform shape in the northern area of the site would not be adverse.

[34] In response to cross-examination by Mr Brabant, Ms Woodhouse acknowledged that given a three to five year time lag for vegetation screening on the bunding to be effective, and if the maximum rate of fill was continuously achieved, then some fill working may be visible from residences to the northeast of the site for a period of up to one year.[6]

[35] In preparing evidence for the Council, consultant landscape architect Mr Simon Cocker peer reviewed the landscape assessment undertaken by Ms Woodhouse and agreed with her methodology and conclusions. Mr Cocker participated with Ms Woodhouse in a witness conference, producing a joint witness statement to assist the Court.[7] This statement confirmed that the landscape witnesses were in agreement that the proposal as now applied for would result in no adverse visual or landscape effects that would be more than minor. In doing so, they acknowledged that the mitigation of the effects of trucks accessing the sites off Blackbridge Road would not be fully effective until after three to five years.

[36] Mr Cocker addressed in evidence the potential visual effects of the proposal on Mr Nicholas de Witte's property at 99 Tender Road, in particular the effects from an approved building site on a new lot directly to the north of the fill site. Mr Cocker concluded that due to a separation distance of some 700 metres and the presence of vegetation adjacent to the 99 Tender Road building site, the adverse visual effects would be low. He confirmed this view in cross-examination from Mr Brabant, stating that in his opinion views of the activity in the fill area "won't be particularly noticeable"[8] from 99 Tender Road.

[37] Presenting evidence for the Society, Mr de Witte outlined his concerns for the visual effects of the fill activity when viewed from his building site, 700 metres to the north. Mr de Witte considered that the active working area at the fill site of up to 3.0 ha

5 Woodhouse EIC at para 68.
6 Transcript page 78, line 19.
7 Expert witness statement – landscape 2004, 2017.
8 Transcript page 165, line 18.

would "completely dominate the view from any of the building sites on my property".[9] He also expressed concern that further subdivision to the north and east of the landfill site would establish a number of additional residences from which the site would be visible even with the proposed screening in place.

[38] Ms Chrystal Henwood expressed concern at the potential visual effect of trucks using the access road when viewed from her property at 27 Drury Lane, some 400 metres away. The fill site itself was around 800 metres from her house, but located on the other side of the central ridgeline on the site, so not directly visible.

[39] Mr Chris Wheeler's property at 246A Blackbridge Road is immediately east of the proposed fill area but separated from it by a low ridge. Mr Wheeler acknowledged in his evidence and in response to cross-examination from Mr Savage that the proposed bund along the ridgeline between his house and the operational fill area was designed to screen any view of the activity from his house area,[10] but that he had reservations about its effectiveness. He also had reservations that the screening bund could or would be constructed to blend with the natural landform of the ridge as recommended by the landscape experts.

Noise

[40] Norsho Bulc relied on the evidence of Mr Neville Hegley, Consultant Noise Expert, to provide measurements of ambient noise in the subject rural area and to assess predicted noise levels attributable to the operation of the proposed managed fill. Mr Hegley's evidence was uncontested by other expert evidence.

[41] Mr Hegley measured ambient noise at the notional boundaries of the site as typically 37dB during mid-morning and mid-afternoon. Based on actual noise measurements at a similar nearby fill site, Mr Hegley predicted that the level of noise from the subject site would be relatively low, rarely above 40dB. It was his opinion that while this level of noise may be heard by the closest neighbours it would not be at an unreasonable level. Mr Hegley considered that noise from the site would typically be below background levels at these neighbouring residences and well below plan provisions for the rural zone. In his opinion, the noise effects would be no more than minor.

[42] We note that the baseline noise level for the rural area in the AUP-OP is $55dBA_{Leq}$.

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9 de Witte EIC at para 4.15.

10 Transcript page 221, line 1.

[43] Mr Hegley noted in rebuttal evidence in response to statements from Dr Bellingham that the noise generated by trucks using Blackbridge Road to access the proposed fill site would be well below the closest relevant New Zealand Standard guideline level of 64 dBA_{Leq}.[11] He predicted a one hour noise level of 41 dBA_{Leq} at the dwelling closest to the road. In his opinion, this would not be an unreasonable level of truck noise either along Blackbridge Road or from the site access road.

[44] Mr de Witte expressed concern that the levels of machinery noise measured by Mr Hegley did not take into account how the bulldozer was being operated or the presence of other noise generating equipment such as a water cart. Based on his experience of a similar operation on Tender Road some 700 metres from his property, Mr de Witte considered that noise from the fill site was likely to be experienced at his proposed building site, 700 metres away and would adversely affect the rural amenity at that site.

[45] Ms Henwood was also concerned that noise from trucks using the access road would be intrusive, based on her experience with the nearby Dirtworks managed fill. This would have an adverse effect on the rural amenity values experienced at her Drury Lane property.

[46] Ms Louise Johnston, resident at 252 Blackbridge Road, considered that what she expected to be continuous noise from the fill operation for up to 11 hours per day, five days per week, would be very different from the general background noise expected in a rural environment and would diminish the amenity value of her property. Mr Stephen Johnston also expressed concern that the constant noise would have a negative effect on his livestock, particularly sheep during lambing season.

Traffic

[47] Mr Phillip Brown, a consultant traffic engineer, prepared a brief of evidence and rebuttal evidence for Norsho Bulc and participated in the preparation of a joint witness statement on traffic matters. Mr Brown was overseas at the time of the hearing so was unable to attend. Mr Donald McKenzie, also a consultant traffic engineer with prior involvement in assessing transport aspects of the proposal, provided a statement of evidence adopting Mr Brown's Evidence-in-Chief and rebuttal.

[48] For the purposes of this decision, we take the written evidence of Mr Brown as being that of Mr McKenzie and refer to it as such. Mr McKenzie has reviewed all of the data, calculations and opinions presented in Mr Brown's statements and adopted all of

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11 NZS 6806:2010

these. He also attended the caucusing of traffic witnesses and agrees with the joint statement of that group.

[49] Lay witnesses for the Society, Mr de Witte, Ms Henwood, Mr and Mrs Johnston and Ms Tanya Syme, resident at 438 Blackbridge Road, provided primary evidence supporting their concerns in relation to the effects of additional trucks using Blackbridge Road. These concerns identified two main issues:

(a) The safety of non-motorised road users including pedestrians, particularly school children accessing school buses, horse riders and cyclists.

(b) The ongoing safe use of the intersection of Blackbridge Road with Dairy Flat Highway.

Both of these issues were addressed in expert evidence by Mr McKenzie and Mr Wesley Edwards, a consultant traffic engineer engaged by the Society.

[50] With regard to Blackbridge Road use, Mr McKenzie outlined modifications to the application designed to address the residents' concern around the safe use of Blackbridge Road. These measures had been developed following discussions with Mr Edwards and a Council traffic engineer, Mr Andrew Gratton. They involved upgrading the one-way bridge priority signage, implementing a pedestrian/cycle/equestrian advanced warning system at the one-way bridge, and installing pipes in four roadside channel sections to improve pedestrian and equestrian access to the berm. He also noted that the proposed weekday only importation of material, the restriction on truck movements to 160 per day and access to the site limited to between 7 am and 5 pm, meant that trucks using the fill site would not be on Blackbridge Road during periods when the majority of non-motorised use was likely to occur, that being evenings and weekends.

[51] Discussions at caucusing of the traffic engineers focused on the need for additional pedestrian/equestrian access culverts along the road. Two further sites were identified as appropriate and agreed to by Mr McKenzie and Mr Edwards, bringing the total number of these mitigation facilities to six. Mr McKenzie and Mr Edwards agreed that the provision of these facilities, together with the other measures described in the revised application would result in no more than minor adverse effects on uses of Blackbridge Road from the proposed fill operation.[12]

[52] Regarding the Blackbridge Road/Dairy Flat Highway intersection, Mr McKenzie described the current volumes on the Highway at the intersection and the controls and

12 Joint traffic statement, 2 May 2017 at para 14.

numbers of lanes on the two side roads being Postman Road and Blackbridge Road. He considered the current controls to be appropriate.

[53] Mr McKenzie examined the data for current turning movements from the Highway into Blackbridge Road, observing that the proportion of heavy to light vehicles making this turn was extremely low during peak hours and that he did not expect this to change significantly with this fill operation in place. Outside peak hours the total volume of traffic turning right or left into Blackbridge Road was lower than in peak times and did not, in his opinion, justify any significant alteration to the layout of the intersection, including the provision of dedicated right or left turn lanes into Blackbridge Road. He did not expect this to change with the proposal.

[54] Mr McKenzie supported his conclusions with an examination of crash history records from 2005 to 2016, noting that only one crash had occurred during that period. This involved a light vehicle turning right into Blackbridge Road. No heavy vehicle had been involved in a right turn crash at the intersection during this period when similar fill operations had been operating along Blackbridge Road.

[55] Notwithstanding his conclusions on the safe operation of the intersection being unaffected by the proposal, Mr McKenzie considered that some minor adjustments could be made to improve the situation for southbound vehicles that may have to pass another vehicle waiting to turn right into Blackbridge Road. This would involve the limit line on Postman Road being repositioned so that it was 6.0 metres back from the marked centre line of the road and repositioning the marked lane edge line and tying this into existing markings. To ensure that visibility from Postman Road to the north is maintained, Mr McKenzie recommended the trees on the eastern side of the road reserve on Dairy Flat Highway north of Postman Road be trimmed back to the property boundary.

[56] These recommended additions to the application have been accepted by Norsho Bulc and included in the proposed conditions as the company's responsibility to implement.

[57] The Council did not call any evidence in relation to traffic matters other than that addressing physical effects on the pavement along Blackbridge Road, a matter that we deal with in detail later in this decision. Counsel for the Council advised that "based on its own advice, the Council accepts the evidence of Mr Brown (McKenzie)".[13] As noted above, this evidence concluded that the proposal was acceptable from a traffic

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13 Mr Lanning opening submissions at para 4.1(e).

engineering perspective if the modifications addressing safety and operational issues are included in consent conditions.

[58] Mr Edwards expected the proposal would generate greater heavy vehicle numbers turning into Blackbridge Road than at present as it was of a significantly larger scale and of much longer duration than other fills that have previously operated along the road. Mr Edwards emphasised that the current volumes of traffic using the intersection at peak hours triggered consideration of right and left designated turn lanes into Blackbridge Road by the Road Controlling Authority.[14] In his opinion, the additional heavy traffic turning generated by the proposed fill would exacerbate the current operation of the intersection and that it was Norsho Bulc's responsibility as applicant to remedy this by upgrading the intersection and providing dedicated turn lanes from the Highway into Blackbridge Road. He accepted that Mr McKenzie's recommended minor lane marking alterations were feasible, but in his opinion these did not adequately mitigate the risk presented by the proposal.

Discussion

Amenity Effects

[59] Members of the Society, all of whom are resident in the general locale of the proposed site, told us of the value they place on the character and amenity of the area they have chosen to live in. Without exception they expressed concern that offsite effects related to dust, noise, views and traffic would have an adverse effect on the lifestyle they currently enjoy.

[60] We also heard expert description and evaluation of the potential effects, together with proposals from the Applicant to address these. These broadly included:

(a) Sealing of the access road, monitoring of dust at the fill site and operational measures to prevent nuisance dust generation;

(b) Earth mound bunding and screen planting at appropriate areas and limitations on active fill areas to avoid visual effects on neighbouring properties from truck movements on the access road and operational activity of the site;

(c) Traffic management and road berm access for pedestrians and horse riders to mitigate the effects of heavy vehicles accessing the site on traffic safety and the safety of non-motorised users of Blackbridge Road.

(d) Restricting truck access to the site to weekdays between 7am and 5pm to

[14] Austroads Guide to Road Design Part 4A: Unsignalised and Signalised Intersections (Section 4.8).

avoid any potential interaction between heavy trucks during evening hours and on weekends and public holidays and residents using the road corridor for walking, riding or cycling.

[61] In each instance expert evaluation of the efficacy of the proposed operational limitations and activities to avoid, remedy or mitigate visual noise, dust and traffic effects, has concluded that each of these potential offsite effects will be contained within acceptable limits and that there will be no significant adverse effects on the character and amenity value of the area within which the proposed fill site is located.

[62] Without in any way doubting the sincerity of the concerns held by Society members or the significance they attach to these concerns, we place considerable weight on the agreement between independent expert witnesses on the level of effects on lifestyle amenity likely to be experienced by members of the Society from the operation of the proposed fill. In doing so, we acknowledge that some local people will be more sensitive to the low level of offsite effects generated by the proposed fill operation than others. This heightened sensitivity is not of itself sufficient cause for us to decline consent.

[63] The application includes the establishment of a community liaison group and a complaints register to allow for and encourage ongoing dialogue between the fill operator and interested local residents. Properly constituted and operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.

[64] We find that the adverse dust, noise, visual and traffic effects on lifestyle amenity in the Blackbridge Road area will be no more than minor.

[65] The only area where there was not an agreement between witnesses related to effects on the continued safe operation of the Dairy Flat Highway/Blackbridge Road intersection. It is clear that heavy vehicles accessing landfill sites along Blackbridge Road has been a reality for some years. The latest fill to be completed was the Dirtworks site in close proximity to the proposed site. This site operated under the same restrictions on daily truck movements as that proposed in the Norsho Bulc application and we were told that on occasions the maximum truck movements allowed was achieved.

[66] The evidence available to us suggests that on an average daily basis this proposal will see similar truck movements as that experienced from the Dirtworks

operation, albeit over a considerably longer period. Mr McKenzie's evidence demonstrated that the subject intersection had been operated without incident involving a heavy vehicle for at least the last ten years and that is in his opinion the layout of the intersection was fit for purpose and will continue to be so with the proposed fill operating. This evidence was accepted by the Council and, anecdotally from Mr McKenzie, by the road controlling authority Auckland Transport.

[67] It is not for this Court to enter into a detailed evaluation of the performance of road intersections against the relevant Austroad Guidelines as suggested by the detailed evidence of Mr Edwards and Mr McKenzie. That is clearly the responsibility of the road controlling authority. Our task is to assess the safety risk of heavy vehicles accessing the proposed landfill on, in this instance, the Dairy Flat Highway/Blackbridge Road intersection.

[68] We accept the evidence of Mr McKenzie that the proposal will not result in a significant increase in daily average truck movements through the intersection. These movements represent a small proportion of the total vehicle movements and consequently there is no additional safety risk at the subject intersection. Despite this, Norsho Bulc have offered consent conditions requiring the company, with the approval of Auckland Transport, to carry out minor lane marking repositioning and visibility enhancement to assist in the smooth flow of traffic through the intersection. We acknowledge this offer is made on an *Augier* basis[15] and have included the relevant consent conditions on that basis.

Effects on Ecology

[69] Counsel for Norsho Bulc submitted that the ecology experts relied on, Mr Nick Goldwater for the company and Mr Rupert Statham for the Council were in agreement on the ecological values associated with the site, the effects of the proposal on ecology, and offset compensation measures that should be undertaken.

[70] It is anticipated that around 600m^2 of wetland vegetation and 480 metres of intermittent and ephemeral watercourses will be lost at the fill site. These areas are heavily modified by past land management practices and their ecological values are considered to be low by the ecologists. Terrestrial vegetation within the fill gullies is

15 This is a reference to the decision in *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD) as authority for the proposition that an applicant for consent who undertakes to abide by a condition of consent cannot later challenge the validity or reasonableness of that condition. See *Frasers Papamoa Ltd v Tauranga CC* [2010] 2 NZLR 202, [2010] NZRMA 29, (2009) 15 ELRNZ 279, for a full discussion of the application of this principle in the context of the RMA.

dominated by exotic plant species and the terrestrial ecological values are considered to be very low.

[71] Norsho Bulc, on the advice of the ecologists, proposed by way of consent conditions to prepare an ecological compensation plan which would include:

(a) Protection of the wetland within the significant ecological area (SEA) north of the fill area.
(b) Riparian protection and enhancement of streams in the northern sub-catchments and downstream of the landfill.
(c) Restoration of identified wetland habitats.

Mitigation measures related to the capture and relocation of any lizards and fish found on the site, pest plant control and management of surface and subsurface hydrology are also proposed.

[72] The ecologists agreed that the package of mitigation and compensatory measures proposed in the revised application will significantly enhance the ecological value of the site. Any adverse effects from the loss of stream and wetland habitats would be minimal. We accept the advice of the ecologists in this regard and have included the recommended mitigation and offset measures in the consent conditions.

Road upgrading issue

[73] The main issue between Norsho Bulc and the Council centred on a proposed purpose for the review condition, being:

> To consider the effectiveness of consent conditions relating to the effect of truck movements on the pavement along Blackbridge Road and the need for any upgrading works to be undertaken and the consideration of limiting truck movements to the managed fill until such improvements have been completed.

[74] The Council sought the inclusion of this purpose and Norsho Bulc opposed it. The s 274 parties, while concerned about the potential effects of heavy vehicle traffic on Blackbridge Road, adopted a neutral stance on whether this purpose should be included in the review condition.

Appellant's case

[75] Counsel for Norsho Bulc submitted that this review purpose was based on the desire of Auckland Transport to levy a charge per tonne of material delivered to the site to be applied in respect of future maintenance. Counsel submitted:

(a) There is no statutory power or district plan provision lawfully enabling such a levy. The Auckland Unitary Plan contains no financial contribution

provisions of the type required by s 108(10) which would enable the Council to impose conditions requiring financial contributions under s 108(2)(a).

(b) A levy is not required in any event given the condition and anticipated life of the current road. Analysis of tests on the road shows it to be in good structural condition such that it is unlikely to require pavement reconstruction within a 25 year period. Norsho Bulc does agree to pay for and maintain the upgrading of the stretch of Blackbridge Road to 50 metres on either side of its entrance, but will not agree to maintain all of the road from the intersection with the Dairy Flat Highway to its entrance.

(c) Such a levy does not recognise properly the road user charges payable by truck operators delivering fill to the site. The cost of improving and maintaining local roads is shared between the New Zealand Transport Agency and local councils with that funding being sourced from road user charges, among other things. The charges likely to be payable by trucks using this section of Blackbridge Road is an appropriate contribution by those operators towards the costs associated with maintaining the road.

(d) Levying Norsho Bulc would be selective and flawed, as the deliveries would be by other companies. There are many other users of the road. It is likely that the road could be used by forestry trucks when the Riverhead Forest is harvested. Previous fill operations on the site and in the vicinity have also resulted in road user charges available for the maintenance and upgrading of the road.

(e) The imposition of a levy on Norsho Bulc but not on other companies with much larger associated trucking operations is unreasonable, illogical and unlawful. Numerous large scale trucking operations use roads all over the region but none are required to pay levies of this kind.

[76] Norsho Bulc relied on the evidence of Mr Michael Lee, its civil engineer, in support of these submissions. Mr Lee is not specifically qualified in road pavement construction but his engineering qualifications and his project management experience provided a basis on which he challenged the Council's approach. He pointed to the classification of Blackbridge Road as a primary collector under the One Network Road Classification published by the New Zealand Transport Agency and said that this indicated that the proposal was consistent with the expected level of traffic (including heavy traffic) on the road. He challenged the Council's calculations of the makeup of

the heavy traffic, which he considered would be likely to result in less "equivalent standard axles" than estimated by Ms Parsonage for the Council.

[77] For those reasons, counsel for Norsho Bulc submitted that this review purpose should not be included in the review condition.

Respondent's case

[78] The Council did not accept that any of Norsho Bulc's arguments were valid. While it accepted that there is no jurisdiction for the Court to impose a levy, it said that it was not seeking one. Rather, its argument was that heavy vehicle traffic associated with the proposal would exceed the structural capacity of the road causing damage well in excess of ordinary wear and tear, and accelerating the need to repair and upgrade the road. The Council accepted that the road is presently sound and able to carry its current traffic loading, so that it is not in need of road pavement reconstruction within 25 years. Allowing the proposed fill operation, however, would significantly increase the axle loading on the road within a relatively confined period, exceeding its capacity to bear such loads. This, counsel submitted, would be an adverse effect of the environment (in particular the physical resource of the road) caused by the proposal which should be internalised by the appellant rather than passed to the road controlling authority, Auckland Transport.

[79] The Council relied on the evidence of Ms Anna Percy as to funding of roading and the use of road user charges. Ms Percy is a senior officer with Auckland Transport. She reviewed in broad terms the way in which road user charges are collected to form part of the funds available to the New Zealand Transport Agency for funding land transport expenditure. She said it was incorrect to say, as Mr Lee did, that charges incurred by vehicle operators through specific travel were then available to fund the roads specifically travelled on. In fact, the funds gathered as road user charges (like other sources of land transport revenue such as petrol taxes or excise duties on motor spirits) have only an indirect relationship to the mitigation of effects on any road in particular.

[80] The Council also relied on the evidence of Ms Angela Parsonage as to the existing condition of Blackbridge Road and the likely effects of traffic generated by the proposal on the road. Ms Parsonage is a civil engineer employed by Auckland Transport with particular experience and expertise in roading pavement. She did not agree with Mr Lee's assessment of Blackbridge Road or his interpretation of particular pavement assessment results. She said that a key difference between the current proposal and other heavy vehicle traffic on Blackbridge Road lay in the frequency of

heavy vehicle movements which occur substantially more often as a result of this proposal and which would therefore subject the road to greater impacts with less time for the pavement (which is inherently flexible) to recover. She advised that many rural roads in the Rodney area appeared to be constructed in the same manner and were similarly susceptible to intensive heavy vehicle movements.

[81] On these grounds the Council's preferred position was that the fill activity should not commence until the road is upgraded. This could be achieved by declining resource consent or by imposing a condition precedent delaying the commencement of consent. Counsel acknowledged the significance of this approach. Mr Scott, the planner called by the Council, under cross-examination by counsel for the Society offered the view that declining consent in this situation would be "*a big conclusion to make.*"[16]

[82] Alternatively, the Council sought a review condition of the kind set out above in paragraph 73. Counsel submitted that this approach would have weaknesses, including the delay between detecting damage and addressing it, the contested nature of any review process and the consequent likelihood that Auckland Transport would be compelled to undertake and fund repairs without any certainty that it would recoup those costs.

Discussion

[83] It is not a matter of dispute that heavy vehicle movements on a road can cause damage to a road. It also does not appear to be in dispute that Blackbridge Road, typical of rural roads in Rodney, is of lower grade construction than, by comparison, the Dairy Flat Highway which was once State Highway 1. The acknowledged potential effect is that heavy traffic will cause premature damage to the road. The issue then is how this effect may be avoided, remedied or mitigated.

[84] We note at the outset that this general issue is not confined to the circumstances of this case. We were told, without apparent challenge, that every new house results in approximately $25m^3$ of spoil which is usually disposed of in a clean- or managed fill. If any large number of houses are to be built in the short to medium term in the Auckland region (and the Auckland Unitary Plan is predicated on a stated need for some 400,000 new homes over the next 30 years) then roughly 10 million cubic metres of spoil may need to be disposed of. The Court would expect that both the Council and Auckland Transport should be making some strategic plans as to how and where that will be done, but no-one involved in this case appeared to know whether that was under way.

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16 Transcript page 197, line 28.

[85] Returning to the more confined issue in this case, and assuming that consent should be granted, there are a number of possible solutions as presented during the hearing:

i. For Auckland Transport to upgrade the road using funds available to it, including whatever subsidy funding may be available from the national land transport fund if the upgrading is approved by the New Zealand Transport Agency.

ii. For Auckland Transport to seek contributions from Norsho Bulc towards this upgrading.

iii. For the Auckland Council to review the exercise of the consent and determine whether there should be any reduction or other constraint imposed on the heavy vehicle traffic associated with the consented activity.

iv. For the exercise of the resource consent not to commence until the road is upgraded.

[86] These possible solutions are not mutually exclusive and might occur in combination or in series. As discussed below, we also do not think this is an exhaustive list and that there are other possible solutions.

[87] In reaching our decision on whether the review purpose sought to be included by the Council, or any other condition, should be imposed in any consent in relation to this proposal, we are mindful that any condition of resource consent must be within the scope of the Act, both in terms of the ambit of s 108 and also in terms of well-established case law[17] that, to be valid, a condition must:

a. be for a resource management purpose and not an ulterior one; and

b. fairly and reasonably relate to the activity for which consent is being granted; and

c. not be so unreasonable that no reasonable consent authority, duly appreciating its statutory duties, could have approved it.

[88] In relation to road user charges, we observe that the Environment Court has no jurisdiction in relation to matters of land transport funding. We therefore will not delve

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17 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731 (UKHL); approved in *Housing New Zealand v Waitakere City Council* [2001] NZRMA 202 (CA); explained in *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, [2007] NZRMA 137 at [64] – [66] (SC).

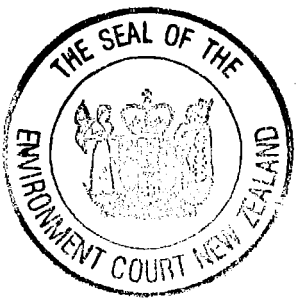
into the issue of whether the charges payable by truck operators whose vehicles travel on Blackbridge Road are or could be hypothecated to the funding of any upgrade of that road. We do note that the Council says the funds will not be used in that way and we accept the submission, supported by authority, that the Court has no power to direct the Executive or any of its agencies as to how they may collect or spend public monies.[18]

[89] We note that it is common ground that there are no provisions in the Auckland Unitary Plan which enable any condition of consent requiring a financial contribution for this purpose to be imposed. That could change should the Auckland Council initiate a plan change but that possibility seems too remote to be an appropriate consideration in this case, especially now that the provisions enabling financial contributions to be included in district plans will be repealed with effect from 18 April 2022.[19]

[90] The absence of any provisions in the plan enabling financial contributions to be imposed as a condition of consent in a case such as this means that care must be taken in considering case law about road upgrading contributions,[20] most of which was decided in the context of such provisions or the corresponding earlier provision in s 321A of the Local Government Act 1974 (repealed).

[91] We also note that the Auckland Council apparently has no development contribution policy under Part 8, Sub-part 5 of the Local Government Act 2002 which would apply in this case. That position could also change, subject to the procedures required to amend the existing policy or adopt a new one under that Act. As we understand it, that process might be considered to be less remote than the prospect of incorporating financial contribution provisions in the Auckland Unitary Plan. However, as with land transport funding, the Council's development contributions policy is not something over which we have any jurisdiction and so we do not give any potential change to it any weight in our assessment.

[92] Looking at the scope for addressing this issue by means of conditions imposed on resource consents, we start by acknowledging that roads are finite physical resources[21] and the use of roads is a use of land.[22] It is a relevant resource



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18 *Bell v Central Otago District Council* C 04/97 at p 8; *Coleman v Tasman District Council* [1999] NZRMA 39 (HC).

19 Pursuant to sections 175 – 184 of the Resource Legislation Amendment Act 2017.

20 Such as *Flude v Waitakere City Council* A 123/92, which is otherwise quite similar to the present case on its facts.

21 *Coleman v Tasman District* W 67/97.

management consideration to seek to manage the effects of activities on such resources in a way or at a rate that enables people and communities to provide for the various aspects of their well-being while sustaining their potential to meet the reasonably foreseeable needs of future generations.[23] As the Court has said:[24]

> It is bad resource management practice and contrary to the purpose of the [Act] ... to zone land for an activity when the infrastructure necessary to allow that activity to occur without adverse effects on the environment does not exist, and there is no commitment to provide it.

[93] It is accordingly open to a Council to refuse a plan change on the grounds that it would cause unnecessary expense to the ratepayers.[25] It is also a lawful basis on which to refuse an application for resource consent.[26]

[94] But these propositions all arise out of proposals, whether in the form of plan changes or applications for resource consent, where the need for new or further infrastructure was acknowledged as a direct consequence of allowing new development. In the *Coleman* case, which related to a subdivision proposal, the Environment Court's assessment of the overall proposal concluded that it *sent all the wrong signals to the community* and entailed much more than the direct effects of the subdivision itself. In the present case, both the plan provisions for the Mixed Rural Zone and evidence of the existing environment indicate that fill activities are planned for and are widespread. So while we accept that the Court may decline resource consent where the effects of the new activity would exceed the capacity of the site and the surrounding environment, we are not convinced that the present case can be properly characterised in that way. In our view, the proposed fill activity is consistent with the relevant plan provisions and (subject to appropriate conditions) with the affected environment. We think that the real issue arising from this case relates to the management of the rural road resources in this and similar neighbourhoods.

[95] We note that the use of roads is a permitted activity under the Auckland Unitary Plan.[27] There was no discussion of this activity status before us, perhaps because the

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22 *Hall v McDrury* [1996] NZRMA 1 (PT).

23 *McIntyre v Tasman District Council* W 83/94.

24 *Foreworld Developments Ltd and ors v Napier City Council* W 008/2005 at [15].

25 *Prospectus Nominees v Queenstown Lakes District Council* C 74/97, citing *Bell v Central Otago District Council* C 4/97.

26 *Coleman v Tasman District Council* W 67/97; upheld on appeal: *Coleman v Tasman District Council* [1999] NZRMA 39 (HC).

27 Activity A67 in Table E.26.2.3.2 of the Auckland Unitary Plan provides for "Construction, operation,

rule may do little more than state a position that must apply in any event: counter-factually, we doubt that a Council could make a rule under which a person seeking to use a road first had to obtain a resource consent. But the rule and the counterfactual both demonstrate a much broader issue in relation to the extent to which the control of the use of roads may be limited under the RMA, at least in practical terms if not in legal theory.

[96] Roads are perhaps the oldest form of public infrastructure. The common law in relation to roads recognises two ancient rights:

i. that the public may pass and repass on a highway without let or hindrance;[28]
and

ii. that every person with property fronting a road may enter that property from and leave it to the road.[29]

[97] While those ancient rights endure, the boundaries of them are now the subject of many statutes and associated subordinate legislation which control or limit the exercise of them. For present purposes the most relevant are the Local Government Act 1974 (especially Part 21 relating to roads), the Land Transport Act 1998 and the Heavy Motor Vehicle Regulations 1974 now in force under the latter Act. This legislation confers on local authorities and road controlling authorities (in the Auckland Region, this is Auckland Transport[30]) broad powers to control the use of roads.

[98] Among the powers available that might be relevant in this case are the following:

(a) under s 319 of the Local Government Act 1974, a range of general powers including to construct, upgrade and repair all roads with such materials and in such manner as the council (here, Auckland Transport) thinks fit;

(b) under s 16A of the Land Transport Act 1998, the power by public notice to direct that any heavy traffic[31] or any specified kind of heavy traffic defined in

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use, maintenance and repair of road network activities" as a permitted activity on both existing and unformed roads. "Road network activities" is defined in Chapter J of that plan to include road carriageways and road pavements.

28 *Paprzik v Tauranga District Council* (1991) 1 NZRMA 73 (HC); *Hall v McDrury* [1996] NZRMA 1 (PT).

29 *Fuller v McLeod* [1981] 1 NZLR 390 (CA).

30 Sections 46 and 50, Local Government (Auckland Council) Act 2009.

31 Defined in the Regulations as the use of motor vehicles having a gross laden weight exceeding 3,500kg.

the notice may not proceed between any 2 places by way of any road or roads specified in the notice;

(c) under s 22AB(1) of the Land Transport Act 1998, the power to make a bylaw for the purposes of:

(c) prohibiting or restricting, absolutely or conditionally, any specified class of traffic (whether heavy traffic or not), or any specified motor vehicles or class of motor vehicle that, by reason of its size or nature or the nature of the goods carried, is unsuitable for use on any road or roads;

(d) for the safety of the public or for the better preservation of any road,—

(i) fixing the maximum speed of vehicles or of specified classes of vehicles on any road:

(j) designating any area, where that designation will have the effect of determining the speed limit in that area:

...

(i) providing for the giving and taking of security by or from any person that no special damage will occur to any road, bridge, culvert, ferry, or ford by reason of any heavy traffic:

(j) prohibiting any specified class of heavy traffic that has caused or is likely to cause serious damage to any road, unless the cost of reinstating or strengthening the road, as estimated by the Minister or the relevant road controlling authority, as the case may be, is paid previously:

(k) providing for the annual or other payment of any reasonable sum by any person concerned in any heavy traffic by way of compensation for any damage likely to occur as a result of the heavy traffic to any road, bridge, culvert, ferry, or ford:

(l) providing for the establishment, in accordance with section 361 of the Local Government Act 1974, of a toll to be levied on any class of heavy traffic: ...

(d) under regulation 3 of the Heavy Motor Vehicle Regulations 1974, the power to classify a road as Class C where it would be likely to suffer excessive damage by heavy motor vehicles if classified in Class I, with the consequence under regulation 5(5) that no person may operate any heavy motor vehicle on that Class C road except for the purposes of the delivery or collection of goods[32] or passengers to or from locations directly accessible only from that road; and

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32 Defined in s 2 Land Transport Act 1998 to mean "all kinds of movable personal property; and

(e) under regulation 10 of the Heavy Motor Vehicle Regulations 1974, the power, on reasonable grounds, to prohibit absolutely or conditionally the use on any specified road of heavy motor vehicles, or to prohibit those which exceed a specified axle weight where that is necessary to protect a road from excessive damage.

[99] In light of this range of methods, it is reasonable to consider whether the transport provisions rehearsed above should be read as excluding any scope for the operation of the Resource Management Act. This question arose in *Hall v McDrury*[33] in relation to a challenge to the Planning Tribunal's jurisdiction to make an enforcement order requiring a dairy farmer to cease the driving of dairy cows on a particular road except for certain limits. There was a stock driving bylaw in effect apparently under s 72 of the Transport Act 1962. His Honour Judge Skelton considered the issues in detail. He held that the common law right to use a road did not necessarily override the RMA.[34] He considered that the existence of other statutory powers in relation to the management of roads was not so inconsistent with or repugnant to the RMA that the statutes were incapable of standing together.[35] On that basis he held that as activities on roads may give rise to the kind of adverse effects that are the subject of ss 17 and 314 of the RMA, the Tribunal did have jurisdiction to make an enforcement order of the kind sought.

[100] It is pertinent to record that in his discussion of the High Court's decision in *Paprzik*, Judge Skelton also noted Fisher J's observation[36] that there may be no compelling reason for seeking to control roads through a district plan given the provisions of other legislative controls.

[101] It is also important to be clear that the Court has no authority to direct the Executive or any of its agencies as to any choice available in the exercise of that agency's powers, including the choice of doing nothing.[37] But in a contested case where the imposition of a regulatory control (such as a condition of a resource consent) is discretionary, we consider that it is a relevant consideration in the exercise of our discretion to look at the other options that may be available including any which appear

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includes articles sent by post, and animals." *Quaere* whether clean or managed fill material are "goods."

33 *Hall v McDrury* [1996] NZRMA 1 (PT).

34 Finding support for this in *Paprzik v Tauranga District Council* (1991) 1 NZRMA 73 (HC).

35 In terms of the approach adopted in *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA).

36 *Paprzik v Tauranga District Council* (1991) 1 NZRMA 73 (HC) at 81.

37 *Bell v Central Otago District Council* C 4/97, cited with approval in *Coleman v Tasman District Council* [1999] NZRMA 39 (HC).

to be open to the agency itself. Further, this may be especially important where the consistent administration of such regulatory controls is particularly desirable because of the likelihood of directly comparable cases arising in the future.

[102] Although we accept that it would be within the scope of the Court's authority to do so, we do not consider it to be necessary or appropriate in this case to refuse resource consent for a managed fill on this site on the basis of future damage to Blackbridge Road. For the Court to make that decision in the present case would, we think, be for the Court to assume a role in the management of the road which would go beyond the ambit of resource management contemplated under the RMA.

[103] We also do not consider it appropriate to include the additional purpose sought by the Council in the review condition. To do so would simply put off for another day the resolution of the central issue. It would run a clear risk that the consent might be rendered nugatory on review or mean that the review would be substantially ineffectual from the point of view of the consent holder should the consent authority treat that risk as determinative.

[104] We consider that the road upgrading issue in this case can be squarely addressed by the road controlling authority through any of a number of options for the management of the road, as outlined above. We note that it may also be possible for the consent authority to address the broader issue through its policy on development contributions but, as we have already indicated, we cannot presume that the Council should make a policy to address these circumstances and so we do not give that any weight. These options may also enable one or both of those authorities to consider the most appropriate basis for enabling fill operations on sites with access via local roads while placing the burden of the cost of any damage to those roads on the person or persons who most appropriately should bear that cost, who may be the operators of the sites that receive the fill material, or the operators of the truck operations that transport the material on these roads, or the land developers whose activities generate the material.

Auckland Unitary Plan

[105] There are a number of objectives and policies within the AUP-OP directed at cleanfills and managed fills within rural zones.

- Policy H19.2.4(2)(b) recognises noise, dust, odour and traffic as usual effects associated with the use of land in rural zones for, amongst other activities, cleanfills, are a typical feature of rural zones.

- Policy H19.2.6(2) requires non-residential activities in the rural zone to be managed to avoid creating reverse sensitivity effects to contain and manage adverse effects on site and avoid, remedy or mitigate effects on traffic and the road network.
- Policy H19.2.6(4) states:

  Restrict cleanfills and managed fills in the rural-rural conservation and rural – countryside living zone. Where cleanfills are established in other zones:

  (a) They should not adversely affect or inhibit the use of surrounding land for production purposes or for carrying out any permitted restricted discretionary or discretionary activity; and

  (b) Their completed state should be in keeping with the appearance, form and location of existing rural character and amenity values.

While these policies refer to managed fills less often than cleanfills, we do not consider that they call for different treatment of them as land uses (as distinct from the management of their potential discharge effects) given they are likely to have the same effects in relation to landscape and visual, noise, traffic and roading. To the extent that they may have different effects in relation to dust or the ecology, there was no evidence put before us on which to make any differentiation in this case.

[106] We have concluded that any potential adverse effects arising from the operation of the fill site will be largely internalised on site or mitigated to an acceptable level. The land will revert to pasture on completion and its form and character will be in keeping with the surrounding rural landscape. The managed fill will not affect or inhibit the use of any surrounding rural land. Potential effects from heavy vehicles accessing the site on the road network and traffic safety have been accepted as either no more than minor or best addressed through non-RMA mechanisms. Taking these findings into account, we find the proposal does not offend the relevant general provisions for rural zones.

[107] The Mixed Rural zone purpose and description is set out in s H 19.4.1. The relevant objectives and policies for the Rural – Mixed Rural zone are:

H19.4.2 Objectives:

1. The existing subdivision pattern is used by a range of rural production activities and non-residential activities that support them.
2. The continuation of rural production and associated non-residential activities in the zone is not adversely affected by inappropriate rural lifestyle activity.
3. Rural character and amenity values of the zone are maintained while anticipating a mix of rural production non-residential and rural lifestyle activities.

H19.4.3 Policies:

1. Enable rural production, rural industries and rural commercial services that are compatible

with the existing subdivision pattern and recognise that these activities are significant elements of and primary contributors to rural character and amenity values.

2. Manage reverse sensitivity effects by:
   (a) Limiting the size, scale and type of non-rural production activities;
   (b) Retaining the larger site sizes within this zone;
   (c) Limiting further subdivision to new rural lifestyle sites; and
   (d) Acknowledging a level of amenity that it reflects the presence of:
      (i) Rural production and processing activities that generate rural odours, noise from stock and the use of machinery and the movement of commercial vehicles on the local road network; and
      (ii) Non-residential activities which may generate noise, light and traffic levels greater than those normally found in areas set aside for rural lifestyle activities.

[108] We consider that Ms Bell best summarised the position of the proposal in the context of these planning provisions in the Mixed Rural zone as:

> The Mixed Rural zone in which the subject site is located recognised that there are a number of rural production activities and non-residential activities, including cleanfills and managed fills which occur and need to continue to occur in the rural environment. The objectives and policies also recognise that the level of amenity which can be expected needs to take into account these non-residential activities which may generate noise, light and traffic levels greater than those associated with rural lifestyle areas. I consider that the proposal is consistent with the above objectives and policies; the actual and potential effects generated are consistent with that expected within a rural area. The key potential effects on amenity values being dust, noise, vibration, safety and efficiency of the road networks have been specifically addressed in the design mitigation measures and recommended conditions of consent.

This position was supported by Mr Scott.[38]

[109] We accept this evidence and find that the proposal is consistent with the objectives and policies for rural zones within the AUP-OP.

[110] Section E3 of the AUP-OP sets out provisions related to the management of lakes, rivers, streams and wetlands. Broadly these provisions direct that permanent loss of these features is to be minimised and significant modification avoided. In some circumstances where adverse effects cannot be avoided, remedied or mitigated, offsetting compensatory action can be considered.

[111] Objectives E 3.2(1) to (6) specify the protection and management requirements for streams and wetlands on the site. The natural values of these features on this site are considered by the ecologist witnesses to be low and onsite enhancement is proposed to offset the permanent loss of the ephemeral stream and wetland areas.

38 Scott EIC at para 75.

The loss of these areas is inevitable as fill material is to be placed in the gully where they exist. No significant ecological area (SEA) is affected by fill and areas identified as SEA on the property are to be protected and enhanced through appropriate conditions of consent proposed by Norsho Bulc. No permanent stream areas will be lost as a result of this managed fill.

[112] It was not in dispute that filling the two north facing gullies on the site would inevitably remove the low value ephemeral streams and wetlands from these gullies, but that any adverse ecological effects would be more than adequately compensated by the protection and ongoing management proposed for the remaining northern streams and wetlands. As a consequence, we agree with the planners that the proposal is not contrary to the relevant objectives and policies for the lakes, rivers, streams and wetlands in the AUP.

Section 104D RMA

[113] The non-complying activity status of the proposal on a bundled basis requires consideration under the relevant provisions of s104D RMA. This states that a consent authority may only grant consent provided it is satisfied that:

(a) The adverse effects on the environment will be minor; or

(b) The application is for an activity that will not be contrary to the objectives and policies of the relevant planning documents.

[114] It was not in dispute in submissions from the parties that the proposal passed at least the second of these gateway tests and could therefore be considered for grant under s. 104.

[115] Dr Bellingham confirmed in response to questions from Mr Savage that he agreed with Ms Bell and Ms Scott that the proposal met the jurisdictional test for non-complying activities under s 104D.[39] In doing so, he acknowledged that the proposal was not contrary to the relevant objectives and policies for rural zones in the AUP.

[116] We have concluded that any adverse effects from operation of the fill and of heavy vehicles accessing the site along Blackbridge Road will be no more than minor for consenting purposes under the RMA, leaving open the possibility that Auckland Transport may manage the road and potential effects of heavy traffic on it in some other way to address its concern about protection of the pavement.. The application therefore also passes the first of the gateway tests.

39 Transcript page 247, line 22.

Section 104

[117] Section 104(1) directs that regard must be had for:

(a) Any actual and potential effects on the environment of allowing the activity;
(b) Any relevant provisions of a plan in this case the AUP-OP; and
(c) Any other relevant matters.

Positive Effects

[118] Cleanfill and managed fill operations are a consequence of residential, commercial and industrial development that is projected to continue apace in this part of the Auckland region. The location of the site in close proximity to this development reduces the need for longer haul heavy traffic journeys to more remote rural areas with consequent reductions and fuel use and road maintenance. It also avoids the inefficient deposition of clean material at sanitary landfill sites.

[119] The proposal is of a large enough size to support a fully controlled and managed operation which may reduce demand for smaller sites in the area. The site will support development year around, including the winter period when smaller fill sites cannot receive wet material.

[120] Riparian protection and enhancement proposed for the northern streams and wetlands outside the operational fill area are a positive environmental gain and the completed fill will enhance the suitability of the site for pastoral farming.

Adverse effects

[121] The proposed fill activity is considered by many in the local community as likely to have adverse effects on the lifestyle amenity of a rural area containing a growing number of residential properties. We have found these adverse effects to be no more than minor. Of themselves, the adverse effects are not significant enough to warrant decline of consent.

Plan provisions

[122] Provision is made for managed fill operations in the operative Auckland Unitary Plan. In the proposed location, the application is consistent with the provisions of the plan and the final proposal before us fully addresses all matters requiring assessment under these provisions.

[123] No other matters were brought to our attention requiring consideration under s 104(1)(c).

Conditions

[124] As requested by the Court at the conclusion of the hearing, the planners called by Norsho Bulc, the Council and the Society drafted an agreed set of consent conditions to assist the Court. These conditions run to some 26 pages and are very comprehensive. We have accepted these draft conditions in full, with the exception of condition 15 providing for review under s128 RMA and a minor amendment to Traffic Management Plan provisions requested by the Society.

[125] We see no need in this case for a general review provision as we consider all potential adverse effects have been identified in evidence and addressed through conditions. We have considered the issue of Blackbridge Road pavement effects separately, concluding that a review provision as promoted by the Council is not the appropriate approach. Draft condition 15 has been removed from the final consent Conditions.

[126] The Society continues to oppose the 10 year grant of consent. We have accepted the application from Norsho Bulc, supported by the Council, for a time frame that enables flexibility to cater to uncertain demand over time for the facility. We have noted earlier that if demand leads to the maximum allowed daily truck movements continuously, the fill will be completed in around 3 years. Should demand be less, the fill will obviously take longer to complete. We accept that a 10 year consent period is reasonable in this circumstance.

[127] The Society has requested a minor addition to Appendix A: Traffic Management Plan to include "riders, pedestrians and cyclists" as subsets of "public". We have no difficulty in accepting this and have amended section 5 of the provisions for the Traffic Management Plan accordingly.

The Council's decision

[128] We are required to give consideration to the Council's decision under s290A RMA. As noted in the introduction to this decision the Council, following a hearing before independent Commissioners, refused consent for the application on a number of grounds. The application has been modified to introduce mitigation measures addressing the adverse effects considered by the Commissioners to in some instances be more than minor. We have considered this modified application under s.104.

[129] The initial application was made under the then operative Auckland District Plan – Rodney Section and assessed by the Commissioners under the provisions of that Plan. Since the initial decision the relevant sections of the Auckland Unitary Plan have been

made operative. The AUP provisions relating to managed fills are quite different from those in the ACDP-RS.

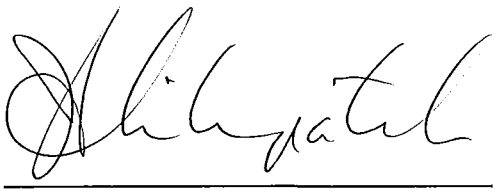
[130] For these reasons we place little weight on the Council decision. We note that the Council now supports the modified application.

Outcome

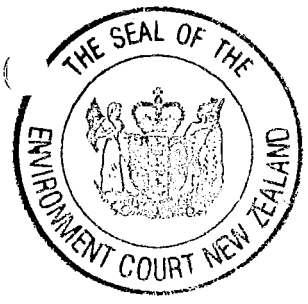
[131] The appeal by Norsho Bulc Ltd is upheld. Resource consents are granted subject to conditions as attached to this decision as Appendix 1.

[132] In relation to costs, given the evolution of the proposal as described in the introductory sections of this decision and in our consideration of the Council's decision, we do not encourage any application. If notwithstanding that indication any party seeks costs, then an application must be made within 10 working days of receipt of this decision and the party against whom costs are sought must respond within a further 5 working days.

For the court:

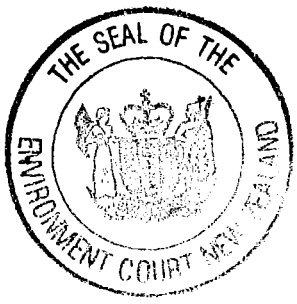


D A Kirkpatrick
Environment Judge



Appendix 1

CONSENT CONDITIONS – NORSHO BULC LTD



CONSENT CONDITIONS – NORSHO BULC LTD

Consent is granted to a managed fill operation and associated activities which will allow for the importation of approximately 600,000m^3 of managed fill over a ten year period.

General Conditions

1. The activity shall be carried out in accordance with the plans referenced below:

Plan / table title and reference	Author	Rev	Date
Draft Site Management Plan	Hazel Hewitt and Associates Ltd		May 2016
Managed Fill Operation – Integrated Earthworks Consents	Hazel Hewitt and Associates Ltd		May 2015
Revised table – Acceptance managed Fill Criteria	Hazel Hewitt and Associates Ltd		August 2015
Sediment Retention Pond Sizes and Supporting Calculations	Hazel Hewitt and Associates Ltd		
Phase A – Erosion and Sediment Control Management Plan for Northern Stage 1, file no 11200/06, sheet C1.1	Airey Consultants Ltd	B	31/08/15
Phase B – Erosion and Sediment Control Management Plan for Northern Stage 1, file no 11200/06, sheet C1.2	Airey Consultants Ltd	B	31/08/15
Phase C – Erosion and Sediment Control Management Plan for Northern Stage 1, file no 11200/06, sheet C1.3	Airey Consultants Ltd	B	31/08/15
Phase D – Erosion and Sediment Control Management Plan for Northern Stage 1, file no 11200/06, sheet C1.4	Airey Consultants Ltd	B	31/08/15
Phase E – Erosion and Sediment Control Management Plan for Northern Stage 1, file no 11200/06, sheet C1.5	Airey Consultants Ltd	B	31/08/15
Overall Plan for Northern Stage 1, file no 11200/06, sheet C1.6	Airey Consultants Ltd	A	31/08/15
Cross Section A-A' & B-B details Northern Stage 1, file no 11200/06, sheet C1.12	Airey Consultants Ltd		Feb 2015
Erosion and Sediment Control Details, file no 11200/06, sheet C1.14	Airey Consultants Ltd		Feb 2015
Sediment Retention Pond 1 Details, file no 11200/06, sheet C1.15	Airey Consultants Ltd	A	31/08/15
Proposed Accessway Plan, file no 11200/06, sheet C2.1	Airey Consultants Ltd	F	14/09/16
Long Section Chainage 300 – 580m,	Airey Consultants	B	30/03/16

file no 11200/06, sheet C2.3	Ltd		
Long Section Chainage 580 – 880m , file no 11200/06, sheet C2.4	Airey Consultants Ltd	C	01/04/16
Long Section Chainage 880 – 1161.78m, file no 11200/06, sheet C2.5	Airey Consultants Ltd	C	01/04/16
Proposed Accessway Chainage 0 to 360m, file no 11200/06, sheet C2.10	Airey Consultants Ltd	A	16/04/16
Proposed Accessway CH 360 to 600m Plan and Proposed Cross Sections, file no 11200/06, sheet C2.11	Airey Consultants Ltd	A	16/04/16
Proposed Accessway CH 600 to 880m Plan and Proposed Cross Sections, file no 11200/06, sheet C2.12	Airey Consultants Ltd	B	16/04/16
Proposed Accessway CH 820 to 1100m Plan and Proposed Cross Sections, file no 11200/06, sheet C2.13	Airey Consultants Ltd	A	16/04/16
Proposed Fencing of Significant Ecolgical Area and Proposed Planting Areas Sheet 1 of 3, file no 11200/06, sheet C2.15	Airey Consultants Ltd	D	21/12/16
Proposed Planting Areas Sheet 2 of 3, file no 11200/06, sheet C2.16	Airey Consultants Ltd	A	12/12/16
Proposed Planting Areas Sheet 3 of 3, file no 11200/06, sheet C2.17	Airey Consultants Ltd	A	19/12/16
Before and After Camera Views Sheet 1 of 2, file no 11200/06, sheet C2.18	Airey Consultants Ltd		March 15
Before and After Camera Views Sheet 2 of 2, file no 11200/06, sheet C2.19	Airey Consultants Ltd		March 15
Stormwater Management Plan, file no 11200/06, sheet C3.1	Airey Consultants Ltd	F	01/04/15

2. The consent holder shall pay the Council an initial consent compliance monitoring charge of $8,400 (inclusive of GST) – ($140 x 60 visits), plus any further monitoring charge or charges to recover the actual and reasonable costs that have been incurred to ensure compliance with the conditions attached to this consent.

Advice Note:

The initial monitoring charge is to cover the cost of inspecting the site, carrying out tests, reviewing conditions, updating files, etc, all being work to ensure compliance with the resource consent. In order to recover actual and reasonable costs, inspections, in excess of those covered by the base fee paid, shall be charged at the relevant hourly rate applicable at the time. The consent holder will be advised of the further monitoring charge or charges as they fall due. Such further charges are to be paid within one month of the date of invoice. Only after all conditions of the resource consent have

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been met, will Council issue a letter confirming compliance on request of the consent holder.

Lapse of consent

3. Under section 125 of the RMA, these consents lapse 5 years after the date they are granted unless:

   a. The consents are given effect to; or

   b. The Council extends the period after which the consents lapse.

Commencement

4. The Team Leader – Northern Monitoring, Auckland Council shall be notified at least five (5) working days prior to any work commencing on the subject site.

   Advice Note:

   The above condition requires the consent holder to notify Council of their intention to begin earthworks a minimum of five working days prior to commencement. Such notification is to be sent to the Monitoring Unit at monitoring@aucklandcouncil.govt.nz or 0800 4265169 to advise of the start of works.

5. Prior to the commencement of the earthworks and / or filling activities, the consent holder shall provide a topographical survey plan of the proposed works area.

Managed Fill Management Plan

6. One month prior to the commencement of the managed fill operations the consent holder shall submit a Managed Fill Management Plan (MFMP) to the Team Leader – Northern Monitoring, Auckland Council for approval. The MFMP shall include:

   a. Copies of this consent;

   b. Timeframes for key stages of the works authorised under this consent;

   c. Copies of operational management plans:

      i. Traffic Management Plan (TMP);

   d. Copies of the environmental management plans:

      i. Site and Managed Fill Management Plan (SMFP);

      ii. Geotechnical Management Plan (GMP);

      iii. Ecological Compensation Plan (ECP);

      iv. Erosion and Sediment control plan (ESCP);

      v. Chemical Treatment Management Plan (CTMP);

      vi. Noise and Vibration Management Plan (NVMP); and

      vii. Air Quality Management Plan (AQMP).

Appendix A sets out the requirements for each of the Management Plans listed above.

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Advice Note:

For clarity, the commencement of the managed fill operation is when first truckload of managed fill material is received.

The council acknowledges that the Management Fill Management Plan (MFMP) is intended to provide flexibility of the management of the managed fill activity. Accordingly, the MFMP may need to be updated. Any updates should be limited to the scope of this consent and consistent with the conditions of this consent.

Pre-start meeting

7. Prior to the commencement of any earthworks on the site, the consent holder must hold a pre-start meeting that:

   - is located on the subject site;
   - is scheduled not less than five (5) working days before the anticipated commencement of earthworks;
   - includes Auckland Council officer(s); and
   - includes representation from the contractors who will undertake the works.

   The meeting shall discuss the erosion and sediment control measures, the earthworks methodologies and the landscape mitigation management plan and shall ensure all relevant parties are aware of and familiar with the necessary conditions of this consent.

   A further pre-start meeting shall be held prior to the commencement of the managed fill activity (i.e prior to the consent holder receiving the first truck load of managed fill material). At this second pre-start meeting the meeting shall discuss the measures and information set out above as well as the contents of the Management Fill Management Plan (**Condition 6**).

   Advice Note:

   To arrange the pre-start meeting please contact the Team Leader – Northern Monitoring, Auckland Council on 09 301-0101. The conditions of consent are to be discussed at this meeting. All additional information required by the Council is to be provided two days prior to the meeting.

   In the event that minor amendments to the Erosion and Sediment Control Plan are required, any such amendments are to be limited to the scope of this consent. Any minor amendments are to be provided to the Team Leader – Northern Monitoring, Auckland Council prior to implementation to confirm that they are within the scope of this consent.

Complaints Register

8. The consent holder shall maintain a permanent record of any complaints received alleging adverse effects from or related to the exercise of this permit. This record shall include the following, where practicable:

   a. The name and address of the complainant, if supplied;

b. Date, time and details of the alleged event;

c. Investigations undertaken by the permit holder in regards to the complaint and any measures adopted to remedy the effects of the incident/valid complaint; and

d. Measures put in place to prevent occurrence of a similar incident.

9. A copy of the complaints register required by **Condition 8** shall be provided to the Team Leader – Northern Monitoring, Auckland Council, within two working days of a request being made by Council.

10. The consent holder shall provide the Team Leader – Northern Monitoring, Auckland Council the contact details (name, email and telephone) of the site manager for public communication prior to the commencement of the filling operations.

Site Closure Report

11. A Site Closure Report (SCR) shall be submitted to the Team Leader – Northern Monitoring, Auckland Council within three (3) months following the completion of the filling operations. The SCR shall include all data collected from the commencement date of this Resource Consent and up until the completion of the filling operation. The report shall be to a standard acceptable to the Team Leader – Northern Monitoring, Auckland Council. The SCR shall address the following matters as a minimum:

    a. Summary of the works undertaken, including a statement confirming whether the filling of the site has been completed in accordance with the Managed Fill Management Plan required by **Condition 6** and the conditions of this consent.

    b. Finished surveyed contour plan showing the final contours / levels of the fill area. The final survey and plan shall confirm that the fill was placed to the consented levels and demonstrate that the consented volume has not been exceeded. The surveys shall be completed by a registered professional surveyor.

    c. Summary of the testing undertaken in accordance with the conditions of this consent, including tabulated analytical results, and interpretation of the results in the context of the requirements of **Condition 61**, the contaminated land rules of the Auckland Unitary Plan – Operative in Part and the National Standard for Assessing and Managing Contaminants in Soil to Protect Human Health including for rural residential (25% produce) land use or relevant guideline derived in accordance with the Contaminated Land Management Guidelines, No.2 – Hierarchy and Application in New Zealand of Environmental Guideline Values, Ministry for the Environment (revised 2011).

    d. Copies of all laboratory transcripts.

    e. Disposal dockets for any material removed from the site.

    f. Details regarding any complaints and/or breaches of the procedures set out in the Managed Fill Management Plan required by **Condition 8** and the conditions of the consents.

    g. Copy of the electronic site register/log book.

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Community Liaison Committee

12.

a. The consent holder shall establish and maintain a Community Liaison Committee to consider and discuss the operations and effects of the managed fill on a regular basis, subject to the invitees' willingness to participate. This Committee shall comprise:

   i. A representative of Auckland Council appointed by the Team Leader - Northern Monitoring.

   ii. At least two representatives from the consent holder company, one whom is involved in operations and one whom is involved with management.

   iii. At least two representatives of Blackbridge Road Environmental Protection Society Inc.

b. Contact details (phone and email) of all committee members shall be circulated at the first meeting.

c. The Committee shall be convened by the consent holder, who shall meet the administrative meeting costs. The consent holder shall convene the first Committee meeting prior to the commencement of the managed fill activity and shall meet thereafter at a frequency of not less than twice yearly from the commencement of these consents, and unless otherwise agreed between the consent holder and the other committee members.

d. The purpose of the committee shall be to disseminate information, to hear concerns of committee members and to discuss ways of addressing those concerns. The consent holder shall keep the minutes of all meetings, and shall no less than 15 days before each meeting distribute to each committee member a copy of the last meeting's minutes along with copies of relevant reports detailing matters relating to compliance with conditions of these consents. Such copies shall include (but not be limited to):

   i. A report on timeframes for key stages of the works authorised under these consents;

   ii. Any report on the truck number movements required by these consents;

   iii. A copy of the managed fill management plan (MFMP) or any approved changes to the MFMP.

e. The Consent Holder may, in consultation with the Team Leader – Northern Monitoring, Auckland Council, develop and modify the form and forum for the Community Liaison Committee over time and may use other consultative mediums (including electronic or web-based mediums) to assist with achieving the outcomes of this condition.

f. Contingent on receiving approval in writing from the Team Leader – Northern Monitoring, Auckland Council , the Consent Holder may discontinue the Community Liaison Committee once it is apparent that attendance at the

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Community Liaison Committee is at a level which indicates a lack of desire from the Blackbridge Road Environmental Protection Society to utilise this forum.

g. In determining whether to approve the discontinuance of the Community Liaison Committee, the Team Leader – Northern Monitoring, Auckland Council shall have regard to the consultation undertaken by the consent holder with the attendees of the Community Liaison Committee or obtain a record of consultation with those attendees.

Monitoring and Review

13. Auckland Council Officers shall have access to the property for the purpose of carrying out inspections, surveys, investigations, tests, measurements and/or to take samples, and to view the records of any measurements the Consent Holder is obliged to record and the register of complaints. Access however must be pre-arranged with the consent holder due to OSH regulations.

14. All personnel working on the site shall be made aware of and have access to the contents of this consent document and the associated MFMP.

Conditions relating only to land use consents LAN-64858 (filling operation), REG-64859 (earthworks) and REG-64861(streamworks)

Duration

15. LAN-64858 shall expire 10 years after the date 'works commence'. The 'works commence' refers to when the Consent Holder accepts the first truckload of managed fill material. The pre-start meeting required by **Condition 7** must occur 5 working days prior to the date that 'works commence'.

    If the date is not advised of when work has commenced, the date will be taken as the granting of these consents unless they have been surrendered or been cancelled at an earlier date pursuant to the RMA.

16. The Consent Holder must notify the Team Leader – Northern Monitoring, Auckland Council at least 2 working days prior to the arrival of the first truckload of managed fill material.

Site register

17. An electronic fill site register of each fill load tipped shall be kept with the following information:

    - Date and time of delivery
    - Account holder's name
    - Vehicle registration
    - Vehicle capacity
    - Origin (address from where the fill material originated) and type of material being deposited e.g. topsoil, clay, aggregate, soil (including any known land use history of source if possible)

- Copies of laboratory details of analytical testing (where required)
- Signature
- Daily tally of vehicle deliveries
- Tonnage of fill tallied on a daily basis.

The register is to be available for inspection by Team Leader – Northern Monitoring, Auckland Council , or similar person upon request. The site register information shall be provided on a six monthly basis to the Team Leader – Northern Monitoring, Auckland Council at all times.

Streamworks

18. Prior to the cleaning out and infilling of any of the stream channels authorised by the granting of consent REG-64861, details regarding the methods for fish relocation from the existing stream channels shall be provided for the written approval of the Team Leader – Northern Monitoring, Auckland Council . Any fish relocation requirements shall be undertaken by a suitably qualified freshwater ecologist. Written confirmation that the works have been carried out appropriately in this regard, shall be provided to the Team Leader, Northern Monitoring prior to cleaning out and infilling commencing.

19. The ecological enhancement measures within the approved ECP shall be implemented progressively starting within the first planting season following the commencement of filling operations and shall be completed by the completion of the third planting season following the commencement of filling operations.

20. The fencing of the riparian margins to be planted as part of the ecological enhancement measures can be staged provided that:

    a. All fencing must be completed within 3 years from the commencement of the filling operations; and

    b. The east/west stream buffer shall be fenced at least 20m from the wetted margin, all other streams in the north eastern portion of the site shall be fenced at least 10 metres from the wetted margin; and

    c. Fencing of the buffer area of the east/west stream immediately to the north of the managed fill must be completed following the completion of earthworks required for the preparation of the site and prior to the commencement of filling operations (for avoidance of doubt this relates to all buffer areas to the south of east/west stream).

Written confirmation shall be provided to the Team Leader – Northern Monitoring, Auckland Council, within 60 days of completion of the ecological enhancement measures, confirming that the measures within the approved ECP have been completed in accordance with the above requirements.

21. Vegetation removal: Scouting/Surveying and rescue wildlife condition

    a. Prior to the removal of the native vegetation on the site, the consent holder shall employ a suitably qualified and experienced ecologist/herpetologist to carry out the following methods:

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i. place Artificial Cover Objects (ACO's) or Live Capture Traps (e.g. pitfall traps or funnel traps which need to be checked daily by a suitably qualified and experienced ecologist/herpetologist) on site for *at least five days and nights*, or

ii. any other scouting/surveying method agreed between the consent holders ecologist/herpetologist and the Team Leader (*North/West*) Biodiversity.

b. Following the scouting/surveying required above, if indigenous lizards are found to be present on site, a suitably qualified and experienced ecologist/herpetologist shall be onsite during the removal of any native vegetation to supervise all and any habitat removal in order to search for and rescue any indigenous lizards found and relocate them to the suitably alternative location on the site.

c. Upon completion of works, all findings resulting from the scouting and search and rescue during native vegetation removal condition shall be recorded by a suitably qualified and experienced ecologist/herpetologist on the Department of Conservation's Amphibian and Reptile Distribution Scheme (ARDS). A copy shall also be sent to the Team Leader (North/West) Biodiversity.

Limitation of earthworks area

23. The maximum area open (bare earth) at the site at any one time during any earthworks season (1 October – 30 April of any year) shall be no greater than 3.0ha (combined) and no greater than 1.5ha (combined) during any winter season (1 May – 30 September) unless an increased limit has first been approved in writing by the Team Leader – Northern Monitoring, Auckland Council, at least two weeks prior to 30 April of any year.

Abandonment or Completion

24. Upon abandonment or completion of earthworks on the subject site, all areas of bare earth shall be permanently stabilised against erosion to the satisfaction of the Team Leader – Northern Monitoring, Auckland Council within 10 working days of abandonment/completion.

This shall include contouring, compaction, and stabilisation of the earthworked area, and fencing to a stock proof standard to keep stock off the area until complete grass cover has established. Stock proof fencing of the earthworked area is only applicable if there is potential for stock to gain access onto the area to be stabilised.

Advice Note:

Should the earthworks be completed or abandoned, bare areas of earth shall be permanently stabilised against erosion. Measures may include:

- *the use of mulching*
- *top-soiling, seeding and mulching of otherwise bare areas of earth*
- *aggregate or vegetative cover that has obtained a density of more than 80% of a normal pasture sward*

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The on-going monitoring of these measures is the responsibility of the consent holder.

It is recommended that you discuss any potential measures with the Council's monitoring officer who will guide you on the most appropriate approach to take. Please contact the Team Leader – Northern Monitoring, Auckland Council for more details. Alternatively, please refer to Auckland Regional Council, Technical Publication No. 90, Erosion & Sediment Control: Guidelines for Land Disturbing Activities in the Auckland Region.

Erosion and Sediment Control

25. A silt fence, constructed in accordance with GD2016/26, shall be installed below the excavations required to construct the sediment retention ponds, prior to the construction of the ponds commencing.

26. Prior to bulk earthworks commencing, a certificate signed by an appropriately qualified and experienced person shall be submitted to the Team Leader – Northern Monitoring, Auckland Council to certify that the erosion and sediment controls have been constructed and or updated in accordance with the ESCP as referred to through **condition 6** of this consent.

    Certified controls shall include the clean water diversions and sediment retention pond. Certification for these measures shall be supplied immediately upon completion of construction of those measures. Information supplied if applicable, shall include:

    a. Location of the structure;

    b. Contributing catchment area;

    c. Shape of structure/control (including dimensions);

    d. Position of inlets/outlets; and

    e. Stabilisation of the structure.

27. There shall be no deposition of earth, mud, dirt or other debris on any public road or footpath resulting from earthworks activity on the subject site. In the event that such deposition does occur, it shall immediately be removed to the satisfaction of the Team Leader – Northern Monitoring, Auckland Council . In no instance shall roads or footpaths be washed down with water without appropriate erosion and sediment control measures in place to prevent contamination of the stormwater drainage system, watercourses or receiving waters.

    Advice Note:

    In order to prevent sediment laden water entering waterways from the road, the following methods may be adopted to prevent or address discharges should they occur:

    - *provision of a stabilised entry and exit(s) point for vehicles;*
    - *provision of wheel wash facilities;*
    - *ceasing of vehicle movement until materials are removed; and/or,*
    - *cleaning of road surfaces using street-sweepers.*

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It is recommended that you discuss any potential measures with the Team Leader – Northern Monitoring, Auckland Council who may be able to provide further guidance on the most appropriate approach to take. Alternatively, please refer to Auckland Council, Technical Publication No. 90, Erosion and Sediment Control Guidelines for Land Disturbing Activities in the Auckland Region.

28. All earthworks shall be managed to ensure that no debris, uncontrolled soil, silt, sediment or sediment-laden water is discharged from the subject site either to land, stormwater drainage systems, watercourse or receiving waters. In the event that discharge occurs, works shall cease immediately and the discharge shall be mitigated and/or rectified to the satisfaction of the Team Leader – Northern Monitoring, Auckland Council.

29. The operational effectiveness and efficiency of all erosion and sediment control measures specifically required by the erosion and sediment control plan referred to through **condition 6** shall be maintained throughout the duration of earthworks activity, or until the site is permanently stabilised against erosion. A record of any maintenance work shall be kept and be supplied to the Team Leader – Northern Monitoring, Auckland Council on request.

30. The site shall be progressively stabilised against erosion at all stages of the earthwork activity, and shall be sequenced to minimise the discharge of sediment and contaminants to air, groundwater or surface water.

Advice Note:

Earthworks shall be progressively stabilised against erosion during all stages of the earthwork activity. Interim stabilisation measures may include:

- *the use of waterproof covers, geotextiles, or mulching; or*
- *aggregate or vegetative cover that has obtained a density of more than 80% of a normal pasture sward.*

It is recommended that you discuss any potential measures with the Council's monitoring officer who may be able to provide further guidance on the most appropriate approach to take. Please contact the Team Leader – Northern Monitoring, Auckland Council for more details. Alternatively, please refer to GD 2016/26

<u>Geotechnical</u>

31. All monitoring instruments (except the groundwater piezometers within fill material) must be installed prior to commencement of filling works.

    i. Piezometers within the fill material shall be installed as filling progresses.

    ii. These instruments must be installed under observation/supervision by KGA Geotechnical Limited or other suitably qualified geotechnical engineer.

32. KGA Geotechnical Limited or other suitably qualified geotechnical engineer shall undertake all engineering inspections during construction and at the following hold points:

a. Following topsoil stripping.

b. Construction of subsoil drainage to confirm the adequacy of drainage and to direct the Contractor to construct additional drainage measures, if required.

c. Inspection of silt pond construction.

d. Inspection of shear key and undercuts to confirm adequacy

e. Regular (3 monthly) fill inspections to ensure the:

i. Nature of the soil visible in the embankment is acceptable as managed fill material;

ii. Maximum loose lift thicknesses of the fill prior to compaction are not exceeding specified dimensions;

iii. Correct number of passes of appropriately sized tracked machines / compaction equipment are being applied to each layer of fill; and

iv. Range of undrained shear strengths of each completed fill layer fall within agreed / specified limits.

33. Stormwater around the fill area shall be managed (by swale drains) and checked on a daily basis by operations staff to avoid ponding.

Landscaping planting

34. The consent holder shall submit a Landscape Mitigation and Management Plan (LMMP) for approval by the Team Leader, Northern Monitoring, Auckland Council. The Plan shall be submitted and approved prior to the commencement of any earthworks.

35. The LMMP shall include the following information which shall be generally consistent with the plans referenced in condition 1 and the evidence of Ms Jan Woodhouse to the Environment Court dated April 2017:

a. The location, shape and extent of the proposed earthworks, mounds and bunds for the purpose of visual mitigation. The design and location of the mounds and bunds shall be generally consistent with the Airey Consultants drawing numbers 11200/06 C2.1 Rev F, 11200/06 C2.12 Rev B, 11200/06 C2.13 Rev A and 11200/06 C2.16 Rev A however the profile of the bunds shall be such that they merge naturally with the existing landform.

b. Proposed planting for the purpose of visual mitigation. The landscape mitigation planting shall be generally consistent with Airey Consultants drawing numbers 11200/06 C2.15 Rev D, 11200/06 C2.16 Rev A and 11200/06 C2.17 Rev A, and Appendices A and B of the evidence of Jan Woodhouse. For clarity, the landscape mitigation planting only relates areas B1-B3, D, E and F on the plans referenced above; the planting of the riparian margins forms part of the ecological compensation works.

c. An implementation and maintenance programme including measures to control weed and pest species within the areas to be planted for the life of the managed fill operation.

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d. Provisions for replacement of plants, or species where appropriate, that die or are in poor health.

36. All earthworks, including bunding, mounding and topsoiling, of the landscape mitigation measures shall be completed prior to the commencement of filling operations on site (note this does not prevent the importation of fill material required to complete the landscape mitigation works). All landscape mitigation/screen planting, other than any enhancement/canopy planting and replacement planting required, shall be completed before the end of the planting season following the commencement of filling operations. Once established, the planting is to be maintained for the life of the managed fill operation.

Landscape Bond

37.

a. Pursuant to Section 108(2)(b) and 108A of the Resource Management Act 1991 a bond shall be entered into to cover all the maintenance (including the replacement and removal of dead specimens) aspects of the LMMP approved under Condition 35 and implemented under this condition for a period of not less than 3 years from the commencement of filling operations.

b. The amount of the bond shall be based on the approved schedule of the maintenance costs supplied in the LMMP submitted under Condition 35.

c. The bond shall be prepared by the Council's solicitor at the expense of the applicant and shall be drawn up if required by the council in a form enabling it to be registered pursuant to Section 109 of the Resource Management Act 1991 against the title to the land to which this bond relates.

d. The bond may be either a cash bond or bond that is guaranteed by a recognised trading bank in New Zealand. The bond shall be reduced by 33% in any one year on certification by an appropriately qualified person that the recommendations and maintenance operations identified in the LMMP approved under Condition 35 has been effectively carried out.

e. Notwithstanding any transfer of title by the consent holder to a new owner, the consent holder or subsequent nominees or representatives are to continue the implementation of the LMMP approved in Condition 35 for the 3-year period.

Hours of operation

38. Trucks visiting the site as part of the managed fill operation shall arrive no earlier than 7.00am Monday to Friday and no trucks shall enter the site after 5.00pm Monday to Friday. No trucks shall deliver fill material to the site on Saturdays, Sundays and public holidays and for a two week period over the Christmas period (23 December – 5 January).

39. The hours of operation of works on the site associated with the fill activity shall be as follows:

Monday to Friday	6.00am to 6.00pm
Saturday	8.00am to 1.00pm

No works shall be undertaken on the site on Sundays and public holidays and for a two week period over the Christmas period (23 December – 5 January). The works to be undertaken on a Saturday shall be limited to machine maintenance work, initial site preparation such as the construction of landscape bunds and mounds, the shear key and sediment control ponds and drainage as well as minor works, drainage, stripping and site maintenance.

Noise and Vibration

40. Noise level generated by the filling operation activity (including the use of a diesel generator to power the weighbridge) on the site when measured within the notional boundary of any existing dwelling shall comply with the maximum noise level of 55dBA/L_{eq} Noise levels shall be measured and assessed in accordance with the requirements of New Zealand Standards NZS 6801:2008 *Measurement of Sound* and New Zealand Standard NZS 6802:2008 *Acoustics – Environmental Noise.*

41. Monitoring of noise emission levels from the activity shall be undertaken at representative locations around the subject site as follows:

    a. Within four weeks of the commencement of operation of the managed fill;

    b. The results of the noise monitoring shall be provided to Team Leader – Northern Monitoring, Auckland Council within 14 days of the noise monitoring being undertaken;

    c. In the event that such monitoring reveals that the 55dBA/L_{eq} maximum noise limit is being exceeded, the Consent Holder shall take immediate remedial action to ensure that the noise limits are complied with unless further consents are obtained.

42. Construction noise from activities on the site shall comply with, and shall be measured and assessed in accordance with NZS 6803:1999 Acoustics – Construction Noise. For the purposes of this condition, construction works shall include the following activities:

    a. Establishment and maintenance of any cut-off or diversion drains, including clean water diversion drains, and silt fences, bunds and decants;

    b. The construction, removal, re-location, modification and maintenance of the shear key and toe bund and any temporary noise bunds designed as noise barriers;

    c. Excavation and maintenance of any settling ponds and perimeter drains around cuts, fills or borrow areas;

    d. Formation of accessways and associated swales;

    e. Final land surface reinstatement or treatments;

    f. Construction of temporary site access roads, public road entrances;

    g. Construction of the landscape mitigation measures;

but shall not include the following activities (which are associated with progressive routine cleanfill operations):

i. Progressive internal drain construction, including sediment drains, silt fences, bunds and decants (other than those within the proposed formed legal road) clearance maintenance or re-construction (as distinct from initial drain construction);

ii. Progressive site clearance, including progressive vegetation removal and progressive topsoil stripping and stockpiling;

iii. Progressive contouring, top-soiling and land-forming of cleanfill over-burden dump sites.

43. If justified noise or vibration complaints occur as a result of the works (as assessed by Council Officers) the consent holder shall engage an acoustic or vibration consultant at their cost to advise on whether the activities approved under these consents comply with the permitted standards. The noise and/or vibration assessment shall be carried out when the filling activity is in full operation.

Should noise and vibration levels exceed the permitted activity standards then noise or vibration mitigation measures recommended by the acoustic or vibration consultant shall be immediately implemented by the consent holder, and remain in place for the duration of the filling operation, to the satisfaction of the Team Leader – Northern Monitoring – Auckland Council unless further consents are obtained. The consent holder shall confirm in writing that the recommended noise and vibration mitigation measures have been implemented.

Dust and Odour

44. There shall be no dust or odour beyond the subject site as a result of the earthworks/filling activity that in the opinion of the Team Leader – Northern Monitoring, Auckland Council, is noxious, offensive or objectionable.

Automated atmospheric particulate monitor system

45. For the purpose of measuring dust conditions to the neighbouring dwellings located near the north-eastern and eastern boundaries of the filling area, one fully automated atmospheric particulate monitor system that is designed with an alert system is to be installed on the site's eastern boundary (midway between the dwellings at 246A Blackbridge Road (Lot 2 DP 434049) and 246B Blackbridge Road (Lot 3 DP 434049)) throughout the filling operation, which include construction related works. Once the dust monitor system is installed, the monitor is to be operated at all times with an alert system to be implemented and to be set off to alert the site operator and the manager of the filling operation. The alert system is to be set off when the trigger levels have been exceeded. The trigger levels can be found in Table 4 of the Good Practice Guide for Assessing and Managing Dust (Ministry for the Environment, 2016). These trigger levels are:

a. 1-hr averaging period = 250 µg/m³

b. 24-hour averaging period (rolling average) = 80 µg/m³

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46. When the dust monitor alert system is set off, action shall be taken to manage dust to an appropriate level as soon as practicably possible. Measures to be undertaken to mitigate, remedy or avoid dust effects to an appropriate level include but are not limited to:

    a. suspension of all operations if necessitated by the prevailing wind conditions;

    b. watering of all access roads, manoeuvring areas and stockpiles during dry periods and;

    c. top-soiling and grassing stockpiles if they are not worked for more than 1 month.

47. A record (throughout the filling operation) of the dust levels from the automated particulate monitor system is to be kept and to be made available for inspection by the Team Leader – Northern Monitoring, Auckland Council or similar person upon request. The record of the dust level from the automated dust monitor shall be provided on a six monthly basis to the Team Leader – Northern Monitoring, Auckland Council or similar person at all times.

48. All necessary measures shall be taken to prevent a dust nuisance to neighbouring properties and public roads; including, but not limited to:

    - The sealing of the site access road from the road entrance on Blackbridge Road to the wheel wash station.
    - Installation of a wheel wash facility.
    - Cleaning of the sealed access road as required.
    - Watering of all access roads, manoeuvring areas and stockpiles during dry periods;
    - Top-soiling and grassing stockpiles if they are not worked for more than 1 month;
    - Limiting vehicle speeds;
    - Suspension of all operations if necessitated by the prevailing conditions.

Traffic, Roads, Access and Parking

49. The use shall be restricted to a maximum of 80 truckloads of fill material (160 truck movements) in any one day, Monday to Friday.

50. There shall be no trucks or vehicles associated with the filling operation parked and / or queued on Blackbridge Road except where the trucks are waiting to turn onto Dairy Flat Highway from Blackbridge Road.

51. An enhanced warning system shall be installed either side of the one way bridge on Blackbridge Road prior to any filling works commencing. The system shall include a detector or activation button which triggers a flashing symbol to alert motorists travelling in both directions along Blackbridge Road that pedestrians, cyclists or horse riders are crossing the bridge.

52. On-site access shall not have grades that exceed 20%.

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53. If in the opinion of the Team Leader – Northern Monitoring, Auckland Council the road surface of Blackbridge Road within 50 metres either side of the site entrance is damaged as a result of the filling activity, beyond normal wear and tear expected, the consent holder shall repair the road surface to the satisfaction of the Team Leader – Northern Monitoring, Auckland Council. Such repair shall be at the expense of the consent holder.

Advice note:

The developer or contractor is advised that they will need to apply for a Corridor Access Request via www.beforeudig.co.nz prior to the commencement of works.

Public access

54. The site shall be secured by locked gate to prevent access by the general public.

Conditions relating only to REG-64860 – fill material

Duration

55. Discharge permit (REG-64860) shall expire 35 years after the date 'works commence'.

Advice note:

The works commence period commences from the arrival of the first truckload of fill material, which must be advised to the Team Leader – Northern Monitoring, Auckland Council. If the date is not advised of when work has commenced, the date will be taken as the granting of these consents unless they have been surrendered or been cancelled at an earlier dated pursuant to the RMA.

Cleanfill Cap

56. All imported Cleanfill material used to form the final cover, top 0.5m, shall:

    a. Comply with the definition of 'cleanfill' in the Ministry for the Environment publication 'A Guide to the Management of Cleanfills' (2002); and

    b. Be solid material of an inert nature; and

    c. Not contain hazardous substances or contaminants above recorded natural background levels of non-volcanic soils of the site.

Advice note:

*Background contamination levels for the site receiving cleanfill referred to by **condition 58** can be found in the Auckland Regional Council, Technical Publication No. 153, Background concentrations of inorganic elements in soils from the Auckland Region (2001).*

Managed Fill

57. All imported Managed Fill material shall:

    a. Comply with the definition of 'managed fill' as set out in the Auckland Unitary Plan – Operative in Part (Updated 14 December 2016).

b. Shall be placed at a depth 0.5 m or more below the surface of the new filling contours.

c. Shall be below the maximum chemical concentrations for fill as set out in the Table 1 below (managed fill acceptance criteria).

Testing of Material

58. Analytical testing of all imported fill material shall be undertaken for the chemical parameters listed in Table 1 below at a rate of no less than 1 sample per 500m^3 of imported fill material, excluding those loads from sites that have been pre-tested and/or pre-approved..

59. Fill originating from any horticultural site, or from any sites where there is evidence to suggest that an activity outlined on the Ministry for the Environments Hazardous Activities and Industries List has been, or is currently being, carried out, shall only be accepted by the consent holder:

a. Where those sites have been sampled and tested in accordance with the Contaminated Land Management Guidelines number 5 – Site Investigation and Analysis of Soils, Ministry for the Environment, revised 2011, by a suitably qualified and experienced contaminated land professional; and

b. Where the results of those investigations have been provided to the consent holder; and

c. Where those results meet the fill acceptance criteria as specified in Table 1 below.

60. The analytical testing required above shall demonstrate that the chemical parameter concentrations in the imported fill set out in Table 1 below are not exceeded.

Parameter	**Maximum Truckload Fill Concentration (<0.5m depth)**	**Maximum Truckload Fill Concentration (>0.5m depth)**
Arsenic	12	16
Cadmium	0.65	0.75
Chromium (total)	55	275
Copper	45	308
Lead	65	152
Mercury	0.45	0.71
Nickel	35	105
Zinc	180	380
TPH C7 –C9 C10 – C14 C15 – C36	 * * *	 20 50 100
Benzo(a)pyrene (equivalent)	*	2.15

DDX (DDT+DDD+DDE)	0.0	0.7

Table 1: Proposed Managed Fill Acceptance Criteria (mg/kg)

*Below the limit of detection for the screen level TPH, PAH, and OCP respectively.

Advice Note:

Any fill containing a potential contaminant that is not listed in Table 1 shall not be accepted unless the concentration of the contaminant is below the maximum concentration recorded in non-volcanic Auckland Soils (the Auckland Regional Council, Technical Publication No. 153, Background concentrations of inorganic elements in soils from the Auckland Region (2001).

Fill Inspection / Rejection

61. All fill loads shall be visually inspected at the tipping point disposal. The load shall be exposed, and spotters or plant operators fully trained in inspection and rejection procedures shall be used to verify the deposited material meets the criteria set out in Site and Fill Management Plan (SFMP) as required above. The load must be inspected within a maximum of 24 hours of being deposited onsite and prior to being added to the fill structure.

62. If any imported fill that does not meet the acceptance requirements identified in the SFMP required above or exceeds any of the maximum truckload fill concentrations listed in Table 1 above (managed fill acceptance criteria), it shall be removed to a suitably consented off-site disposal facility within two weeks of receiving laboratory test results confirming unacceptability. If the material fails any visual and olfactory checks then the material shall be rejected immediately.

Sampling and Testing During Fill Operation

63. All sampling of imported managed fill material, cleanfill and sediments from the sediment retention pond, shall be supervised by a suitably qualified and experienced contaminated land professional. All sampling shall be undertaken in accordance with the relevant conditions of this consent and Contaminated Land Management Guidelines number 5 – Site Investigation and Analysis of Soils, Ministry for the Environment, revised 2011. The person undertaking the sampling, under the supervision of a suitably qualified and experienced contaminated land professional must be trained in correct sampling procedure and the requirements of Contaminated Land Management Guidelines number 5 – Site Investigation and Analysis of Soils, Ministry for the Environment, revised 2011.

64. Results of testing shall be provided to the Team Leader - Northern Monitoring, Auckland Council on a 6 monthly basis.

Advice note:

Sampling and testing are required to comply with the Ministry for the Environment's Contaminated Land Management Guidelines (revised 2011), all testing and analysis is

to be undertaken in a laboratory with suitable experience and ability to carry out the analysis. For more details on how to confirm the suitability of the laboratory please refer to Part 4: Laboratory Analysis, of Contaminated Land Management Guidelines No.5.

Sediment Contaminant Sampling at Fill Completion

65. Sediment from the base of the sediment pond shall be sampled and analysed at the end of the filling operation. The sample shall only be collected after a period of at least 5 days from the last activation of the chemical treatment, i.e. flocculants being added to the sediment pond. The sample shall be tested for all of the parameters set out in Table 1 above with regard to managed fill acceptance criteria (including mercury) and the results sent to the Team Leader – Northern Monitoring, Auckland Council for review within one (1) month of the activation of the chemical treatment.

66. Sample results of the sediment from the base of sediment pond required by the condition above shall be compared to the ISQG – low trigger value in Table 3.5.1 (Recommended sediment quality guidelines) of Australian and New Zealand Guidelines for Fresh and Marine Water Quality (ANZEC 2000). If the sediment has contaminant concentrations above the ISQG – low trigger value, then an assessment of the environmental effect shall be undertaken to determine whether the exceedance(s) are attributable to the managed fill activity, and identify any potential adverse effects on surface water quality associated with the exceedance(s). The Team Leader – Northern Monitoring, Auckland Council shall be made aware of the exceedance(s) within five (5) working days of them being identified, and shall be provided with a copy of the assessment within one month

67. If the sediment sample results of the assessment undertaken in accordance with the above condition identify that the exceedance(s) in contaminant concentrations are attributable to discharges from the managed fill and adverse effects on surface water quality are occurring, then a contaminant contingency plan shall be provided with the required assessment of environmental effects to the Team Leader– Northern Monitoring, Auckland Council. The contingency plan shall be prepared by a suitably qualified and experienced contaminated land professional. The contaminant contingency plan will outline the measures and timescales to be undertaken by the consent holder to reduce or mitigate the adverse effects from the contaminant concentrations from the pond sediments on the receiving environment. The mitigation measures shall therein be implemented in accordance with the timeframes advised by the Team Leader – Northern Monitoring, Auckland Council.

Advice note:

Contingencies can include (but not be limited to) removal of the pond sediments and filling in the pond with cleanfill material or removal of the pond sediments and leaving the pond to become an ornamental feature onsite receiving surface water runoff from the stabilised fill site.

68. Results of testing shall be provided to the Team Leader - Northern Monitoring, Auckland Council on a 6 monthly basis.

Advice note:

Sampling and testing are required to comply with the Ministry for the Environment's Contaminated Land Management Guidelines (revised 2011), all testing and analysis is to be undertaken in a laboratory with suitable experience and ability to carry out the analysis. For more details on how to confirm the suitability of the laboratory please refer to Part 4: Laboratory Analysis, of Contaminated Land Management Guidelines No.5.

GENERAL ADVICE NOTES

1. *As the site will contain managed fill, any re-development of the site or earthworks within the vicinity of the fill area may require consent under the 'National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health 2011'.*

2. *In the event of archaeological site evidence (e.g. shells, middens, hangi or ovens, pit depressions, defensive ditches, artifactual material or human bones) being uncovered during construction, the consent holder shall ensure that operations shall cease in the vicinity of the discovery and that the archaeologist, Auckland Council, is contacted so that the appropriate action can be taken before any work may recommence there. Should earthworks on the site result in the identification of any previously unknown archaeological site, the land disturbance – Regional Accidental Discovery rule [E12.6.1] set out in the Auckland Unitary Plan Operative in part (November 2016) shall be applied.*

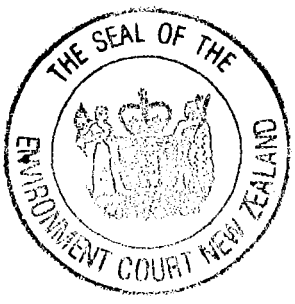
3. *The HNZPTA 2014 provides for the identification, protection, preservation and conservation of the historic and cultural heritage of New Zealand. Under s.2 of the Heritage New Zealand, an archaeological site is defined as a place associated with pre-1900 human activity where there may be evidence relation to history of New Zealand. All archaeological sites are protected under the provisions of the Heritage New Zealand Pouhere Taonga Act 2014 (HNZPTA). It is an offence under this Act to destroy, damage or modify any archaeological site, whether or not the site is entered on the Heritage New Zealand (HNZ) Register of historic places, historic areas, wahi tapu and wahi tapu areas. An authority is required for such work whether or not the land on which an archaeological site may be present is designated, or a resource, demolition or building consent has been granted, or the activity is permitted in a regional or district plan. It is the responsibility of the applicant (consent holder) to consult with the HNZ about the requirements of the HNZPTA and to obtain the necessary authorities under the HNZPTA should these become necessary as a result of any activity associated with the proposed development.*

4. *The consent holder shall obtain all other necessary consents and permits, including those under the Building Act 2004 and Signage Bylaws etc. This consent does not remove the need to comply with all other applicable Acts (including the Property Law Act 2007), regulations, relevant Bylaws, and rules of law. This consent does not constitute building consent approval. Please check whether a building consent is*

required under the Building Act 2004. Please note that the approval of this resource consent, including consent conditions specified above, may affect a previously issued building consent for the same project, in which case a new building consent may be required.

5. *A copy of this consent should be held on site at all times during the establishment and operation of the activity.*

6. *Compliance with the consent conditions will be monitored by Council in accordance with section 35(d) of the Resource Management Act. This will typically include site visits to verify compliance (or non-compliance) and documentation (site notes and photographs) of the activity established under the Resource Consent. In order to recover actual and reasonable costs, inspections, in excess of those covered by the base fee paid, shall be charged at the relevant hourly rate applicable at the time. Only after all conditions of the Resource Consent have been met, will Council issue a letter on request of the consent holder.*



APPENDIX A (Management Plan Requirements)

Condition	Management Plan
6	Managed Fill Management Plan (MFMP)
1	Site and Fill Management Plan
1, 6	Erosion and Sediment Control Plan
6	Traffic Management Plan (TMP)
6	Geotechnical Management Plan (GMP)
6	Chemical Treatment Management Plan (CTMP)
6	Noise and Vibration Management Plan (NVMP)
6	Ecological Compensation Plan (ECP)
6	Air Quality Management Plan (AQMP)

Managed Fill Management Plan (MFMP)

The MFMP is the overarching management plan for the managed fill activity and includes those components listed below.

Site Fill Management Plan (SFMP)

As required by Condition 6 of this consent, the SFMP shall include, but not be limited to, the following:

1. Incorporate the requirements of the conditions of consent;
2. Site management structure and responsibilities;
3. Schedule of regular site inspections to ensure the compliance with the SFMP's and conditions of the consent;
4. Waste acceptance criteria for the parameters to be monitored and tested for the Managed Fill and Clean fill importation;
5. Load inspection procedures;
6. Incoming load screening and sampling procedures;
7. Fill rejection and quarantine procedures for imported materials including recording and reporting requirements;
8. A contingency plan for dealing with non-compliant materials identified subsequent to placement of the fill;
9. Training procedures for staff and a record of employees who have undertaken relevant training;
10. Details of the proposed works around any stockpiles of fill, including quarantine areas, to minimise the potential of contamination migration via stormwater runoff;
11. Details of the proposed surface water and sediment quality monitoring for the managed fill site, including details of the monitoring locations, chemical parameters frequency, trigger levels, contingency measures and reporting requirements;

Erosion and Sediment Control Plan (ESCP)

As required by Condition 6 of this consent, the ESCP shall include, but not be limited to, the following:

1. Erosion and sediment controls including specific design;
2. Supporting calculations;
3. Catchment boundaries for the sediment controls;
4. Location of the works, and earthworks operations;
5. Details of construction method to be employed including timing and duration;
6. A staging programme for managing the exposed area including progressive stabilisation considerations;
7. Details of drying areas for fill material, which must be within the maximum exposed area of the footprint;
8. Shall be designed to an appropriate scale.

Traffic Management Plan (TMP)

As required by Condition 6 of this consent, the TMP shall include, but not be limited to, the following:

1. Control of access to the site;
2. Traffic control adjacent to the site;
3. Erection of signage, with Auckland Transport's approval, close to the Drury Lane intersection and close to the Dairy Flat Highway intersection that advises all motorists not to pass a stationary school bus at speeds greater than 20 km/hr (the legal requirement);
4. Upgrade of the one-way bridge priority signage, with Auckland Transport's approval;
5. Measures to protect the public, including riders, pedestrians and cyclists;
6. Details on the trimming or removal of any vegetation to either side of the access to the one lane bridge on Blackbridge Road to maximise sight distances or in the vicinity;
7. Details to remove the long grass and tree stump located in the road berm to the west of the site access;
8. Details on how drivers are to be informed that engine braking is to be avoided on Blackbridge Road where practicable;
9. The piping of the six short sections of roadside open channels along Blackbridge Road, identified in the traffic evidence of Mr Phillip Brown and Mr Don McKenzie to the Environment Court dated 27 January 2017 and 1 May 2017, and topping with fine aggregate;
10. The repositioning of the limit line on Postman Road so that it is 6.0 metres back from the marked centreline of the road, the marked edge line is also to be appropriately repositioned and tied into existing markings and the trees on the eastern side of the road reserve on the Highway to the north of Postman Road are to be trimmed with Auckland Transport's approval;
11. The issuing of hi-visibility vests to every student of Dairy Flat Primary School living on Blackbridge Road who catches the school bus (to be signed for by parents).

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Geotechnical Management Plan (GMP)

As required by Condition 6 of this consent, the GMP, to be prepared by KGA Geotechnical Limited or other suitably qualified geotechnical engineer shall include, but not be limited to, the following:

1. Monitoring to be carried out through-out construction and five years following practical completion;
2. Trigger levels and appropriate actions;
3. Measures to protect the instruments during construction.

Chemical Treatment Management Plan (CTMP)

As required by Condition 6 of this consent, the CTMP shall include, but not be limited to, the following:

1. Specific design details of the chemical treatment system based on a rainfall activated methodology for the site's sediment retention ponds;
2. Monitoring, maintenance (including post storm) and contingency programme (including a record sheet);
3. Details of optimum dosage (including assumptions);
4. Results of initial chemical treatment trial;
5. A spill contingency plan.
6. Details of the person or bodies who will hold responsibility for long-term maintenance of the flocculation treatment system and the organisational structure which will support this structure

Noise and Vibration Management Plan (NVMP)

As required by Condition 6, the NVMP shall refer to all noise management measures to demonstrate compliance with 55dBA/Leq maximum noise level and detail all methodologies that will be employed to demonstrate compliance with the rule.

The noise and vibration management plan shall include, but is not limited to the following:

1. Work sequence for the managed fill;
2. Machinery and equipment to be used;
3. Hours and operation, including times and days when noisy works would occur;
4. Methods for monitoring and responding to complaints about works noise and vibration.

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Environmental Compensation Plan (ECP)

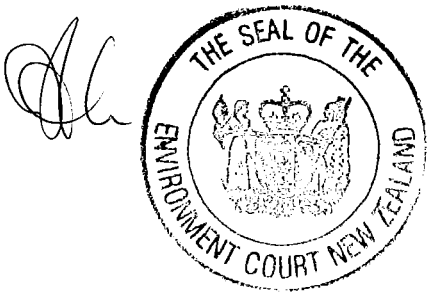
As required by Condition 6 the ECP, shall include, but is not limited to the following:

1. It shall be in general accordance with the evidence of Mr Nick Goldwater to the Environment Court dated 1 February 2017 outlining ecological enhancement measures to be undertaken along the riparian margins of the streams located in north-eastern portion of the subject site (Lot 4 DP 166787) as well as along the main stream channel flowing west to east through the site.
2. The ECP shall also include details of the riparian planting works including but not limited to the following:
    a. Plans in A3 format showing where the riparian planting is to be carried out along the margins of the streams in the north eastern portion of the site and the stream running from west to east through the property, including a list of species, their locations and densities.
    b. Details regarding timing of works and techniques of weed and plant management measures for a period of no less than 5 years or until such time that 80% canopy closure has been achieved throughout the planted areas.
    c. Details confirming how the areas identified in the ECP are to be legally protected in perpetuity.
    d. Details of how the riparian margins will be permanently fenced, and any staging in accordance with Condition 20.

Air Quality Management Plan (AQMP)

The AQMP as required by Condition 6 shall include, but is not limited to the following:

1. Measures to be used to mitigate the effects of dust during the construction and operation of the managed fill;
2. Criteria used to determine when the measures will be used to mitigate the effects of dust;
3. Details of the design and operational factors used to ensure that open areas are minimised;
4. Procedures for maintaining the access road to ensure that it is appropriately maintained and cleaned;
5. Provisions for temporary cover and the use of sprinklers;
6. The location, operation and maintenance of the dust monitoring equipment;
7. Details on any dust suppressant chemicals that will be used on site, including the supplier's application rates suitability for particular locations;
8. A list of the key responsibilities (such as the use of the water truck) and who will be responsible for implementing these and making day-to-day decisions;
9. The measurement of atmospheric particulate which will cause the alarm to be triggered on the fully automated atmospheric particulate monitor;
10. The actions to be taken once the alarm has been triggered.



IN THE ENVIRONMENT COURT
AT AUCKLAND

[2016] NZEnvC 073

IN THE MATTER OF	an appeal pursuant to section 174 of the Resource Management Act 1991 **(the Act)** in respect of a Notice of Requirement
BETWEEN	NORTH EASTERN INVESTMENTS LIMITED HERITAGE LAND LIMITED (ENV-2014-AKL-000003) Appellants
AND	AUCKLAND TRANSPORT Respondent

Hearing:	at Auckland 18-22, 25 January and 23-26 February 2016
Court:	Environment Judge J A Smith Environment Commissioner K A Edmonds Environment Commissioner D J Bunting
Appearances:	Mr M E Casey QC for North Eastern Investments Limited and Heritage Land Limited (**NEIL**) Mr GC Lanning and Mr WMC Randal for Auckland Transport Mr C J Brown for Auckland Council – watching brief only
Decision:	29 April 2016

DECISION OF THE ENVIRONMENT COURT

A. For the reasons set out in detail in the Decision the Court will confirm a modified NOR subject to the following:

1. **It is to be based upon:**

   (a) **the indicative operational road corridor shown in Annexure D attached to this decision, and covering a maximum width of 22m with the exception of areas specified in (2) and (3),**

   (b) **a vertical profile for the road as shown in Annexure D (or better);**

2. **In addition, the Designation over 1 and 2 being lots 2 DP199126, being 1,531m^2 owned by the Auckland Council, is to be designated in full, and lot 1 DP340400, being 856m^2, is designated in full.**

3. **In addition to the operational road corridor there shall be an additional area provided as follows:**

   (a) **an area necessary to construct the bridge abutments;**

   (b) **to connect with Fairview Avenue to the west of the proposed roundabout and on the eastern side of the roundabout to connect with the existing roading designation;**

   (c) **any area essential to allow construction of the road corridor or supporting infrastructure such as retaining walls.**

B: The parties are encouraged to reach an agreement in respect of access for the purposes of construction of their respective activities.

C: By 30 June 2016 Auckland Transport is to produce and circulate an indicative plan of the modified designation area in accordance with this decision. The indicative plan is to identify the specific land identified in A1 and A2, and any further areas required under A3. Reasons for the extent of any additional area required for construction purposes are to be provided. In undertaking its assessment of construction needs,

Auckland Transport is to minimise the effect on the NEIL development proposal adjacent to the road corridor.

D: **Auckland Transport is to provide proposed consents and conditions for the modified designation within a further ten working days.**

E: **NEIL then has fifteen working days in which to advise Auckland Transport and the Court whether it agrees with the area proposed to be designated in line with the Court's directions in the Decision, and particularly any additional area required for construction by Auckland Transport, as well as on the proposed conditions. NEIL is to advise of any concerns and ways in which these might be addressed, including any substitute condition wording.**

F: **Auckland Transport has a further ten working days to consider and advise NEIL and the Court of its response to any matters raised by NEIL.**

G: **The Court will then make a decision on the overall extent of the land to be designated, and the conditions to which the designation will be subject. In making this decision the Court will have regard to the memoranda lodged by the parties and, if necessary, convene a further hearing or conclude the matter on the papers.**

H: **Once the extent of the designation has been decided by the Court, Auckland Transport is to undertake a survey and prepare a plan that clearly identifies the area of the designation to be confirmed by the Court, and submit this plan to the Court within twenty working days.**

I: **Any applications for costs are reserved and application is to be made on issuing the final decision in accordance with directions given at that time.**

REASONS FOR DECISION

Introduction

[1] This notice of requirement (NOR) relates to the provision of much needed roading to allow the development of Fairview Catchment in Albany. The NOR goes through land owned by Heritage Land Limited, and which the company North Eastern Investments Limited (**NEIL**) is responsible for developing.

[2] Since around 2003, NEIL has been seeking to progress intensive residential and other development on this land, approximately 7.8 hectares in area, between Fairview Avenue and Oteha Valley Road. Over the ensuing decade a number of issues have arisen, leading to several hearings in the Environment Court and the current proceedings. There have been ongoing issues with obtaining resource consents for the project, with the resource consent for land use declined at the first instance hearing and an appeal lodged seeking that decision be overturned.

[3] The primary issues in this case are:

(a) should a requirement under s 171 of the Act, to a route through the NEIL site, be confirmed?

(b) if the assessment of alternatives has not been an adequate consideration of alternatives (including Fairview Avenue), should the designation nevertheless be confirmed?

[4] In relation to both issues, the effect on NEIL land available for intensive residential use is relevant.

Background

[5] The NEIL site has been subject to a *preferred road indication* on the former North Shore City Council district plans since the late 1990s. During discussions for development, the North Shore City Council and its successor Auckland Council made it clear that it was anticipating a road going through this site linked to Medallion Drive and Fairview Avenue. We will discuss later the detailed history of this matter.

[6] Subsequently the North Shore City Council notified a plan change (PC32) constraining lot sizes within the Fairview Catchment. Eventually, PC32 came to a hearing before the Environment Court relating to whether or not the Council should or

could constrain development within certain areas of the Fairview Catchment (which includes land to the north and west of Fairview Avenue but not the NEIL site) until the necessary roading infrastructure was in place.

[7] During the course of that decision, the Court acknowledged, *the status of the notation is unclear and at best, can be described as indicative* and that it did not impact on the property in terms of any rule.[1] As well as identifying that the preferred road indication had no planning force, the Court upheld the rule maintaining larger lot sizes in certain parts of the Fairview Catchment, essentially those to the west of the motorway that use Lonely Track Road to access Fairview Road, until the necessary infrastructure was in place.

[8] In the meantime NEIL had advanced plans for a comprehensive development on its site with three main components:

(a) a mixed use area with residential and retail facing Oteha Valley Road;

(b) an intensive residential area over the majority of its land excluding a corridor some 20m wide for roading between Medallion Drive and Fairview Avenue; and

(c) the East-West Towers on a smaller portion of land between Fairview Avenue and Oteha Valley Road to the west of the proposed corridor.

[9] After the hearing on PC32 the parties engaged in discussions as to how to best address the issues. Although the alignment for a road between Medallion Drive and Fairview Avenue seemed to be agreed in traffic assessment terms, there were a number of caveats on whether this was the appropriate road and the particular design or modelling required for it.

[10] At the same time NEIL was pursuing its application for resource consent for the towers on the western portion of the site (**East-West Towers**), which was set down for hearing before Judge Thompson in 2012. Prior to that hearing, and as recorded in the decision, NEIL and the Auckland Council had reached agreement in respect of resource consents for the intensive residential development and mixed use business area. The Court decision recorded that the parties would be filing a consent order (sic) in the near future.

[1] ***Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council & Ors*** [2013] EnvC 082, paragraph [31]

[11] The Court then proceeded to hear that part of NEIL's appeal relating to the proposal for an East-West Towers complex on 12-13 November 2012. It is recorded in the decision of 6 December 2012 that at the time of that hearing the Court was advised about a notice of requirement, and notes:

> We were advised at the hearing that a notice of requirement has now been issued for the extension by Auckland Transport and that it conforms at least broadly, with the development's design for it.

[12] Subsequently the Court disallowed the East-West Tower residential development resource consent application.[2]

[13] It transpires that the notice of requirement was adopted by Auckland Transport on 2 November 2012, ten days prior to the Court hearing, but it was not advertised until February 2013, well after the date of the issue of the Court's decision on 6 December 2012. The notice of requirement was then notified and has proceeded to the Commissioner recommendation and decision by Auckland Transport.

The current hearing

[14] The designation decision was appealed to this Court in 2014, and was proceeding through preliminary stages to a hearing.

[15] In the meantime, this Court had assumed that matters relating to the intensive residential and mixed use business area appeals had been resolved and closed its file. It was not until 2015 that the parties advised the Court that they had not been able to settle the terms of the resource consent and required a hearing. The Court set both the designation and resource consents matters down to be heard in January/February 2016 with an estimate of three days for each hearing.

[16] After the first week of the designation hearing, which commenced on 8 January 2016, it was clear that it was unlikely that this matter would conclude, and the Court subsequently adjourned to continue hearing the NOR matter on 23 February. The Court has subsequently issued a Minute adjourning the intensive residential and mixed use area resource consent proceedings for the reasons set out in that Minute, which need not be repeated in this decision.

[17] However, we need to mention the plans detailing the proposals which are to be the subject of the two land use consent applications and appeals which were

[2] ***North Eastern Investments Ltd v Auckland Council*** [2012] NZEnvC 266

constantly referred to during the hearing. We remain mindful that this is not a hearing of those proposals and also that there is nothing to prevent NEIL, or any future landowner or land developer, from proceeding with a completely different proposal for the land. But a focus of the hearing was the implications of the designation on NEIL's land use proposals and we traverse the issues raised in the course of our decision.

Background to the designation

[18] The designation appears to have its genesis in some comments made by the Environment Court in respect of PC32, particularly in relation to a joint witness statement prepared on 22 August 2011 which reads, in part:

> The witnesses agree that in any consideration of the transportation and engineering implications of the alternatives of the Medallion Drive extension versus the upgrading of the existing alignment of Fairview Avenue, that the Medallion Drive extension is an option that is preferred. This is because it provides improved network connectivity and efficiency and achieves greater separation of the intersection and State Highway 1 interchange.

[19] In those proceedings the Court noted:

> Subsequently Mr Lanning filed a memorandum advising that Auckland Transport now had funding in place to enable it to proceed with the notice of requirement, and also that it intended to commence parallel discussions with the landowner regarding acquisition of the land required, rather than await completion of the NOR process.

[20] Of critical importance to our evaluation of the issues is the aerial extent of the designation sought.[3] That was originally notified as annexed hereto as **"A"** and shows the designation of an area of some 7,881m^2 on the NEIL land. The proposed alignment of the road and its positioning is of some importance given the subsequent plans produced to this Court during the hearing.

[21] The designation matter was heard before (then) Commissioner D Kirkpatrick, a commissioner appointed by the Auckland Council, who concluded that the NOR should be confirmed *as notified by Auckland Transport*, with the recommendation that there be minor alterations to several of the conditions.

[22] Subsequently Auckland Transport resolved to adopt the Commissioner's recommendation confirming the notified designation and conditions subject to further minor alteration of several of those conditions. Annexed hereto and marked **"B"** is a

[3] Common bundle of documents, page 164

map showing the actual area to be designated adopted by Auckland Transport.[4] This was produced to the Commissioner towards the closing of the hearing on the designation. That map is not attached to the Commissioner's decision and it is unclear whether he was aware of the extent of the difference between the area on that map and that attached to the original notice.

[23] Annexed to the Auckland Transport decision is a diagram (Annexed hereto as **"C"**) showing areas to be removed from the designation (shown in orange), and additional areas to be included in the designation (shown in blue).[5] What was not clear, and certainly was not discussed by the Commissioner, is that those blue areas were in fact not part of the notified NOR, and represented new areas of land to be included within the designation.

[24] The Commissioner discusses changes to the Designation Plan at paragraph 14 of his decision.

> AT produced an amended plan of the NOR, moving its alignment up to 6m to the south and consequently adjusting the areas of land for construction purposes on either side of the proposed alignment. This Plan also reduced the area of affected land at 21 Fairview Avenue.

[25] However, the differences are not immediately apparent. It is not until one undertakes a very close comparison of the two designation plans "**A**" and "**B**" that one is able to ascertain that there is in fact a strip of land on the eastern side of the corridor on NEIL's land that is added to the designation. Overall there is a net increase in designated land of some 238m^2 from that notified, which we understand to be the net effect of the areas removed and those added. More importantly it has no apparent reduction in effect on the eastern side, but an increase in the impacts on any building opportunities on the western side.

[26] Counsel addressed the Court on this matter and raised it as a jurisdictional matter as to whether a NOR can be modified in circumstances where the Commissioner and Auckland Transport have simply confirmed the notified notice of requirement. For reasons that will become clear during the course of this decision, the matter in the end is of no particular moment but does highlight the importance of clarifying the exact areas sought to be covered by designations. This lack of information was troubling throughout the hearing, with the Court still having no exact dimensions in respect of the proposed designation.

[4] Common bundle of documents, page 356
[5] Common bundle of documents, page 357

Context of designation

[27] The objectives of the NOR are:

- to facilitate future growth in the residential areas north of Oteha Valley Road;
- to increase capacity of the transport links between Oteha/Pinehill and Fairview Heights/Northcross;
- to provide a link which optimises the efficiency of existing intersections at SH1, Medallion Drive and Rising Parade with future traffic growth;
- to provide a link which addresses the existing safety issues for traffic accessing Oteha Valley Road from Fairview Avenue; and
- to improve walking and cycling connections between Medallion Drive and Fairview Avenue across Oteha Valley Road.

[28] The designation seeks essentially to provide a roading corridor consisting of two lanes over the majority of the length through the NEIL property each 4.2m wide; a 3m combined cycleway/footpath on the eastern side and a 1.8m footpath on the western side. The formed roadway would therefore be 8.4m wide with a further 4.8m required for cycleway/footpaths, making a total of 13.2m. To this was added a verge of 0.8m on each side of the road between the road and the footpath and a berm (or amenity strip) of some 3m on the outside of the footpath. All of this combines to give a total width of 20.8m. Over a length from the Medallion Drive intersection with Oteha Valley Road the designation plans include a third lane 3.9m to allow left and right stacking or queuing for the peak morning traffic heading south. This additional 3.9m gives a total width of just under 25m (24.7). The width of amenity berms was a subject of dispute at 3m on each side. Without them, the roading corridor is between 15 and 19m.

Land outside the roading corridor

[29] However, the proposed designation area extends well beyond this on each side of the road. We were told that the extended areas may be required for construction purposes. The width of the extra area varies significantly, including batter slopes of 3:1 on both sides of the corridor to tie in with the original ground level.

[30] We were told that it is intended by Auckland Transport for the land beyond the finished extent of the road corridor to be surrendered to NEIL once the road has been constructed. A major concern of the appellant in respect of this part of the designation is that it effectively prevents the developer from developing this part of the land until the road is constructed. The designation would require the developer to obtain permission for works outside the road corridor but within the designation under s176 of the RMA, and there was no guarantee that approval would be forthcoming.

[31] The argument of the Auckland Council in this regard is somewhat more subtle. It says that in principle it does not object to the NEIL works being done on the designated land, but:

(a) that NEIL cannot prevent or hinder the designation works; and

(b) that it cannot know whether the NEIL development proposal will prevent or hinder the designation work until such time as design is finalised.

Given that it is seeking a lapse period of ten years, that could essentially constrain construction and the development of this part of the NEIL land for the next decade or until the final design of the road has been completed.

[32] Furthermore, despite lengthy attempts by Auckland Transport and NEIL to agree on the vertical alignment of the road, the alignment supplied to the Court as part of supplementary evidence produced after the closing of the applicant's case and after the opening for NEIL brought the area to be designated and its effect sharply into focus, not just for the Court but also the parties. That shows that a vertical alignment for the road can be adopted that gets close to or matches the existing ground level over the majority of its length, thereby minimising cuts.[6] We attach that design as Annexure "**D**".

[33] The effect of the broader designation area being sought by Auckland Transport is that it prevents or constrains large building platforms on the NEIL site that encroach on the designation outside the roading corridor.

[34] Currently the situation is that NEIL has been refused consent for the East-West Towers part of its development, and the proposed development east of the corridor is subject to concerns about the impact of the buildings on the designation. Despite this, we were told the parties largely have reached agreement in respect of land use consent

[6] Common bundle of documents, Exhibit M

conditions for the eastern part. More importantly, until the road is constructed or Fairview Avenue is upgraded the wider Fairview Catchment cannot be fully developed.

Chronology

[35] In order to establish the context in which this NOR matter has been determined it is important to understand the inter-relationship of the development issues, including roading, roading funding, and the constraint over development in the Fairview Catchment (excluding the NEIL site) that currently exists. Over the last ten to twelve years there have been changes not only in terms of the territorial authority responsible for the resource consents for the land use development, but also in respect of the standards required in terms of riparian margins, accessibility and the like.

[36] We considered attaching a chronology of key actions and documents provided to us before and during the course of the hearing, however we recognise that many of these documents were produced in relation to the appeal of the land use consents, which has yet to be heard. We concluded that such a chronology was not necessary.

[37] Mr John R Farquhar, who manages NEIL, the company responsible for developing the site and the applicant for resource consents for the site, referred to extensive correspondence and said that he tried between 2005 and 2013 to accommodate the Medallion Drive link as the path of least resistance in seeking to obtain land use consent. (Mr Farquhar is also the director and beneficial owner of Heritage Land Limited which owns 56 Fairview Avenue (purchased in 2001) and 129 Oteha Valley Road (purchased in 2006)).

[38] We acknowledge that the history of this matter has been less than impressive and it is extremely unfortunate that matters could not have been resolved much earlier. There was a great deal of finger pointing during the hearing as to where the blame could and should be apportioned, referencing particular documents. However, we do not find the background to the matter to warrant recital of the detail of that history. We also remain mindful of the Commissioner's reasons for declining the first land use consent application for the East-West Towers, which extended beyond transport considerations.

[39] However, we do take Mr Casey's point, this being that Mr Farquhar should not now be penalised for going along with the demands of the various regulators and transport agencies (North Shore City and then Auckland Transport and Auckland

Council) that a road corridor be included in the proposals for land use consent. Accordingly, we set aside the fact that there were various iterations of the land use proposals illustrating the road corridor as a reason for confirming the designation.

The Court's role in the designation

[40] The appeal is pursuant to s 174 of the Act and section 174(4) enables the Court to cancel, confirm, confirm and modify and/or impose conditions. Section 171(1) applies, and subsection (1) is directly relevant for consideration of this appeal. This reads:

> S171(1) When considering a requirement and any submissions received the territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement having particular regards to:
>
> (a) the relevant provisions of a national policy statement, New Zealand Coastal Policy Statement or regional policy statement or proposed regional policy statement and a plan or proposed plan;
>
> (b) whether adequate consideration has been given to alternative sites, routes or methods of undertaking work if:
>
> (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; and
>
> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought;
>
> (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

Subject to Part 2

[41] Clearly, the consideration of the NOR by this Court is subject to Part 2 and whether the designation achieves the purpose of the Act as set out particularly in s 5. Sections 6, 7 and 8 also assist in the interpretation of the purpose of the Act. Accordingly, we understand that the overall test to be applied is that it must achieve the purpose of the Act as that is defined in s 5. In doing so the Court must consider the effects on the environment, and have particular regard to the matters set out in s 171(1)(a), (b), (c) and (d). It can be seen from these provisions that the power we have to modify the proposal or impose conditions can have an impact on the designation by reducing effects on the environment. There is clearly an inter-relationship between the various matters under s 171(1)(a), (b), (c) and (d) and the effects on the environment to be considered.

[42] Importantly, the Court's power to control effects on the environment only rises in circumstances where it confirms the notice of requirement. It must at least confirm a modified requirement to enable it to impose conditions.

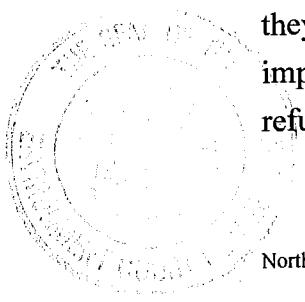
What is the environment on which the effects are judged?

[43] Section 171 uses the words *effects on the environment* compared to s 104, which refers to *any actual or potential effects on the environment*. We cannot see any distinction between the wording. Both deal with effects under s 3, which defines effects in the widest terms. It includes positive and negative effects. Environment is also defined in s 2 in the widest terms, and includes communities and people, social, economic, aesthetic and cultural conditions. The environment includes that which lawfully exists and that which can be established.

[44] Of particular difficulty in this case are aspects of the NOR requiring discretionary actions by Auckland Transport to achieve intended results. For example, granting a designation may enable the outcomes anticipated, however Auckland Transport clearly have the power to not implement the designation and allow it to lapse. All the experts agreed the effect of not having improvements to the roading would be significant. Even with a designation it is possible that Auckland Council might decide on other roading improvement works it could perform without requiring a designation, such as improvements within the existing Fairview Avenue roading corridor, which could render the designation unnecessary.

[45] Even with a designation, Auckland Transport must undertake other activities not included in the designation before full benefits can be realised. These include signalising the Oteha Valley Road/Medallion Drive intersection. The traffic experts appear to have worked on the assumption that traffic lights would be installed at Medallion Drive/ Oteha Valley Road, or at the Fairview Avenue/Oteha Valley Road intersection if the improvements were undertaken to that road. These improvements are not part of the designation sought, and would be subject to funding and design decisions by Auckland Transport over which this Court has no control.

[46] We have also concluded that it would be unwise for the Court to conclude that improvements to Fairview Avenue would be part of the existing environment, even if they could be undertaken on a permitted basis, as there is no certainty that such improvements would proceed even if the NOR for the Medallion Drive extension was refused. Similarly, we do not think we can conclude that the existing Medallion



Drive/Oteha Valley Road roundabout will be signalised, given that signalisation is not covered by the designation and relies upon other decisions by Auckland Transport.

[47] We have concluded that we should take into account the potential for NEIL to develop its land, at least to the discretionary activity limits, especially as NEIL is not affected by the development constraints set out in the Court's decision for PC32. Although it appears that a number of non-complying developments may have been granted consent within the areas subject to PC32 constraints, we were not given any details of those consents, and we cannot assume that development will occur on a non-complying basis within the wider catchment.

[48] It was clear to us, and accepted by all witnesses, that there is a need for an improvement to the Fairview Catchment roading. This has been evident for a significant period. The Court noted in 2011 that the access was in urgent need of upgrade and the situation has only worsened since that time. Traffic numbers have increased through this area since that time, and are likely to increase further. A recent example is the Hung development, in which the Auckland Council concluded that the cumulative effects on traffic from this development were negligible.

[49] The NEIL existing environment also includes the motorway immediately to the west of the site, and the fact that the motorway's north and south on and off ramps are readily accessible from Oteha Valley Road. Beyond this there is the wider transport network available through the transport hub less than 1 kilometre from the site, and the Albany shopping centre situated within 1½ kilometres. Oteha Valley Road is also a major arterial road providing access both east and west, and access to East Coast Bays Road, Medallion Drive, and the Albany town centre via McClymonts Avenue.

Effects on NEIL

[50] In this case a major allegation is the disenabling effect of the designation on the use of the NEIL land for intensive residential development.

[51] When we come to the application of the provisions of s 171(1)(a)-(d) we have concluded that this follows a format similar to section 104 of the Act, which lists these matters to inform the assessment required in respect of effects and under Part 2. As the High Court said in ***NZTA v Architecture Centre Inc (Basin Reserve)***,[7] no

[7] [2015] NZEnvC 375, p [1]-[3] and p [62]-[78] HC

extra weight is to be attributed to the matters under s 171(1)(a) to (d) and the strength of an individual matter will depend on the evidence and importance in respect of a particular case. We can, however, ascertain from the various criteria that where there is an effect on private land, greater scrutiny is required, as noted in the ***Queenstown Airport***[8] case.

[52] In respect of reasonable necessity, although this has a meaning between desirable and essential, again it is a question of practical import in the circumstances of the case as discussed in the ***Basin Reserve*** case.[9]

[53] In relation to alternatives, this formed a significant element of the appellant's argument. It was suggested that in the circumstances of this case there had been only a cursory consideration of alternatives. For current purposes we have concluded that, even if the consideration of alternatives is unsatisfactory or arbitrary, this is not, of itself, a bar to the requirement being confirmed.

[54] We acknowledge that the effects of the development on private land are effects on the environment as defined. Similarly we acknowledge that, through the power to modify and impose conditions, the Court has the potential to ameliorate those effects so that that effect reaches a satisfactory or acceptable effect having regard to the exercise of evaluation under Part 2 of the Act.

[55] We intend to approach these matters by working through:

(a) whether there has been an adequate consideration of alternatives;

(b) is there a reasonable necessity for the works;

(c) other related matters, including the conduct of the parties;

(d) the Plan provisions that apply; and

(e) assessing the matter under Part 2.

[56] In doing this we recognise the need under s 290A to have special regard to the Commissioner's decision, and we will discuss aspects of this in due course. Suffice to say similar arguments were raised before the Commissioner.

[8] ***Queenstown Airport Corporation Ltd v Queenstown Lakes District Council*** [2013] NZHC 2347
[9] [2015] NZEnvC 375, p [28]-[32]

[57] When the Court comes to exercising its power under Part 2 of the Act we note in particular that the question of whether or not the notice of requirement meets the purpose of the Act can only be judged after the Court has assessed whether there are modifications and/or conditions that could be imposed which might reduce adverse effects to an acceptable level.

The approach alternatives

[58] In the ***Basin Reserve***[10] case the High Court commences discussion of alternatives at paragraph [97]. We note that at paragraph [98] the High Court holds that ss 171(1)(a)-(d) are subject to Part 2.

[59] Section 171(1)(b) of the Act requires that alternative sites, routes and methods are required to be considered when either the consent authority does not hold the land, or there are significant adverse effects. In this case, the authority does not hold the land, or at least the majority of it, which is in the hands of NEIL. Accordingly, the test is applicable.

[60] Adopting the words of Whata J in the ***Queenstown Airport*** [11] case there is a requirement to establish an appropriate range of alternatives and properly consider them. Whata J at paragraph [121] noted:

> The section [171(a)(b)] presupposes that where private land will be affected by a designation, adequate consideration of alternative sites not involving private land must be undertaken by the requiring authority. Furthermore, the measure of adequacy will depend on the extent of the land affected by the designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will be.

[61] In ***Basin Reserve***[12] the High Court concluded that a similar approach should be adopted in relation to adverse effects. Looking at the decisions side by side, we have reached the conclusion that the question of a proportional response to the impact of the designation is appropriate. This is especially so when the designation has a greater impact under national documents, as in ***King Salmon***,[13] or in relation to private land, as in the ***Queenstown Airport*** case, or in relation to adverse effects on heritage as in the ***Basin Reserve*** case.

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[10] [2015] NZRMA 375
[11] [2013] NZHC 2347 at p [97]
[12] As above
[13] ***Environmental Defence Society v The New Zealand King Salmon Company Ltd*** (SC) [2014] NZRMA 195

[62] The word *adequate* is discussed in ***Te Runanga o Atiwhaka Rongotai v Kapiti Coast District Council***:[14]

> ...adequate is a perfectly simple word and we have no doubt has been deliberately used in this context. It does not mean meticulous; it does not mean exhaustive; it means sufficient or satisfactory.

[63] This proportionate response now required means that the question of sufficiency is one to be judged by regard to the identified impacts, whether in planning terms or otherwise, including in terms of impact on private land or adverse effects. As the High Court said in the ***Basin Reserve*** case:[15]

> ... it is simply common sense that what will amount to sufficient consideration of alternative sites will be influenced to some degree by the extent of the consequences of the scenarios in s 171(1)(b)(i) and (ii)...

Alternatives considered

[64] The NEIL case was that the consideration of alternatives had been cursory and not adequate, and also that it involved pre-determination of the Medallion extension as the preferred option. Mr Casey extensively cross-examined Auckland Transport witnesses in respect of the contract for setting project objectives and identifying and evaluating alternatives and their effects, the work done on the alternatives prior to the issue of the NOR and the work done since that time. Mr Casey also focussed on and questioned the decision-making process within Auckland Transport. We now consider these points.

[65] Mr Casey spent considerable time cross-examining witnesses and questioning whether the process and decision-making leading to, and the notice of requirement itself, had involved anyone with an appropriate level of seniority within Auckland Transport or the Board. We accept that the RMA does not specify any particular level within a requiring authority organisation that these responsibilities need to be undertaken by.

[66] We accept Mr Lanning's submission that Auckland Transport is a body corporate under s 38(2)(a) of the Local Government (Auckland Council) Act 2009 (**LGACA**). As a body corporate it necessarily has to act, including making decision, through individuals with authority to act on its behalf – from the Board on down. The Act has powers to delegate, and then to sub-delegate in s 54(1) and (3) LGACA.

[14] 2002 8 ELRNZ 265 at [153]
[15] Paragraph [140]

[67] We also accept Mr Lanning's submission that the evidence shows that Auckland Transport, acting through officers of appropriate expertise and seniority, and with expert assistance from outside the organisation and particularly external consultants, undertook the necessary actions, notwithstanding our conclusions on the adequacy of the consideration of alternatives.

[68] The question of whether the individuals exercising that authority held the necessary delegation is still moot. Witnesses for Auckland Transport focussed on current structure rather than that which applied at the time. However, the resolutions and activities have the apparent authority of Auckland Transport, and we conclude the actions should be assumed as legitimate under delegation for the purpose of this appeal. A declaration as to the legality of the designation process in terms of delegation is a matter for the High Court.

[69] Auckland Transport commissioned Beca to undertake the work leading to the NOR and we were provided with a copy of the contract for services.

[70] The Notice of Requirement attached the Options Evaluation Report November 2012 (prepared by Beca), with Fairview Avenue being one of those. The work first had a long list of options and that was refined to a short list of 7 options, as follows:

- Option 1 – Do Minimum
- Option 2 – Do Minimum Plus – Construct two lane bridge; retain existing Fairview/Oteha Valley Road intersection
- Option 3 – Do Minimum Plus – Construct two lane bridge: upgrade Fairview/Oteha Valley Road Extension
- Option 4 – Short Link – Across NEIL land with a roundabout at Fairview Avenue Intersection
- Option 5 – Short Link – Across NEIL lane with a T-intersection at Fairview Avenue Intersection
- Option 6 – Short Link – Across NEIL land with Fairview Avenue realigned to provide more direct link to retirement village
- Option 7 – Long Link – Across Fairview Avenue land to provide more direct linear link into Fairview Avenue.

[71] For the evaluation of the short list key assessment areas with underpinning criteria were selected – Land Use, Urban Design and Social (7 criteria),

Transportation (5 criteria), Environmental (5 criteria) and Economic (2 criteria). The evaluation scoring system was 3 (supports criteria), 2 (limited or neutral support of the criteria, 1 not supportive of criteria, and a red flag was noted as a 'show stopper' for the option to progress.

[72] So-called internal and stakeholders' workshops, which involved Beca and its project team, various people and areas within Auckland Transport, and at times NZTA and Auckland Council, were held to undertake and then confirm the evaluation.

[73] The outcome was an overall recommended option as the preferred outcome in terms of the project objectives and the evaluation criteria, a new short link option extending Medallion Drive and involving constructing a T-intersection (option 5) at the Medallion Drive/Fairview Avenue intersection and upgrading the existing roundabout at the Oteha Valley Road/Medallion Drive intersection to a signalised intersection.

[74] The report contained an aerial plan of the proposed designation footprint, an indicative alignment, and an indicative operational road corridor following construction which was the basis of the NOR.

Concerns with alternative evaluation

[75] Mr Casey's cross-examination and the evidence of Mr Paul Thomas, planner for NEIL, and Mr Brett Harries, traffic expert for NEIL, was directed at highlighting deficiencies in the evaluation of alternatives which meant that the small differences between the Fairview Avenue and Medallion extension options were magnified. In particular, these concerned:

- the selection (and application) of the factors in the multivariate option evaluation framework and analysis,
- the scoring system,
- the weighting of the factors in the multivariate analysis.

We accept that there were shortcomings in the evaluation of alternatives on these matters.

[76] There is no doubt that Auckland Transport recognised at an early stage the potential for an upgrade of Fairview Avenue. It was identified as a viable alternative that met the objectives and purposes of the notice of requirement. We conclude that it is clear from the evidence given that the NOR always involved the installation of a signalled intersection to replace the current Medallion Drive/Oteha Valley Road roundabout, and was compared with Fairview without signalisation.

[77] Assumptions were also made that the signalisation at Fairview Avenue would have a significant adverse impact on traffic flows.

[78] We conclude that there was a failure to fairly consider NEIL's position, including a failure to properly consult prior to proceeding with the NOR. Auckland Transport wrote by email to Mr Farquhar on 4 August 2012, inviting a response to the proposal. Mr Farquhar apparently replied that he did not live in Auckland or would not be available on that specific date, but offered several alternative dates. The response to that, forwarded on 4 September, was that the Council was not able to attend on those dates, and that the process was over and he could attend public open days. Given that the designation was to be placed over NEIL's land, this was most unsatisfactory.

[79] A focus of Mr Casey's cross-examination of Mr Stephen Burris and Mr David Nelson from Auckland Transport, and Ms Catherine Richards a planner (Beca consultant) for Auckland Transport, was on the involvement of Auckland Transport and its decision making in the process. We accept that there were also some shortcomings with the approach taken to the evaluation of alternatives within Auckland Transport.

[80] Furthermore, our consideration of the report to the Auckland Transport dVac Committee[16] (the Auckland Transport Committee that apparently made the decision on the NOR), demonstrates:

(a) that the adequacy of the Fairview Avenue alternative option was not considered in any detail in that report, including whether the costings were similar or lower than the Medallion Drive extension;

(b) it was asserted that consultation with landowners had occurred when this was patently not correct;

[16] Decision Value Assurance Committee, which apparently made the designation decision

(c) the NOR traffic modelling was undertaken on the basis that there were no access roads or connections to it, notwithstanding that it was shown as a local or local arterial road;

(d) the Auckland Transport dVac Committee was not advised that there was a major development planned for the NEIL site, nor the details of that plan, nor the fact that the parties had largely reached agreement in respect of the other two land use consents – even though it was clear that the purpose for the haste with which the notification took place was due to the upcoming Court hearing on a NEIL land use consent.

[81] We have concluded that there was inadequate written background information provided to the Committee at this stage. Nor are we satisfied that the committee, or the person actually making the decision, Mr Sean Baker, had the full information relating to the development potential of this site, and the potential for signalisation of the Fairview Avenue intersection.

[82] An assumption appears to have been made that Fairview Avenue, being some 120m closer to the motorway than Medallion Drive, would create greater traffic impacts. At that time, however, no modelling had been undertaken to support this assumption.

[83] The question is whether these shortcomings meant there was inadequate consideration of alternatives, and in particular on the upgrading of Fairview Avenue.

Can adequacy be considered over a period of time?

[84] Subsequent to the lodging of the appeal, further work was done on the Fairview Avenue option (now called Option 3B) and evaluating the differences between this option and the Medallion Drive extension option.

[85] Prior to the hearing, Auckland Transport undertook a re-design of the Fairview Avenue option for what we were told was a needed comparison of *like with like*. Mr Casey was critical of the basis for this work, portraying it as a ploy to increase the relative costs and downplay the benefits of the Fairview Avenue option.

[86] As this Court has said on many occasions, the process under the RMA can be an iterative one. Circumstances change, and in the three years since the decision on the NOR was made by Auckland Transport considerable additional modelling and

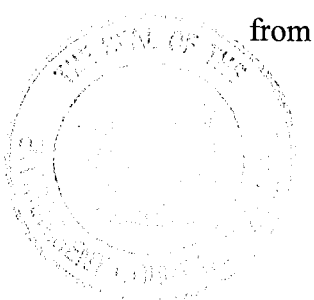
information has become available. This has been used to evaluate many of the issues not addressed by Auckland Transport at the time of notification of the NOR.

[87] From our own site inspection, we observed that the area to the north of Oteha Valley Road has continued to be developed to the stage that it is now largely medium intensity residential, at least to the east of the motorway. Traffic has continued to build, with an estimated 3,000 vehicles per day currently using Fairview Avenue. Given that Fairview Avenue has a one-lane bridge near to the intersection with Oteha Valley Road, we suspect that this road is already getting near to capacity.

[88] The NEIL land will introduce something in the order of another 450-500 homes that will also require traffic access. The question of timeliness becomes relevant, and it is clear that Auckland Council and Auckland Transport have now been seeking to address this matter for well over ten years. There have been various statements made over that period as to the immediacy of acquiring the NEIL land and constructing the new road.

[89] More recent modelling has demonstrated that a signalised Fairview Avenue/ Oteha Valley Road intersection, and double-laning of the existing single lane bridge with other improvement works, will produce a design which, overall, in performance is closely equivalent to the Medallion extension under the NOR.

[90] This modelling has also demonstrated that the Fairview Avenue intersection will provide a high level of service – in some cases C, D and E compared with the Oteha Valley/Medallion Drive signalisation, which can achieve an F or an F+ (the lowest level of service possible). We were told that the modelling runs can vary and that there is potential for oscillation in the outcomes of modelling depending on the assumptions used. One of the primary assumptions affecting the performance of the Fairview Avenue/Oteha Valley Road intersection is synchronising of its traffic lights with those at the motorway off ramp. This does not appear to have been provided for in earlier modelling, for reasons that were unexplained to the Court. Given the proximity of this intersection to the motorway, there is clearly the potential (with another set of lights a further 60m away) for signalisation to enable *green waves* in a particular direction at peaks, ie onto the motorway south during the morning peak, and from the off ramp north onto Oteha Valley Road during the afternoon/evening peak.



[91] Given that this modelling of Fairview Avenue had not been undertaken prior to the notification of the NOR, critical assumptions on which Auckland Transport appear to have made their decision on the NOR would not now hold up.

Benefits and costs of alternatives

[92] The question of costs and benefits also relates to the question of adequacy of consideration of alternatives. At the time of the NOR being confirmed, costs of the Medallion Drive extension had been estimated by Auckland Transport to be similar to or slightly lower than those of a Fairview Avenue upgrade. By the commencement of our hearing, the position appeared to be that the Medallion Drive extension alternative had been costed at around $14m and a Fairview Avenue upgrade at $8m. Further evidence suggested considerable additional cost if a pumping station required its re-siting for road widening near the Fairview Avenue bridge. What is clear from the estimates is that the significant difference between the two costs is that the cost of acquiring the NEIL land is included in the costings for the Medallion Drive alternative. Given that the proposed designation area involves just under a hectare of land that could potentially be available for medium to high intensity residential use, the Court can immediately see the problems with providing an adequate or proper assessment of its value. A key aspect of NEIL's case is that, without the NOR and designation in place, NEIL could relocate or redesign the East-West Towers (the consents had been declined in an earlier hearing because of a lack of open space and shading of a neighbouring property (among other reasons)), or by being able to incorporate the proposed NOR land into any development.

[93] Clearly, in evaluating the alternatives one question is whether or not the benefits of each alternative have been sufficiently considered. The effect on NEIL can either be seen as a benefit to NEIL if the Fairview Avenue alternative was adopted, or a cost to NEIL if the Medallion Drive alternative was adopted. The fundamental proposition for NEIL is that there had been a failure to consider it under either head.

[94] We think this interpretation goes too far in stating the position in respect of the evaluation. However we do accept that the evaluation was insufficient in addressing only the effect of the NEIL property as though it was a cost to Auckland Transport of acquiring the land. In our view, the values of this land, in terms of effects, and benefits and costs, are represented in more ephemeral issues such as:

(a) the NOR creates a separation of two pieces of land;

(b) how pedestrian access is provided, not only from and to this site, but through the site;

(c) the question of how the NOR addresses the continuity of public access along the stream is not addressed; although a connection to the east is shown (we were told at its current inversion site the bridge could not have a walkway underneath it), no alternative as to how people would travel further down the stream to the west is given; nor has any methodology for crossing Medallion Drive to continue further to the west on the northern side of Oteha Valley Road been given;

(d) this might be addressed by signalisation, but we are unclear on that issue and there wasn't any substantive evidence on the point. In fact, there seems to have been an assumption that people would cross the road to the east of the Medallion Drive/Oteha Valley Road intersection, and that there would be some form of bus stop both in front of the commercial shops to the north, and opposite that to the south.

[95] In saying this we do not suggest that these matters are insurmountable, but rather that there was little, if any, evidence of their consideration in the evaluation of alternatives.

NEIL development without the NOR

[96] During the hearing evidence was produced for NEIL showing that an alternative layout for the NEIL development had been offered by NEIL in 2013.[17] This is annexed as "**E**", showing access into the NEIL site from the Medallion Drive roundabout, crossing the stream and then moving to the east and connecting up with the internal roadwork of the site. This would allow some site permeability, even though there are likely to be some traffic calming measures through the site, ie stop signs, crossings etc.

[97] This proposal suggested that Fairview Avenue would be upgraded, and one assumes signalised, at the Oteha Valley Road intersection. No modelling has been produced by either party relating to that option, but it is relatively clear that it could enable traffic from the site to move either down Fairview Avenue or through the Medallion Drive roundabout. NEIL considered that any roads on their site would be

[17] Common bundle of documents, Exhibit L (attached to letter)

private roads, but little consideration seems to have been given to vehicular access to or from the site as opposed to pedestrian and cycle access for such a development.

[98] Traffic from further north might also permeate through this site but we had no details on this. In that regard it seems that if people were travelling directly south, ie further along Medallion Drive or to the school, they may very well permeate through the development and exit straight onto Medallion Drive through the roundabout. Alternatively, they could travel down Fairview Avenue, turn left and then exit right from the roundabout onto Medallion Drive. That would turn on whether the internal NEIL roads (or parts of these) were public.

[99] Those choices would be driven by personal preference, traffic safety and congestion issues. Such a NEIL development without the NOR would also enable people travelling to the NEIL site, or further north, to make a choice to either turn left on Fairview Avenue or travel on to the roundabout, which choices would again be driven by congestion and destination. None of the witnesses for Auckland Transport appeared to be aware of this option, even though it was provided to Auckland Transport in 2013.

Joint witness statements and related appeals

[100] This Court was handed a folder consisting of some 29 joint witness statements, covering a whole range of issues in relation to both the NOR and the development itself. We suspect there may be other joint witness statements which are relevant only to the NEIL East-West Towers project, or to land use aspects which have not been included in the bundle. This folder appears to include joint witness statements prepared from 2011, and we understand there was significant work done by the parties prior to that date referred to in two other bundles of documents.

[101] Behind these joint witness statements a significant amount of work has been done in respect of considering various planning and roading aspects of the development and the alignment of the proposed Medallion Drive extension. Not surprisingly, this work appears to have taken on a life of its own, and matters have somewhat devolved from the core issues in which this Court is involved.

[102] The starting point is a joint witness statement prepared on 22 August 2011 quoted by Judge Harland in her 2011 decision at paragraphs [28]-[32] which stated:

> [28] The trigger rule, which was introduced in the decision version of PC32, sought to implement the upgrade policy, and related objectives and policies, in the specific context of the parts of Areas A and B that were considered to be within the Fairview Avenue catchment.
>
> [29] It was agreed by all of the parties that road improvements need to be completed before further subdivision to smaller lots is enabled in the area identified as the Fairview Catchment. Although several options for road improvements were evaluated, the four transportation experts agreed that the Medallion Drive Extension was the preferred option from a traffic management perspective.[18] This was because it provides improved network connectivity and efficiency, and it achieves greater separation from the Oteha Valley Road/SH1 Interchange.
>
> [30] The Plan objectives and policies are quite clear that any road upgrading required to mitigate adverse effects of additional traffic is to be completed before, or concurrent with, any additional development rights being realised. However in this particular case there is considerable uncertainty surrounding several aspects of the road works required to provide for the additional subdivision potential in those parts of Areas A and B.
>
> [31] The Medallion Drive Extension is shown as a "*preferred road*" on the Planning Map in the District Plan. The status of this notation is unclear and at best, can be described as indicative. Although Mr Lanning submitted that there was a linkage between the dotted lines on the map and the *assessment criteria* for any resource consent (subdivision), Mr Reidy said that the preferred road did not impact on the property in terms of any rule.[19]
>
> [32] The Medallion Drive Extension road works affect NEIL's land, which is outside of the PC32 area. These works will most likely be public works for which the Council will have responsibility as they are to service a wider area than just NEIL's land.

[103] The matter was put to the Environment Court again in 2012,[20] but in relation to the Towers concept on the east of the NEIL land in a much more truncated way. At paragraph [4] the Court noted:

> For some years and certainly since this proposal has been alive, there has been a proposal to extend Medallion Drive across NEIL's site to Fairview Avenue in the west and the overall design of the development allows for an extension of Medallion Drive across the site immediately to the north of the proposed towers. For reasons that are not entirely clear, the proposal has made very slow progress and unsurprisingly NEIL had become rather frustrated with it, but we were advised at the hearing that a notice of requirement has now been issued for the extension by Auckland Transport, and that it confirms at least broadly with the development's design for it.

[18] Joint Statement of the Transportation Engineering Witnesses, 22 August 2012, paragraph 8, signed by Messrs I Clark, B Harries, B Hall and A Bell.
[19] Mr Reidy, Transcript, page 97, lines 13 and 14
[20] Get reference

[104] To understand the context of these comments by the Court, there are several factual matters which only became evident as our hearing progressed.

1. The NOR was adopted by the Auckland Transport relevant dVac committee on 2 November 2012, but was not notified until February 2013.
2. The hearing before Judge Thompson commenced on 12-13 November 2012 and it is unclear whether any details of the designation were made available either to the Court or the other parties.
3. In relation to the comments made by Judge Harland, one must have regard to paragraph [32] of that decision, cited earlier.

[105] Paragraph [32] of the ***Thurlow*** decision then cites a number of issues:

- (a) and (b) amounting to the fact that there was no provision in the Long-term Plan for the construction of the extension, or any related land purchase. The memorandum was filed on 30 August.
- at paragraph (c) the Court notes that on 19 December 2011, after the hearing but prior to the issue of the decision, Mr Lanning filed a memorandum advising that Auckland Council now have funding in place to enable it to proceed with the notice of requirement, and also that it intended to commence parallel discussions with the landowner regarding acquisition of the land required rather than await completion of the NOR process.
- subsequently Mr Lanning advised there had been a delay in appointing a consultant, but that they expect to have a contract by the end of February 2012; and
- on 10 February Mr Maassen (for NEIL Homes) advised that NEIL had not been approached to negotiate the terms of acquisition to any part of its land or road.

Failure to progress resolution

[106] It is important, in the context of this decision to note that assertions (as had been made earlier at the PC32 hearing) were made before this Court that there are now funds available to enable land purchase; however as at the date of the hearing of this matter no offer to purchase the land had been made.

[107] In ***Thurlow Consulting***[21] the Court notes that as early as December 2011, Mr Lanning advised the Court that Auckland Transport (interalia):

> ...intended to commence parallel discussions with the landowner regarding acquisition of the land required, rather than await completion of the NOC process.

[108] The Court records that it had not done so by February 2012.[22]

[109] In this hearing, Mr Farquhar again advised that there has been no approach by Auckland Transport to acquire the land over the past four year period.

[110] Mr Lanning repeated the assertion that funding was available, but offered no evidence or assertion that Auckland Transport had made any effort to negotiate a purchase.

[111] In his final submissions, Mr Lanning stated:[23]

> Non-compulsory acquisition in the absence of land use approval is unlikely to meet Auckland Transport's obligations to operate in a financially responsible manner.

[112] If Auckland Transport have no intention to acquire the land until after the NOR process, this is not what they told the Court in 2011 and at this hearing.

[113] Similarly, in relation to the road design assertions were made that:[24]

> Auckland Transport does not oppose the building being located within the designation footprint as it is understood that they will not be located within the final link alignment.

[114] Notwithstanding this statement, Auckland Transport was dilatory in undertaking the works necessary on the alignment, and this was only produced to the Court late in the evidence exchange.

[115] This lack of progress had led to significant frustration by Environment Commissioner Oliver appointed to undertake the various mediations, and led to Commissioner Oliver for the Environment Court noting her displeasure at Auckland

[21] Above at paragraph [32](c)
[22] Above at paragraph [32](e)
[23] Final Submissions, 6.21(b)
[24] Auckland Transport Memorandum to the Court dated 19 June 2015 at [5]

Transport's refusal to supply revised design that would take into account the relative levels of the two properties.

[116] Commissioner Oliver's report on an expert conference held on 2 October 2015 also records that all experts agreed that a technical design solution could be achieved, but there had been a failure by Auckland Transport ahead of the conference to undertake the relevant work to investigate the feasibility of raising the level of the proposed NOR between Oteha Valley Road and Fairview Avenue.

[117] These matters are indicative of the background to the slow progress on the matters at issue between the parties, as amplified by Ms Amanda Coats, project manager for NEIL, in her evidence and cross-examination. We could go on but it is sufficient to now recognise that by the time of our hearing matters had moved on considerably, with a revised vertical alignment to accommodate NEIL's concerns about the level distances between the road and their land development proposals to the east.

[118] We note that Annexure **D**, which was produced by Mr Burris after the close of Auckland Transport's case, showed a new vertical alignment raising the finished road level proposed NOR close to the existing ground levels, particularly between chainage 100 to 120. That Annexure, originally produced in November 2015, was an attachment to the evidence of Mr Robert Mason, civil engineer and a consultant for Auckland Transport, filed with his rebuttal.

[119] Given that this was a core issue for potential resolution of this matter, it is surprising to us that Auckland Transport took no real effort until just prior to this hearing to move these issues forward. That is particularly so when Mr Lanning submitted, and several witnesses accepted, that the Medallion Drive extension is a small project for Auckland Transport.

[120] The Medallion Drive extension, when complete, could have facilitated the opening up of a substantial area of the Fairview Catchment, including the NEIL site, for development. Even after 2011, if Auckland Transport had entered into negotiations with NEIL and reached an agreement in respect of the construction through the NEIL property, including within the designation footprint (but outside the active roading corridor) for the NEIL development, then this roading designation could have been finalised and the development on the NEIL site could have been

started. Not only this, it would have given the opportunity to open up the Fairview Catchment for further development, which has been held up by these delays.

[121] We are satisfied on the balance of the evidence before us that if the corridor could have been narrowed to that necessary for the road, and/or a reasonable agreement reached to allow NEIL to construct its buildings within the designation footprint, but outside the roading corridor, this matter could have been resolved by private agreement and with the acquisition of the land by Auckland Transport.

[122] The failure to do so highlights a major breach in the implementation of the Auckland Regional Policy Statement and the Auckland Plan, and indicates a significant failure by Auckland Transport to enable the construction of infrastructure and allow the intensification of Fairview Catchment and the NEIL property.

[123] This disconnect between the objectives and policies of the regional and district planning documents, and implementation by Auckland Transport to allow for intensification of the city, is a recurring theme which we shall revisit a number of times through the course of this decision.

Modifications

[124] We conclude that there are important principles in our approach to the designation that should inform the modification of the designation for the Medallion Drive extension. These principles are:

- Designation of all the land required to undertake the work not only allows the work to be treated in an integrated manner but authorises its land use activities in terms of the District Plan.
- A vertical alignment for the road which should not impede development of the adjoining NEIL land.
- The extension of Medallion Drive should provide for carriageways, pedestrian and cycling facilities, reasonable berms with associated space for services and lighting.
- The extent of the designation should be the minimum necessary to allow for the construction of the Medallion Drive extension so as to maximise the area of land available for residential development, open space etc on the NEIL land.

- The construction of the extension should generally be contained as far as is practicable within the operational road corridor where it crosses the NEIL land.
- The extent of land at the south end of the extension already in the ownership of the Auckland Council in the vicinity of the bridge has several benefits, including for construction of the bridge and potentially to accommodate the storage of construction equipment and materials.
- The bridge should be built to a height and design that allows for pedestrian/cycling access under the bridge and along the stream bank.
- The riparian margins within an area of approximately 20m at the side of the stream require sensitive treatment.
- The area required under the designation for the construction of the Medallion Drive extension/Fairview Avenue roundabout needs particular attention to address both operational and construction needs.
- Conditions should be developed and be attached to the designation with respect to these principles to ensure the above.

We now consider what this means for the designation.

Effect of vertical profile of the road on land requirements

[125] As emerged during the hearing, we conclude that a vertical profile for the road as shown in Annexure **D** or better, which is close to the existing ground level will minimise the extent of the retaining walls that will be required. That should be subject to a condition.

[126] In this context, it seems clear to us that the area to be designated should be minimised to an area sufficient to accommodate the operational road corridor and a narrow construction area on either side. In that regard we need to have a slightly closer look at the road corridor itself, and what width that would entail.

[127] We have concluded that the operational 3-lane roading corridor could be accommodated within a width of 22m, which would allow for three lanes; two of 4.2m width and one at 3.9m to a total of 12.3m; 3m and 1.8m footpaths (4.8m) two 0.8m verges (1.6m) and leaving land available for two 1.65m berms (3.3m) on each side. Where only two road lanes are required the designation width could be reduced, or wider berms provided.

[128] To get an understanding of the type of roading expected, we would have expected the witnesses to have made some comparison with Medallion Drive south of Oteha Valley Road given it is an extension of that road. From our visual inspection and without taking any measurements, including the berms, the road corridor in that area appears to be around 20m wide. Some sections incorporate an extra slip lane.

[129] We conclude that the extent of the operational road corridor be reduced but stop short of specifying the exact dimensions of the design elements within the corridor, other than requiring that there be a pedestrian footpath on one side and a shared footpath/cycle path on the other. From the analysis we have set out above we consider that a corridor width of 22m would provide sufficient flexibility and future proofing for transport needs. In relation to Fairview Avenue, Mr Mason said it should be noted that the footpath and berm area on the eastern side of Fairview Avenue has been removed, as a result of mediation with NEIL, to reduce the impact on the NEIL land. However, there is still a need for works to accommodate the roundabout. These are likely to involve a fan shape but do not need to encroach on any proposed building platforms. Further work for intersection road works needs to be done to show the designation here.

Bridge area

[130] When we looked at the proposed plans for the Medallion Drive bridge we note that its width is approximately 17m because there are no berms. However it does require abutments on both sides of the stream and associated earthworks. We acknowledge also that there needs to be sufficient room to allow for the construction of the wing walls.

[131] Bridge works on the southern side of the stream can be accommodated on the land already owned by the Council adjacent to Oteha Valley Road. As we have already noted, that land also appears to have the capacity to store materials, equipment and machinery for the entire project. Given that Auckland Council is not seeking any modification to the designation in relation to its properties, this land can clearly be utilised for construction and then any surplus re-dedicated as required.

[132] The designation of the land already owned by Auckland Council to the south of the stream should be confirmed as there are many reasons for roading works to be authorised and accommodated on this land, including for construction purposes.

[133] An issue for the bridge then is the transition from this width adjacent to the stream to the corridor north of the stream. Mr Mason told us there was an opportunity to reduce the large splayed area in the designation while still allowing sufficient room for a contractor to build the bridge and the abutments. This requires specific attention of the design team to provide an area which is adequate but not unnecessary.

[134] Quite simply, if agreements cannot be reached between the parties we can see no problem to creating retaining walls – this has been done south on Medallion Drive and elsewhere through this district. We noted for example that the motorway itself has post retainers in excess of 4m high after the abutments to its bridge over Oteha Valley Road. There is nothing exceptional about this type of construction in this area and it is repeated many times locally. Thus the road could be constructed even if this meant retaining at the edges to meet existing ground level.

Comment on alignment levels

[135] We accept that the logical proposition is that NEIL and Auckland Transport should work together to develop a common earthworking strategy to reach common levels in respect of their respective properties and provide for common erosion controls. We are satisfied that it is possible to construct the road within the corridor restraints constraints. None of the Auckland Transport engineers suggested otherwise. We are unable to understand why 3:1 batter slopes would be required beyond the edges of the road; they are certainly not required by NEIL and in the absence of any sensible agreement retaining walls could be put in place which would look the same as the many others throughout this local area.

Reasonably necessary

[136] We have used this elliptical approach matter to try and bring some order to the evaluation required under s 171. The question of reasonably necessity itself turns upon the extent of works, and thus we have felt it necessary to reach some conclusion as to the extent of the designation that might be appropriate before considering whether the designation is reasonably necessary.

[137] The answer to that question will vary significantly depending on whether the extent of the NOR is sought as notified or for the modified corridor that we have discussed. Given the shortcomings in the evaluation of alternatives and the failure to reach agreement on acquisition it is difficult to establish that the entire designation

area is reasonably necessary. *Reasonably necessary* falls between desirable and essential. Where acquisition of private land is concerned the degree of necessity is scrutinised more rigorously.

[138] We conclude that the entire designation area as sought is not necessary. It would defeat a purpose of the designation and impede the construction of intensive housing on the NEIL land.

[139] On the other hand, it follows that the need for a road to service new development to the north is plain and has been for some considerable period of time. We recognise that, in the absence of this designation, it would always be possible for Auckland Transport to improve Fairview Avenue to provide a better connection to Oteha Valley Road. However, that is not an outcome that this Court can compel. The designation of land for a roading corridor does not mean that the road will be constructed, but it gives a much clearer signal that development is appropriate. We will discuss its potential impact on development later in this decision.

[140] When we come to consider the question of whether it is reasonably necessary we, like Commissioner Kirkpatrick in making the recommendation at first instance on the NOR, and the Court on the PC32 decision, are drawn back to the joint witness statement prepared by the traffic experts in August 2011.

[141] In the context of that history and those statements we conclude that there is a reasonable necessity for the designation of a road corridor to the extent it is necessary for the road's construction.

[142] In that regard we have discussed a corridor somewhat narrower than the designation confirmed by the Commissioner, and more limited, but still generous in the context of roading development for Medallion Drive south of Oteha Valley Road. Such a modified designation would avoid or reduce the impact on the NEIL land use proposals currently before the Court for the land to the east of the corridor. Such a NOR would also enable reasonable development of land to the west of the corridor.

[143] As we will discuss later, the failure to uphold the designation may have an unintended impact upon the NEIL development in giving rise to new traffic considerations in respect of the NEIL land use consent appeal currently due to be heard by this Court. In that regard the Auckland Council has signalled that it will be raising traffic impact issues if there is no NOR.

[144] In summary, we have concluded that a reduced roading designation is reasonably necessary to achieve the purpose of the designation.

Other effects

[145] As we have noted, there are significant effects both from the granting of a designation and from refusing it. In this regard a major consideration for this Court is to enable the development of the land within the Fairview Catchment including the land on the NEIL site. Provided it was limited to the more confined corridor we have identified, it is our understanding that the designation would not impact on the buildings that have been designed for the NEIL site. If the road was to be removed it could give rise to new issues about parking and access that may in fact prevent or hinder NEIL from continuing with their development as currently planned. We also note the importance of allowing development within the Fairview Catchment generally. We take into account that there is a need for intensive housing near major road corridors and transportation centres and that this site, and the Fairview Catchment generally, would provide an opportunity to construct housing in appropriate areas close to major infrastructural facilities.

[146] We also note that currently Fairview Avenue is accessed by a single lane bridge close to a 90° turn, a legacy of the rural character of the area. We note that traffic issues were of concern to the Court in 2011, and those had been exacerbated by 2016 when this case was heard. That is a potentially significant adverse effect of not providing certainty about roading in this area.

[147] Accordingly we conclude that, with a modified corridor as we have discussed, the effects on the environment of granting the designation are likely to be beneficial overall to the Fairview Catchment, and would accommodate the existing NEIL proposal.

Planning documents

[148] Relevant provisions of planning documents (National Policy Statements, Regional Policy Statements, regional and district plans) are also matters which must be had regard to when considering *the effects on the environment of allowing the requirement*. Mr Lanning submitted that the NOR was in line with the planning documents. Mr Casey submitted that there is little in the relevant plans that warrant particular discussion, other than to reiterate that the inclusion of the *preferred road* in

the District Plan over NEIL land does not provide any support for the NOR. He submitted that the preferred road notation in the District Plan has no clear justification, nor does it have any legal effect on the site (as was confirmed in the Court's decision on PC32), which would warrant giving it any weight in these proceedings.

[149] An assessment of the project against relevant planning documents was undertaken in section 10 of the Assessment of Environmental Effects to the NOR. Ms Catherine Richards, the planner for Auckland Transport, gave evidence on what she considers to be the key planning provisions of relevance. There are no National Policy Statements and the requirements of the National Environmental Standard: Contaminated Soils are to be considered as part of detailed design and through the consenting phase, including the outline plan.

[150] However, Mr Thomas the planning witness for NEIL did give some evidence on the planning documents. By the time of the hearing, matters that were in contention between the two planning witnesses appeared to be more confined.

Regional Policy Statement

[151] Chapter 2 Strategic Direction and Chapter 4 Transport contain important 'policy' direction.

> 2.6.8 Strategic Policies - Urban design
>
> 1. The design of Future Urban Areas and the management and promotion of change in existing urban areas is to occur so that:
>
> (i) There is a diversity of urban environments (including building types and densities) and living choices for individuals and communities;
> (ii) Buildings, public spaces and road corridors contribute to a vibrant, liveable and attractive environment with a sense of place; ...
> (iv) Urban environments have a logical permeable and safe structure of connected routes for all modes of transport, including walking and cycling;
> (v) Public transport, roading, cycling and walking networks are integrated with each other and the land uses they serve:
> (vi) Roads (including new roads) and road improvements within higher density areas should be designed to provide a pleasant environment for cyclists, pedestrians and residents and minimise adverse effects on urban amenities;
>
> 2.6.11 Strategic Policies – Land Use and Transport Integration
>
> 1. Land Use and Transport shall be integrated throughout the region to ensure that:
>
> (i) within urban areas land use patterns provide communities with improved access to a range of services and activities and opportunities to work locally;

(ii) within urban areas new urban development and subdivision provides for improved connectivity for all transport modes including walking and cycling;
(ii) within urban areas new development and redevelopment provides for safe and attractive walking and cycling environments; ...

[152] There are objectives and policies related to transport with a similar focus but there was no suggestion that the proposed Medallion Drive extension cut across them. We accept that the proposed road link facilitates the region's growth by enabling the development of greenfield areas. Mr Thomas accepted that the adverse effects of urban growth on the transport infrastructure need to be managed and a planned integrated approach to land use and transportation taken. That often means additional or upgraded transport infrastructure is required. He considered that taking a broad, integrated look at what is the most sustainable solution for Auckland in relation to this land and in his opinion that was not to put a public road through it.

[153] Mr Thomas agreed we should be looking for an outcome that creates a logical, permeable and safe structure of connected routes.

[154] We were told that it is proposed that the development of the NEIL land have no public roading through it. Instead, the only public access across the site would be a pedestrian/cycling route secured by an easement. If resource consent is granted and not implemented, this access would not be provided.

[155] Mr Thomas considered what NEIL proposed was a higher quality walking and cycling link through the NEIL site than the Medallion Drive extension. He saw more value in the use of this link for the local access to school function of pedestrian cycling than a 3m shared path down the Medallion Drive extension. We consider that unlikely given vehicle accesses including to buildings and the crossing of internal roads, even if in a low speed environment. Mr Ian Clark, a transport witness for Auckland Transport, considered the route to be less satisfactory for cycling.

[156] In contrast Medallion Drive will provide a safe, legible and fully pedestrian and cycling route. It will add to existing pedestrian and cycle facilities in the area as Fairview Avenue will be still available for pedestrians and cyclists.

[157] Mr Thomas also argued a link along Medallion Drive is not part of a proposed cycle network of that part of the city depicted in an external document on the Auckland Transport website despite policies in the RPS which refer to in general

terms improving facilities for cyclists. He said that there is no proposal to provide a shared path the full length of Fairview Avenue.

[158] Mr Thomas accepted that Fairview Avenue was not built to service the urban development of the area and there is a legibility issue of flow with having to do a dog leg north on north-south movement and a perception of a clearer north-south linkage with the Medallion Drive extension.

[159] We conclude that the proposed Medallion Drive extension accords with the relevant provisions of the Regional Policy Statement.

Regional Plans

[160] Matters under the Auckland Council Regional Plan: Air, Land and Water and the Auckland Regional Plan: Sediment Control will be dealt with by resource consents for the Project in the future.

District Plan

[161] In reading the operative Auckland Council District Plan: North Shore section there is a strong policy emphasis on achieving an integrated approach to planning for growth. In particular, policy 10 in section 6.4 of the District Plan which states:

> Integrated planning of growth to match the needs of the community and the capacity of infrastructure needs to be used in a way that protects environmental values, and avoids the adverse effects of growth that will arise if land use, community and infrastructure planning (including planning for regionally and nationally significant infrastructure) that contributes to the growth concept in the Auckland Regional Growth Strategy and land use transportation integration, is not co-ordinated and sequenced correctly. Infrastructure planning and new growth need to be carried out and sequenced in a timely and efficient manner if the desired urban form is to be achieved and if infrastructure is to be efficiently provided, operated, maintained and upgraded.

[162] We conclude that the Medallion Drive extension will address *the needs of the community and the capacity of infrastructure* in a way that integrates with the NEIL proposed development and is consistent with the long term planning of the Albany Structure Plan area. The Medallion Drive extension will facilitate growth in the residential areas north of Oteha Valley Road. It will address existing and forecast traffic effects generated by urban (predominantly residential) growth. The road link

has been planned to address the transport effects of land use growth in the structure plan area to 2031.

[163] We recognise that perfect coordination of public infrastructure works with private land development is frequently difficult given differing imperatives and constraints applying to the parties involved. As the case for NEIL pointed out, the development of the land involved has a long, complex and challenging history. However, we conclude that the confirmation of the modified NOR, with the conditions including a five year lapse term as proposed in the decision, would provide strong direction and encouragement to Auckland Transport and achieve that policy.

Proposed Auckland Unitary Plan (PAUP)

[164] Mr Thomas gave evidence that there is no proposal for a road link consistent with the NOR in the PAUP. Some interim guidance has been issued from the Independent Hearings Panel. However, his main point was that while that there is little in the way of guidance that is relevant to this matter other than an endorsement that it is appropriate to enable higher densities around centres and corridors or close to public transport routes, social facilities or employment opportunities. He considered that this location achieves all those requirements, and this lends weight to the lost opportunity for additional intensive residential activities if the land is taken for roading.

[165] Mr Thomas also referred to Policies 10 and 11 and suggested that these policies seek a *balance* (although this word was not used in either policy) between placemaking and transport movement and accessibility, and place weight on the failure to resolve a positive design interface with the adjacent development and also on upgrading the existing road corridor as opposed to a new corridor. The modifications and conditions we propose to the designation mean that both policies would be achieved.

[166] In any case we need give the notified provisions of the PAUP little attention given the stage the PAUP has reached, with submissions being heard and decisions yet to issue.

Overall conclusion on plan provisions

[167] It is clear that the planning documents as a whole support intensification of residential development on the NEIL land and within the Fairview Catchment. They

also enable, and in fact require, adequate infrastructural facilities including transportation. The Plan itself is silent as to whether that is provided by an improvement to Fairview Avenue or by an extension to Medallion Drive. Nevertheless, Medallion Drive would be consistent with those principles, provided it does not interfere with the intensification of residential development.

[168] The core question that this Court has asked itself is whether there is a solution which achieves both these key intents, namely:

(a) setting a corridor to allow the road to be constructed;

(b) establishing controls, if necessary, on the outer boundary where the parties can't reach agreement;

(c) ensuring sufficient room to enable the construction of the road and ancillary works; and

(d) encouraging the parties to find agreement so that the works can be developed in common.

[169] In reaching the conclusions we have about a reduced designation width, we consider these intents can be met.

Lapse period

[170] In that regard we come to the question of the lapse period. Auckland Transport sought a lapse period of ten years. We consider their reasoning for this to be contradictory. On the one hand they were saying that there was a necessity for the works and on the other that they did not want to construct the works for the next ten years. Given Mr Lanning advising the Court that funding had been provided for the purchase of the land, and they now had a fund available to meet the cost of the construction of the road, we found the suggestion of a ten year lapse period unsustainable. On the other hand, NEIL sought a lapse period in the order of 6 months or a year. Given the necessity to try and acquire the land and then give necessary notices under the Public Works Act, finalise design, let contracts and enable construction, we consider those periods are too short.

[171] The default period in the Act is five years. We have concluded that, with the narrowed corridor, and conditions that specify vertical levels for the road that allow integration with proposed adjoining land uses, the potential impacts upon NEIL

construction should be limited. There is clearly a mutual benefit to adopting a common earthworks and design policy and approach, but we cannot require this. NEIL could continue with the construction of its development, if approved, without awaiting the completion of the roading by Auckland Transport. It is clear that the roading is urgent and should have been attended to some years ago.

[172] In the circumstances of this case we have concluded that, with the narrower designation, the standard period of five years is appropriate, being that term recognised by Parliament as being an appropriate period for a party to invoke a designation.

The commissioner's decision under s 290A

[173] We have discussed various portions of the Commissioner's decision through this document. Although we consider a modified designation is generally appropriate we note that the Commissioner did not engage in significant discussion about the extent of the designation given his conclusions that the parties would reach an agreement as to the necessary earthworks along the boundary between the NEIL development and the road.

[174] It is clear that that has not occurred. In general terms, therefore, we have agreed with the concept of a designation but not with either its extent or the period for which it is settled. We consider that there needs to be demonstrated reasons to depart from the five year set out in the statute rather than just an assumption that the parties will require more time. Given the potential impact of such extra time, not only on the NEIL property but on the Fairview Catchment generally, we have reached a very different conclusion as to the lapse period.

Part 2 of the Act

[175] It is clear that the Act seeks to enable people and communities to provide for their wellbeing. In particular in this case that includes sufficient land for residential use and appropriate infrastructure including roading. The NEIL site is clearly ideal for intensive residential development, being:

(a) close to a public transport hub;

(b) encouraging cycling and walking;

(c) close to local schools, public transport, retail areas including the new retail on Oteha Valley Road, and community facilities;

(d) adjacent to arterial roads;

(e) close to the town centre;

(f) close to the motorway.

[176] To enable development on the NEIL site and to the north of Oteha Valley Road, there needs to be improved access for people and traffic.

[177] While the consideration of alternatives in respect of Fairview Avenue had shortcomings, by the time of the hearing further work had been done, and traffic expert conferencing had agreed that Fairview Avenue is roughly equivalent to the Medallion Drive extension in traffic engineering terms. There was some disagreement about what the cost implications of the two alternatives would be given these depend very much on the land to be acquired (for the Medallion Drive extension) and the extent of the works needed for the Fairview Avenue upgrade, including the design of the bridge, numbers of lanes, pedestrian and cycling provision, and whether the relocation of the water supply pumping station might be involved.

[178] We agree with the traffic engineers' position in 2011 that, in any evaluation of alternatives, Medallion Drive extension has advantages. Although we initially were concerned as to whether or not it would provide any improvement in terms of connectivity, evidence analysed by the Court towards the end of the hearing indicate that in fact contrary to the expectation, a strong proportion of the traffic using Fairview Avenue or Medallion Drive extension would be travelling to the south down Medallion Drive. Although this seems counter-intuitive, the modelling, agreed by the traffic engineers, seems to indicate that of the 6,000 vehicles per day, some 600 would be travelling south in the am peak.

[179] Although one would be expecting the majority of that traffic to be heading to the motorway, the modelling shows around one third moves to the west and one third to the east, leaving around one third travelling from the Medallion Drive extension through to Medallion Drive itself. An analysis of figures from the modelling of the upgraded Fairview Avenue alternative shows a similar number of vehicles likely to be travelling the same route. In other words, although one third carry on to the west and one third go to the east, approximately one third go to the south. This strengthens an

argument that Medallion Drive extension provides better connectivity and that it provides the same selection to the east and west yet a more direct route to the south.

[180] The Medallion Drive extension itself also provides an additional option for all forms of transport. It involves a safe, legible and fully pedestrian and cycling route and will add to existing pedestrian and cycle facilities in the area as Fairview Avenue will also be still available for pedestrians and cyclists. We contrast that with the NEIL land use proposal which is yet to be granted land use consent which does not involve public access through the NEIL land other than a pedestrian and cycleway route secured by an easement.

[181] In short, the Medallion Drive extension provides better connectivity and thus better enables people and communities to provide for their social, cultural and other requirements.

[182] We recognise the shortcomings in the consideration of alternatives and particularly their potential adverse effects. In many cases this would be fatal to a designation of this sort. However in this case we note that the removal of the designation itself may have significant consequences in respect of a re-design of the NEIL development already proposed. It may involve having to provide alternative connections to Oteha Valley Road given the current state of Fairview Avenue. In addition, the shortcomings of the analysis of the two alternatives were cured during the extensive work undertaken before the hearing and as a result of the material placed before the Court and the lengthy cross-examination and questioning.

[183] We were told that the proposed position and design of the buildings on the NEIL land had been worked on for a long period of time, and a major re-design may bring into play an entirely new range of issues. When we keep in mind that the Act requires us to *manage physical and natural resources in a way or at a rate to enable people and communities* we acknowledge that this brings into relevance a question of timeliness and proportionality.

[184] To date, Auckland Transport, and previously the North Shore City Council, has failed to provide infrastructure at a rate to enable the provision of housing in this area. The response of the District Plan through PC32 was to delay the subdivision of certain land below high thresholds until such infrastructure was provided. However, given the clear need for further housing, the failure to provide infrastructure for over a decade is difficult to see as fulfilling the purpose of the Act.

[185] We acknowledge that the extent of the designation notified and now sought could have the effect of blighting the development of this area of land for the period of this designation, or until construction is concluded. This is because there is a significant area beyond the road corridor which could be developed for intensive residential use but could not be utilised until such time as it was re-vested in NEIL.

[186] Given that Auckland Transport is seeking a period of ten years for the designation it is likely to be more than a decade before that land could be utilised. Even a shorter lapse period of five years does not ensure the road will be constructed within that time or the residual land re-vested. NEIL then has the choice of either:

(a) developing now, and having to avoid that designated land entirely. This will mean that it will be essentially sterilised for further development in the future; or

(b) would need to restrain from developing that portion of the site until such time as the land was available. In our view that would be an unacceptable effect on the land use and currently could affect between 3 and 5 buildings.

[187] For the reasons we have already stated, we conclude that greater certainty will be provided to the development of this area and to the Fairview Catchment generally by providing for a reduced designation roading corridor. This will have the advantage of enabling development not only of the NEIL land on the basis of its current application for consent, but also making direct provision in meeting the terms of PC32 for development.

Conclusion

[188] Looking at the overall questions under s 171 and Part 2, including the narrower designation and a lapse period of five years we are satisfied that such a modified designation would meet the purpose of Part 2 and enable the development of the NEIL land and other land in the Fairview Catchment if implemented.

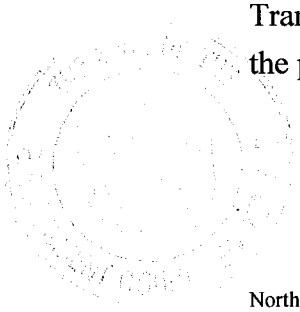
[189] Although we recognise that the Fairview Avenue alternative may achieve the purpose of the designation and the Act we have concluded that Medallion Drive extension provides improved connectivity and efficiency for motor vehicles, cyclists and pedestrians. The need for an improved road has been clear since the 1990s and is now urgent and the failure to construct this has had a significant effect on the development of this area.

[190] The regulatory regional and district planning documents also reinforce the requirement that the infrastructure should enable development. There has been a consistent failure to resolve this issue for over a decade and urgently since 2011.

[191] To that extent we acknowledge that the designation can achieve the purpose of the Act only if it does not conflict with reasonable development on the NEIL land beyond the infrastructure necessary for the road. After nearly three years since the NOR was notified, there has still been a failure of the parties to commit to a design that avoids impact beyond the corridor. Our response in those circumstances is to confirm a corridor sufficient to allow the road construction. This enables the infrastructure and the housing development. If a consequence of that are higher construction costs, we note that there has been more than adequate opportunity for resolution. We refer in this regard to two previous decisions of the Environment Court and the Commissioners' decision on this designation. We conclude that an agreement should be reached between the parties but we are not going to hold up the development further because of the parties' unwillingness or inability to reach an agreement.

[192] To that end the question arises whether the Court could include within the designation a condition that the designation can be relied on for the development by NEIL, to avoid any argument arising on the consent application that the development cannot occur until a road is actually constructed. Given the shorter lapse period and the narrowed NOR we cannot see any argument that the development of NEIL is constrained until the road is built. References to this decision (and others) should be sufficient to counter any such argument for the NEIL land.

[193] It has been clear to us from the commencement of this case, and upon our original reading of the papers, that Auckland Transport and the developer need to reach an agreement so that they can have a common earthworks arrangement in respect of the area around the roading corridor. Many attempts seem to have been undertaken to do this, but after in excess of ten years no real progress was made until just prior to this hearing. We note that nearly 30 Joint Witness statements have been prepared, including extensive witness statements from the traffic engineers and the planners. Despite all this, agreement has still to be reached on the Auckland Transport corridor/NEIL land development interface. However, we cannot insist that the parties do this even if it is in their best interests.



Conditions

[194] Conditions are required to ensure the above. The conditions to secure these outcomes need to be certain, workable and enforceable.

[195] We recognise there is an outline plan process, but we see that as dealing with matters of detailed design rather than the outcomes required of the proposed corridor extension. The outline plan process is one that only involves the Auckland Council and Auckland Transport and not NEIL. To that extent our view is different from that of the Commissioner at the first instance hearing.

Directions

[196] For the reasons set out in detail in the Decision the Court will confirm a modified NOR subject to the following:

(1) It is to be based upon:

(a) the operational road corridor shown in Annexure **D** attached to this decision, and covering a maximum width of 22m with the exception of areas specified in (2) and (3);

(b) a vertical profile for the road as shown in Annexure **D** (or better).

(2) In addition, the Designation over 1 and 2 being lots 2 DP199126, being 1,531m^2 owned by the Auckland Council, is to be designated in full, and lot 1 DP340400, being 856m^2, is designated in full.

(3) In addition to the operational road corridor there shall be an additional area provided as follows:

(a) an area necessary to construct the bridge abutments,

(b) to connect with Fairview Avenue to the west of the proposed roundabout and on the eastern side of the roundabout to connect with the existing roading designation,

(c) any area essential to allow construction of the road corridor or supporting infrastructure such as retaining walls;

(4) The parties are encouraged to reach an agreement in respect of access for the purposes of construction of their respective activities.

(5) By 30 June 2016 Auckland Transport is to produce and circulate an indicative plan of the modified designation area in accordance with this decision. The indicative plan is to identify the specific land identified in A1 and A2, and any further areas required under A3. Reasons for the extent of any additional area required for construction purposes are to be provided. In undertaking its assessment of construction needs, Auckland Transport is to minimise the effect on the NEIL development proposal adjacent to the road corridor.

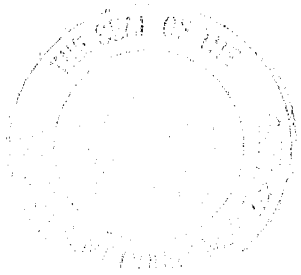
(6) Auckland Transport is to provide proposed consents and conditions for the modified designation within a further ten working days.

(7) NEIL then has fifteen working days in which to advise Auckland Transport and the Court whether it agrees with the area proposed to be designated in line with the Court's directions in the Decision, and particularly any additional area required for construction by Auckland Transport, as well as on the proposed conditions. NEIL is to advise of any concerns and ways in which these might be addressed, including any substitute condition wording.

(8) Auckland Transport has a further ten working days to consider and advise NEIL and the Court of its response to any matters raised by NEIL.

(9) The Court will then make a decision on the overall extent of the land to be designated, and the conditions to which the designation will be subject. In making this decision the Court will have regard to the memoranda lodged by the parties and, if necessary, convene a further hearing or conclude the matter on the papers.

(10) Once the extent of the designation has been decided by the Court, Auckland Transport is to undertake a survey and prepare a plan that clearly identifies the area of the designation to be confirmed by the Court, and submit this plan to the Court within twenty working days.

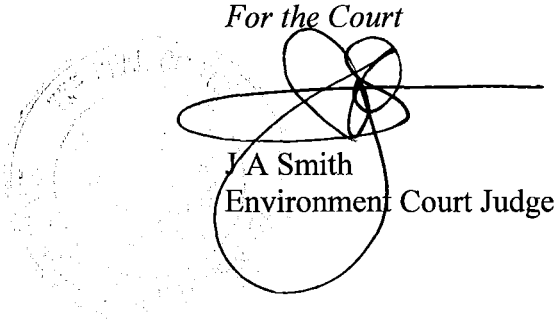


Costs

[197] Any applications for costs are reserved and application is to be made on issuing the final decision in accordance with directions given at that time.

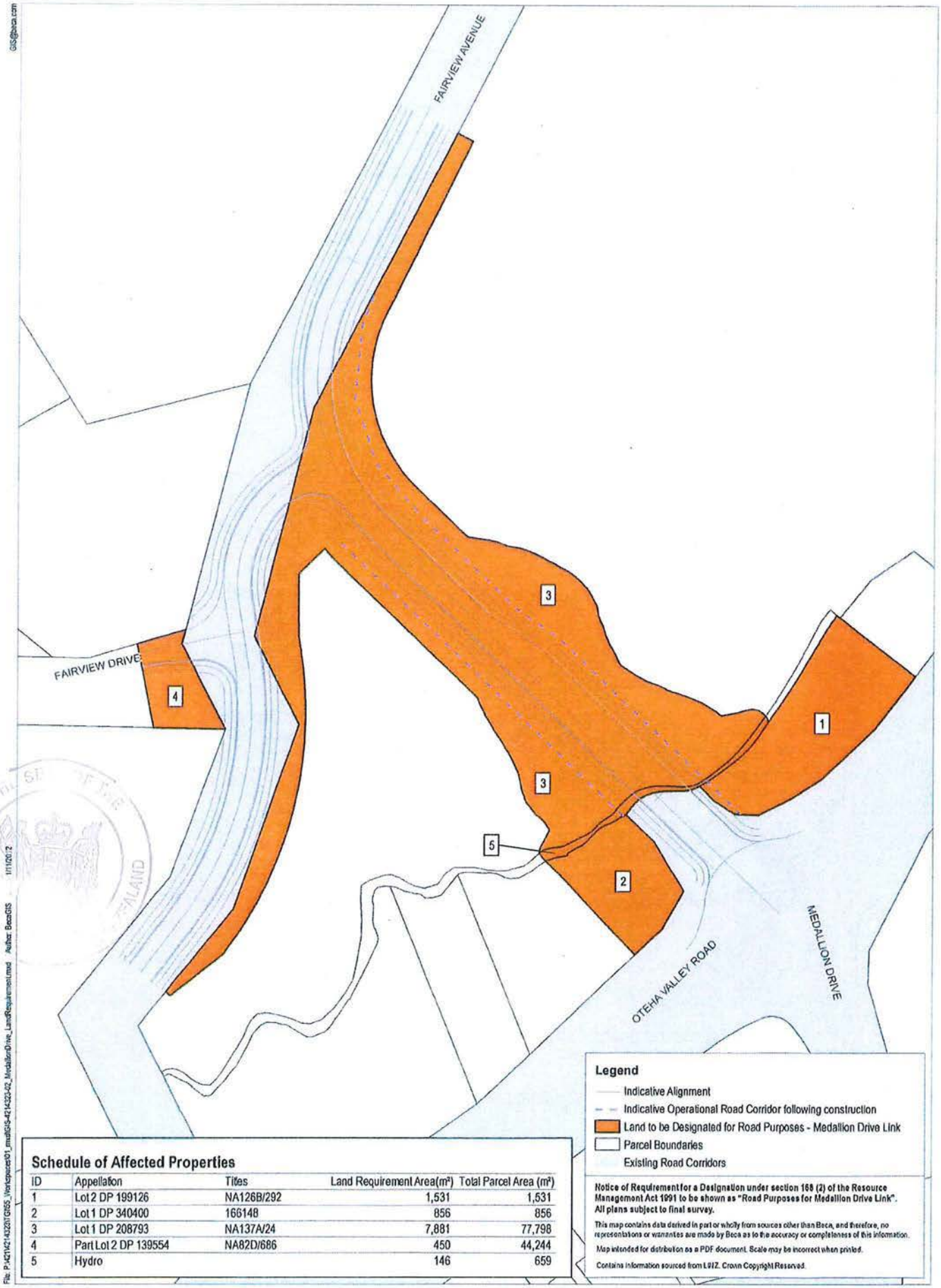
SIGNED AT AUCKLAND THIS 29th day of April 2016

For the Court



J A Smith
Environment Court Judge

A



Schedule of Affected Properties

ID	Appellation	Titles	Land Requirement Area(m²)	Total Parcel Area (m²)
1	Lot 2 DP 199126	NA126B/292	1,531	1,531
2	Lot 1 DP 340400	166148	856	856
3	Lot 1 DP 208793	NA137A/24	7,881	77,798
4	Part Lot 2 DP 139554	NA82D/686	450	44,244
5	Hydro		146	659

Legend

- Indicative Alignment
- Indicative Operational Road Corridor following construction
- Land to be Designated for Road Purposes - Medallion Drive Link
- Parcel Boundaries
- Existing Road Corridors

Notice of Requirement for a Designation under section 168 (2) of the Resource Management Act 1991 to be shown as "Road Purposes for Medallion Drive Link". All plans subject to final survey.

This map contains data derived in part or wholly from sources other than Beca, and therefore, no representations or warranties are made by Beca as to the accuracy or completeness of this information.

Map intended for distribution as a PDF document. Scale may be incorrect when printed.

Map Scale @ A3: 1:1,000

0 5 10 20 30 m

Revision	Author	Verified	Approved	Date
1	HEC	BP	KM	01/11/2017

Title: **Medallion Drive Link**
Land Requirement Plan

Client: Auckland Transport

Project: Medallion Drive NoR

N

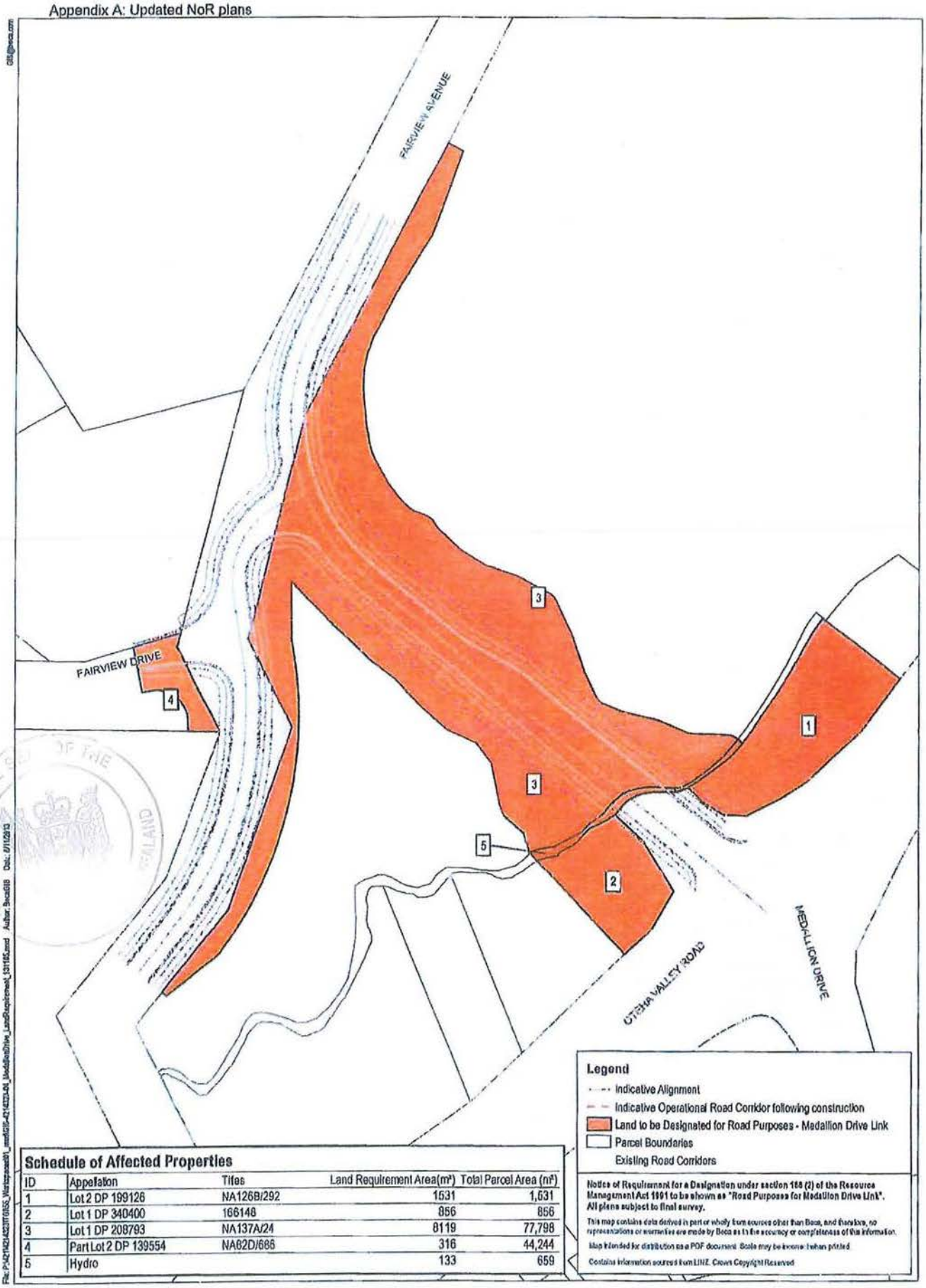
Beca

Discipline: GIS

Drawing No: GIS-4214323-02

B

Appendix A: Updated NoR plans



Schedule of Affected Properties

ID	Appellation	Titles	Land Requirement Area(m²)	Total Parcel Area (m²)
1	Lot 2 DP 199126	NA126B/292	1631	1,631
2	Lot 1 DP 340400	166148	856	856
3	Lot 1 DP 208793	NA137A/24	8119	77,798
4	Part Lot 2 DP 139554	NA62D/686	316	44,244
5	Hydro		133	659

Map Scale @ A3: 1:1,000

0 5 10 20 30 m

Title: **Medallion Drive Link**
Land Requirement Plan

Client: Auckland Transport

Project: Medallion Drive NoR

Beca

Discipline: GIS

Drawing No: GIS-4214323-04

C

Map Scale @ A3: 1:1,000

0 5 10 20 30 m

DRAFT

Title: DRAFT
Medallion Drive Link
Aerial Plan of Proposed Designation and Indicative Alignment
FOR DISCUSSION ONLY

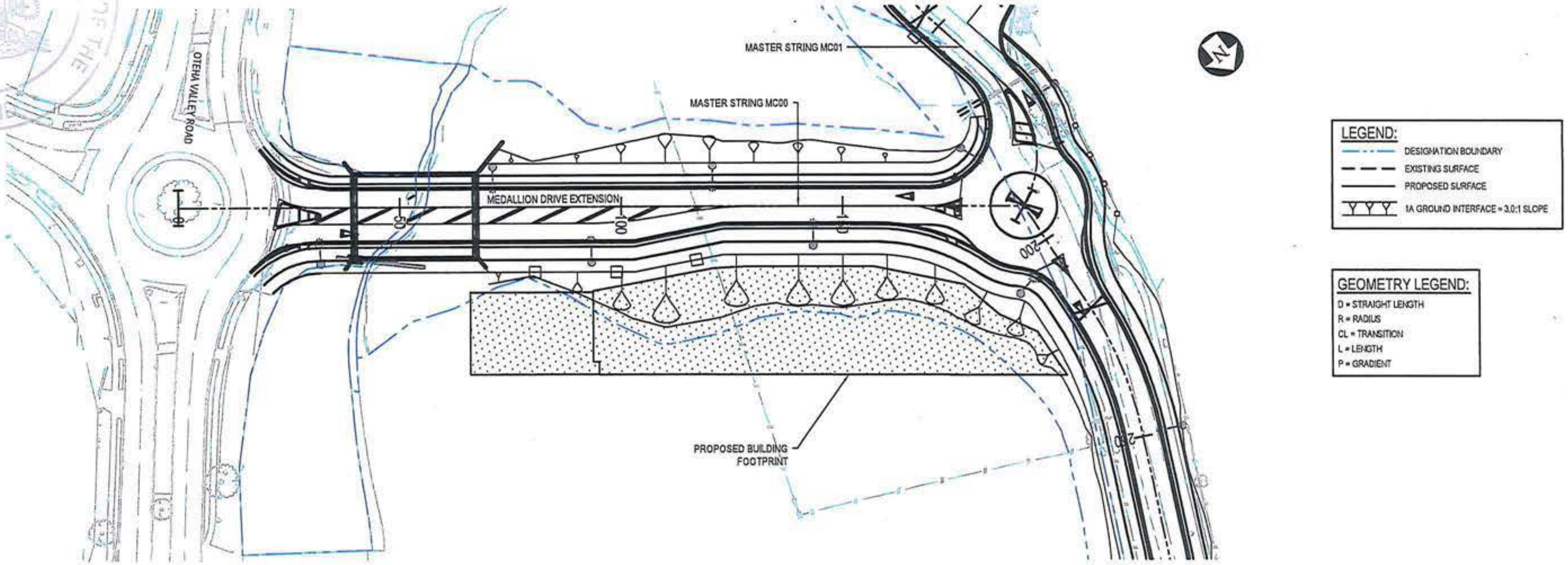
Client: Auckland Transport

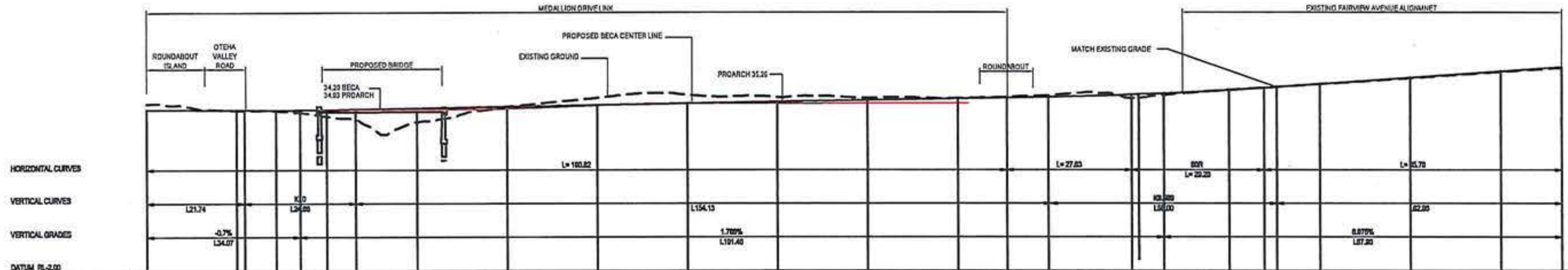
Project: Medallion Drive NoR

Beca

Discipline: GIS

Drawing No: GIS-421432-01





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DEPTHS	1.19	-0.09 -0.14	-0.18	-0.50	-1.47	-2.21	-3.09	-0.08	1.59	1.91	1.02	0.43	0.00	0.02	0.29	-0.02 -0.05	-0.40	-0.00	-0.00 0.01	-0.02	-0.09	-0.12	-0.17
DESIGN LEVEL	34.057	33.917 33.905	33.880	33.895	33.944	34.028	34.277	34.630	34.983	35.338	35.690	36.043	36.399	36.587	36.749	37.243 37.300	37.523	38.287	38.732 38.844	39.035	41.030	42.355	43.335
EXISTING LEVEL	35.24	33.82 33.77	33.72	33.39	32.48	31.83	31.19	34.57	36.54	37.25	36.71	36.48	36.40	36.61	37.03	36.43 36.45	37.12	38.29	38.75 38.85	38.59	40.91	42.27	43.19

LONGITUDINAL SECTION
SCALE 1:500 (HOR)A1 1:1000A3
SCALE 1:500 (VER) 1:1000A3

PRELIMINARY
NOT FOR CONSTRUCTION

A	REVISED VERTICAL ALIGNMENT NOVEMBER 2016	JR	JR		05.02.16
No.	Revision	By	Chk	Appd	Date

Beca

Original Scale (A1) 1:500
Reduced Scale (A3) 1:1000
Design JAR 05.02.16
Drawn JAR 05.02.16
Dsg Verifier
Dwg Check
Approved For Construction*
Date
* Refer to Revision 1 for Original Signature

Client: Auckland Transport — An Auckland Council Organisation

Project: MEDALLION DRIVE LINK
OTEHA VALLEY RD TO FAIRVIEW AVE
…VEMBER 2016 ALIGNMENT

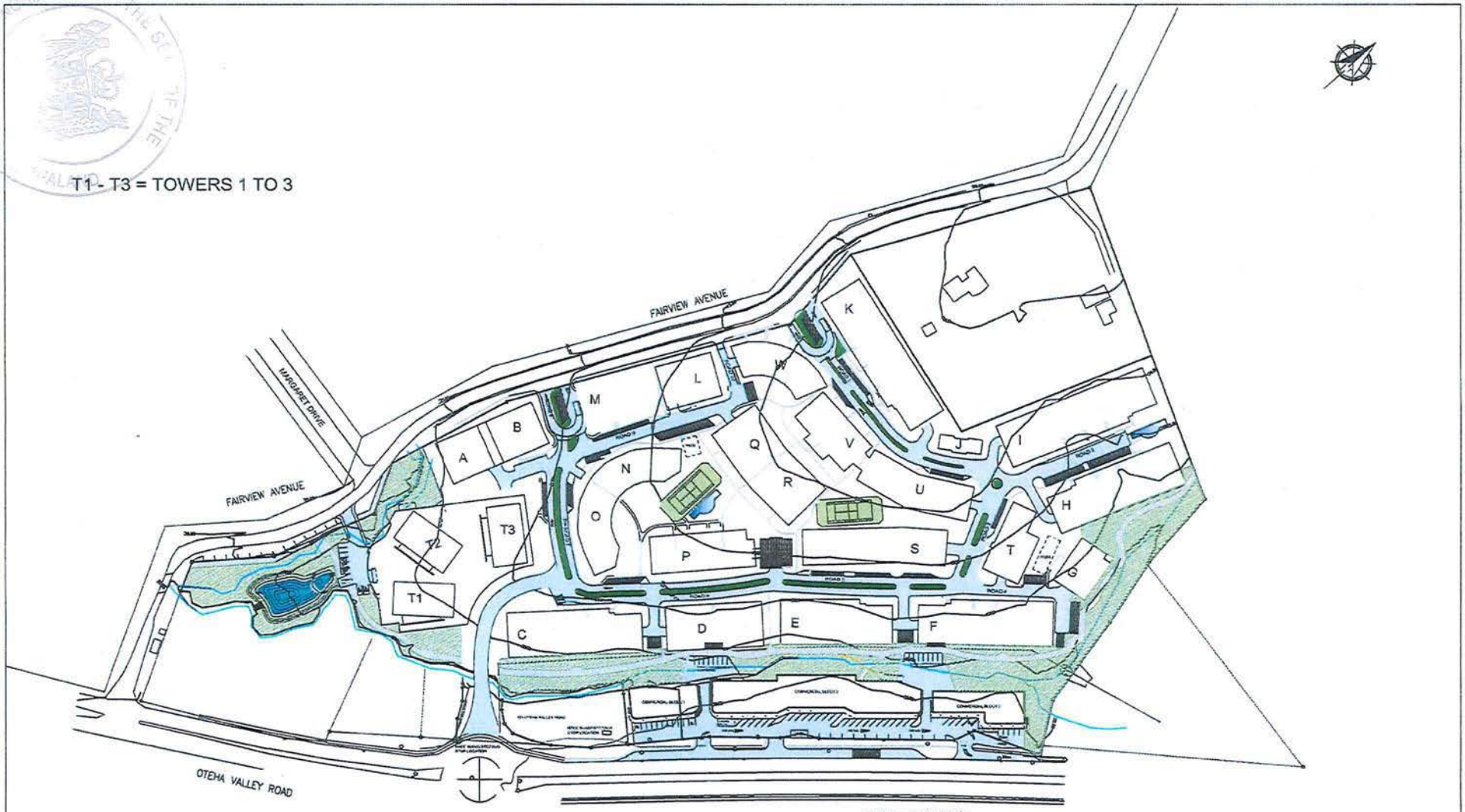
Title: MEDALLION DRIVE LINK
PLAN & LONGITUDINAL SECTION

Discipline: CIVIL

Drawing No. 3818845-CK-100 Rev. A

DO NOT SCALE

T1 - T3 = TOWERS 1 TO 3



PC32 ALTERNATIVE ACCESS SKETCH

PRELIMINARY

FAIRVIEW HEIGHTS
OTEHA VALLEY ROAD
ALBANY, AUCKLAND
LOCATION PLAN

214 Church Street
PO Box 1105
Palmerston North
Phone 06 357 9540
Fax 06 357 3697

Drawn: MDW/MA
Checked:
Approved:

Job No: 2606
Date: MAR 2007
Scale: 1:1000 @A1, 1:2000 @A3
Drawing No: SK500e

E

IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
NGĀMOTU ROHE

CIV-2020-443-005
[2020] NZHC 3159

UNDER THE	Resource Management Act 1991 (RMA)
IN THE MATTER	of an appeal from a decision of the Environment Court pursuant to section 299 of the RMA
BETWEEN	POUTAMA KAITIAKI CHARITABLE TRUST AND D & T PASCOE Appellants
AND	TARANAKI REGIONAL COUNCIL First Respondent
AND	NEW PLYMOUTH DISTRICT COUNCIL Second Respondent
AND	NEW ZEALAND TRANSPORT AGENCY Third Respondent
AND	TE RŪNANGA O NGĀTI TAMA TRUST Section 301 Party
AND	TE KOROWAI TIAKI O TE HAUĀURU INCORPORATED Section 301 Party

CIV-2020-443-020

UNDER THE	Resource Management Act 1991 (RMA)
IN THE MATTER	of an appeal from a decision of the Environment Court pursuant to section 299 of the RMA
BETWEEN	TE KOROWAI TIAKI O TE HAUĀURU INCORPORATED Appellant

	AND	NEW ZEALAND TRANSPORT AGENCY First Respondent
	AND	NEW PLYMOUTH DISTRICT COUNCIL Second Respondent
	AND	TE RŪNANGA O NGĀTI TAMA TRUST Section 301 Party
	AND	POUTAMA KAITIAKI CHARITABLE TRUST AND D & T PASCOE Section 301 Party

Hearing:	24–26 August 2020; further submissions received after the hearing. Most recently dated 20 and 24 November 2020
Appearances:	M and R Gibbs in person for Appellants S Grey for Appellants (D and T Pascoe) H Harwood for First and Second Respondent P Beverley and D Allen for Third Respondent P Majurey and V Morrison-Shaw for Te Rūnanga o Ngāti Tama Trust R Haazen and R Enright for Te Korowai Tiaki o Te Hauāuru Incorporated (leave to withdraw)
Judgment:	1 December 2020

JUDGMENT OF GRICE J

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Introduction

[1] The New Zealand Transport Agency (Waka Kotahi), which is responsible for the New Zealand state highway system, is undertaking a programme of improvements to State Highway 3 connecting the Taranaki and the Waikato regions. Over Mount Messenger (Te Ara o Te Ata) approximately 60 kilometres north east of New Plymouth, it intends to replace a 7.4 kilometre highway that is no longer safe or fit for purpose.

[2] The replacement road is not on the line of the existing highway. The line of the replacement 6 kilometres lies to the east of the existing highway and will run through the Mangapepeke Valley. This appeal is against the interim decision of the Environment Court relating to the required consent and approval of designation paving the way for the construction of that new portion of highway. The construction will take about four years. During that time a haul road and storage yard will be built for temporary use. The temporary works will be removed, and the underlying land reinstated at the end of construction.

[3] In its decision the Environment Court[1] determined that Ngāti Tama held mana whenua and exercised kaitiakitanga over the project area.[2]

[4] Waka Kotahi require nearly 21 hectares of Ngāti Tama land to be designated and acquired for the new road as well as temporary use of approximately 17 hectares. That land had been returned to Ngāti Tama under a Treaty settlement.[3] The project will have adverse effects on land and resources over which Ngāti Tama exercises kaitiakitanga including significant adverse cultural and ecological effects. The Environment Court indicated that it was satisfied that those effects would be appropriately addressed through conditions that could only be implemented if there was an agreement between Waka Kotahi and Ngāti Tama for acquisition of the land, and a Further Mitigation Agreement. Those agreements had not been finalised at the time of the hearing.[4]

[5] The only other large piece of privately held land, which Waka Kotahi need for the project, is 11.2 hectares of land belonging to Mr and Mrs Pascoe. A further 13.5 hectares of their land will also be required during the four-year construction period. At approximately 100 metres away the road will be 20 metres closer to their house than the present road. The view will be softened by regenerated vegetation on the valley floor and the fact the highway will be in a box cutting to the north.[5]

[6] The Pascoes have lived on their family farm in the Mangapepeke Valley since they were married over 30 years ago. Mr Pascoe's family acquired the farm 65 years ago and he has lived there since he was born. The Pascoes claim cultural rights over the land and claim that the adverse effects on them and their land resulting from the roading project, temporary works including a haul road and storage yard and construction effects in particular were not properly considered and/or taken into account by the Environment Court.

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1 *Director-General of Conservation v Taranaki Regional Council* [2018] NZEnvC 203.
2 At [333].
3 Ngāti Tama Claims Settlement Act 2003.
4 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [214] and [469].
5 At [164].

[7] The Pascoes' homestead and outbuildings are near the site of the proposed temporary storage yard and haul road which will be used for the storage of equipment and access to the construction site. The level of activity on and around the yard and haul road, from a practical point of view, will make occupation of the Pascoes' home during the construction period problematic.[6]

[8] The Poutama Kaitiaki Charitable Trust Inc is a charitable trust set up as a vehicle for Poutama, a Māori grouping claiming tangata whenua and other cultural connections to the project area. In this appeal its primary position is that it exercises mana whenua and kaitiakitanga over the land.[7] The Environment Court considered that Ngāti Tama had mana whenua and exercised kaitiakitanga over the project land but that Poutama had no cultural connection for the purposes of the project under the Resource Mangement Act 1991 (the Act). Poutama appeals against that finding.

[9] The joint appellants say the Environment Court should not have made an interim decision and it made final determinations that were in error of law. They seek the Environment Court's interim decision be quashed.[8]

Background

[10] Waka Kotahi had been planning this project for many years. It commenced consideration of the alternatives in earnest in 2016. Once it had formed a view on the preferred position for the road it followed the required statutory procedure to designate the project land and obtain the resource consents. This included both seeking approval to issue the Notice of Requirement (the NOR) to designate the project land and seeking the resource consents from the New Plymouth District Council and the Taranaki District Council. The councils jointly appointed an independent Commissioner to hear the applications. The applications were heard over several days in August and October 2018.

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6 The Environment Court considered the noise during the construction period would make it untenable for the Pascoes to continue to live in the house: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [157].

7 A second appeal by Te Korowai was withdrawn at the commencement of the hearing. It also withdrew as a section 301 party in this appeal.

8 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* HC New Plymouth CIV-2020-443-5, 11 March 2020.

[11] The independent Commissioner decided that the resource consents should be granted subject to various conditions. The Commissioner recommended to Waka Kotahi that its NOR to alter an existing designation for the project be confirmed subject to conditions.[9] The Agency accepted this recommendation subject to two changes, which are not relevant here.[10]

[12] The Director-General of Conservation, Te Korowai Tiaki O Te Hauāuru (Te Korowai) and Ngāti Tama, as well as the present joint appellants, Poutama and Mr and Mrs Pascoe, appealed the Commissioner's decisions to the Environment Court. The Environment Court heard the appeals in July 2019 and delivered an interim decision on 20 December 2019.[11]

[13] The reason for the decision being issued as an interim decision was that in order to finalise a number of conditions, in particular those relating to mitigation of ecological and cultural adverse effects, a final agreement was needed between Waka Kotahi and Ngāti Tama.

[14] Waka Kotahi, from the outset of the project, had indicated that it would not acquire Ngāti Tama's land compulsorily. It took that approach, referred to with approval by the Environment Court, because the land had been returned to Ngāti Tama to redress confiscation of its land in the 19th century. It was not appropriate for the Crown to compulsorily acquire it back. Given that indication the Environment Court issued the interim decision and was not prepared to complete its consideration of the appeal until it was advised that the acquisition and Further Mitigation Agreement had been finalised.[12] Negotiations between Waka Kotahi and Poutama were largely completed by the end of the Environment Court hearing. The Court put in place a timetable for the parties to file memoranda and make further

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9 The Councils' decision is dated 8 December 2018. For convenience I will refer to both the Notice of Requirement and Resource Consents together as the consents.

10 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [9].

11 At [470].

12 At [214].

submissions. If necessary, it indicated it would reconvene the hearing to consider the agreement and relevant conditions before it would make its final decision.[13]

[15] Without an agreement to acquire the land and the Further Mitigation Agreement with Ngāti Tama, Waka Kotahi could not go ahead with the project. Ngāti Tama was owner and held mana whenua and exercised kaitiaki over the land, and the Further Mitigation Agreement was integral to not only the cultural effects, but to the proposed conditions relating to wide-ranging ecological and related mitigation conditions.[14]

[16] The conditions proposed by the Environment Court included a comprehensive restoration package and the establishment of an ecological review panel.[15] The Environment Court commented on the generosity of Waka Kotahi's proposed in-perpetuity restoration package.[16] If that was put in place the Court indicated that it would be satisfied about the proposals for the mitigation of adverse effects on the ecology of the Pascoes' land as well as the project as a whole.[17] However, that was dependent on the agreement between Ngāti Tama and Waka Kotahi. The Environment Court said:[18]

> [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 [O Ngāti Tama Trust] to acquire the Ngāti Tama Land.

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13 The timetable was extended partly as a result of the imposition of the Alert levels due to COVID-19. Counsel advise that the agreements have now been finalised and the Environment Court has issued a further minute to progress the matter.

14 *Director-General of Conservation v Taranaki Regional* Council, above n 1, at [214].

15 At [186].

16 At [209].

17 At [188]–[197] and [212].

18 At [214].

The roading project

[17] The Environment Court provided an overview of the background to the project in Part A. The introduction to its reasons reads as follows:[19]

> [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:
>
> > (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, 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 other things, exhibit a sense of social and environmental responsibility. The Agency must also use its revenue in a manner that seeks value for money.
>
> [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:
>
> - 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

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19 *Director-General of Conservation v Taranaki Regional* Council, above n 1, at [1]–[5] (footnotes omitted).

and low speeds which, when combined, mean the road is no longer fit for purpose.

[18] The Environment Court noted it was considering both the NOR approval process and the application for resource consents. In relation to the NOR, the Court was required to have regard to the considerations required of a territorial authority when making a recommendation under s 171 RMA.[20] That section provides:[21]

> **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

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20 Resource Management Act 1991, s 174(4).

21 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [24].

> 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.
>
> …

[19] The Environment Court went on to say:[22]

> [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.
>
> …
>
> [31] In any event we were advised that, out of caution, Mr Roan had provided a 'fulsome Part 2 assessment'. 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.

[20] Part 2 of the Resource Management Act 1991 contains the purpose and principles of the Act. The purpose is sustainable management of resources, including the "avoiding, remedying, or mitigating any adverse effects of activities on the environment".[23] That Part also requires anyone exercising functions and powers under the Act relating to resources to recognise and provide for matters of national importance. These matters include, relevantly in this case, the protection of ecological resources and the recognition and provision for "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga",[24] as well as protection of protected customary rights.[25] Section 7 provides for other matters to which particular regard must be had, including kaitiakitanga and the ethic of stewardship. Section 8 requires the taking into account of the principles of the Treaty of Waitangi.

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22 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [26]–[27] and [31]–[32] (footnotes omitted).

23 Resource Management Act 1991, s 5(2)(c).

24 Resource Management Act 1991, s 6(e).

25 Section 6(g).

[21] The selection for the route of the new highway followed an assessment process. The online option (the present route) was not considered feasible.

[22] The selected alternative had a number of features that meant the adverse effects required extensive consideration. The site and surrounding environment was described as follows:[26]

> [46] … 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 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.
>
> [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. 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.

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[26] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [46]–[54] (footnotes omitted).

[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. 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 with the Paraninihi land immediately west and east of the Transport Agency's SH3 landholding, is vested in Te Rūnanga;

- 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. 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).

[23] The numerous adverse effects of the project were assessed and considered by both the Commissioner and then on appeal by the Environment Court. The common bundle of documents ran to over 200 volumes. The evidence before the Commissioner and the Environment Court ran to thousands of pages, including maps, drawings, design and engineering information and project material, as well as evidence from planners, consultants and experts in various disciplines dealing with the effects of the project. Various witnesses were cross-examined by the parties at the hearing and the members of the Court also questioned them.

[24] There were design and other changes made over the course of the project's development. As the designers and engineers received feedback from the various experts (such as ecologists, engineers and other interested parties) they made changes to accommodate the feedback.

[25] The landscape and visual effects resulting from the proposed new portion of state highway, insofar as they affected the Pascoes, were not a specific issue on appeal but the adverse cultural, spiritual and, to a more limited extent, ecological effects were raised in this appeal. The following provides an overview:[27]

> [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.
>
> [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:
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> > 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 ...

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[27] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [161]–[167] (footnotes omitted).

> [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 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".
>
> [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.
>
> [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. 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.

[26] The Commissioner's findings in respect of many of the effects were not in issue before the Environment Court. It said:[28]

> [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;

[28] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [115]–[116].

- Lighting from the road;
- Natural hazards;
- Soil contamination;
- Hazardous substances.

We rely on the findings of the Commissioner as to those effects being acceptable.

[27] By the time of the Environment Court hearing, the focus had narrowed to wildlife and ecological issues (DOC's appeal); the cultural effects of the project and the inclusion of Mr and Mrs Pascoe in the kaitiaki forum group (Ngāti Tama's appeal); consultation, biodiversity and taonga species (Te Korowai's appeal), as well as the issues raised by the Pascoes and Poutama in their joint appeal.[29] These were summarised by that Court as follows:[30]

> [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;

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29 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [10]–[15].
30 At [16]–[17].

- 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.

[28] The Environment Court summarised its findings on the core issues which emerged from the Pascoe/Poutama appeals before it, as follows:

(a) The Waka Kotahi consideration of alternative sites or methods of undertaking the project was adequate.[31]

(b) The Agency's consultation was "detailed and extensive".[32]

(c) Ngāti Tama holds mana whenua over the project area and should be the only body referred to in the conditions addressing cultural matters.[33]

(d) Ms Pascoe and her family had not established the kaitiaki or whanaungatanga relationships or exercised the associated tikanga that would require recognition under the Act.[34]

(e) Poutama are not tangata whenua with mana whenua in the project area and should not be recognised in any consent conditions addressing kaitiakitanga.[35]

(f) That the project would have significant ecological adverse effects but those effects would be "appropriately addressed" through the proposed conditions in the event Ngāti Tama agreed to the acquisition of its land by Waka Kotahi.[36]

[29] Insofar as the NOR was concerned, Waka Kotahi, under s 171(1)(c) of the Act, was required to have regard to whether the work and designation were reasonably

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31 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [458].
32 At [460].
33 At [462].
34 At [463]–[464].
35 At [467].
36 At [469].

necessary for achieving the objectives of Waka Kotahi.[37] The Environment Court found that the NOR met three of the four objectives of Waka Kotahi. First, it would enhance the safety of travel on the State Highway 3;[38] secondly, it would enhance resilience and journey time reliability;[39] and thirdly, it would contribute to the enhanced local and regional economic growth and productivity by improving connectivity and reducing journey times.[40] The fourth objective of Waka Kotahi related to managing the long-term, cultural, social land use and other environmental effects as far as possible by avoiding, remedying or mitigating any such effects through route and alignment selection, highway design and conditions.[41] The Court concluded it could not make a final determination as to whether that objective would be met. A significant part of the Agency's ability to avoid, remedy and mitigate the effects rested on compliance with the proposed conditions addressing cultural and ecological effects which were to be contained in the agreements with Ngāti Tama. At the date of the decision the land had not been acquired and the agreement on other "key elements" had not been reached.[42]

Appeal on question of law

[30] Section 299 of the Act allows a party to a proceeding before the Environment Court to appeal to the High Court on a question of law on any decision, report, or recommendation of the Environment Court. The onus of establishing that the Environment Court erred in law rests on the appellants.[43]

[31] The Supreme Court in *Bryson v Three Foot Six Ltd*, discussed what amounts to a question of law for appeal purposes.[44] From that and other authorities, and for present purposes, the tribunal may have made an error of law if it:

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37 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [69]–[70].
38 At [428].
39 At [433].
40 At [436].
41 At [437].
42 At [438].
43 *Smith v Takapuna City Council* [1988] 13 NZPTA 156 (HC) at [159].
44 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[27]. The Supreme Court has revisited this topic on other occasions such as in *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 4 and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153.

(a) Applied a wrong legal test;[45]

(b) Reached a factual finding that was "so insupportable – so clearly untenable – as to amount to an error law";[46]

(c) Came to a conclusion that it could not reasonably have reached on the evidence before it;[47]

(d) Took into account irrelevant matters;[48] or

(e) Failed to take into account matters that it should have considered.[49]

[32] Procedural errors historically associated with judicial review may amount to a point of law in an appeal.[50]

[33] The Supreme Court in *Vodafone*[51] suggested that the issue was whether the decision-maker misinterpreted what was required by the legislation. In addition, if what was done was so misconceived that it was clearly wrong and an unlawful decision, an appeal would succeed. This might be where there was no evidence to support the decision, or the true and the only conclusion contradicts the decision.[52] However, that is rare. That the Court would have reached a different conclusion of itself does not allow interference on appeal if the decision on appeal was a permissible option. This presents a very high hurdle.[53]

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45 *Bryson v Three Foot Six Ltd*, above n 44, at [24].
46 At [26].
47 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at [153].
48 *May v May* (1982) 1 NZFLR 165 at [170].
49 At [170].
50 *Kawarau Jet Services Holdings Ltd v Queenstown Lakes District Council* [2015] NZHC 2343 at [45], contemplating a breach of natural justice.
51 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd,* above n 44, at [50].
52 At [52].
53 *Bryson v Three Foot Six Ltd*, above n 44, at [27].

[34] A question about facts and the evidence or the inferences and conclusions drawn from them by the decision-maker may sometimes amount to a question of law. However, as this Court said in *Marris*:[54]

> … It is not, however, every allegation of a lack of factual basis or incorrect or inappropriate inferences or conclusions from the evidence which will turn the issue of fact into a question of law. In other words, it is not sufficient merely to allege that there is no sufficient evidence as has been done in the case, to raise the point of law. …

[35] In a similar vein the Court of Appeal in *Chorus Ltd v Commerce Commission* warned that:[55]

> In the absence of a right of general appeal it is not the role of the Court in an appeal on a question of law to undertake a broad reappraisal of the Commission's factual findings or the exercise of its evaluative judgments. …

[36] The Court must be vigilant in resisting attempts by litigants to use an appeal to the High Court as a mechanism to re-litigate factual findings made by the Environment Court.[56] At the same time, it is possible for findings of fact to amount to an error of law. As noted recently in *Lau v Auckland Council* there are two primary hurdles that need to be jumped when an appeal is founded almost entirely on criticisms of factual findings:[57]

> (i) First, the appellant will need to show a seriously arguable case that factual findings by the Environment Court are actually incorrect. An appeal court will not interfere where there is an available evidential basis for the Court's finding.
>
> (ii) Second, the applicant will need to show that the factual errors are, in combination and in the context of the whole decision, so grave as to constitute an error of law. That is, it is seriously arguable that: (1) the Court has made a finding of fact which is based on no evidence, based on evidence inconsistent with or contradictory of another finding of fact, or contradictory of the only reasonable conclusion of fact available on the evidence; and (2) the errors of fact are so significant and extensive that the Environment Court, had it properly directed

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54 *Marris v Ministry of Works and Development* [1987] 1 NZLR 125 at [127]. This decision related to similar provisions in the predecessor to the Resource Management Act 1991: the Town and Country Planning Act 1977. See also *Northern Action Incorporated v Local Government Commission* [2018] NZHC 2823 ["*NAG v LGC* (2018)"] at [68]–[70].

55 *Chorus Ltd v Commerce Commission* [2014] NZCA 440 at [112].

56 *Heybridge Developments Ltd v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593 (HC) at [3]; citing *New Zealand Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 (HC) at [426].

57 *Lau v Auckland Council* [2017] NZHC 1010 at [6](d) (footnotes omitted).

> itself, may well have reached a different decision overall on the matter before it.

[37] It must generally be the want of evidence, rather than the weight of the evidence, that forms the basis of an argument that factual errors are such as to constitute an error of law.[58]

[38] The decision-maker must generally provide reasons which are intelligible, adequate and enable an understanding of why the matter has been decided in the way it has and why the conclusions have been reached on important issues. The reasons need only to refer to the main issues in dispute, not every material consideration.[59] The decision must show that the decision-maker has addressed its mind to the criteria it was required apply.[60] Failing to articulate all the reasoning does not amount to an error of law "provided it is made clear that the Court has turned its mind to the relevant statutory provisions and had evidence to justify a conclusion".[61]

[39] How much weight the Environment Court chooses to give relevant policy or evidence is a matter solely for the Environment Court. This cannot be reconsidered as a question of law.[62] Similarly, the merits of the case dressed up as an error of law will not be considered.[63] Planning and resource management policy are, for obvious reasons, matters that will not be considered by this Court.[64]

[40] In *Countdown Properties (Northlands) Ltd* the High Court warned against interfering with findings of fact and identifying errors of law, saying:[65]

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58 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at 437; *Hunt v Auckland City Council* HC Auckland HC41/95, 31 October 1995 at [9]; *Skinner v Tauranga District Council* HC Auckland AP98/02, 5 March 2003 at [13]; and *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [31].

59 *South Buckinghamshire District Council v Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953 at [36] per Lord Brown of Eaton-under-Heywood.

60 *Bovaird v J* [2008] NZCA 325, [2008] NZAR 667 at [74].

61 *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) at [92]; citing *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 at [513]–[514].

62 *Stark v Waitakare City Council* HC Auckland HC5/94, 28 June 1994 at [4]. See also *Moriarty v North Shore City Council,* above n 58.

63 *Young v Queenstown Lakes District Council* [2014] NZHC 414, (2014) 18 ELRNZ 1 at [19]; citing *Sean Investments Pty Ltd v MacKeller* (1981) 38 ALR 363 (FCA).

64 *Russell v Manukau City Council* [1996] NZRMA 35 (HC). To similar effect: *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [28].

65 *Countdown Properties (Northlands) Ltd v Dunedin City Council,* above n 47, at [153].

> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mongonui County Council* (1987) 12 NZTPA 349 at 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: see *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 at 81-82."
>
> …

[41] It is insufficient for an error of law simply to be identified. The error must be a material one, impacting the final result reached by the Environment Court.[66]

[42] In *Guardians of Paku Bay Association Inc v Waikato Regional Council*, the High Court recognised the deference to be shown to the Environment Court as an expert tribunal when determining planning questions:[67]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.

[43] These comments are particularly apt in this case where experts in relevant areas of expertise sat on the Court. The Environment Court in this case comprised three Judges (two Environment Court Judges and one Māori Land Court Judge) and two Environment Court Commissioners. Counsel noted that it was relatively rare for a full court to hear an application of this type. A quorum usually consists of one Environment Court Judge and one Commissioner.[68]

[44] The Environment Court made no final determination on the ecological and cultural effects. It could not do so in the absence of evidence that the agreements with Ngāti Tama were finalised. Therefore, I have considered the appeal as it relates to the

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66 At [153].

67 *Guardians of Paku Bay Association Inc v Waikato Regional Council,* above n 58, at [33] (footnotes omitted).

68 The Court comprised Environment Court Judges Dwyer and Dickey, Judge Doogan (Māori Land Court Judge), Commissioner Bunting (with a background in engineering) and Commissioner Bartlett (with a background in geography and botany/ecology).

final findings on the other effects. I have also considered the conclusions on the evidence it made in the course of its consideration of the ecological and cultural effects. The issue left at large was whether Ngāti Tama and Waka Kotahi would finalise their agreement on the land acquisition and the Further Mitigation Agreement.[69]

[45] The joint appellants pursue their appeal against the interim decision first, on the basis an interim decision should not have been made on the evidence available or, in the alternative, the Environment Court should have required agreement with the Pascoes in relation to the acquisition of their land and compensation in the same way it was requiring agreement with Ngāti Tama. Further grounds of appeal relate to the final determinations made in the interim decision. This appeal can only be against the final decisions or findings made. Whether or not the appeal should proceed against the interim decision, rather than awaiting the final decision, was an issue considered at case management conferences and the parties were of the view it was appropriate to proceed in relation to the findings made in the interim decision.[70]

[46] Before I move on to consider the grounds of appeal filed in this Court, the manner in which the joint appellants have conducted their case to date warrants some comment.

Conduct of the appeal

[47] The grounds in the joint appellants' original notice of appeal[71] filed in this Court were largely based on the conclusions that the Environment Court reached on cultural issues.[72] The remedies sought related to recognising Poutama's claims to mana whenua, and its kaitiakitanga over the project land, as well as its status as an iwi authority for the purposes of the Act.

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69 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [95]–[97].

70 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* HC New Plymouth CIV-2020-443-5, 11 March 2020 [Minute No 1]; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* HC New Plymouth CIV-2020-443-5, 9 April 2020 [Minute No 2]; and *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* HC New Plymouth CIV-2020-443-5, 10 July 2020 [Minute No 3].

71 The notice of appeal was dated 21 January 2020.

72 In the preamble the notice of appeal refers to "significant adverse effects from the Project on Poutama including the Pascoe whānau…". The notice also references that significant adverse cultural effects include "ecological effects".

[48] Prompted by concerns expressed by Clark J at a case management conference that the grounds of appeal did not appear to involve questions of law,[73] the joint appellants amended their notice of appeal.[74]

[49] Ms Grey was briefed by the Pascoes after the appeal to this Court had been lodged. The joint appellants reformulated their grounds of appeal in an amended notice of appeal.[75]

[50] Mr and Mrs Pascoe and Poutama collaborated in the conduct of this appeal. Mr Gibbs and Ms Gibbs had represented the Pascoes as well Poutama before the Environment Court. Ms Grey was instructed by Mr and Mrs Pascoe although in practical terms she led the appeal for both the Pascoes and Poutama. Ms Marie Gibbs, for Poutama, supplemented Ms Grey's submissions, in particular, relating to matters concerning Poutama's claims to mana whenua and cultural issues. Her brother, Mr Russell Gibbs of Poutama assisted her. Neither are lawyers but had also appeared before the Commissioner and at the Environment Court. They associate with Poutama although they are Pākehā.[76] Ms Gibbs explained that their role in representing Poutama was as supporters but did not indicate a lack of Māori leadership in Poutama.

[51] A significant issue for Poutama in the appeal was its concern that the Environment Court had undermined its standing and put in jeopardy its right to be consulted by local authorities and other bodies in the region on matters such as resource management consents. Poutama is listed as an iwi agency for those purposes on a website list maintained by Te Puni Kōkiri called Te Kāhui Māngai. Poutama says this listing is recognition of Poutama's mana whenua and kaitiakitanga in the region. It says that its status in general has been eroded by a "side wind" as a result of the Environment Court decision. Therefore, it says the decision is ultra vires. I will deal with this issue later in my decision.[77]

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73 Minute No 1, above n 70.
74 The amended notice of appeal was dated 15 July 2020.
75 The Court pointed out the difficulties to the joint appellants at a case management conference: Minute No 1, above n 70.
76 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [343]. See below at [118]–[120].
77 See below at [152]–[170].

The grounds of appeal

[52] The first ground of appeal relates to the interim nature of the decision. The appeal has its primary focus on the cultural findings of the Environment Court as well as the effects of the project on the Pascoes and their land, particularly in relation to the temporary works that will be in place for the period of construction. A number of points under the grounds of appeal were only addressed in passing or not addressed at all. Attached is a copy of the four grounds of appeal and a summary of the particulars under each ground.[78]

Appeal Ground One: error of law in making an interim decision

[53] The joint appellants say that the Environment Court should not have issued a decision that was only interim. The decision should have been made final based on the evidence before it. In the alternative, they say that the Environment Court's interim decision should have dealt with the Pascoes' land acquisition and compensation package in the same way as that of Ngāti Tama, in that the interim decision should have required the finalisation of those arrangements with the Pascoes before the decision would be made final.

[54] The particulars under this ground were that the Environment Court erred in making an interim decision as:

(a) There was no certainty that Waka Kotahi would acquire the Ngāti Tama land.

(b) The Court failed to treat the Pascoes the same as Ngāti Tama in that their land had not been acquired and would require a side agreement to deal with the significant adverse effects if the project proceeded.

(c) Waka Kotahi had not obtained from the Department of Conservation an authority under s 53 of the Wildlife Act 1953 "to catch alive or kill" kiwi and other native wildlife. Such an authority would be required to enable the relocation of kiwi and other native wildlife.

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78 Attachment 1.

(d) The Environment Court had incomplete information and so should not have made an interim decision.

(e) The decision on the project was not timely as required by the Resource Management Act.

Analysis – interim decision

[55] Mr Beverley, for Waka Kotahi, submitted that it was well established that the Environment Court was entitled to make interim decisions. He pointed to the decision in *Mawhinney*[79] in which the High Court considered whether an interim decision had been made for the purposes of time running for an appeal. Wylie J said:

> [88] … the Environment Court can, in appropriate cases, issue an interim decision notwithstanding the absence of any express provision in this regard in the Act. It can do so pursuant to s 269. An interim decision may well be appropriate where the Court is able to reach conclusions on a number of issues, but cannot finalise its decision, because it has insufficient material to enable it to determine some matter which requires adjudication or because it wants to give the parties the opportunity to comment on or advance a particular issue. Resource management planning frequently calls for a large number of judgments, on a host of disparate issues. It can therefore be unrealistic to expect the parties to have finalised their position on all matters ultimately requiring a determination from the Court. Indeed, they may be unable to do so until the Court has made a decision on other matters. In such circumstances, and they are not meant to be exhaustive, it may well be appropriate for the Court to issue an interim decision.

[56] In *Motiti Avocados Ltd,* Andrews J, in considering whether a final determination had been made by the Environment Court, commented:[80]

> [55] The question arises as to whether an "interim decision" is a "decision" as that word is used in s 299. Having reviewed the authorities cited to me, I accept that an "interim decision" is a "decision" for the purposes of being appealable, if it finally resolves a particular issue. I also accept that an "interim decision" may include "preliminary determinations" on particular issues and "final determinations" on other issues.
>
> [56] The more difficult issue is determining whether a determination on a particular issue is "preliminary" or "final". I adopt, with respect, the comments of Wylie J in *Mawhinney v Auckland Council*:

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79 *Mawhinney v Auckland Council* (2011) 16 ELRNZ 608 (HC).

80 *Motiti Avocados Ltd v Minister of Local Government* [2013] NZHC 1268, at [55]–[56] (footnotes omitted).

> In my view, no "bright line" rule is possible. Each interim decision must be considered in its own terms. If an interim decision finally decides a substantive issue between the parties, then there is a decision in respect of that issue in terms of s 299, notwithstanding that some other issue may be left for further consideration. If an interim decision does not finally decide a substantive issue, and leaves it for the parties to return to Court, then there is no decision in terms of s 299.

Final determinations

[57] As noted above, the question as to whether or not it was appropriate to hear this appeal before a final decision was issued by the Environment Court was considered at a case management conference on 9 July 2020.[81] Ms Grey, on behalf of the joint appellants, had expressed some concern about the appeal hearing proceeding as scheduled. The present amended notice of appeal had been filed.[82]

[58] Waka Kotahi noted that the appeal should proceed even if Ngāti Tama rejected the proposals, which were set out in the agreement for acquisition of land and for further mitigation, at the special general meeting due to be held the following weekend. Even if the agreement was not ratified at that meeting, Waka Kotahi submitted it could be ratified at a subsequent meeting. Ms Grey agreed that the appeals needed to be determined.[83] Therefore, the hearing proceeded on the basis of the grounds set out in the amended notice of appeal.

[59] In *Gardez,*[84] the Environment Court, presided over by Judge Jackson, noted that once a final determination had been made on a substantive issue, the Court became functus officio and an appeal lies to the High Court.[85] The labelling of a decision as "interim" is not itself determinative.[86] The test, it said, was whether in substance the interim decision:[87]

> (a) decides the whole proceedings or, at least, one or more particular issues conclusively (in which case the Court is *functus officio* on each such issue); or

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81 Minute No 3, above n 70.
82 Minute No 1, above n 70, at [3] and [5].
83 Minute No 3, above n 70, at [4]–[7].
84 *Gardez Investments Ltd v Queenstown Lakes District Council* EnvC Christchurch C95/05, 4 July 2005.
85 At [39].
86 At [40].
87 At [40]; citing *Marlborough Aquaculture Ltd v Chief Executive of the Ministry of Fisheries* [2003] NZAR 362 (HC) at [21].

(b) leaves the matter open for parties to return to the Court with further submissions and/or not evidence notwithstanding the views expressed at the interim stage.

[60] Very few decisions, whether described as interim or not, are fully provisional. In most cases an interim decision decides some issues and leaves others "usually subordinate issues still to be decided".[88] An example is, for instance, a decision which resolves a question about the wording of objectives and policies but adjourns issues about rules to implement those objectives and policies to be determined either by the party, or failing agreement by the Court.[89]

[61] The High Court in *Mawhinney* cited *Gardez* with approval noting the questions were:[90]

- what has the Court decided?
- and what has it left undecided?

[62] As Wiley J in *Mawhinney* noted, there was no "bright line" rule possible and each interim decision must be considered in its own terms. If an interim decision finally decides a substantive issue between the parties, then there is a decision in respect of that issue in terms of s 299 (appeal) of the Act, notwithstanding that some other issue may be left for further consideration.

[63] The Court also emphasised that "resource management planning frequently calls for a large number of judgments, on a host of disparate issues. It can therefore be unrealistic to expect the parties to have finalised their position on all matters ultimately requiring a determination from the Court".

[64] The purpose of a final determination may be to give the parties certainty so the case may be progressed to the next stage.[91] In addition, a determination may be final notwithstanding it will be subject to minor changes. Even if a determination leaves open a machinery provision to enable later resolution of some issues or for a return to

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88 *Gardez Investments Ltd v Queenstown Lakes District Council*, above n 84, at [41].
89 At [41].
90 *Mawhinney v Auckland Council*, above n 79, at [95]; quoting *Gardez Investments Ltd v Queenstown Lakes District Council*, above n 84.
91 *Fox v Christchurch City Council* HC Christchurch CIV-2008-409-898, 5 December 2008 at [51].

the decision-maker on a point, there may be a final determination capable of appeal.[92] A final determination may be made in relation to the rights of one party.[93]

[65] In this case, the Court did not finally determine the appeals but noted it would have regard to the findings set out in its summary of findings.[94] Those findings are set out as follows:

> ***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.
>
> …
>
> ***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.

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92 *Mawhinney v Auckland Council*, above n 79, at [90]; citing *Wellington City Council v Australian Mutual Providence Society* HC Wellington AP47/91, 15 May 1991.

93 *Hahei Developments Ltd v Thames Coromandel District Council* [2005] NZRMA 21 at [35] and [55](b).

94 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [471].

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.

[66] The issue of construction noise as it affects the Pascoes, if they remain in their home during the period of construction, remains open for further consideration. The Environment Court proceeded "on the basis that the Pascoes will relocate (as they indicated they would) should the project proceed. If necessary, we will hear from the Pascoes on that matter as part of any final determination".[95]

Requirements of timeliness

[67] Ms Grey pointed out that the decision in *Mawhinney* had predated amendments to the Act under the Resource Management Amendment Act 2013, which introduced a number of general requirements for timeliness and limits for taking specified steps in consent processes.[96] While there was no specified time limit for issuing a decision by the Court, she noted that s 269, which had been referred to in *Mawhinney*, had been amended by the insertion of s 269(1A) so that s 269 now reads:[97]

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95 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [454].

96 The respondents' written submissions referred to s 103A of the Act. However, that does not apply to hearings on appeal.

97 Emphasis added.

269 Court procedure

(1) Except as expressly provided in this Act, the Environment Court may regulate its own proceedings in such manner as it thinks fit.

(1A) *However, the Environment Court must regulate its proceedings in a manner that best promotes their timely and cost-effective resolution.*

(2) Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency.

(3) The Environment Court should recognise tikanga Māori where appropriate.

(4) The Environment Court may use or allow the use in any proceedings, or conference under section 267, of any telecommunication facility which will assist in the fair and efficient determination of the proceedings or conference.

[68] Ms Grey argued, in her oral submissions, that the Environment Court, in issuing an interim decision, had not met the requirement for a timely resolution of this matter as required by s 269(1A). She noted the project had been going for some years and not making a final decision further prolonged matters. Ms Grey said that the Environment Court should have specifically considered whether to issue an interim decision as opposed to making a final decision. If it had issued a final decision, she said it would have had to refuse the consents and decline approval of the NOR. The appellants said the Environment Court had failed to consider that option and therefore was in breach of public law principles of fairness and reasonableness.

[69] Section 269(1A) requires the Environment Court to regulate its proceeding in a manner that best promotes "timely and cost-effective resolution". Section 269(1A) is a general direction akin to the provision in the High Court Rules specifying that the objective of the rules is to secure the just, speedy and inexpensive determination of any proceeding or interlocutory application.[98] It does not impose a requirement on the Court to specifically address that provision every time the Court takes a procedural step or makes an interim decision. It therefore made no error in failing to specifically refer to address that provision before it made its interim decision.

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98 High Court Rules 2016, r 1.2.

[70] The Environment Court noted that Waka Kotahi had endeavoured to persuade it to confirm the NOR pending the agreement by Ngāti Tama to sell its land.[99] However, the Court said it could not reach a final decision on all matters before it unless it knew whether or not agreement had been finalised between Te Rūnanga and Waka Kotahi.[100] It concluded:

> [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 it 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 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 fits negotiations with Te Rūnanga.

[71] The matter was adjourned beyond the 31 March date. Counsel has advised that the agreement was finalised following its approval at a special AGM by Te Rūnanga o Ngāti Tama Trust and formal approval by Waka Kotahi.

[72] The Commissioner's decision was released in December 2018. The hearing of the Environment Court appeal was in July 2019, and the interim decision was delivered by that Court in December 2019. Matters have been necessarily further delayed by this appeal. Counsel noted that the Environment Court has been advised of the finalisation of the agreement with Ngāti Tama and it is now in a position to consider further submissions to enable it to make its final decision.

[73] The Environment Court made no error of law by issuing an interim decision based on the information it had before it. It required further evidence before it could be satisfied on the cultural and ecological effects. That further evidence related to the

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99 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [472].
100 At [472].

finalisation of agreements with Ngāti Tama, which were integral to the avoidance, remediation or mitigation of those effects.[101]

The Pascoes' land and compensation

[74] I now turn to consider whether the Environment Court should have made its decision interim subject to the finalisation of the acquisition of the Pascoes' land (whether by compulsory acquisition or by agreement) and agreement with the Pascoes for compensation in the same way as it did for the acquisition of Ngāti Tama land and Further Mitigation Agreement.

[75] The Environment Court had determined that Ngāti Tama were tangata whenua, held mana whenua and exercised kaitiakitanga in terms of the Act for the purposes of this project. Waka Kotahi advised the Court that the Ngāti Tama land would not be compulsorily acquired due to its cultural significance to that iwi. The land had been returned by the Crown under a Treaty settlement. The Environment Court was required to recognise and provide for the Ngāti Tama ancestral relationship, culture and traditions connected with the project area, as a matter of national importance under s 6(e) of the Act. The Court was also required to have particular regard to kaitiakitanga exercised by Ngāti Tama under s 7(a) of the Act. In addition, it was required to take account of the principles of the Treaty.[102] The acquisition of the land by agreement with Ngāti Tama and the finalisation of the Further Mitigation Agreement were therefore central to the Court's findings on the cultural and ecological effects.

[76] The Environment Court noted that in the normal course it would "not concern" itself with the acquisition of land for a particular work because the Public Works Act 1981 sets out the powers for that to occur, whether by agreement or by compulsory acquisition.[103] However, it considered the acquisition of the Ngāti Tama land was in a special category. It said:[104]

> [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

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101 *Director-General of Conservation v Taranaki Regional* Council, above n 1, at [438] and [469]–[470].
102 Resource Management Act 1991, s 8.
103 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [439].
104 At [241]–[243] (footnotes omitted).

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 protection for, Ngāti Tama's interests relies on:

- 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:

- 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.

[77] The Environment Court concluded:[105]

> [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 R[ū]nanga'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'. …

[78] The relationship between the Pascoes and the land, and their role in the mitigation conditions, was not in the same category as that of Ngāti Tama. At the same time the Environment Court acknowledged that the social and other effects of the project on Mr and Mrs Pascoe were significantly adverse. It said:[106]

> [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.

[79] However, the Environment Court concluded that the adverse effects could be mitigated to the extent possible by comprehensive conditions. It concluded that the conditions it intended to impose would mitigate the adverse social impacts of the project on the Pascoes to the extent possible.[107]

[80] Part of the Pascoes' land was to be acquired for the new road. The Environment Court was aware that there would be negotiations between Waka Kotahi and the Pascoes concerning that and compensation. It noted it would be the Pascoes' decision as to whether they sold other parts of their land, including the homestead. It noted:[108]

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105 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [438]–[439].
106 At [160].
107 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [468]. See above at [65] for the paragraph in full.
108 At [452]–[453].

> [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 [proposed pest management area], $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.

[81] Ms Grey, in her reply, said that the negotiations between Waka Kotahi and the Pascoes were not going well. She said that if the Environment Court's interim decision had been made subject to acquisition of the Pascoes' land and agreement as to compensation as it had been in relation to Ngāti Tama, it would assist the Pascoes to achieve a better outcome.

[82] The Act is concerned with the proposed activities' effects "not the nature of the applicant's legal rights or interests in the particular land".[109]

[83] It is often the practice for the acquisition of land to take place after the consents and designations have been approved. The Court of Appeal in *MacLaurin v Hexton Holdings Ltd* said:[110]

> [47] … The structure of the Resource Management Act is such that "any person" may apply for resource consents affecting land over which they might have no ownership or other rights … What consent authorities are concerned with is the proposed activity's effects, not the nature of the applicant's legal rights or interests in the particular land. …

[84] The separate processes under the Public Works Act for the acquisition of the Pascoes' land and compensation sit outside the Resource Management Act. They are independent and separate.[111] The Land Valuation Tribunal is the statutory tribunal set up to deal with land acquisition and disturbance payments and has specialist expertise in those areas. The Environment Court plays no part in that process.

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109 *MacLaurin v Hexton Holdings Ltd* [2008] NZCA 570, (2008) 10 NZCPR 1 at [47].
110 At [47] (footnotes omitted).
111 See *Pryor v New Zealand Transport Agency* EnvC Auckland A105/2009 28 October 2009 at [8].

[85] This is not a case of similar cases being treated differently. Ngāti Tama's position and its relationship with the land and resources was significantly different to that of the Pascoes'.

[86] Having considered and been satisfied that the adverse effects on the Pascoes and their land under the Act were appropriately avoided, remedied or mitigated to the extent possible, the Environment Court was entitled to leave the land acquisition and compensation to be dealt with through other processes.

[87] The Environment Court did not err in law in failing to make the interim decision subject to an agreement concerning acquisition and compensation for the Pascoes' land.

Other statutory authorities

[88] The Environment Court noted there were separate statutory considerations under other statutes that were relevant to the project. These included the acquisition of land under the Public Works Act, authorities required to be obtained under the Heritage NZ Pouhere Taonga Act 2014, as well as authorities under the Wildlife Act required.[112]

[89] Ms Grey did not expressly address this point in her oral submissions, however, the grounds of appeal alleged that the Environment Court made an error by failing to ensure the authorities under the Wildlife Act or other authorities had not been secured.

[90] In general terms, there is no requirement that resource consents be conditional upon authorities being granted under other statutory regimes. The Environment Court has no jurisdiction, for instance, under the Wildlife Act to grant authorities to take possession of wildlife. That jurisdiction is vested in the Director-General of Conservation. As long as the Environment Court had properly considered effects on wildlife, which was not in issue in this appeal, it was entitled to make its decision.[113]

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112 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [438]–[439].
113 Resource Management Act 1991, s 6(c).

Conclusion on interim decision

[91] The Environment Court made no error in law in issuing an interim decision.

[92] I now turn to the cultural issues, which occupied a substantial amount of time at the hearing of the appeal.

Appeal Ground Two: customary and cultural rights, tikanga, mana whenua and kaitiaki

[93] In summary, the particulars under this ground are that the Environment Court erred in law in the following ways:

(a) The Court assumed that only one iwi (Ngāti Tama) could have mana whenua, kaitiakitanga or tikanga or other cultural rights over land in breach of s 6, which requires the recognition and provision for the relationship of Māori with their cultural traditions and their ancestral lands, water sites and other taonga.

(b) The Court did not recognise that determination of mana whenua and kaitiakitanga over any rohe is a matter for Māori themselves. In the case of Poutama, it is recorded by Te Kāhui Māngai[114] (a list of iwi maintained by Te Puni Kōkiri) which lists ngā hapū o Poutama for the purposes of consultation on Resource Management Act issues.

(c) The Court misstated the appellant's case, which was "that Poutama including Debbie Pascoe's ancestral connection is to the Poutama tribe and Rohe as a whole, including to the wider project area, and the Pascoe Whānau land in the Mangapepeke valley".

[94] Poutama says the Court was in error in finding that Ngāti Tama had mana whenua over the land and resources and the exclusion of Poutama for the purposes of the applications. Poutama says that it led evidence that supported its claims dating back to the 1800s.

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[114] See below at [152]–[160].

[95] This ground of appeal largely criticises the evidence accepted by the Environment Court and the weight it placed on it in reaching its conclusion on Poutama and/or Ms Pascoe's claims to mana whenua, kaitiakitanga, tikanga or other cultural rights. I deal with the approach taken by the Court to its evaluation and assessment of the cultural evidence.

Approach of the Environment Court to determination of cultural issues

[96] The Environment Court noted that its consideration under s 171 (the NOR) and s 104 (resource consents for discretionary activities) was subject to Part 2 of the Act.[115] That required the Court, under s 6(e) as a matter of national importance, to "recognise and provide for" the relationship of Māori and their culture and traditions with their "lands, water, sites, waahi tapu, and other taonga".

[97] Mr Majurey, for Ngāti Tama, said recognition of these rights was hard-won and reflected the culmination of 150 years of advocacy by Māori. He submitted it was key that the recognition and provision for the "ancestral relationship" referred to was specific to the case under consideration. To extend such recognition to Māori (or other) claimants who had not established, by evidence to the satisfaction of the Court, their ancestral relationship to the land would diminish the value and importance of those rights.[116] The Privy Council underscored that recognition saying that these matters are "strong directions to be borne in mind at every stage of the decision-making process".[117]

[98] In *McGuire*, the Privy Council emphasised that redress and protection of cultural interests was to be provided where the case presented had merit.[118] Their Lordships stressed the desirability of including a Māori Land Court Judge on an Environment Court bench when considering and assessing the claims of Māori under the Resource Management Act.[119]

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115 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [27].

116 Mr Majurey noted it has never been a Māori customary value or practice for one to have an ancestral connection with the whenua solely on the basis of being Māori.

117 *McGuire v Hastings District Council* [2002] 2 NZLR 577(PC); referenced in *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [338].

118 At [20].

119 At [28].

[99] Mr Majurey noted that it had taken some years before the exhortations of the Privy Council had been taken to heart but these days there were more instances of a Māori Land Court Judge sitting on the Environment Court where cultural issues demanded. He noted that in this case an experienced Māori Land Court Judge had sat on the Court. He said this was significant. He further noted it was unusual to have a five-person court including not only a Māori Land Court Judge, but also two Environment Court Judges and Commissioners with special expertise in botany/ecology and geography, as well as engineering.

[100] Mr Majurey submitted that the Court's emphasis must be on ascertaining and taking into account the Māori interests as recognised under the Act. He said that Ngāti Tama's claim to mana whenua over the project land had been established on the evidence and the Environment Court had been satisfied of that on the evidence.

[101] He emphasised that it was a matter of fact to be determined by the Court as to which Māori groups belonged to the land (tangata whenua), had mana whenua and exercised kaitiakitanga in each case. Little has changed in that regard since the comments in *Royal Forest & Bird Protection Society v W A Habgoode Ltd*[120] were made in relation to the predecessor to the Resource Management Act. In Mr Majurey's submission the principle remains:[121]

> The general purpose of the legislature … in particular to recognise and provide for, the relationship of the Māori people and their culture and traditions with the land which was once [and still remains] theirs [or, more accurately, the land to which they belong] ... Each case will have to be considered on its own merits and once the nature of the relationship has been established it will be necessary for the deciding body to consider in the circumstances the importance of that relationship in the overall consideration of the application before it.

[102] In *Tūwharetoa Māori Trust Board v Waikato Regional Council*[122] the original decision-maker, the ouncil, would not make a decision on "who had" mana whenua

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120 *Royal Forest & Bird Protection Society v Habgoode* [1987] 12 NZTPA 76 (HC).

121 At [81]. The Judge was discussing section 3(1)(g) of the Town and Country Planning Act 1977, which concerned "ancestral land", which is the same term found in s 6(e) of the Resource Management Act 1991: see below at [132]–[133].

122 *Tūwharetoa Māori Trust Board v Waikato Regional Council*, above n **Error! Bookmark not defined.**.

and kaitiakitanga status.[123] The Environment Court emphasised it was the council's role to make such determinations. It said:[124]

> [55] … a Council cannot abdicate its role as a decisionmaker in respect of a matter that is an essential element of resource management in the application before it. It may be that a Council would rather not make such a decision because of the risk of error, or perhaps in the hope of not causing offence to a person against whose interests the decision is made, but abdication is not an option available to it. A decision-maker is required to make decisions and so, for better or worse, it must address the issues before it, including those of status where they arise.

[103] In that case, the Environment Court, after examining the evidence, determined that Tūwharetoa should be included in a kaitiaki group from which it had been excluded.

[104] It is not for the Court to rank iwi or hapū in the area, but it is the role of the Environment Court to make a fact-based evaluation on the evidence in the case before it.[125]

[105] Counsel for Ngāti Tama noted that the Environment Court had approached the analysis of the cultural evidence and, in particular, the issue of mana whenua in the project area under the Act using the "rule of reason" approach.

[106] The rule of reason approach was adopted in *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council*.[126] The Environment Court there was required to consider the ancestral relationship with dune lands claimed by Ngāti Awa in the context of s 6(e) of the Act. It noted that in the end the weight to be given to the evidence would be "unique to that case".[127] The evidence must be tested.

[107] The rule of reason approach was described by the Judge as follows:[128]

> [53] That "rule of reason" approach if applied by the Environment Court, to intrinsic and other values and traditions, means that the Court can decide

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123 At [53].
124 At [55] (footnotes omitted).
125 *Ngāti Maru Trust v Ngāti Whēnua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768.
126 *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council* [2002] 9 ELRNZ 111 (EnvC).
127 At [56].
128 At [53] (footnotes omitted).

> issues raising beliefs about those values and traditions by listening to, reading and examining (amongst other things):
>
> - 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 (eg Māori Land Court Minutes) or corroborating information (eg waiata, or whakatauki) about the values. By "external" we mean before they became important for a particular issues and (potentially) changed by the value-holders;
> - the internal consistency of people's explanations (whether there are contradictions);
> - the coherence of those values with others;
> - 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.

[108] That approach was adopted by the Environment Court here.[129] The Environment Court was required to make a determination on the cultural issues on the evidence before it.

[109] The Court expressly recognised that more than one group might have that status in a given area.[130] It said:

> [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. 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.

[110] The Environment Court noted High Court authority which pointed out there was a distinction between a group holding kaitiakitanga in a place and a second group with a weaker kaitiaki relationship and recognised there were wider values of tikanga Māori with whanaungatanga being the most pervasive.[131]

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129 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [238].
130 At [234].
131 At [234] and [236]; citing *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

[111] Mr Majurey pointed out that the Environment Court in this case had had considerable evidence before it given by cultural experts including historians. After considering the evidence, it came to a conclusion that Ngāti Tama held mana whenua and exercised kaitiakitanga for the purposes of this case in terms of ss 6(e) and 7(a) of the Act. This then enabled the rights and claims to other cultural and traditional dimensions to be catered for. It concluded:[132]

> [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.

[112] The Court had an available evidential basis upon which to reach its conclusion. The Environment Court noted:[133]

> [218] Te Rūnanga prepared a "Maori Values Assessment in relation to the Paraninihi Te Ara o Te Ata Project"(MVA) dated December 2017. 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.
>
> [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:
>
> > 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:

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132 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [333] (footnotes omitted).

133 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [218]–[221] (footnotes omitted).

> 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.

[113] The Environment Court determined that Poutama was not tangata whenua and did not hold mana whenua, nor did it exercise kaitiakitanga or have lesser cultural connections over the project area, including the Pascoe family land.[134]

[114] The joint appellants contended the Environment Court made errors in accepting certain witness' evidence, rejecting other evidence and failing to accept Poutama's own assertions of mana whenua and kaitiakitanga.

[115] For instance, Ms Gibbs, in her submission in this appeal, argued that the Environment Court had failed to properly take into account a decision of a Māori Land Court in which she said Judge Harvey had made comments which supported Poutama's claims.[135] That case involved an application by Mr Russell Gibbs, a Pākehā, to establish a Māori reservation over land to the north and west of the project land.

[116] As Ngāti Tama submitted, at best the *Gibbs* decision might support Poutama having interests in the Gibbs property well north west, but not over the project land.

[117] In any event, the Environment Court had the *Gibbs* decision before it and dealt with it as follows:[136]

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134 At [276].

135 *Gibbs v Te Rūnanga o Ngāti Tama and ors* (2011) 274 Aotea MB 47 (274 AOT 47) [*Gibbs*].

136 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [343]–[344] (footnotes omitted).

> [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:
>
> > 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.

[118] The Environment Court had adequate evidence on which to conclude that Poutama was not tangata whenua exercising kaitiakitanga, nor did it have relevant cultural connection to the project area. The Environment Court summarised that evidence. It said:[137]

> [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

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137 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [278]–[279] and [320] and [325] and [334] (footnotes omitted).

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 Rūnanga. For some years now, he 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:

> 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.

…

[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 tīpuna T[ō]mairangi as having a Te Atiawa – Ng[ā]ti R[ā]hiri whakapapa. 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.

…

[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.

…

> [334] Mr G White noted that it is generally understood within Maori 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.

[119] Further, it noted Poutama was not recognised as an iwi or iwi authority by Ngāti Tama or other neighbouring iwi.[138]

[120] While the Court accepted that Mr Gibbs and his siblings were committed to the incorporation of Māori cultural values which it considered a constructive and positive force, it said "[t]he 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".[139] The Court concluded:[140]

> [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 hapū that holds mana whenua over a particular area and mana whenua in turn means the exercise of customary authority by an iwi or hapū in a particular area. While Mrs Pascoe has whakapapa it is to a hapū that makes no claim to exercise mana whenua over the Project area. We are not persuaded that Poutama is an iwi or hapū 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 hapū 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.

Ms Pascoes' ancestral connections

[121] The notice of appeal claims the Court erred in "misstating the appellant's case which was that Poutama, including Debbie Pascoe's ancestral connection is to the Poutama tribe and rohe as a whole, including to the wider project area, and the Pascoe

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138 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [334] and [336].
139 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [337].
140 At [339].

whānau land in the Mangapekepeke Valley". The alleged misstatement is referenced as being at [304] of the decision which reads as follows:[141]

> [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:
>
> **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.

[122] The Environment Court made no misstatement. It merely recorded its exchange with Ms Pascoe concerning her ancestral claims. However, the joint appellants argued that the Poutama cultural rights, together with Ms Pascoe's Māori heritage and the Pascoes' ownership rights and their stewardship of the valley, merged to form a right greater than its separate parts. The Environment Court was alive to all aspects of the claim but was not satisfied on the evidence that Ms Pascoe had a relevant cultural connection with the land. It said:[142]:

> [318] It is clear that:

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141 At [304] (footnotes omitted).

142 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [318]–[319] (footnotes omitted).

- 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.

[123] It also noted that the intervention of Poutama on the Pascoe's behalf had made the task of addressing the Pascoe's rights and interests more complex than it needed to be and that the claims to cultural right had been made on behalf of the Pascoes that went well beyond what the evidence supported.[143]

[124] The Environment Court rejected the claim that the relationship of Mr and Mrs Pascoe with the land, as the long-term owner/occupiers, supported their claims of kaitiakitanga. It found that the Pascoes could not claim to exercise kaitiakitanga over the project land. They were not tangata whenua.[144] It concluded that no whanaungatanga relationship was demonstrated by the Pascoes.[145]

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143 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [273].
144 At [339].
145 At [325]–[326]. These paragraphs are set out in full above at [118].

[125] The Environment Court referred to the evidence of Mr G White, for Ngāti Tama, in relation to the issue of kaitiakitanga. It said:[146]

> [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:
>
> 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, ng[ā] 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 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 t[ū]puna 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.

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146 At [327]–[329] (footnotes omitted).

[126] The Environment Court concluded that the Commissioner had erred in characterising the Pascoes as kaitiaki. The Court said:

> [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.

[127] The notice of appeal alleged that the Environment Court had erred "in misstating the appellant's case". The appellants said the case was a more general claim for special cultural recognition.[147] Ms Grey advanced this as being based on tikanga or other cultural rights over the land, which she said was supported by a combination of different interests, including Ms Pascoe's claims to whakapapa to Poutama, her identity as Māori and the Pascoe whanau's relationship with the land and the Mangapepeke Valley a long-term landowners.[148] The Environment Court had rejected that argument and found that Ms Pascoe had established no cultural claims, in terms of the Act, to the project land. It had adequate evidence before it to reach that conclusion. The Act recognises cultural claims based on ancestral connections as separate to that of stewardship. The two are separate notions. This was recognised by the Environment Court.[149]

Other cultural connections

[128] The Environment Court was satisfied that Waka Kotahi had received proper advice and had undertaken appropriate engagement with mana whenua and consulted with Māori more generally in relation to the project.[150]

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147 The Court referred to a "cultural connection" to the property: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [304].

148 Paragraphs [1]–[8] of the joint amended notice of appeal by Poutama Kaitiaki Charitable Trust.

149 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [327].

150 At [244].

[129] Waka Kotahi had engaged Mr Dreaver to lead engagement.[151] The Court noted he had over 20 years' experience with negotiation of historical treaty settlements and on the provision of advice to various parties around engagement with Māori issues. It noted of particular relevance was his previous experience as the manager at the Office of Treaty Settlements responsible for negotiating with iwi of Taranaki including Ngāti Tama and Ngāti Mutunga. This included engagement with Ngāti Maniapoto representatives over aspects of the Ngāti Tama settlement. The Court placed weight on Mr Dreaver's evidence.[152] Mr Dreaver had developed the engagement and negotiation strategy and the Court particularly noted that as well as engagement with Ngāti Tama, he engaged with other relevant iwi including Ngāti Mutanga, which had interests in the Mimi Stream which flowed through the project area and part of the Mount Messenger conservation area. That iwi deferred to Ngāti Tama for primary engagement. Mr Dreaver had also noted that Ngāti Maniapoto, which had an interest in the land as far south as the Wahanui line, which included the project area, was also willing to defer to Ngāti Tama in respect of the impacts of the project.[153]

[130] Mr Dreaver had taken into account the assertion by Poutama and acknowledged other groups that asserted interests in the project area. It had been that engagement which had led the Waka Kotahi to fund a cultural values assessment for Poutama by Mr Bruce Stirling, upon which it relied at the Environment Court hearing and in this appeal.[154]

[131] The appellants claimed that the Environment Court did not recognise that there could be more than one group holding mana whenua and exercising kaitiakitanga over the land. However, the Environment Court expressly recognised this possibility.[155]

[132] In the course of her argument, Ms Grey also advanced an argument that s 6(e) (a matter of national importance required to be recognised and provided for) applied

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151 The Environment Court rejected allegations by the joint appellants in a memorandum filed after the Environment Court hearing concerning Mr Dreaver and his relationship with Ngāti Tama: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [480].

152 At [244].

153 At [248].

154 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [250].

155 See above at [109]–[110]; referring to *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [234].

to Māori generally, not just Māori with ancestral connections to the land. That interpretation of s 6(e) is not borne out by the wording of this section. The section requires recognition and provision for:

> **6 Matters of national importance**
>
> …
>
> (e) the relationship of M[ā]ori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:[156]

[133] The important relationship is the "ancestral" one. As Mr Majurey submitted, the Courts have recognised that it is the ancestral connection which must be established on the evidence.

[134] The Environment Court made no errors of law in relation to its consideration of the evidence and its findings on cultural issues.[157]

Application to adduce new evidence on appeal

[135] In the course of submissions, Ms Gibbs sought to introduce further evidence in support of Poutama's claims.

[136] The additional evidence was intended to support the Poutama claims to mana whenua, kaitiakitanga and its cultural status generally. It included affidavits and statements by five descendants of Poutama who had apparently come forward after they heard about the Environment Court decision, as well as a Waitangi Tribunal report.

[137] The Waitangi Tribunal report that Ms Gibbs sought to have admitted had not been delivered at the time of the Environment Court hearing. Ms Gibbs took me to a number of passages in that report that she said supported Poutama's claims.

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156 Emphasis added.

157 It has not made a final determination on adverse cultural effects as it required further evidence on the finalisation of the agreements between Ngāti Tama and Waka Kotahi on land acquisition and further mitigation: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [461].

[138] The respondents and Ngāti Tama opposed the application to adduce fresh evidence. They submitted that it would not assist the Court, the proposed material added no value and would open up factual matters which had been explored in depth by the Environment Court.

[139] The appeal in this case is limited to questions of law. There need to be "very special" reasons to allow further evidence to be adduced in an appeal on a question of law.[158]

[140] In *Chamberlain v Scott,*[159] this Court noted a factual error of itself is not a special reason to admit evidence on appeal. Fogarty J, hearing an appeal from a decision of the Environment Court, rejected an application for leave to adduce expert evidence that had critically examined and refuted evidence that had been before the Environment Court. His Honour rejected the argument that the new evidence should be admitted even if, as was claimed, it totally undermined the weight of the existing evidence.[160] His Honour noted that Parliament had made a deliberate decision to run the risk of factual error in the Environment Court and the High Court would not disturb that policy decision.[161] Fogarty J refused to allow the new evidence despite the fact it was highly relevant and "may well have" made a difference if it had been before the Environment Court.[162]

[141] In support of Poutama's application to adduce further affidavit evidence, Ms Grey said that the new evidence was largely limited to short affidavits or statements by people stating they were of Poutama ancestry.[163] She said this evidence should not necessarily lead to a reopening of the evidence.

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158 Under r 20.16 of the High Court Rules 2016 (Rules) further evidence may be adduced in certain circumstances. In particular, leave would be granted if there are special reasons for hearing the evidence, for instance, if the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal: r 20.16(3) of the Rules; and *Schier v Removal Review Authority* [1999] 1 NZLR 703 (CA). The Court has an inherent jurisdiction to receive further evidence in very special circumstances: *Terrace Tower (NZ) Pty Ltd v Queenstown Lakes District Council* [2001] 2 NZLR 388 (HC) at [9].

159 *Chamberlain v Scott* [2012] NZHC 2596, (2012) 21 PRNZ 176.

160 *Chamberlain v Scott*, above n 159, at [20].

161 At [24] and [25].

162 At [22]–[23]. By comparison, this case is even less compelling. The impact of the evidence referred to by Ms Gibbs was difficult to assess out of context.

163 The report of the Waitangi Tribunal that Ms Gibbs referred to was in the common bundle at Ms Gibbs' request. The other evidence was contained in three sworn affidavits, a scanned copy

[142] I do not agree. The admission of the evidence in question would, without doubt, reopen factual matters on which the Environment Court had made findings. The evidence was sought to be adduced to contest the factual findings of the Environment Court. The admission of this evidence would not assist this Court in determining an appeal on a question of law. It merely invited the Court to reconsider questions of fact already determined by the Environment Court. The Environment Court had a substantial amount of evidence before it and the Court was well-placed to assess that evidence. It is the final adjudicator on questions of fact unless the factual finding was so insupportable such as to amount to an error of law.[164] That is not the case here.

[143] Ms Gibbs acknowledged she had had the opportunity to present relevant cultural evidence at the Environment Court hearing and to make the submissions but said that it was only after the Environment Court decision the relevant people had come forward to make the affidavits.

[144] The Waitangi Tribunal report may not have been available at the time of the hearing but again, Ms Gibbs seeks to use it to dispute the factual matters already determined.

[145] I do not consider there are special reasons which support the admission of the affidavit and other new evidence. The evidence is sought to be adduced to contest factual determinations which were a matter for the Environment Court. There are no special reasons for its introduction, and it would unnecessarily prolong the proceedings.

[146] The application to adduce further evidence is dismissed.

Joint appellants' chronology

[147] A further issue which arose in the context of the cultural issues was the joint appellants' chronology.

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of an affidavit and an unsworn affidavit and a declaration all by deponents as to their ancestry of Poutama.

[164] See above at [30]–[33] for questions of law.

[148] The joint appellants and the other parties were unable to reach agreement on the contents of a joint chronology. Each, the joint appellants and the respondents therefore, filed their own chronologies. Both Waka Kotahi and Te Rūnanga objected to the joint appellants' "Chronology" on the grounds that it was merely a vehicle for putting further submissions, evidence and disputed facts before the Court.

[149] I accept that submission. The joint appellants' chronology resembled a narration of events, much of which was based on the material and evidence of Mr Stirling who had prepared the Poutama cultural report. Most of that evidence had been contested at the hearing.[165]

[150] Ngāti Tama submitted that Mr Stirling's evidence had been found wanting under cross-examination before the Court.[166]

[151] The joint appellants' chronology did not assist this Court on an appeal. It is a narrative, contains submissions, evidence and disputed facts.

Te Kāhui Māngai listing of Poutama

[152] Ms Gibbs submitted that Poutama's already established status as an iwi agency in the region had been undermined by a "side wind" in the Environment Court decision. Ms Gibbs accepted that Poutama had had the opportunity to address the matter at the Environment Court hearing, but she said Poutama had been taken by surprise at the wording of the interim decision as it undermined Poutama's status generally.

[153] Section 35A(2) of the Act 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.[167]

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165 The Environment Court noted Ngāti Tama opposed relief by Poutama "in toto": *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [258].

166 Ms Morrison-Shaw pointed to an example in the transcript where Mr Stirling had conceded he had relied on information about an important historic event from Mr Russell Gibbs, a Pākehā, without checking the information with a kaumātua or Ngāti Tama. This was at best unorthodox in her submission.

167 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [345].

[154] The Crown meets this obligation by publishing on its website a list called Te Kāhui Māngai. It is a directory of iwi organisations managed by Te Puni Kōkiri. The list includes Kā Rū o Poutama as an "other iwi authority".[168] The Environment Court noted that the Te Kāhui Māngai directory website cautions that an 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".[169]

[155] The Environment Court said:[170]

> [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 address those issues and provide greater certainty for iwi consultation purposes. We agree that this is relevant context to the interpretation of s 35A.
>
> [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:
>
> > 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.

[156] The Environment Court said that the inclusion of Poutama on Te Kāhui Māngai did not create iwi authority or mana whenua status where no such

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168 At [347].

169 At [347]. In his oral submissions on appeal Mr Harwood, for the councils, also pointed to further material before the Environment Court including the Ministry for the Environment's guidance document which stated that the information on the website had not been vetted by Te Puni Kōkiri and could not be conclusively relied on.

170 At [351]–[352] (footnotes omitted).

status *otherwise* existed. It had found no reliable evidence that the Poutama collective was in fact an iwi or an iwi authority exercising mana whenua in the project area and it concluded, on the evidence, that in terms of the Act Poutama was not tangata whenua. It did not have mana whenua in the project area.[171]

[157] The Environment Court viewed the inclusion of Poutama in the Te Kāhui Māngai registry as neutral. The listing did not confirm that a group is an iwi authority, nor did it disprove it.[172]

[158] Poutama said this amounted to a finding by the Environment Court that Poutama was not an iwi authority and that the finding undermined its standing as an iwi to be consulted by the relevant local authorities under the Act. Poutama says the Environment Court was ultra vires in making that finding.

[159] The Environment Court made no error in its analysis of s 35A. Its determination that Poutama's listing on Te Kāhui Māngai was neutral and not evidence in support of its claims to mana whenua or other cultural connection, was a conclusion open to it on the evidence. The Environment Court did not find that Poutama should not be listed on Te Kāhui Māngai, nor did it make any general findings on Poutama's status. The Court's findings were limited to the issues before it.

[160] Finally, in response to some specific matters raised by the joint appellants under this ground I note:[173]

(a) Contrary to the appellants' assertion, the Environment Court did not conclude that only one iwi grouping could have cultural rights over the land. However, it did find that only Ngāti Tama had the ancestral connections that were required under the Act to establish they were tangata whenua, held mana whenua and exercised kaitiaki in the project area. It was satisfied that neither Poutama nor the Pascoes had established cultural claims in relation to the project land.

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171 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [350].
172 At [349].
173 See above at [93]–[95].

(b) The determination of mana whenua and kaitiakitanga for the purposes of the Act is not determined on assertions of a grouping of Māori. The Environment Court was required to make a factual evaluation on the evidence before it. The Environment Court was not in error in undertaking that exercise and using the rule of reason approach.[174]

(c) The Environment Court made no error of law in its assessment concerning the entry of Poutama in Te Kāhui Māngai as an iwi agency. The weight the Environment Court put on that evidence was a matter for it.

(d) The Environment Court did not err by "failing to refer to the 1882 Native Land Court decision in favour of Poutama, te puna and hapū (and against Ngāti Tama te puna)". It was not required to specifically refer to every piece of evidence before it.

(e) In general terms the Environment Court outlined the evidence it relied on, and why, on cultural issues. It was not required to refer to every piece of evidence put before it nor explain why it accepted or refuted it.[175] It gave its reasons for accepting and/or rejecting the evidence in general terms and gave adequate reasons for its findings.[176]

[161] In addition, Ms Grey, in her oral submissions, referred to this Court's decision in *Klink* as authority for recognition of competing cultural claims.[177] The relevant part of that decision was primarily concerned with whether or not the Environmental Protection Authority (EPA) had followed the advice of its Māori Advisory Committee. Consideration of this advice was a mandatory consideration under the relevant statute.[178] This Court, in an appeal from the EPA decision, found it had not properly done so. That case has no application here.[179]

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174 See the rule of reason approach adopted at [106]–[109].
175 *Bovaird v J*, above n 60, at [74].
176 For instance, the Court summarised why it refuted Ms Pascoe's claims at [318] which I have set out above at [122].
177 *Klink v Environmental Protection Authority* [2019] NZHC 3161, (2019) 21 ELRNZ 493.
178 At [77].
179 At [76].

[162] Following the hearing of this appeal the High Court decision in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* was released (*Ngāti Maru*).[180] That was an appeal from an Environment Court decision which had been the subject of submissions in this appeal.[181] The High Court was dealing with an appeal from the determination of the Environment Court on an agreed question. The Environment Court had reframed the question as follows:[182]

> When addressing the s6(e) RMA [Resource Management Act 1991] requirement to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, does a consent authority including the Environment Court have jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and wording of the resource consent conditions.

[163] The Environment Court had answered this Reframed Question in the affirmative.

[164] The joint appellants said that *Ngāti Maru* supported the recognition of their cultural interests in the project. They reiterated their submission that the Pascoe whānau had cultural connections to the land, and that relationship needed to be recognised in considering any adverse effects. The fact that the Pascoes lived on the land and the fact that Ms Pascoe was Māori, gave rise to the need to recognise the s 6(e) obligations to the Pascoe whānau at some level.

[165] The joint appellants also reiterated their submission that it was up to the affected tribe, that is Poutama, to determine its kaitiaki and who it represents. They submitted that the *Ngāti Maru* case supported the appellants' submission that the Environment Court had been in error in rejecting evidence of Poutama experts on Poutama tikanga and basing "Poutama's customary interests, on evidence from experts called by Waka Kotahi".

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180 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768.

181 *Ngāti Whātua Ōrākei Whaia Maia Ltd v Auckland Council* [2019] NZEnvC 184, (2019) 21 ELRNZ 447.

182 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 180, at [2].

[166] I do not consider that these submissions for the joint appellants are supported by the *Ngāti Maru* decision insofar as they relate to the Poutama/Pascoe whānau cultural claims in relation to the project land for the purposes of this case.

[167] In *Ngāti Maru* the competing Māori groupings were tangata whenua in relation to the relevant site. They had recognised mana whenua. The High Court in *Ngāti Maru* cited with approval the approach adopted in *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council*,[183] and its approach for assessing conflicting evidence from within the Māori system. It specifically referred to the methodology (referred to above as the rule of reason approach) for dealing with divergent claims about iwi and hapū values and traditions which had been adopted by the Environment Court in this case.[184] The High Court noted that one of the key tasks to be undertaken by the Environment Court, in the face of divergent claims, was to identify the mana whenua of the affected land to establish the relevant Māori tribal groupings whose relationships should be considered for the purpose of an application.[185]

[168] In this case the Environment Court undertook that assessment following the approved methodology and concluded Poutama and/or the Pascoe whānau had not established any cultural connections which should be recognised. It found that Poutama were not tangata whenua, nor was Ms Pascoe. In addition, the combination of the various interests claimed by Poutama and Ms Pascoe, together with the longstanding ownership and occupation of the land by the Pascoes, did not establish cultural connections such as to require recognition.

[169] *Ngāti Maru* was concerned with a different issue. It was concerned with divergent claims between tribal groupings based on recognised tangata whenua interests. That does not arise in this case. Insofar as *Ngāti Maru* is relevant to this appeal, it supports the findings of the Environment Court.

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183 *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council*, above n 126.
184 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 180, at [117].
185 At [118].

Conclusion on cultural issues

[170] The Environment Court made no error of law in its assessment of the cultural issues. It considered the evidence before it and made a determination that Ngāti Tama held mana whenua and exercised kaitiakitanga over the project land. It had ample evidence upon which to base its findings. It gave reasons for its conclusions. Having reached those findings, the Environment Court recognised and provided for the relationship of Māori and their ancestral land and resources, and had regard to kaitiakitanga, as well as taking into account the principles of the Treaty of Waitangi.[186]

Appeal Grounds Three and Four: other adverse effects of the project

[171] Ground three is a general ground which alleges failure by the Environment Court to assess, avoid, remedy or mitigate adverse effects, including construction, noise, social, cultural, spiritual, ecological and economic and cumulative effects. It includes points dealing with the haul road and storage yard which was also the separate subject of appeal ground four. Ground four alleges a failure by the Environment Court to consider the relocation of the haul road, failure to consider alternatives and failing to consider avoiding or mitigating the significant harm on the Pascoe whānau and the environment.

[172] Before I move on to consider these more general grounds of appeal, I note that in the Environment Court appeal there had been a considerable focus on why the online route had not been selected over the Mangapepeke Valley route.

[173] In the Environment Court the joint appellants had challenged the assessment and suggested that the online option (the existing road alignment) had not been properly considered.[187]

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[186] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [216]–[390] and [404]–[413].

[187] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [98].

[174] The Environment Court concluded that Waka Kotahi had undertaken a detailed evaluation of the highway route options.[188] There had been at least 13 corridors or routes considered in the process, of which five were shortlisted for evaluation.[189]

[175] The Environment Court noted there was some appeal for the online option for the appellants as that route did not intrude into the Mangapepeke Valley. Nevertheless, the Environment Court noted its task was to assess the adequacy of the process to investigate alternatives, not to decide what route might be more suitable. It also noted there were substantial difficulties involved in construction on an online option.[190]

[176] The online option (also known as option Z) was discounted largely because of the measures required to stabilise a large landslide feature (a feature not present on the selected route) at the northern end of the existing highway. The Environment Court listed in detail the reasons for the rejection of the online option, including the stability analysis that had identified that horizontal movements of up to six metres could occur at the landslide in a design earthquake with further movements also likely under extremely high rainfall. While it explored engineering possibilities to overcome these difficulties, it was not possible.[191] In addition, option Z had high adverse effects on terrestrial ecology.[192] There were also high/very significant cultural issues due to the proximity to the maunga.[193] In addition, the construction of the online option would have been highly disruptive for both the contractor undertaking the works and for road users during the multiyear construction period.[194]

[177] The principal components of the selected route were:[195]

- Construction of 6km of new two-lane road with tie-ins to the existing highway at each end;

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188 At [71].
189 At [83].
190 At [99].
191 At [89].
192 At [86].
193 At [93].
194 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [95].
195 At [92].

- 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 to address the Project's adverse effects on ecological values.

[178] The Environment Court determined that Waka Kotahi had undertaken a "thorough and detailed evaluation of route options before deciding on its preferred option along the Mangapepeke Valley".[196]

[179] This appeal does not challenge the selection of the highway route, but it appeals against the location of the temporary haul road and storage yard required for construction on the selected route.

Haul road and storage yard location

[180] The haul road and storage yard were to be temporary works, in place for the period of construction of the new road.[197]

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196 At [100].
197 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [117].

[181] Particulars under the fourth ground of appeal allege an error of law by the Environment Court in failing to consider avoidance of harm by relocating the haul road and failing to consider alternatives, as well is failing to consider avoiding or mitigating the significant harm on the Pascoe whānau.

[182] The Pascoes were concerned about the haul road's location, the placement of the storage yard and the proximity to their home; the lack of specificity as to the exact alignment of the haul road, and the effects on the Pascoes during the period of construction. Ms Grey said that the haul road and storage yard were a large undertaking and the effects of these temporary works had been lost given the size of the project as a whole. She said they deserved entirely separate consideration.

[183] The appellants said the haul road could have been placed on the other side of the Mangapepeke Stream (on the same side as the proposed road). In addition, they said that the land was swampy and the terrain difficult therefore, as obstacles were encountered, the haul road may need to deviate from the alignment presently shown on the maps.

[184] While the Pascoes' home was not included in the land required for the storage yard and haul road, their house was close to one edge of the storage yard and the proposed haul road route ran past their outbuildings.[198]

[185] One side of the 5000 square metre storage yard would be a few metres from the Pascoes' home.[199] At its closest edge the storage yard would be approximately 6 metres from the Pascoes' house.

[186] The storage yard provided the access to the haul road proper, from the existing road. The haul road would be laid on fabric and the ground reinstated once construction was complete.[200] During the period of construction heavy machinery, trucks and other equipment (including towing equipment) would be stored in the construction yard and move up and down the haul road. It was proposed the

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198 At [117].
199 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [128].
200 At [131] and [133].

movements of the trucks through the storage yard would be at the side of the yard farthest from the Pascoes' home. The yard will be approximately 30 metres wide.

[187] The Environment Court noted:[201]

> [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.
>
> [130] We note Mr Symmans' advice that while the currently identified construction yard site was preferred, there was some flexibility for its configuration to be changed or even relocated.
>
> [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 1 m 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 11 m at the base.
>
> [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.
>
> [133] Mr Milliken said that the Project haul roads would be removed and the ground reinstated once construction was complete.
>
> [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.

[188] It was to be a condition that the haul road and storage yard would be removed, and the ground reinstated at the end of the construction period. The Environment Court said "… at the completion of construction, for all temporary

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[201] At [128]–[134] (footnotes omitted).

construction areas on their land to be reinstated as far as possible to their original condition".[202]

[189] The evidence indicated that the construction traffic entered the haul road from the existing public road through the construction yard. The traffic flow through the storage yard into the haul road which led onto the construction site would be directed using a lay down. The evidence was that exactly how the traffic would be moved through the yard was yet to be determined. However, the evidence indicated that its width would enable the lay down (being the truck passage through the yard to the start of the haul road proper) to be placed at the far side of the yard, so, putting some distance between the Pascoes' house and any construction traffic movements.

[190] The Environment Court had expert evidence before it in relation to the preferred location of the haul road for road construction. The experts noted that the narrow valley and the operational needs of the haul road limited the possible location. The route chosen followed the existing farm track which was on higher and drier ground and so chosen as the reasonable option in view of the terrain. The fabrication of the haul road would be wider and allow for the movement of the trucks and other equipment to the road construction areas. This evidence was before the Court and was tested by the appellants in cross-examination.[203]

[191] The existing farm track was dry and on higher ground, so it was the reasonable choice. The haul road was designed to a level which allowed for the ground supervisor to deal with any obstacles, such as unsuitable ground, as they were encountered. The evidence indicated that the line of the road on the map was to an 80 to 90 per cent certainty. The map showing the haul road was "pretty much" the location of it.

[192] Counsel, in submissions, indicated that the certainty was in fact higher, at a level of 95 per cent. The maps produced showed the final alignment apart from the need for minor adjustments which might be necessary if there were unforeseen difficulties with terrain, or for some other reason, such as a request by the Pascoes, it

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202 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [451].
203 At [131].

was necessary to realign or make a slight deviation.[204] The evidence indicated that an experienced supervisor would walk the land with the Pascoes to talk about the exact position of the road at the time of construction.

[193] The Environment Court recognised the need for flexibility in the design of the haul road and storage yard.[205] It proposed a condition that feedback from the Pascoes would be an input in the placement and the design of the temporary works. The condition envisaged a preliminary design meeting as well as fortnightly meetings on the site between relevant Waka Kotahi staff or contractors and the Pascoes. This would allow for the Pascoes to have input throughout the construction period to deal with matters which arose, such as the maintenance of access and to have input into ecological mitigation.[206] It would also look "at things like what the clearing programme is, where the haul roads will be about to be constructed and any specific concerns about location of haul roads, those kinds of things".[207] In addition, a dedicated telephone line would be provided for the Pascoes to contact Waka Kotahi. This would be in place throughout the period of construction.

[194] Feedback from the Pascoes had already been incorporated in the design, which led to some minor variation in the placement of the road (for instance to avoid their animal cemetery).

[195] These arrangements were incorporated into proposed condition 5A. In addition to that condition, which directly related to the Pascoes, there were other provisions to manage adverse effects during the period of construction. For instance, the Environment Court noted that a Construction Management Environmental Plan (CEMP) was to be put in place.[208] This was designed to "avoid, remedy, mitigate or offset adverse environmental, cultural, and social effects associated with the construction of the Project". The plan had been considered at the council hearing and

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204 One of the conditions was that there would be regular meetings with Waka Kotahi staff and contractors to discuss construction effects to enable them to identify features on their land to be protected, ensure access to their land was maintained and to have inputs for ecological mitigation on their land during the construction phase: *Director-General of Conservation v Taranaki Regional Council,* above n 1, at [450]–[451].

205 At [130].

206 At [445].

207 At [451].

208 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [124].

had had inputs from key stakeholders. The Environment Court noted the draft plans had also been carefully considered and tested at the council hearing, with the final plans submitted to the Court having been approved by the Commissioner.[209]

[196] In addition to the CEMP, the temporary works were assessed as a part of the general project framework. For instance, temporary stream diversions with temporary culverts will be constructed to enable access to some construction areas. These will be managed as part of the Landscape and Environmental Design Framework.[210]

[197] The issue of relocating the storage yard and haul road was specifically considered by the Environment Court. It said:[211]

> [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;
> - The potential for "siting the haul road on the road alignment, therefore reducing damage to one side of the 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 [L][212] - *Conditions*.
>
> [102] We find that the Agency has given adequate consideration to alternative sites, routes or methods for undertaking the work and has met its obligation under s171(1)(b) of the Act.

[198] There was adequate evidence before the Court for it to conclude, as it did, that Waka Kotahi had met its obligations to consider the location of the haul road and the storage yard.

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209 At [126]–[127].
210 At [137].
211 At [98] and [101]–[102] (footnotes omitted).
212 The decision incorrectly referred to section [K] as containing the conditions.

[199] The Environment Court was not required to record findings on every aspect of the evidence before it nor record every part of its reasoning process. This Court in *Contact Energy Ltd v Waikato Regional Council* noted:[213]

> … there is no error of law by failing to articulate all of the reasoning provided it is clear that the Court turned its mind to the relevant statutory provisions and had evidence to justify a conclusion … the depth of reasoning that must be expressed will vary depending on the subject matter, but here it is clear that the Court, faced with conflicting expert opinions, made its decision based on the evidence it heard and its own expertise …

[200] In relation to the Pascoes' concern that the alignment of the haul road might be varied during the project, if there were to be any material changes or a material realignment of the road or project works, including the temporary works, a variation of the consents would be required.[214]

[201] The Environment Court has made no error of law in relation to its consideration of the location of the haul road and storage yards.

Construction effects

[202] The Environment Court noted that the storage yard and the haul road were within a few metres of the Pascoes' house. It referred to a number of specific issues that had been raised on behalf of the Pascoes in relation to the location and design of the haul road.[215] It commented that Waka Kotahi was committed to providing alternative housing for the Pascoes and that proposed designation condition 19(b) offered the alternative of temporary accommodation at another location during construction.[216]

[203] The Court noted conditions were to be imposed for the control of construction effects, including a design to forestall the risk of increased flooding and control of construction stormwater and sediment discharges. In addition, a construction

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213 *Contact Energy Ltd v Waikato Regional Council,* above n 61, at [92].

214 An application for a variation of the consents would be required if the alteration is not minor or has additional environmental effects: *Director-General of Conservation v NZ Transport Agency* [2020] NZEnvC 19, (2020) 21 ELRANZ 620 at [16] and [36]; *Handley v South Taranaki District Council* [2018] NZEnvC 97 at [45]; and *Shell New Zealand Ltd v Porirua City Council* CA 57/05. 19/05/2005 at [7].

215 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [128]–[134].

216 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [132] and [157].

management plan for that purpose (a SCWMP[217]) would be prepared for the yard (referred to as the construction yard) which would be subject to certification by the Regional Council that the plan complied with the conditions of consent.

[204] The Court's conclusions on the construction effects were as follows:[218]

> [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 [Construction Noise Management Plan (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. We agree with Mr Milliken that this noise would be very difficult to mitigate. We go further and find that it would be

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217 Specific Construction Water Management Plan.

218 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [157].

> 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. We understand that for this reason the Pascoes home will [**not**][219] 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.

[205] As is apparent, of the construction effects the Environment Court was of the view that only noise would be difficult to mitigate. The Court took the view that it was most likely that the Pascoes would elect to relocate during the period of construction.[220] However, if they remained in the house during construction, specific noise mitigation would need to be provided in accordance with the construction noise standards. The Court said:[221]

> [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. 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. Having said this, Mr Milliken did agree with the Court that the

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219 It was agreed by all parties that a typographical error had occurred in the sixth bullet point, which should read "…the Pascoes' home will *not* be compulsorily acquired using the Public Works Act processes". It is apparent that the Environment Court was alive to that fact: see *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [452]–[453].

220 That appears to be the indication given by the Pascoes.

221 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [143] (footnotes omitted).

> noise would be very difficult to mitigate and that this was why the offer had been made to relocate the Pascoes.

[206] Therefore, if the Pasoces did decide to remain in the house during the construction period it may be necessary to hear further from the Pascoes. It said:[222]

> [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 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.

[207] The Court had before it, and understood, the alternative accommodation options proposed both through designation conditions 19B (alternative accommodation to be provided by Waka Kotahi during construction) and 5A which offered an additional option for the Pascoes to sell parts of their farm. These were proposed mitigation conditions. The Environment Court had proceeded on the basis that the Pascoes would take alternative accommodation "as they had indicated they would". It was open to the Court to proceed on that basis however, it expressly left open the option to further consider mitigation in relation to construction noise if the Pascoes reconsidered.

[208] As Waka Kotahi submitted it was, in a Resource Management Act sense, impossible to entirely mitigate the effects on the Pascoes. However, they were offered a range of measures set out in the proposed conditions to ensure "to the extent possible" the effects were mitigated.[223]

[209] The Court recognised there would be residual effects. However, it was required to balance all the factors involved and reach a conclusion on whether the construction, operational, ecological, amenity, social and landscape effects on the Pascoes were so "significant that the NOR should be cancelled and the consents refused".[224] The Environment Court had considered each of the alleged effects in the evidence before it and had regard to the findings of the Commissioner.[225]

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222 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [454].

223 At [498]. Matters of compensation for the Pascoes were not for the Environment Court but were to be dealt with under the Public Works Act 1981 process.

224 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [43].

225 At [455]–[456].

[210] The Court referred to the fact that the effects raised by the Pascoes were not of a scale such that the project consent and approval should be declined subject to its final determinations in relation to the cultural and ecological effects.

[211] The Environment Court did specifically consider both the location of the temporary haul road and storage yard and the construction effects on the Pascoes given the location. It referred to the construction management plans, which were to be prepared or were before it, to deal with the construction effects. The Court was not required to list in its decision every effect that might result from the construction, but the Court had turned its mind to the effects identified and specifically addressed a number of the construction effects, including those raised by the Pascoes, such as the possibility of flooding and drainage issues. It raised the topic of noise and has left it open to the Pascoes to be heard further on that topic if they decide to remain in the house.

[212] The Court was satisfied that the conditions it proposed to impose would avoid, remedy or mitigate the effects of the construction given the location of the temporary works to the extent possible, with the exception of noise. It referred to the conditions which specifically dealt with the Pascoes' position (which were proposed as being in addition to the general conditions concerning construction management and design) as follows:[226]

> [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.
>
> …
>
> [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:

[226] At [445] and [447]–[453] (footnotes omitted).

- 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 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.

[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.

[213] The requirements set out in condition 5A provided the Pascoes with a dedicated line to Waka Kotahi and ongoing consultation with it on all matters, including construction and ecological issues. While the Pascoes were not kaitiaki, the proposals allowed for their continued role in the stewardship of the land.

[214] The Environment Court noted that the measures contained in the proposed conditions were to apply at each phase, including the preconstruction and construction phases.[227]

[215] Ms Grey, in her submissions, said the ecological effects of the haul road and storage yard had not been properly considered. However, the package included regular meetings with the Pascoes and envisage the Pascoes would have continuing input into ecological mitigation on their land.[228]

[216] The ecological effects and other general effects had been dealt with generally in the consideration of the project as a whole.[229] The joint appellants did not call any expert evidence on the ecological effects but the experts called were cross-examined by the appellants. The evidence indicated that the haul road location in general terms avoided ecologically sensitive/significant areas.

Conclusion on temporary works: haul road and storage yard

[217] In conclusion, the conditions for mitigation satisfied the Court in terms of the avoidance, remedying or mitigation to the extent possible.[230] These recognised the Pascoes' stewardship role over the land,[231] including arrangements for a liaison person to be available to Mr and Mrs Pascoe 24 hours a day/seven days a week to respond to matters of concern regarding any aspect of the works carried out on or adjacent to the Pascoes' land;[232] and a process to ensure that features of particular importance or value to the Pascoes were recorded and any damage to them avoided or minimised;[233] involvement by the Pascoes in ecological mitigation including restoration or landscape

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227 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [449].

228 At [450]–[453].

229 The summary of findings on the general effects of the project are set out at part N: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [457]–[486].

230 A memorandum of the Environment Court dated 17 July 2020 was produced. This refers to a memorandum of counsel for the Transport Agency providing updated plans dated 16 July 2020. The Environment Court proposes to seek comments from all parties on the proposed final conditions.

231 In general terms the relevant conditions were before the Environment Court when it made its interim decision. Subsequently, amendments to the storage yard not relevant to this appeal have been sought.

232 This also addresses the suggestion by the Environment Court of consistent points of contact: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [113].

233 At [449].

planting;[234] reinstatement of the temporary construction works area; and a list of mitigation measures to deal with the operational effects. These conditions were in addition to other measures including $55,000 offered to the Pascoes by Waka Kotahi for planting on their land.[235]

[218] Ground three of the Notice of Appeal alleged, in general terms, the failure of the Environment Court to assess, avoid, remedy or mitigate adverse effects, including construction, noise, social, cultural, spiritual, ecological and economic and cumulative effects. I have earlier dealt with the Environment Court's consideration of the construction, noise, and cultural effects, as well as the location of the haul road and storage yard. Under this ground Ms Grey addressed the lack of representation of the Pascoes in the process.

[219] Ms Grey submitted that the Pascoes had been overwhelmed by the volume of material concerning the project. In addition, she said they had not been legally represented, in particular, for the Environment Court hearing.

[220] The Environment Court was alive to this and commented that it had the:[236]

> … 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.

[221] The Environment Court noted the Pascoes' view that they should have been resourced for all aspects of the project.[237] However, the Court noted that the Pascoes had chosen how to participate and who should represent them. They had dispensed with funded legal representation in their negotiations with Waka Kotahi. The Court was alert to the fact that the Pascoes' interests might have been compromised by their choice of representative.

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234 At [451].

235 At [197]. The Environment Court offered this on an *Augier* basis (an enforceable undertaking): Derek Nolan *Environmental and Resource Management Law* (6th ed, LexisNexis, Wellington, 2018) at [18.35].

236 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [108].

237 At [110].

[222] The Court noted the fact that the Poutama representatives were not legally trained and their advocacy on behalf of the Pascoes had complicated matters due to collateral objectives.[238] The Court expressed its concerns as follows:[239]

> [270] ... 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.
>
> [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 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.
>
> [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.

[223] The Environment Court noted that the Pascoes had had the benefit of a legal representative for the land acquisition and compensation process whose costs were met by Waka Kotahi. That lawyer had had to step away due to her concerns about the influence of Mr Gibbs over the Pascoes. The Court said:[240]

> [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

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238 The Environment Court also noted that Mr Gibbs, for Poutama, had expressed support for the chosen road placement rather than alternatives closer to the coast. *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [271]–[272].

239 At [270]–[273] (footnotes omitted).

240 At [285]–[287] and [306]–[307] (footnotes omitted).

negotiation of the land acquisition and compensation agreement. Her costs were met by the Agency.

[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.

…

[306] … After setting out the background to her original retainer, she said:

> 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.

[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.

[224] Waka Kotahi had funded Poutama for the preparation of the cultural values assessment by Mr Stirling.[241] The expert evidence of Mr Stirling was led by the appellants in support of both Poutama and Ms Pascoe's claims for recognition of their cultural standing in relation to the land.

[225] Evidence was given by the project manager, Mr Napier, who had visited the Pascoes' property approximately 20 times between March 2016 and the end of June 2018.[242]

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241 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [289].
242 At [288].

[226] The Environment Court was cognisant of the fact that the process was overwhelming for the Pascoes but nevertheless was satisfied with the consultation involved. It noted:[243]

> [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.
>
> …
>
> [110] One of the Pascoes' major issues was the fact that the Agency did not resource them so that they 'could effectively participate'. 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.
>
> …
>
> [113] … 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.

[227] The Environment Court observed that there was no statutory obligation on a requiring authority to consult but that consultation was the best practice.[244] The Court was satisfied that there had been appropriate engagement and consultation with the Pascoes (and Poutama) in the circumstances. It noted the consultation "was detailed and extensive"[245] and it found that Waka Kotahi's consultation with Poutama and the Pascoes was adequate.[246] It acknowledged that for the Pascoes the complexities, combined with the fear and upset at losing a significant part of their land and home, made the process of engaging with Waka Kotahi extremely difficult.[247] The Environment Court noted that the relationship with Waka Kotahi and the interests of the Pascoes had not been assisted by their chosen advocates.[248]

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243 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [108], [110] and [113] (footnotes omitted).
244 At [105].
245 At [460].
246 At [107].
247 At [108].
248 At [112].

[228] At the Environment Court hearing the Pascoes participated fully, gave evidence and made submissions, as well as questioning witnesses through their advocates (Mr and Mrs Gibbs). The Environment Court specifically referred to the extensive questioning from Ms Gibbs, in particular, about the potential for adverse ecological effects from the project on the Pascoes' land.[249]

[229] The Environment Court regularly has parties appearing before it who represent themselves or are assisted by non-lawyer advocates. It is experienced at conducting the hearings involving self-represented litigants and adapts its processes to accommodate a more inquisitorial and less formal approach. An example of the Court's hands-on approach is apparent from the transcript in relation to the Pascoes' concerns about the effects of construction and how they might be appropriately managed. The following exchange was recorded between a member of the court and Ms Pascoe:

> Q. ... if we look at 5(a)(i) on the list, there's the discussion is fortnightly with the construction manager on construction effects and mitigation for upcoming construction activities including for a six week period ahead of you. So would that be an opportunity to address some of those concerns you were worried about?
>
> A. Some but not all because as works progress, things change.
>
> Q. So if we move down to (ii) then, it's details of substantive design or construction method changes, so where things change, so would that help with addressing the changes with the construction manager?
>
> A. I still feel that we need to be there to address the issues as they arrive…
>
> Q. Just tell us what you mean when you say "participate", you said it two or three times?
>
> A. To be there to actually be on the ground, to try to have an input into where things are going to be or, you know, like in planting and that sort of thing.
>
> Q. Well, we've asked NZTA to come back with its mitigation and offset proposals. I need to bear that in mind and I imagine – I understand now what you're saying and I think that's probably what's envisaged.

[230] The participation sought by Ms Pascoe was captured in the proposed Condition 5A referred to above. That proposal also responded to the appellants'

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[249] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [188].

submission that Waka Kotahi should have had a framework and process for their ongoing engagement.[250] The conditions provided for a dedicated liaison person for the Pascoes as well as site visits for them and a workshop with the technical experts, as well as assistance and support to ensure the Pascoes could effectively participate. For instance, by the provision of internet connection and IT support, as well as various payments, for example, for their time to attend a workshop.

[231] No error of law is apparent in relation to the issues raised concerning the amount of material involved in the project or the participation afforded to the Pascoes. No issues of natural justice arise.

Loss of part of transcript

[232] Late in the appeal hearing, in the course of her reply Ms Grey mentioned that part of the transcript of the Environment Court hearing, which contained the oral evidence of Mr Pascoe, had not been transcribed. She said that may have resulted in the Court not being fully aware of the effects on the Pascoes.[251] It appears there had been difficulties with the sound quality earlier in the hearing.[252] Ms Grey submitted that the lack of the transcript of Mr Pascoe's evidence to assist the Court in its deliberations meant that the members of the Court were deprived of information which showed the full extent of the effects of the project on the Pascoes.

[233] The incomplete transcript was referred to in a footnote to the decision referring to comments made by Mr Pascoe that the Court had captured in the members' notes.[253] It said:

> [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

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250 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [110].

251 This point was not raised in the Notice of Appeal.

252 There is no reason given for the gap in the transcript.

253 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at fn 63 of [112]. Footnote 63 at [112]. A note at the beginning of the notes of evidence that the notes had been transcribed from a poor quality sound recording indicates that the loss of parts of the transcript was because of technical difficulties.

> 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.
>
> [63] Notes taken at hearing - Transcript incomplete.

[234] The transcript is an aid for the Court. It is not the evidence. The issue raised by Ms Grey is that the Court, in the absence of the transcript, might not have appreciated the significance of the effects on the Pascoes. It is apparent from the judgment that is not the case.

[235] It is apparent from the decision that the Court listened to and made notes where necessary, in the course of Mr Pascoe's evidence. The Court was alive to the effects of the project on the Pascoes as is evident from its comments, which I have set out above.[254]

[236] The decision of the Environment Court was based on a considerable amount of expert evidence and input. Along the way adjustments were made to the proposals to deal with various effects that would be caused by the project and in response to concerns expressed by the Pascoes. An example was the new proposed conditions developed by Waka Kotahi as far as possible to deal with the concerns raised by the Pascoes in the course of the hearing.[255]

[237] In summary, the Environment Court was very much alive to the effects on the Pascoes and their land of the project a as whole, as well as, in particular, the haul road and storage yard. It recorded that Waka Kotahi had proposed additional measures to be considered in conditions and would continue to take steps to ensure the concerns of the Pascoes were taken into account in the ongoing process of construction.[256]

Ecological and related adverse effects

[238] In her submissions Ms Grey submitted that the Pascoes had carefully nurtured the land and looked after, among other things, its ecology. The evidence before the Environment Court was that the relevant project land farmed by the Pascoes was of

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254 See above at [122]. See also *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [108], [110] and [468].

255 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [157] and [444].

256 At [445] and [446].

relatively low quality ecologically in the main. Ms Grey said that while that may be the case from a technical ecological point of view, nevertheless, the Pascoes had looked after the land and it was a special place for them on which they hunted and gathered food.

[239] The natural character, landscape, and visual effects on the Pascoes and their land were considered. These were entwined with the ecological and spiritual qualities and were specifically referred to by the Court, as I have set out above.[257]

[240] In addition, the Environment Court heard expert evidence on many aspects of ecology including pest management, wildlife including kiwi, as well as the methodology of a proposed restoration package. The importance of Ngāti Tama's ongoing involvement in any restoration package was emphasised.[258] Mr MacGibbon, the ecological expert for Waka Kotahi, was subjected to extensive questioning on the adverse ecological effects from the project on the Pascoes' land.[259]

[241] In conclusion the Court said:[260]

> [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.

[242] There is no error of law apparent in relation to the consideration of the ecological and related adverse effects by the Environment Court.

Other effects on the Pascoes

[243] As to the social effects on the Pascoes, the Court accepted the findings of Ms McBeth, the planning expert who gave evidence on behalf of the New Plymouth District Council. It said:[261]

> ***Social effects – the Pascoes***

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257 See above at [25]; referring to *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [161]–[167].
258 At [174].
259 At [188].
260 At [469].
261 At [158]–[159].

> [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". 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". In her statement following the s 42A report, Ms McBeth had formed the 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.
>
> [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.

[244] The Court was entitled to cross refer and rely on Ms McBeth's s 42A report to reach that conclusion.[262] The Environment Court then went on to consider the remaining social effects on the Pascoes and reached the conclusion that while the project would have significant adverse effects on the Pascoes and their land and the adverse social impact would be severe, it considered that proposed condition 5A would mitigate those effects to the extent possible if they accepted the offer to buy their house and the land on which it sits as well as the other land that was required for the project.[263]

[245] Effects will always be unavoidable for large-scale, linear projects and the Act does not purport to be a "no effects statute."[264] It was for the Environment Court to consider those effects and reach a conclusion on the basis of the evidence whether these were sufficiently avoided, remedied or mitigated, in the context of the project applications as a whole. It did so.

Present negotiations

[246] The Pascoes noted that there would be significant effects on them if they stayed in the house during the construction period. Options were available for relocating (to an alternative suitable property to be located and paid for by Waka Kotahi) or

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262 Resource Management Act 1991, s 113(3)(a)(ii).

263 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [468].

264 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* (number 2) [2013] NZHC 1346, [2013] NZRMA 293 at [52].

Waka Kotahi building the Pascoes an alternative house up to a set value. Ms Grey said these came with other strings that the Pascoes found unattractive.

[247] The Court is not privy to the details of the negotiations between the Pascoes and Waka Kotahi, nor did Waka Kotahi have the opportunity to comment on them. In any event, these negotiations and the agreements on compensation are matters outside the scope of this appeal.

[248] The Environment Court has left the door open for further consideration of the noise in the event the Pascoes do remain in the house during construction.

New Zealand Bill of Rights (NZBORA)

[249] Under the third ground of appeal was an allegation of breaches of the New Zealand Bill of Rights Act (NZBORA) in respect of the Pascoes. The particulars referred to the implications of the removal of rights enjoyed by land owners and the principles of natural justice and fairness in breach of s 27 (which states that every person has the right to natural justice) and s 28 (which states that other rights and freedom are not abrogated or restricted only by reason of not being included in NZBORA).

[250] These were not matters raised in the Environment Court, so unsurprisingly it did not refer to them in its decision. Even if in general terms this particular did properly raise a question of law that it was appropriate to deal with in this appeal, there is nothing in it. The Pascoes were given ample opportunity to be heard and test the evidence before the Commissioner as well as before the Environment Court. I have referred to their participation in the Environment Court hearing in some detail above.[265] There was no breach of natural justice or unfairness in the circumstances.

[251] The right to enjoy one's land is necessarily subject to lawful processes which govern and limit those rights. The effect of s 4 of NZBORA is that no court in relation to any enactment shall decline to apply any provision of an enactment by reason only that the provision is inconsistent with any provision of NZBORA. This applies to

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[265] See above at [219]–[231].

provisions of the Resource Management Act. In this case the provisions of the Act have been applied to reach decisions as to the resource consents and the approval of the Notice of Requirement. No NZBORA implications arise here.[266]

Summary of conclusions

[252] I have dealt with the specific points that were pursued on submissions. They raised no questions of law.

[253] A broad assertion was made in the third ground of appeal that the Environment Court had failed to assess a range of adverse effects, separately and/or cumulatively. That broad assertion raises no questions of law but rather invites this Court to embark on an unfocused assessment of the factual matters and evidence before the Environment Court. That is not the function of this Court on an appeal.

[254] The joint appellants have not established any questions of law under the grounds of appeal:

Ground One: Error of law in making an interim decision:

(a) The Environment Court did not err in making an interim decision rather than a final decision pending agreement on the land purchase and Further Mitigation Agreement between Ngāti Tama and Waka Kotahi. Ngāti Tama maintains a relationship with its ancestral land and is mana whenua and kaitiaki in the project area. This required special provision and recognition under the Act and it was open to the Environment Court to issue an interim judgment pending finalisation of the agreement.

(b) The Environment Court had all necessary material before it in order to issue an interim decision and make final determinations in relation to the relevant issues.

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[266] *Fullers Group Ltd v Auckland Regional Council* HC Auckland M1077/98, 21 August 1998 at [14]; affirmed by the Court of Appeal in *Fullers Group Ltd v Auckland Regional Council* [1999] NZRMA 439 (CA).

(c) The adverse effects of the project on Mr and Mrs Pascoe and their land were properly considered and taken into account of in terms of the requirements of the requirements of the Act. The Environment Court was satisfied with the proposed conditions to avoid, remedy, or mitigate the effects, to the extent possible.

(d) It did not err in law by not requiring arrangements for land acquisition and compensation between the Pascoes and Waka Kotahi to be dealt with independently.

Ground Two: Customary and cultural rights, tikanga, mana whenua and kaitiakitanga

(a) The Court undertook an assessment of the cultural issues arising from the project as required under the Act. It concluded on evidence before it that Ngāti Tama were tangata whenua, held mana whenua and were entitled to exercise kaitiakitanga in relation to the project land. It had adequate evidence on which to base that conclusion and gave reasons for its conclusion.

(b) It concluded on the evidence Ms Pascoe could not establish whakapapa or cultural connections to be recognised under the Act. Nor did the fact that she was Māori give her the cultural connection to the land as required under the Act.

(c) The Environment Court properly considered the cultural issues as required under the Act, particularly as referred to in s 6(e) (provide for the relationship with ancestral lands); s 7(a)(aa) (have regard to kaitiakitanga) and s 8 (take into account the principles of the Treaty of Waitangi).

(d) It did not act in an ultra vires manner when it concluded that Poutama's entry as an "iwi authority" in the Te Kāhui Māngai register maintained by Te Puni Kōkiri was neutral in the context of its assessment of the evidence.

Ground Three: Failure to assess, avoid, remedy or mitigate adverse effects, including construction, noise, social, cultural, spiritual, ecological and economic and cumulative effects

(a) The Environment Court heard a considerable amount of evidence from various experts in the specialist areas. No errors in its consideration and evaluation of that evidence have been pointed to or are apparent.

(b) It concluded that the effects of the project on the Pascoes and their land was significant but that the conditions proposed would mitigate the effects to the extent possible in the circumstances. It had adequate evidence on which to base that determination.

(c) The Pascoes raised no new matters in this Court that had not been properly dealt with by the Environment Court.

(d) The Environment Court took into account the cumulative effects of the project on the Pascoes and their land as all relevant effects and in particular those raised by Mr and Mrs Pascoe before the Environment Court.

(e) No breach of NZBORA has been established.

Ground Four: Error of law in failing to consider avoidance of harm by relocating the haul road

(a) The location of the haul road and storage area, which are temporary works for the period of construction, was the subject of considerable attention at the Environment Court hearing. The Environment Court considered the effects of the haul road and its location as well as the nature of the terrain including possible flooding.

(b) It made no error in its assessment of the proposal and the granting of consent on the basis of the proposal as to the location and construction of the temporary haul road and storage yard and allowing some flexibility in the management of their construction.

[255] Mr and Mrs Pascoe may not accept the Environment Court's findings as to fact, but no errors of law have been established. It set out in its decision the matters which it was required to under s 133 of the Act and covered the main issues that were in contention, summarised the evidence heard and set out its main findings on the principal issues.

[256] The appellants have not established a threshold question of law required in this appeal.[267] The appeal is dismissed.

Further Memoranda

[257] At the conclusion of the appeal hearing I requested the parties to identify the most useful maps of the area involved. The Environment Court had included in its decision an elevation model looking from the south to the north along the alignment, which was useful.[268]

[258] The parties were unable to agree on the appropriate maps, therefore, I do not intend using any of the maps provided in the memoranda.

[259] I had also asked for a summary of references to the areas of land in question, which was supplied as a table by Waka Kotahi, the Councils and Ngāti Tama in their joint memorandum. No issue is taken by the joint appellants with the accuracy of that information, which is largely cross-referenced to the evidence.

[260] Waka Kotahi, Ngāti Tama and the two councils on the one hand, and the joint appellants on the other, each provided separate memoranda. The memoranda of the joint appellants raised a number of matters of evidence and submission, in particular, concerning negotiations and details about the siting of various works and arrangements made for managing matters such as the septic tank for the Pascoes' homestead. These matters are outside the ambit of this appeal as I have noted earlier.

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267 *Bryson*, above n 44.

268 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* HC New Plymouth CIV-2020-443-5, 28 August 2020.

[261] The joint appellants suggested that changes may be made by Waka Kotahi to the haul road route following the Environment Court hearing and this appeal. If Waka Kotahi proposes making any material changes that are not covered by the resource consents or are outside the designation under the approved Notice of Requirement, Waka Kotahi would be required to apply to the Environment Court for variations. That is also a matter outside this appeal.[269]

Costs

[262] If the parties are unable to agree on costs, any application together with supporting memorandum should be filed and served within five working days of the date of this judgment. Any response is to be filed by memorandum within a further five working days and any reply within a further three working days.

Grice J

Solicitors:
Sue Grey Lawyer, Nelson for the appellants
Simpson Grierson, Wellington for the first and second respondents
Buddle Findlay, Wellington for the third respondent
Atkins Holm Majurey, Auckland for Te Rūnanga o Ngāti Tama Trust
Tu Pono Legal Limited, Rotorua for Te Korowai Tiaki o te Hauāuru Incorporated

[269] In relation to amendments to the Notice of Requirement, see *Director-General of Conservation v New Zealand Transport Agency*, above n 214, at [16] and [26]. In relation to the scope and changes to resource consent applications, see *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [29]; *Collins v Northland Regional Council* [2013] NZHC 3039 at [27]; and *Sustainable Ventures Limited v Tasman District Council* [2012] NZEnvC 235 at [32].

Attachment 1: Summary of grounds of appeal and particulars

Appeal Ground One: error of law in making an interim decision

[1] The particulars under this ground were that the Environment Court erred in making an interim decision as:

(a) There was no certainty that Waka Kotahi would acquire the Te Rūnanga land.

(b) The Court failed to treat the Pascoes the same as Ngāti Tama in that their land had not been acquired and would require a side agreement to deal with the significant adverse effects if the project proceeded.

(c) Waka Kotahi had not obtained from the Department of Conservation an authority under s 53 of the Wildlife Act "to hunt or kill" kiwi and other native wildlife. Such an authority would be required to enable the relocation of kiwi and other native wildlife.

(d) The Environment Court had incomplete information and so should not have made an interim decision.

(e) The decision on the project was not timely as required by the Resource Management Act.

Appeal Ground Two: customary and cultural rights, tikanga, mana whenua and kaitiaki.

[2] In summary, the particulars under this ground are that the Environment Court erred in law in:

(a) Assuming that only one iwi (Ngāti Tama) could have mana whenua, kaitiakitanga or tikanga or other cultural rights over land in breach of s 6 which requires the recognition and provision for the relationship of Māori with their cultural traditions and their ancestral lands, water sites and other taonga.

(b) Not recognising that determination of mana whenua and kaitiakitanga over any Rohe is a matter for Māori themselves. In the case of Poutama, as it is recorded by Te Kāhui Māngai (a list of iwi maintained by Te Puni Kōkiri) which listed ngā hapū o Poutama for the purposes of consultation on Resource Management Act issues.

(c) Misstating the appellant's case which was "that Poutama including Debbie Pascoe's ancestral connection is to the Poutama tribe and Rohe as a whole, including to the wider project area, and the Pascoe Whānau land in the Mangapepeke valley".

Appeal Grounds Three and Four: relating to other effects of the project

[3] Appeal Ground Three

(a) The haul road and storage areas close to the Pacoes' home will produce effects which are too adverse for the Pascoe whānau to live on to live in their home during the four year plus construction period.

(b) Failing to consider all of the individual effects or the cumulative effects on Poutama, including the Pascoe whānau, and how each of these effects would be avoided, remedied or mitigated individually and cumulatively.

(c) The Court failed to consider the significant effects (as defined by s 3) including social, amenity, noise, economic, health and safety, their physical, cultural and spiritual relationship with their lifestyle and land and cumulative effects during construction and after construction.

(d) The Court erred in law by making a determination without evidence that an agreement was in place to provide the alternative accommodation that the Court had identified was required or without assessing all the individual and cumulative effects of the project on the Poutama, including the Pascoe whānau, and how these would be avoided, remedied or mitigated.

(e) The decision was conditional on a future agreement with Ngāti Tama but not conditional on any agreement with the Pascoes.

(f) Failure to consider the New Zealand Bill of Rights implication, implications of the removal of rights enjoyed by landowners, the principles of natural justice and fairness in breach of ss 27 and 28 of the New Zealand Bill of Rights and interference with other rights and freedoms.

[4] Appeal Ground Four

(a) Failing to consider Poutama's request for relocation of the haul road to avoid or mitigate the effects on Poutama, including the Pascoe whānau and the wider environment.

(b) Failing to consider alternatives.

(c) Failing to consider avoiding or mitigating the significant harm on the Pascoe whānau and the environment. Insufficient evidence to assess the effects of the haul road.

(d) Failing to consider relocation of the haul road to the north side of the streams and wetlands.

Decision No. W 28/2000

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal and purported appeal under ss.120 and 174 of the Act

AND

IN THE MATTER of notices of requirement to designate land for State Highway purposes

BETWEEN **QUAY PROPERTY MANAGEMENT LIMITED**

(RMA 200/94 and RMA 613/98)

Appellant

AND **TRANSIT NEW ZEALAND**

First Respondent

AND **NAPIER CITY COUNCIL**

Second Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge S E Kenderdine presiding
Environment Commissioner R Bishop
Environment Commissioner J D Rowan

HEARING at NAPIER on the 26th, 27th and 28th days of April and 5th, 6th, 7th and 8th days of July 1999. Final documentation completed 3 February 2000

COUNSEL/APPEARANCES

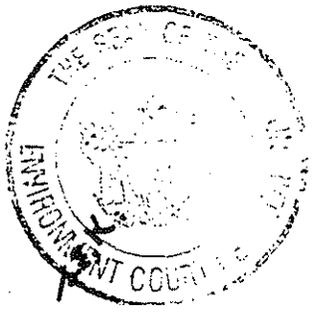
Mr S Ryan for Quay Property Management Limited and Westshore Motor Camp Partnership

Mr M E J MacFarlane for Transit New Zealand

Mr J Lawson for Napier City Council

APPLICATION FOR A REQUIREMENT TO DESIGNATE LAND FOR THE NAPIER NORTHERN MOTORWAY EXTENSION

INTERIM DECISION OF THE ENVIRONMENT COURT



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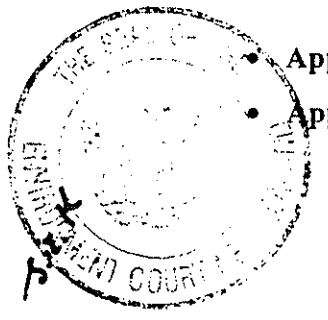

- **Appendix 5 – Access to the Reserve. Sketch Attached to Additional Evidence of Mr Tonks**
- **Appendix 6 – Predicted Traffic Noise Contour Levels with 2 metre Noise Barrier Fence and Chip Seal Surface. Taken from Joint Memorandum of Two Noise Experts**
- **Appendix 7 – Predicted Traffic Noise Contour Levels with 2 metre Noise Barrier Fence and Friction Course. Taken from Joint Memorandum of Two Noise Experts**

Schedule A - Notice of Requirement – Northern Motorway Extension Recommendation of Napier City Council 2.2.94.

Schedule B - Confirmation of Alteration to the Designation Transit New Zealand 22.3.94.

Introduction

1. Transit New Zealand Limited (**Transit**) is a statutory agent established under the Transit Act 1989. It was originally established with the primary focus on the provision of an integrated and safe roading network. An amendment to the Transit Act in 1996 has resulted in Transit's role being focussed on its state highway activities. Section 5 of the Transit Act now states that the principal objective of Transit is "**To operate a safe and efficient State highway system.**"

2. Transit is a requiring authority pursuant to s.167 of the Resource Management Act 1991 (**RMA**). It had a number of designations that had been carried forward from old district schemes when, in July 1993 on request by the Napier City Council (**NCC**), Transit gave "provisional" notice of its requirement for an alteration to the designation of the proposed motorway between Hawkes Bay Airport and Taradale Road (the Napier northern motorway extension) in the Napier City Council's Transitional Plan (the transitional plan). State Highway 2 (**SH2**) is the primary national strategic highway route - combining motorway, rural highway and urban road over its length. Transit then issued another notice of requirement in August 1993 which sought an alteration to its existing designation by realigning the designation to what is known as alignment option 2. The notification was undertaken jointly by NCC with the Hawkes Bay Regional Council (**HBRC**) which was processing the discharge and coastal consents associated with the alteration to the designation. It was decided that the submission process for the requirement and the consent processing would run concurrently. A joint hearing was held and the designation confirmed and resource consents granted including coastal permits for coastal marine issues (see **Appendix 1** for general Site Plan 1 attached to this decision, taken from the Opus Scheme Assessment Report Revised 1998).[1]

3. Appeal RMA 200/94 by Quay Property Management Limited (QPM) and Others (Mr and Mrs Milne, the then operators of the Westshore Motorcamp) arises from the decision of Transit to accept the recommendation of the Hearing Commissioners acting under delegated authority for NCC to confirm the requirement for an alteration of its designation to alignment 2. Transit's decision accepted in part the Commissioners' recommended conditions and this decision is now the subject of the relevant appeal and decision of this Court.

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[1] Appendix 1 – Introduced into evidence late in the proceedings because it had inadvertently been omitted from the Record of Documents.

4. Appeal RMA 613/98 by the same parties made in the same terms on the same issues related to the inclusion of the alteration to the existing designation for the motorway in the City of Napier's Ahuriri Section of the Proposed Plan (proposed Ahuri Section of the plan). There is some question as to the validity of inclusion by NCC of this designation. This issue is referred to elsewhere.

5. We record here that at a callover of Napier cases, the Milnes sought and were granted leave to withdraw from appeals RMA 101/94 and RMA 102/94 which related to the Hawkes Bay Regional Council's recommendation with regard to the coastal permit and land use content to reclaim the wetlands.

Transit's Proposal

6. Consideration and development of the completion of the Napier-Hastings northern motorway extension has spanned a number of decades. A designation was first set in place in the 1970s, the route of which ran through the middle of Ahuriri Estuary. At that time there was not the same appreciation as there is now for the importance of wetland habitats in New Zealand and there was little regard for the effects which this might have on the estuary biota or other values. This particularly affected the Ahuriri Southern Marsh as it was completely bisected by the designation.

7. It became apparent to Transit that there was a need to look at other alternatives to the designated alignment and to find a route which would not have the same severe impact on the Ahuriri Estuary's Southern Marsh (see **Appendix 2** attached to this decision showing alternative alignments for the motorway included as Fig 1 in Scheme Assessment Report by Works Consultancy Services).[2]

8. In a notice of requirement for an alteration to an existing designation, dated 20 August 1993, Transit proposed a realignment of the designation. The proposed alignment route, known as "alignment 2", is owned by the Crown, or Transit New Zealand. This comprises a 5.5 kilometre stretch of the Napier-Hastings motorway, forming a 2-lane arterial route between Hawkes Bay Airport and Taradale Road. The proposed motorway forms an arterial link that provides alternative access to the northern outlet of Napier City and a by-pass of Taradale Road, Hyderabad Road, Pandora Road and Meeanee Quay. It is intended that the proposed

[2] Appendix 2 – Napier-Hastings Motorway: Hawke's Bay Airport to Taradale Road Section: Alternative Alignments, Record of Documents – Volume 3, Document 27, page 636.

alignment will afford a complete by-pass of Napier City by the 2-lane arterial, which ultimately is intended to become part of the Napier-Hastings motorway with the main benefits being derived from the separation of through-traffic from local traffic in Napier City.

9. The further reasons why the alteration of the designation was needed were set out in Transit's August 1993 notice of requirement. It was stated the completion of the Napier-Hastings motorway extension would result in significant benefits for both Napier City and the wider Hawkes Bay. For Napier City, this will mean direct improvements in the "level of service" on a number of existing local roads, including Georges Drive, Meeanee Quay, Hyderabad Road, Pandora Road, Taradale Road, Avondale Road, Westminster Avenue and others. It was considered there will also be measurable reductions in time travel, vehicle fuel consumption and reductions in carbon dioxide emissions.

10. It is stated that the result will be a reduction in the amount of conflict between traffic which is servicing local needs and traffic which is travelling between major urban destinations. As an example, the latest projections are that by the 2012 design year the road will be taking about 46% of the 21,000 vehicles per day that would otherwise be diverted via Meeanee Quay. Transit considers that if the motorway is not built by 2012, 21,000 vehicles per day would be using Meeanee Quay. If it is built, 9,900 vehicles per day would be split between the motorway and 11,5000 vehicles per day on Meeanee Quay.

11. As part of its investigations into the proposal Transit undertook a Scheme Assessment Report in 1992. This recorded that alignment 2 bore a benefit/ cost ratio of 5.09. This was found to be a mistake when there had been a revised modelling by Mr Graham Bellis in the Bellis Report.[3] Recalculations undertaken by Opus in 1999 revealed a benefit/ cost ratio of 3.6 for alignment 2[4] and 3.2 for alignment 2A.

12. It was also considered the realigned designation will substantially reduce the direct impacts of the motorway on the Ahuriri environment and in particular on the Southern Marsh and its wildlife.

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[3] **Hawkes Bay Regional Transportation Study, Heretaunga Plains Section Summary Report**, prepared for the Hawkes Bay Regional Council by Graeme Bellis Transport Planning, March 1996.

[4] See evidence-in-chief of Mr Butcher for Transit, para 6.2, page 28.

13. The alignment crosses the Ahuriri Estuary and misses an area known as North Pond, with some encroachment into the high water area of the pond which is about 20 square metres. The proposed motorway will avoid the Westshore Lagoon, it being at least 40 metres from the Lagoon at its nearest point. The route will bisect the "New Pond" area and via an embankment causeway, will cross the main out-fall channel of the Ahuriri Estuary known as the "middle estuary". Alignment 2 passes to the west of the Westshore Motorcamp and to the east of the Westshore Lagoon. Its alignment was moved by Transit at the request of the Milne family in order to miss the boundary of the camp.

The Site

The Westshore Holiday Camp

14. The first appeal and reference lodged by QPM relate principally to the impact of the proposed motorway on the Westshore Holiday Camp alongside which the designation for the motorway passes.

15. The land on which the camp is located comprises an area of some 1.3 hectares (3.2 acres). This is bounded by the Palmerston North-Gisborne railway line to the east, State Highway No.2 to the north and the Westshore Domain Recreation Reserve and Wildlife Refuge to the west and the south.

16. Vehicle access to the camp is from State Highway 2. The camp comprises 9 tourist flats, 16 cabins, 19 tent sites, 41 caravan sites and associated facilities including a kitchen, ablutions block and manager's dwelling. Most buildings are older in style, some built in the '30s.

17. The camp has been in existence on its current site for over 40 years. It provides budget accommodation for travellers which is apparently in limited supply in Napier. While the entrance to the camp is not particularly attractive, once inside it is a well treed, well maintained and a relatively tranquil environment.

18. The existing tourist flats and cabins are located towards the State Highway (SH2) frontage of the site and adjacent to the western boundary. This is the part of the site which currently experiences most of the noise associated with the highway. The tent and caravan sites and some cabins are located towards the rear of the property. This is a quieter part of the site as it

adjoins the wildlife reserve and the railway line provides a physical bund between the camp and the highway.

19. The camp has some open aspect to the wildlife reserve which adjoins the western and southern boundaries of the site. Camp occupants can access the recreation reserve and wildlife refuge from inside the camp through a rear gate.

20. The current realignment designated in the transitional plan review is located some 450 metres from the western boundary of the camp.

21. The western boundary of the camp has a length of some 189 metres. The proposed motorway realignment will be located alongside this boundary for its full length. From the maps provided by Transit, it is not easy to assess precisely the actual distance of the motorway from the camp boundary (see **Appendix 3** which is a reduced copy of a photo of the area with the alignments superimposed).[5] At the southern end of the camp the designation appears to clip the western boundary of the camp. But from the noise documentation received at the end of 1999 and other evidence we note the motorway alignment has since been altered to miss the motorcamp, the distance from a passing vehicle to 1 metre inside the camp being 15 metres.

22. The proposed realignment will result in two intersections being located in close proximity to the existing entranceway to the motorcamp. The first intersection is located adjacent to its north western corner and provides a link from the proposed motorway to Meeanee Quay. The second will provide for traffic from Westshore and the isolated part of the current SH2. This intersection appears to be located at the existing entranceway to the camp.

23. Located just to the north of the camp across Watchman Road is North Pond, an important wildlife habitat and reserve. The proposed realignment appears to clip the western corner of the pond (see Appendix 3) and impacts to some extent on the reed area adjacent to this corner of the pond. Transit maintains that in order not to unduly impact on the existing dwellings and the motorcamp, it has been necessary for the realignment to encroach on North Pond.

[5] Appendix 3 - Taken from counsel for Transit's closing submissions (the scale was advised by Mr Daly of Opus) [note as a result of the reduction the scale will be modified].

The Andersons' Property

24. The Andersons' property, the subject of some attention by QPM, is the northern-most house of a group of 3 dwellings on the west side of SH2, a short distance north of the camp. We refer to this property again elsewhere.

The Parties

Quay Property Management Limited

25. Quay Property Management (**QPM**) is a duly incorporated company that has its place of business in Tauranga. The company manages a variety of commercial and industrial properties. Mr David Shea, a director and shareholder of the company, acts as the property manager for the Westshore Holiday Camp Partnership which holds the lease to the Westshore Holiday Camp ("the motorcamp") through which the proposed designation passes.

26. NCC holds the fee simple to the land and leases it to the Westshore Holiday Camp Partnership (**the Partnership**). QPM manages the affairs of the partnership and its lease. The partnership subleases the holiday camp to a tenant, the Milne family, the current operator and sub-lessee of the camp. The Milnes see to the day to day operation of the camp and the running of the business. The lease is a registered lease with rights of renewal in perpetuity.

27. It was QPM's view that the claimed benefits of the proposal are not significant, are in doubt, or do not exist. Further, the adverse effects on the environment affected by the proposal are significant and are not adequately avoided, remedied or mitigated by what is proposed. In addition there has been inadequate consideration of alternatives to the proposal.

28. QPM initially sought the cancellation of the requirement, secondly the modification of the alignment to pass through the motorcamp and thirdly changed conditions.

29. With a view to achieving finality to the litigation, however, in the second (purported) appeal (RMA 613/98), QPM now seeks as its preferred relief an order that alignment 2 be modified to the same or similar path as alignment 2A in such a way as to pass straight through the motorcamp. By allowing a claim for compensation to be made under the Public Works Act 1981 this would allow internalisation of adverse effects on the "polluter pays" basis. In the

event Transit finds such a result unacceptable, then it has the option (without further Court intervention) of withdrawing the requirement at any time.

30. QPM suggest that modifying the alignment to pass through the camp on alignment 2A would not preclude Transit and Tranz Rail later collaborating on a joint road/rail bridge across the estuary. It was considered that option would be preserved, and the motorcamp would not face the uncertainty of being enclosed within two designations, one being the railway, or three strategic transport corridors.

31. In the event that the Court does not accept QPM's case to modify the alignment through the motorcamp, then QPM seeks that the requirement be cancelled. The practical result this would achieve is that Transit would then have to look properly at investigation of a joint road/rail facility.

32. In seeking this relief in counsel's opening submissions (modification to alignment 2A, or alternatively, cancellation (conditions would not largely satisfy)) it is QPM's case that the unusual/unique factual circumstances of this site, and the limited alternative use for the restrictively zoned land, make mitigation by conditions unsatisfactory. It was contended that as the land the camp is established upon is within the Wildlife Estuary Zone of the transitional plan, if patronage fell to the extent that operation of the camp became uneconomic, the land would have to be handed back to NCC from whom it is leased for incorporation into the reserve.

The Westshore Motorcamp Partnership

33. The Partnership is party to the proceedings by virtue of lodging a s.274 notice on 9 April 1999. It is made up of 8 people.

34. At the time of the acquisition of the lease, the Partnership had a high interest loan to 90% of the value of the property which is now largely paid off. The objective of the partnership was that it would be a compulsory savings type scheme which would act as a retirement fund. The motorcamp was seen as a "passive" investment in that the property was not expected to create employment for the partners who were in a business sense otherwise engaged.

35. The partnership receives annual rental from the tenant in the sum of approximately $70,000. The tenant pays for all outgoings including ground rental to NCC. All the buildings and the land improvements are owned by the Partnership. The tenant's sub-lease expires at the end of 2001 and management rights for operation of the business of the holiday camp will revert to the Partnership.

36. After the owners of the Westshore Motorcamp lodged an appeal against Transit's proposal, the parties came together in an attempt to negotiate a resolution of the appeal. During the negotiations a settlement was proposed which involved the Westshore Motorcamp acquiring the leasehold of an additional area of land to the south of the camp in order to "off set" the effects of the proposed motorway running next to it. It was proposed that the 8000 square metres extension to the south would be one of the noise mitigation measures. However, the owners believed that only 3,000 square metres of this area approximately would be suitable for accommodation purposes, providing no more than a further 15-18 power sites beyond the camp's existing capacity. The negotiations broke down. The owner of the land and the camp owners could not reach an agreement on the price for the leasehold. A sketch drawing of the proposed extended lease area prepared by the late Mr Lance Leikis, Environmental Planning Assessment Consultant to QPM showing the final shape of the lease area at 0.8 hectares and taken from the Scheme Assessment Report Revised June 1998, is attached to this decision marked **Appendix 4**.[6]

37. We understand several of the partners are now seeking to withdraw from the Partnership. In 1996 the owners of the Partnership attempted to market the leasehold of the property. It received one offer but the Partnership's asking price was somewhat more than the offer received.

The Napier City Council

38. NCC owns the fee simple of the land leased by the partnership together with significant portions of other land which are the subject of the requirement by Transit. NCC inherited the land from the Harbour Board in the last changes to local government.

39. From the outset NCC's position was that it would take a minor role in the appeal proceedings. It called one planning witness, **Mr R R Wallis, Senior Planner to NCC**, to outline the history

[6] See N1 – Proposed Extended Lease for Westshore Motorcamp, November 1994.

of the proposed motorway, the process of the alteration to the designation, the approach to the review of the Ahuriri Section of the proposed plan and the steps taken by NCC leading up to the notices of reference filed by the appellants. Once its evidence had been heard, NCC sought leave to withdraw as second respondent. This was granted with leave reserved for counsel to make final submissions.

Procedural Steps

40. The procedure for inclusion of the requirement into the proposed Ahuriri Section of the plan is the subject of some confusion and attracted criticism by QPM. We have found it necessary therefore to set out the procedural background to Transit's requirement.

41. On 3 June 1993 NCC requested requiring authorities to notify of any existing designations which they wanted to have included within a forthcoming plan review pursuant to clause 4 of the First Schedule of the Act. Notices of requirement were to be received by NCC no later than 5 July 1993.

42. Transit lodged a provisional notice of requirement on 5 July 1993 for designations to be included as rules in the Napier City District Plan Review pursuant to s.181 of the Act in respect of:

> *An alteration to the designation of the 'proposed motorway' between Hawkes Bay Airport and Taradale Road.*

43. **Mr M Tonks, Environmental Management Consultant to Transit,** described this first notice of alteration as being a 'provisional notice'. In its covering letter to the notice of requirement, Transit explained that it was able to supply only a brief outline of the requirement at this stage, sufficient for meeting the 5 July closing date. More detailed information and plans would be supplied shortly.

44. On 20 August 1993 Transit gave another notice of requirement for an alteration to the existing designation of the proposed motorway extension between Hawkes Bay Airport and Taradale road. The notice of alteration stated:

> *Notice is given for an alteration to the designation of the "Proposed Motorway" between Hawkes Bay Airport and Taradale Road, Napier.*

Transit New Zealand requires the inclusion of this alteration in the Proposed Napier City District Plan Review, and requires the Council to specify a thirty five (35) year life to the designation (for its full length, from Hawkes Bay Airport to Taradale Road).

45. In cross examination by Mr Ryan for the appellant, Mr Tonks accepted that the 'provisional notice' was superseded by the formal requirement of 20 August 1993. It was submitted by Mr Ryan that procedurally, matters at this point were overtaken by the 20 August 1993 notice of requirement and that it is this notice that is the subject of this appeal. Transit does not have an issue with this conclusion. However, NCC submitted that notwithstanding that Mr Tonks was now of the view that there was a 'provisional notice', no notice was ever given to NCC that the July 1993 notice of requirement had been withdrawn, as envisaged by s.168(4) of the Act.

46. In late October 1993 QPM made a submission on the requirement, coastal permits, land use consents and water permits in respect of the northern motorway extension. The reasons given for making the submission were as follows:

1. *That the alteration to the existing designation is not necessary for the establishment of the motorway extension.*

2. *That adequate consideration has not been given to other alternative routes such as retaining the existing designation or adopting proposed Alignment 3.*

3. *That the proposed alteration to the existing designation is contrary to sustainable management principles of the Resource Management Act in that the proposed re-aligned route for the motorway will have an adverse effect on the social and economic wellbeing of the owners, lessee and occupants of the Westshore Motorcamp.*

47. In the event Transit was granted a coastal permit to construct a bridge and causeway (being a restricted coastal activity), a coastal permit to discharge fine sediment during the construction phase and a land use permit to reclaim wetland areas adjacent to the Ahuriri Estuary. The hearing of the notice of requirement was as if for a new (not rolled over) designation under s.171.

48. In February 1994 NCC issued a notice of recommendation to Transit that it confirm its alteration for the motorway on the preferred route alignment 2, subject to conditions (s.171(1)). In March 1994 Transit confirmed its requirement by accepting in part, subject to conditions, NCC's recommendation pursuant to s.172. One of those conditions was that the designation of the proposed motorway should not lapse for a period of ten years, expiring on 31 December 2003. Transit's original contention for a 35 year period had been rejected.

49. A notice of appeal (RMA 200/94) was then issued under s.174 by QPM and Mr and Mrs Milne, operators of Westshore Holiday Camp on 20 April 1994. The reasons for the appeal were given as follows:

> *Quay Property Management are owners of the Westshore Holiday Camp and Mr and Mrs B Milne are the operators of the Holiday Camp business.*
>
> *The operative District Plan shows a designation for a proposed motorway from Taradale Road to State Highway No.2 (at Westshore), Napier. The Notice of Requirement, which is the subject of the appeal, is to relocate the designation to the east which would result in the proposed motorway passing alongside the Westshore Holiday Camp.*
>
> *The likely adverse effects of a motorway, in the proposed location, include; noise, dust, fumes, traffic generation, loss of property value, loss of business, detraction of amenity values, deterioration of the quality of the environment and destruction of significant natural wetland and habitat.*
>
> *Transit New Zealand has failed to give adequate consideration to, whether the relocation is reasonably necessary, the alternative routes or methods, the impact on existing landowners, the effects on users of resources in the vicinity and the overall affect* [sic] *on the natural and physical resources of the district.*
>
> *Transit New Zealand has failed to give adequate consideration to the means and methods of avoiding, mitigating or remedying potential adverse effects of the relocation of the motorway, particularly on the owners and occupiers of the Westshore Holiday Camp.*
>
> *The confirmation of the Notice of Requirement, even having regard to the proposed conditions, will not promote sustainable management of the natural and physical resources and is likely to have an adverse effect on the environment and amenity values of the district without any appreciable benefits to the welfare of the community.*

50. QPM sought the following relief:

> *To cancel the decision confirming the Notice of Requirement*
>
> *or*
>
> *To locate the proposed motorway alignment through the Westshore Holiday Camp land*
>
> *or*
>
> *To require Transit New Zealand to establish effective barriers between the proposed motorway and the Westshore Holiday Camp and to impose the noise conditions contained in the Napier City Council's recommendation. The barriers could include earth mounding to reduce noise, land acquisition to relocate the*

Westshore Holiday Camp activities and planting for visual enhancement and reduction of fumes.

51. In May 1995 and again in May 1996 the hearing of the appeal was adjourned in the hope that negotiations between the parties might result in a resolution of the matter.

52. In the meantime, in August 1997 NCC notified the Proposed Ahuriri Section of the Napier City Council District Plan (proposed Ahuriri Section of the plan). By this time NCC had decided to promote plans in sub-districts of which the Ahuriri was one. In planning map F5 of the proposed Ahuriri Section of the plan, the proposed motorway appears as a 'designation'. QPM made a submission to the plan in November 1997. Despite this NCC recommended the requirement be confirmed, subject to conditions. On 21 August 1998 Transit decided to accept the recommendation of NCC in whole more or less in the same terms and conditions as recommended by NCC in 1993. It was this decision of Transit that gave rise to the appeal contained in RMA 613/98.

53. It appeared then at the time the Court heard this appeal, Transit had:

(a) an existing designation in the transitional plan;
(b) a notice of requirement in respect of the transitional district plan for an altered designation;
(c) a confirmation of its notice of requirement for the altered designation in respect of the proposed Ahuriri Section of the plan.

and QPM had lodged two appeals against both notices of requirement.

54. The question now may be asked does the Court have the jurisdiction to consider either the July 1993 provisional notice, the August 1993 notice of requirement and also the 1997 notice of requirement?

55. The answer to the questions posed depends on whether that notice of requirement proceeded as part of a plan preparation or review under the First Schedule or outside the process of a plan review as we referred to above. It also depends on the requirements of s.175. In Wellington International Airport Limited v Bridge Street/Coutts Street Subcommittee (1999) 5 ELRNZ 381 it was determined that the Act contains two distinct procedures under which a designation may come into being:-

(1) Either through ss.168-175 (as discussed in the Wellington Inner City Motorway (CBC) case[7]; or

(2) Clauses 4-15 of the First Schedule to the Act.

56. The first procedure (to which ss.168-174 apply) pertains to designations created outside the process of a plan review by requiring authorities. The second pertains to designations created within the process of a plan review/preparation – or 'rolled over' designations by territorial authorities (see Wellington International Airport Limited). Section 175 contains a proviso in that a designation must not be included in a district plan where there is an appeal lodged against a decision of a requiring authority under s.172 (s.175(1)(a)). This is the case here. The evidence established that the designation appeal was lodged by QPM and the Milnes in 1994 and only the appeals against the water permit and coastal permits were withdrawn. The appeal against the 1993 designation remained.

57. The distinction between these two procedures becomes significant when determining an appeal. Where a designation has proceeded as part of plan preparation under the First Schedule of the Act, the Court finds its jurisdiction to hear the reference within those provisions. There is no jurisdiction within the substantive provisions of the Act, namely ss.168-174. These sections relate to designations created under s.168 and not those created as part of a plan review. In determining an appeal under s.174, the Court has jurisdiction to review not only Transit's confirmation of NCC's recommendation, but NCC's recommendation to the requiring authority because it is required to have regard to the matters set out in s.171.

58. It is important, therefore, to determine under which procedure the August notice of requirement proceeded. On this point, it appears from the evidence that neither Transit nor NCC were clear on these distinct procedures and processed the notices of requirement under both at different times. What in fact began as a designation being 'rolled-over' as part of a plan review pursuant to Clause 4 of the First Schedule under the "provisional" notice lodged in July 1993, in effect became an alteration of a motorway designation when Transit lodged another notice pursuant to the provisions found governing designations within the main provisions of the Act.

[7] Estate of P A Moran v Transit NZ Ltd (W 55/99) pages 18 – 80.

The Appellant's Position

59. The appellant asserts that when NCC notified its proposed Ahuriri Section of the City of Napier District Plan Review in August 1997 it did so without seeking fresh confirmation from Transit as the requiring authority. Nor did NCC properly notify those it was obliged to under the public participation procedures prescribed by the Act. According to Mr Ryan the appellant learned of the insertion of the requirement in the proposed plan by happen-stance at a meeting with NCC over its proposed lease.

60. The appellant therefore claims that due process was not followed by NCC when it included the altered requirement in its proposed plan. It was submitted the Court should find that this defect is fatal to the process of inclusion of the requirement in the proposed Ahuriri Section of the plan. To reach such a finding would conclude the issues raised in the RMA 613/98 appeal but would leave RMA 200/94 for adjudication. Mr Ryan claims Transit would not be disadvantaged by this submission, because if the Court declined the substantive relief sought in RMA 200/94, the alteration to the requirement could be included within the proposed Ahuriri Section of the plan under s.175. In any case, Mr Ryan understood this was also Transit's preferred approach.

Transit's Position

61. Transit's position seems to concur with that taken by the appellant. Mr MacFarlane submitted that although the designation referred to in the proposed Ahuriri Section of the plan (which gave rise to the RMA 613/98 appeal) is that which was recommended by NCC in 1993, the relevant designation for the purpose of both appeals must be that which was the subject of Transit's decision as requiring authority, ie its decision of March 1994.

62. Counsel submits this is so because the process by which a designation gains entry into a plan where the designation decision has been appealed is complete only upon the Court's decision (see ss.166, 168 and 175(1)). The consequence of QPM's appeal contained in RMA 200/94 was to suspend the designation pending the resolution of this appeal. The appeal hearing of RMA 200/94 therefore will determine which designation should be included in the plan. Transit presented its case therefore on the basis that the designation in issue in the proceeding is that which was the subject of its decision as requiring authority, and not that which NCC purported to include in its plan.

NCC's Position

63. NCC however took a somewhat different view. Mr Lawson in his closing submission said that the requirement to which these appeals relate is that inserted in the proposed Ahuriri Section of the plan.

64. Counsel submitted that Transit had an existing designation in the transitional plan for a motorway alignment to the west of the alignments which are the subject of these appeals. In Mr Lawson's view Transit had advised NCC pursuant to Clause 4 of the First Schedule that it required a modified alignment for the proposed motorway.

65. Shortly after receiving that advice, Transit lodged a notice of requirement in August 1993 to alter the existing designation in the transitional plan to a new alignment, the same as that of which NCC had been notified pursuant to clause 4 of the First Schedule. (But again, Transit notified this requirement pursuant to s.181 of the Act.)

66. Mr Lawson acknowledges that this state of affairs gave rise to an unusual and confusing situation.

67. However, it is the view of counsel that NCC had never received notice that this requirement had been withdrawn as is envisaged by s.168(4) of the Act. In these circumstances, it was appropriate for NCC to have included the designation in the proposed plan notwithstanding that a notice of requirement had been lodged by Transit in respect of the transitional plan.

68. NCC tried as far as possible to run the two procedures in parallel and ultimately adopted the Hearing Commissioner's decision of February 1994 in respect of Transit's notice of requirement, with minor alterations, as the basis for its decision in respect of the requirement in the proposed plan.

69. Mr Lawson submitted that had NCC taken it upon itself to not include the notice of requirement in the proposed plan, it could have been subject to criticism – firstly, from Transit (which had not given notice to withdraw the requirement) or secondly, from members of the public on the basis that the plan was misleading members of the public by not including a notice of requirement of which NCC had notice and which would suddenly emerge should the appeals in respect of the earlier Transit decision be resolved.

70. In any case, counsel submits the issues raised by the designation under either RMA 613/98 or 200/94 are the same and should simply be determined on their merits.

Evaluation

71. Arising from these somewhat legal lengthy issues we have reached several conclusions as follows:-

- **The July notice not a valid notice**

72. A requiring authority responsible for a designation may at any time give notice to the territorial authority of its requirement to alter the designation (s.181).

73. Subject to s.181(3)(a), sections 168-179 shall, with all necessary modifications, apply to a requirement referred to in s.181(1) as if it were a requirement for a new designation.

74. Section 168(3) requires that a notice shall be in the prescribed form and shall include a number of requirements. The provisional notice of July 1993 does not meet these requirements because it does not set out the effects of the public work and the ways in which any adverse effects may be mitigated. The provisional notice at clause 1(d) simply notes that the impacts to be addressed will include effects on a number of issues – but at a later date.

75. It is clear s.168 requires the requiring authority to undertake an assessment of environmental effects before notifying a requirement for designation. This did not happen. It had occurred by the notice of August 1993. And **Mr Mark Cairns, Transit's Regional State Highway Manager for the Hawkes Bay Region** in cross-examination acknowledged the previous notice was overtaken - or defunct as the case may be.

76. We find that the "provisional" notice is null and void and of no legal effect. The requirement did not need to be formally withdrawn therefore as envisaged by s.168(4). Nor could it legally provide a springboard for NCC's actions to include the designation further down the track in the proposed Ahuriri Section of the plan. It follows that the process begun by NCC when it sought to have the motorway designation rolled over as part of its initial plan review pursuant to Clause 4 of the First Schedule was superseded by Transit's August 1993 notice of requirement under ss.168-172. (We note in this context Transit had in fact advised NCC that it required a

modified alignment pursuant to s.181 of the Act which deals with alterations of designations which can be made at any time and not in the context of a plan review.)

- **Designation in proposed plan invalid**

77. If we are wrong in our conclusion as to whether NCC followed due process when it notified the designation in its proposed Ahuriri Section of the plan in August 1997, then at one level this is irrelevant. Where there is an appeal lodged against a decision of a requiring authority, as there was in 1994, a designation ought not be provided for in a district plan pursuant to s.175.

78. Section 175 reads:

> **175. DESIGNATION TO BE PROVIDED FOR IN DISTRICT PLAN--**
> **(1) Where--**
> **(a) No appeal is lodged against a decision of a requiring authority under section 172 within the time permitted by that section; or**
> **(b) An appeal is lodged but is withdrawn or dismissed; or**
> **(c) An appeal is lodged and the [Environment Court] confirms or modifies the requirement--**
> **the territorial authority shall, as soon as reasonably practicable and without further formality,--**
> **(d) Include the designation in its district plan [and any proposed district plan] as if it were a rule in accordance with the requirement as issued or modified in accordance with this Act; and**
> **[(e) State in its district plan and in any proposed district plan the name of the requiring authority which has the benefit of the designation.]**
> **(f) Repealed.**
> **[(2) The provisions of the First Schedule shall not apply to any designation in a district plan or proposed district plan under this section.]**
> **(3) Repealed.**

79. In order to comply with s.175(1)(a) and (d) NCC could not lawfully insert Transit's designation for the motorway into the proposed Ahuriri Section of the plan until appeal RMA 200/94 was resolved. Accordingly, the purported designation that gave rise to the appeal in RMA 613/98 is not for our deliberation. Transit's designation of 1994 is therefore the only subject of our consideration in this decision.

Finding

80. **From the point when Transit filed its formal requirement of 20 August 1993, the alteration of the designation proceeded under ss.168-174. The hearing of the notice of requirement, NCC's recommendation on the notice, Transit's confirmation and acceptance of the recommendation and the appellant's appeal of that decision all proceeded under the provisions of the Act which relate to designations outside a plan review. This approach is, we consider, reinforced by the provisions of s.175(2) which**

states that the provisions of the First Schedule shall not apply to any designation under this section of the Act.

81. Despite the rather uncertain way in which Transit's requirements began in August 1993, the correct procedures appear to have been followed for the QPM appeal (RMA 200/94). It is that appeal which we now address. The issues raised by both appeals are somewhat similar and so therefore we intend to address the issues on the merits, taking into account information which has become available to the parties since 1994. The relief sought by QPM in the 1994 appeal however is the relevant relief, a point to which we refer elsewhere.

Legal Framework

Statutory Framework

82. The statutory framework for considering issues in respect of designations under the RMA is as follows:

- Sections 166, 175, 176 and 176A which set out the legal effect of a designation and outline the plan procedures;
- Section 168 which sets out the matters to be included in the notice of requirement;
- Part II which section 171(1) is subject to;
- Section 171(1) which sets out the matters to which regard and particular regard should be had by the territorial authority and which should form the basis for the territorial authority's recommendation to the requiring authority;
- Section 171(2) which sets out the territorial authority's discretion in determining the requirement; and
- Section 174 which sets out the appeal process and confirms the Court's discretion in determining the appeals.

83. In terms of background to the designation process, s.166 provides that a designation is a provision made in a plan to give effect to a requirement made under s.168. Under s.175, where a designation is confirmed by the Environment Court, the territorial authority is:

> **to include the designation in its district plan and proposed district plan as if it were a rule in accordance with the requirement as issued or modified. ...**

84. Once in place a designation has the following effects, pursuant to s.176(1):

- it removes any requirement to obtain resource consents otherwise required under the relevant plan;
- it gives the requiring authority consent to do anything in accordance with the designation;
- it prevents any use of the land subject to the designation which would prevent or hinder the work without written permission of the requiring authority.

85. The outline plan provisions (s.176A), introduced by the Resource Management Amendment Act 1997 **(the Amendment Act)**, provide a means whereby work that is not otherwise approved by the RMA, or incorporated into the designation, is subject to the territorial authority's (and if necessary the Court's) scrutiny before commencement.

86. However, s.78(5) of the Amendment Act provides that:

> **Where an appeal has been lodged or an objection has been made before the commencement of this section, but the hearing of that appeal or consideration of that objection has not commenced, ... the appeal or objection must be considered and completed under the principal Act as if this Act had not been enacted.**

87. Therefore, under the transitional provisions of the Amendment Act, these proceedings are to be heard as if the Amendment Act had not been enacted, and the designation is to be assessed under the unamended form of s.176.

Adequacy of Notice of Requirement

88. Section 168(3) requires as follows:

> (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

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> **(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.**

89. In terms of s.168(3)(c), Part 4 of the notice of requirement deals with environmental effects and proposed mitigation measures including effects on the transportation network, wetland habitats, fish life and shellfish, the hydrology of the Ahuriri outfall channel, extreme flood events, discharges of sediment during construction, navigability of the Ahuriri channel, rising sea levels, Hawkes Bay Airport operations, visual amenities, noise, private property, the Napier City Westshore Domain, access to residential properties, access to the middle estuary, city drainage, railway structures and land severance.

90. In its closing submissions, counsel for QPM alleges that the notice of requirement did not provide sufficient information to satisfy some aspects of s.168(3). QPM alleges that the requirement was inadequate in that the assessment of effects in the notice of requirement does not accord with the concerns raised by the ecological studies relating to the Ahuriri Estuary through which part of the motorway proceeds. This should have led to further inquiry into alignment 2A as providing a larger spatial buffer resulting in a better outcome for the estuary.

91. In relation to s.168(3)(c) also Part 5 of the requirement sets out the nine alternative routes that were considered. QPM challenge also whether adequate consideration was given to alternative alignments linking effects on the estuary with promotion of alternative designation 2A.

92. Transit is concerned that these points, which could easily have been dealt with by experts, was raised against a background in which it was agreed that it was not necessary such experts be called. Contrary to QPM's statements, Transit believes that the record plainly and carefully discloses proximity to the Westshore Lagoon and North Pond as an issue and that the matter was revisited in the Scheme Assessment Report of June 1998.

93. In relation to s.163(3)(f) parts 6 and 7 of the Requirement set out the resource consents that were identified and applied for. QPM alleges that the notice of requirement failed to properly specify all other resource consents that Transit would need. More specifically, it failed to identify that consents were required for extraction of gravel from the Westshore Domain which is in the estuary zone of the proposed Ahuriri Section of the plan. QPM learned of the need for further consents when Transit discovered the Scheme Assessment Report Volume 1 of June 1998 midway through the hearing in May 1999. Counsel explained that these matters were not put to Transit witnesses because the Scheme Assessment Report of June 1998 was not

discovered until it emerged during the cross examination of Mr Geoffrey Butcher, Consultant Economist to Transit.

94. QPM submits it is not apparent where the proposed gravel extraction areas will occur. It suggests the winning of gravel from the embankment road may interfere with the public access way around Ahuriri Estuary and involve a cost in terms of opportunity lost in the potential for co-ordination with Tranz Rail.

95. QPM allege there has been no assessment of effects on such applications, the need for such having not been disclosed in the notice of requirement. QPM has no ability to ascertain how much gravel Transit proposes to extract, the duration of the extraction, the route any trucking would take and other effects which may impact on the camp and its patrons.

96. Transit again has a problem with the way QPM raised this issue in its closing submissions. It had understood this litigation was to be resolved within the framework of the issues identified by QPM in its pre-hearing memorandum of 19 March 1999. The issue therefore was not properly put to the Transit witnesses. However, in recognition of the risk of failing to address this point, counsel for Transit responded to the issue in his closing submissions.

97. QPM further alleges that the notice of requirement contains inaccurate overstatements about the tangible benefits of the project. It submits that there is an onus on the proponent of a designation to ensure that the information put out to the public by way of notice of requirement and accompanying assessment of effects is reasonably accurate. The errors in projected tangible benefits are of significance in terms of the integrity of the informational process, the importance of public participation. Further, the lower benefits result in the 'costs' of the project assuming a greater significance in proportion to the reduced level of tangible benefits.

98. In response Transit notes that s.168(3)(a)-(f) does not require a benefit/cost analysis. Transit submits the benefit/cost error may be important in determining whether it gave adequate consideration to alternative routes under s.171(1)(b) (see below) but does not support the contention that the notice of requirement was defective such as to render Transit's process nugatory.

99. While it is true that the original assessment of benefits was overstated because of an input error, this error had the same effect on all alignments so none was advantaged or disadvantaged. It did not alter the proposition fundamental to any benefit/cost analysis which is to determine whether or not the predicted benefits exceed costs.

Evaluation

100. QPM did not raise its challenge to Transit's August 1993 notice of requirement in its Statement of Issues filed with the Court on 19 March 1999. Therefore Transit was left to respond in a way which was less than satisfactory in the circumstances.

101. As held in CBC,[8] the content of a notice of requirement resembles that of a check list of factors which are required to be noted or evaluated by a proponent and then put out for public information. Our conclusion on its nature stems in part from s.168(3)(c) which provides for *the extent to which alternative sites or methods may have been considered and the ways in which effects may be mitigated.* It stems also from s.168(3)(e) which requires a notice of the consultation *if any* undertaken in the process of putting together the proposal. That provision admits to the possibility that consultation may not have occurred.[9] 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.

102. Section 174(4) requires that the Court on appeal "shall" have regard to the matters in s.171 – being the matters set out in the notice of requirement given under s.168 to which NCC has regard when making its recommendations. Although not raised in submissions, we note that s.174(4) does not require that the Court on appeal shall therefore necessarily review the adequacy of the notice of requirement itself. The matters raised in the notice are our focus by virtue of s.171(1).

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[8] See n 7 above, page 21.

[9] For example, it was held by the Environment Court in Malfroy Area Residents Action Group v Rotorua District Council A 92/98 that consultation about designations is not a statutory requirement.

103. In this case, as we shall see, the extent of the ongoing scheme assessment reports,[10] the submissions, the ongoing benefit/ cost reviews,[11] the ongoing consultation with QPM and Partnership members[12] all indicate that assessment of the project is not a static one, limited in all its implications by the notice itself.

Finding

104. Accordingly, for these reasons, we have decided to limit our inquiry to Transit's decision under s.174 and NCC's recommendations on Transit's notice of requirement under s.171. Effectively these incorporate all the issues raised by QPM under s.168(3) (the notice provisions) in any event.

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[10] **Napier Hastings Motorway Hawkes Bay Airport to Taradale Road – Scheme Assessment Report** by C W Daly and P S McCarten, WORKS Consultancy Services, Napier, of June 1991, Record of Documents - Volume 4, Document 41, 917; and **Napier – Hastings Motorway Hawkes Bay Airport to Taradale Road – Scheme Assessment Report (Revised June 1998)** by C Stuart, Opus International Consultants Limited, Napier Office, of June 1998, Exhibit III.

[11] **Economic Appraisal of Alternative Alignments**, included in **Napier Hastings Motorway Hawkes Bay Airport to Taradale Road – Scheme Assessment Report** by C W Daly and P S McCarten, WORKS Consultancy Services, Napier, of June 1991, Record of Documents - Volume 4, Document 41, page 933; and Current Benefit/Cost Documentation, Record of Documents - Volume 4, Document 44, page 1018. Following the errors found in Transit's initial benefit/ cost analysis by the Parliamentary Commissioner for the Environment in 1994, the Bellis Report followed, see n 3 above.

[12] See Record of Documents – Volume 3, Document 39, pages 809-851.

Chapter 7: Matters To Which Particular Regard Is To Be Paid

Interpretation of Section 171

105. Section 171 states as follows:

> **171. Recommendation by territorial authority -**
> **(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.**
> **(2) After considering a requirement made under section 168, the territorial authority shall recommend to the requiring authority that the requiring authority either -**
> **(a) Confirm the requirement, and any conditions as to duration, with or without modification and subject to such conditions as the territorial authority considers appropriate; or**
> **(b) Withdraw the requirement.**
> **...**
> **(e) The territorial authority shall give reasons for a recommendation made under subsection (2).**

Subject to Part II

106. QPM seek an affirmative finding from this Court that alignment 2 will not promote the statutory purpose for the Westshore Motorcamp in the unique circumstances of this site.

107. Counsel for Transit submitted that, in the context of s.171(1), the words "*Subject to Part II*" mean that Part II is to be over-arching in the manner similarly identified in relation to s.104 in the decision of Paihia and District Citizens Association Incorporated v Northland Regional Council (A 77/95) where it was determined to mean that the general direction to have regard to the matters listed does not apply to any one or more matters where to do so would conflict with something in Part II.

As such, it is appropriate to determine overall whether the motorway project for which the designation is sought would assist or impede in achieving the RMA's purpose **to promote the**

sustainable management of natural and physical resources (s.5) and how the project fares in terms of the matters in ss.6, 7 and 8 which qualify the issues in s.5.

108. In CBC the Court held that:

> *... We have concluded that all considerations, whether favouring or negating the designation, are secondary to the requirement that the provisions of Part II of the RMA must be fulfilled by the proposal.*[13]

109. The overall promotion of the sustainable management of the natural and physical resources of Napier City not just the Westshore Motorcamp and the estuary is in issue in this designation. The motorcamp is only one constituent part of the physical resources of the area which together with those and its natural resources are to be managed in such a way that they achieve the various attributes of sustainable management contained in s.5(2)(a), (b) and (c).

110. After considering all the issues raised, if the Court is not satisfied that the proposal does not meet the Act's overall purpose of sustainable management, it has the power to cancel the alignment or to modify the alignment or impose such conditions as it thinks fit in order to fulfil the Act's purpose (s.174(4)).

Meaning of "Particular Regard"

111. Particular regard is to be had to the matters set out in s.171(1)(a) - (d). Essentially the Court turns its mind to each of the matters listed by virtue of the provisions of s.174(4). The words indicate an intention that these matters be given greater weight than other matters which arise for example under s.168 and the submissions, to which the territorial authority has regard.

112. The Planning Tribunal (as it then was) has found that it is not necessary for all of the criteria in s.171(1)(a) - (d) to be fulfilled.[14]

Reasonable Necessity

113. Section 171(1)(a) requires NCC to have particular regard to:

> **Whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought.**

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[13] See n 7 above, page 27.

[14] Babington v Invercargill City Council (1993) 2 NZRMA 480.

114. QPM submits that in CBC the Court recognised that the question of timing was relevant to s.171(1)(a).[15] In that case a designation was sought for 5 years, construction was expected to take two years with funding applications and final design work expected to be completed within 12-18 months. However, in the present case Mr Cairns, for Transit, stated that full-scale construction of the motorway was unlikely to receive funding before 2005 or 2006 due to the benefit/cost ratio of 3.6 where the cut-off ratio for funding by Transfund is set at 4.0. Mr Cairns was, however, confident of being able to secure funding to allow pre-loading of the bridge embankment. This would allow consolidation of the embankment to take place in advance of the main construction stage.

115. Mr Ryan contends that when it was put to Mr Cairns that "pre-loading" was simply a device in order to have the territorial authority exercise its powers under s.184 of the Act to prevent the lapsing of the designation which otherwise would not have been given effect to within its 10 year life, Mr Cairns acknowledged that this was part of the situation. It was argued by QPM that no engineering evidence was produced by Transit which established that pre-loading is required for valid technical or engineering reasons so far in advance of construction proper other than to prevent lapsing of the designation under s.184.

116. According to Mr Ryan, this issue highlights the uncertainty which surrounds this project. It is not good resource management practice because the appellant and members of the community are subject to unreasonable uncertainty.

117. Transit argues that the evidence of Mr Cairns (an engineer) and the updated traffic modelling and assessments summarised in the 1998 Scheme Assessment Report[16] demonstrate that the designation is still necessary as a form of approval or authority. That the work may not commence in full until later is irrelevant. The whole point of a designation is to provide the planning basis upon which the objective of the proposal can be achieved. Whether or not it is actually achieved within the lapse period or is only under way at that time is immaterial. In any event, QPM's argument is inconsistent with the special status the Act gives to designations. It is a matter for Transit (and now Transfund) to decide whether and when to fund a particular work.

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[15] See n 7 above, page 31.
[16] See n 10 above.

J.E.K.

118. Put simply, Transit contends that the transportation needs and volumes make it inevitable that the work should take place. At some point within a reasonable time the project will attain funding application status.

Evaluation

119. The objective of the work is to provide a safe and efficient highway. This was not challenged by QPM. The appellant also conceded that the designation as a form of approval or authority is reasonably necessary if the works are to occur. It seems that timing of the designation is the issue.

120. Given that full scale construction of the motorway is now not likely to proceed before the designation lapses in the year 2003 (10 years from the date the designation was first confirmed) does the necessity for pre-loading before that date to ensure the designation does not lapse, make the designation unnecessary at this point in time? We have concluded that it does not for reasonableness is a question of fact and degree.

121. Under s. 184 a designation lapses if it is not given effect to before the expiry of 5 years after the date it is included in the district plan. But the section reads as follows:

> **s.184. Lapsing Of Designations 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.
> ...

Where substantial progress has been made towards giving effect to the designation, s.184(1)(b) provides that the designation will not lapse if Transit makes an application to the territorial authority. Section 184(1)(b) does not specify how and in what form this may be achieved but clearly preliminary works is one such method. The discretion remains with the territorial (not requiring) authority to determine the matter on application. Section 184 therefore contemplates work on the preliminary stages of the motorway such as "pre-loading" as a means of avoiding the designation's lapse which is thoroughly legitimate.

122. In any event, the evidence of Mr Cairns further established that the present benefit/cost figures are such that design and pre-construction (base foundation work) may commence between 1999-2002.

123. 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 – not just the motorcamp. Section 171(1)(a) is subject to the provisions of Part II. 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, then 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. Similarly, the motorcamp would be unable to make commercial plans for its future based on the perceived impact of the motorway on its operations. **Mr Mark Milne, Camp Operator**, indicated that it would definitely help them with selling or staying to know whether the alignment would be alignment 2 and what the conditions ought to be.

Finding

124. We find that the designation is reasonably necessary to achieve the objective of the public work for which it is sought.

Alternatives

125. Section 171(1)(b) requires particular regard to be had to:

> Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work.

126. QPM submits that Transit had not provided adequate consideration of alignment 2A or collaboration with Tranz Rail for an alignment involving a joint road/rail bridge (see Appendix 2) along the lines suggested in evidence by **Mr J D Clentworth, spokesperson for the Partnership for QPM**. Transit however, believe the requirements of s.171(1)(b) have been met and go well beyond any arbitrary approach.

Joint Road/Rail Bridge

127. QPM claims that the prospect of a joint road/rail bridge was the subject of considerable interest by environment groups in the pre-application consultation. Clearly at the time of the 1993 joint hearing Transit had explored the prospect of a joint road/rail facility with Tranz Rail. Counsel submits however that the notice of requirement was founded on the premise that the existing rail bridge had 10 years effective life (as at 1993) and doubt existed at the time as to the future viability for a Gisborne railway line due to Railways undergoing privatisation at that time.

128. Mr Ryan submits that it is now known that Tranz Rail has decided to retain the Gisborne-Palmerston North rail line. Even at the time of the notice of requirement New Zealand Railway had a preference for an alignment in proximity to the existing railway embankment. But in June 1996 Tranz Rail expressed a rekindled interest in a joint structure. A meeting then occurred in October 1996 where it was resolved that a cost estimate would be prepared for a combined road/rail transportation route across the estuary. From the resulting Works Consultancy Services assessment it appears there was little incentive for Transit to explore the combined estuary crossing in view of the estimated benefit/cost ratio. While Tranz Rail was prepared to meet half the total cost of the costs of the initial investigation ($25,000) Transit would not participate in a joint feasibility study because of the low benefit/cost ratio. It was pointed out the 1998 Scheme Assessment Report identifies that Transit decided not to pursue the feasibility study because the cost in purchasing the lease of the Westshore motorcamp would effectively cancel any tangible cost savings of a combined route.[17]

129. QPM submitted therefore it is the tangible costs which are driving selection of alignment 2. This approach in QPM's submission has thwarted investigation of options or alignments which have recognised greater intangible benefits to the environment, the community and QPM. Had Transit spent $12,5000 on the feasibility study, it may be able to claim that it had adequately considered the alternative options.

[17] **Napier – Hastings Motorway Hawkes Bay Airport to Taradale Road – Scheme Assessment Report (Revised June 1998)** see n 5, page 34.

130. It is Transit's view that consideration was given to both the combined road/rail option and alignment 2A. The question before the Court is whether it was adequate in the Waimairi sense.[18] The evidence proves that it was not possible to build a joint road/rail bridge with Tranz Rail. Transit attribute this to Tranz Rail's unco-operative approach in wishing to transfer its costs of building its own bridge, moving its lines and contributing to any cost associated with the motorcamp. Transit does not hold out any expectation that Tranz Rail will become co-operative in the future nor that it is committed in any way to the railway north of Napier.

131. As to the possible construction of a joint railroad bridge and joint venture with Tranz Rail for the motorway extension which was the subject of close attention by QPM, Mr Cairns acknowledged that there was considerable public interest in a joint road/rail alignment due to its significant environmental benefits and reduction in costs. He further acknowledged that in 1996 Transit was actively seeking liaison with Tranz Rail over a joint venture due to the environmental benefits of having only the one footprint over the estuary. The cost of a feasibility study at that time was $25,0000. Tranz Rail, meanwhile, had indicated that a major cost would be the demolition costs of the bridge which it considered was Transit's responsibility to undertake. Mr Cairns acknowledged this then became an added cost factor for Transit to consider - in addition to the costs of acquiring the motorcamp which was in the path of alignment 2A being the total cost of the venture.

132. Mr Butcher for Transit was of the view that if Tranz Rail were serious about the issue it would commit its own funds to the venture. As a business advisor, he was surprised at Tranz Rail's approach and that meanwhile that company was foreclosing its options. He acknowledged that Transit did not wish to finance a feasibility study because on the strength of the initial cost estimates and having regard to the B:C existing for the project at that time, Transit could not secure either design or assessment funds.

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[18] See Waimairi District Council v Christchurch City Council C 30/82, pages 24-25 which explains what is required when considering whether adequate consideration has been given to alternatives. See also n 22 below.

Alignment 2 and Alignment 2A

133. QPM concluded that alignment 2A was identified after Transit commissioned the DSIR to prepare the ecological reports in 1990 and 1992.[19] This had been acknowledged by Mr Tonks for Transit in cross examination. It was considered the tangible and intangible benefits of choosing alignment 2A over alignment 2 were, therefore, not the subject of express study by Transit or its consultants. It was never the subject of an express analysis or study that would allow Transit to make the "trade-off" in balancing ecological protection with a desire to avoid acquisition of the motorcamp. The decision to proceed along alignment 2 was made at a time when the tangible benefits of the motorway were thought to be much greater than subsequent analysis is revealed.

134. It was submitted that a true and proper reading of the 1990 and 1992 ecological reports would conclude that the synopsis of the reports is not accurate as to the effects of alignment 2 relative to alignments further to the east. Specifically, alignments 2A and 4 provide a greater buffer area between the proposed motorway, Westshore Lagoon and North Pond. The authors of the reports had concerns as to the proximity of alignment 2 to the Westshore Lagoon and the North Pond and provision of an adequate buffer strip was seen as important in ensuring proper mitigation of ecological effects.

135. QPM argue it is clear as a result that it is the tangible land acquisition cost which differentiated Transit's selection of preferred alignment 2 from alignment 2A. In his evidence Mr Tonks delineated alignment 2A passing on the same route past the Anderson property - that is, on the eastern side rather than the western side as proposed by alignment 2. QPM argue there would be no change in noise effects to the Andersons if the route passed along alignment 2A.

136. In response counsel for Transit notes that QPM makes no reference to the legal tests now made applicable by the Court in CBC. The question is whether the consideration was adequate such that Transit can demonstrate it did not act arbitrarily in its selection (the test identified in Waimairi). Transit is not obliged to show that the alternative chosen was the best of all alternatives. It is not necessary to go into a detailed adjudication of the merits so as to

[19] These being a report undertaken by the DSIR **Environmental Impact Statement: Motorway Re-alignment Through Ahuriri Estuary**, Napier, July 1990 by T M Hume et al – Record of Documents, Volume 1, Document 1, 2; and **Environmental Impact Statement: Motorway Re-alignment Through Ahuriri Estuary, Napier – Further Studies on the Alignment Options** by D S Roper et al of June 1992 – Record of Documents, Volume 1, Document 4, page 208.

eliminate all but the one 'best' alternative. CBC confirms that Transit is "not required to select the best option".[20]

137. As to alignment 2A, Transit contends that there are a number of erroneous statements in QPM's submissions dealing with this matter. Transit acknowledges that alignment 2A was not specifically addressed in the 1990 and 1992 ecological reports. However, that overlooks the fact that alignments 2 and 2A are largely identical and only diverge slightly in the vicinity of the south western corner of the camp. The divergence takes the proposed road slightly to the west and therefore closer to Westshore Lagoon. However, it has no direct impact on the lagoon, is irrelevant to the estuary and can be ignored for the New Ponds.

138. Transit submits that it is not at all clear there are any real adverse effects except at North Pond and in any event these effects are the same for alignments 2 and 2A. The North Pond has been subject to expert scrutiny resulting in special conditions to avoid the margin of the pond and reed area.

139. As to QPM's suggestions that alignment 2A would have a lesser effect on the Westshore Lagoon, Transit suggests that the 1990 ecological report does not mention any adverse impacts on the Lagoon caused by alignment 2. The report refers more specifically to the 'disturbance to wildlife in the newly created ponds at Westshore Lagoon'. While Transit accepts that alignment 2 would have a direct impact on these ponds, it argues the effect of alignment 2A would be exactly the same. The alignments are identical along this section of the motorway route.

140. The 1992 ecological report compares alignments 2 and 4 and Transit acknowledges that alignment 2 would have a greater impact on the newly created ponds at Westshore Lagoon than alignment 4. It is also closer in proximity to the lagoon than alignment 4. Transit submits, however, that alignment 2A would have the same impact on the new ponds (created out of old gravel pits) and would have a similar proximity to the lagoon as alignment 2. Transit accepts that alignment 2 is closer to the lagoon on the northern approach but submits that the difference is not significant. In fact, the proximity of alignment 2 to the lagoon is less than that for the North Pond, yet according to the 1990 ecological report, the potential impacts on the North Pond are described as 'minimal'.

[20] See n 7 above, page 258.

141. Transit argue that the ecological reports addressed all the effects described above and it was therefore capable of applying those reports to an alignment 2A which was in such close proximity. This Transit did from 1992 onwards. This can be seen in Transit's Scheme Assessment Report of June 1992, where consideration was given to both tangibles and intangibles, and in the evidence presented by Transit to the joint hearing committees in December 1993.

142. Transit disputes the conclusion that costs were the basis for the differentiation between alignments 2 and 2A. To the contrary, the evidence describes the value of the motorcamp itself as a resource and that there are benefits for the Westshore residents in reducing the noise because alignment 2 will be further from them than alignment 2A. In fact, the proposed motorway will be further away from the Andersons' house than the existing SH2. The evidence also shows that alignment 2 was once slightly to the east, clipping the corner of the camp but was moved westwards at the camp's request.

Evaluation

143. It was Mr Cairns' evidence for Transit that alignment 2 remains Transit's preferred route because it is the least environmentally damaging out of all the options realistically available. He identified that it avoids a number of significantly adverse effects associated with the other options such as the risk of increased bird strike for the Hawkes Bay Airport, the risk of destabilising the existing railway embankment bridge, and the potential loss of the Westshore Motorcamp. Noise issues and impacts on the North Pond reed area were considered to be all adequately mitigated.

144. Mr Tonks endorsed this evidence adding that alignment 2 is preferred because it does not rely on the uncertain future of the Gisborne railway line. And compared with alignment 3 it will result in less enclosed estuary space remaining between the road bridge and the existing railway embankment. Compared with alignment 3A it will involve a more simplified interaction with the existing city drainage network. The overall noise level at the Anderson property will be essentially unchanged but we note the dwelling will be further away from traffic than at present.

145. The record of evidence presented by Transit to the Hearing Commissioner in December 1993 shows the alignment 2A was considered but as it involved a complete loss of the Westshore Motor Camp (although avoidance of North Pond) it was rejected. It was stated:

J.E.K

> *I am advised that, purely within the constraints of safe roading geometry, the motorway could be moved up to a maximum of 8 metres further to the east of the proposed alignment. However, I understand that this movement would then have a significant impact on the residential properties on the west side of the existing State Highway, or on the Westshore Motor Camp, which lie in this direction.*[21]

146. Alignment 2 was eventually chosen because it is further from Southern Marsh (the existing designation being considered to have unacceptable impacts on the considerable wildlife in that marsh).

147. NCC's recommendation states as follows:

> *The Council agreed with the process of evaluation of the alternative routes which arrived at the preference for Alignment 2. The avoidance of the Southern Marsh and a reduction in the risk of bird-strikes near the airport are accepted as sound reasons to remove the presently-designated alignment and Alignments 1 and 1A from further consideration.*
>
> *The alternative Alignment 2A was given serious consideration but because it would have given rise to more extensive detrimental effects on the environment it was decided that Alignment 2 was the best practicable option available. More extensive detrimental effects on the environment would include noise and a reduction in traffic safety both caused by an increase in the number of intersections, and a closer proximity to residences. It was also possible that Alignment 2A would give rise to a need for re-notification.*
>
> *The protection of the structural integrity of the existing rail bridge meant that Alignments 4 and 4A were not possible (see below as to possibility of a combined crossing).* **(see Schedule A)**

148. On those considerations alone we consider the choice of alignment 2 was not arbitrary. For the record, we note the tests in Waimairi:

> ***Then too, so far as the matters in s.118(8)(d) are concerned, we do not consider that Parliament intended that alternatives should necessarily be excluded before the Tribunal can be satisfied that the matters set out in that part of the sub-section have been given adequate consideration. We think the purpose of that part of the sub-section 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***

[21] **Notice of Requirement for an Alteration and Applications for Resource Consent**, Evidence Presented on Behalf of Transit to the Hearings Commissioner, 13 December 1993 - Record of Documents, Volume 3, Document 27, page 649.

> ***direct** that any other alternative must be selected. In the absence of that power, we think in the end, it would become an exercise in futility if the Tribunal were required to examine, in detail, and adjudicate upon, in detail, the merits of various alternatives. In satisfying itself that adequate consideration has been given to alternatives, inevitably the Tribunal will find itself considering various land use planning merit aspects. But we repeat and stress that the wording of this part of the sub-section 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.*[22] (underlining in origin)

149. As to the road/rail alignment, Transit obviously could find a number of environmental benefit/ cost advantages in Tranz Rail's co-operation in the replacement of the existing railway embankment bridge. But it comes at a cost – that of the destruction of the motorcamp – and consequently in our view from the review of the evidence destruction of a real amenity to the City of Napier. And Tranz Rail has proposed that Transit should pay for the majority of costs of demolition of the existing structures. Mr Cairns stated that this (on top of the other expenses including purchase of the motorcamp) would push the total cost of this option up beyond the current land. It would result in a more, rather than less, expensive alignment.

150. Nevertheless it is clear that Transit closely pursued the matter. Mr Cairns stated that Tranz Rail more recently (as late as 1999) indicated it no longer wishes to revisit the whole issue.[23] Mr Cairns stated that given his understanding of the current funding priorities for Tranz Rail, the low priority of capital improvements on the Gisborne railway line, he had generally concluded that such a commitment would be unlikely.

151. So this is the result we are left with. Transit may well decide to fund half a feasibility study but if Tranz Rail are reluctant to participate in the exercise then there is little that Transit or this Court can do to further advance matters. Unless Tranz Rail is a willing party to the concept of a joint road rail facility, the matter can be taken no further.

Finding

152. Subject to what we have to say about Part II matters below, we have concluded that adequate consideration has been given by Transit to alternatives. On the facts before us

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[22] See n 18 above, pages 24 – 25. This passage was adopted in full by the High Court in STOP Action Group v Auckland Regional Authority (Unreported HC Wellington M514/85, 31 July 1987, Chilwell J, pages 46-47).

[23] Exhibit 2 is a letter from Tranz Rail dated as late as April 1999 in which it explains to Transit that it is not in a position to firmly commit to participating in the construction of a joint road/rail replacement structure.

we consider it would be unreasonable to require the requiring authority to seek alignment 2A other than alignment 2. It is sufficient for Transit to show it did not act arbitrarily in its selection. It is not required to show that the alternative chosen was the best of all alternatives.[24] Effectively what QPM invites the Court to do is, as Mr MacFarlane submitted, cross the line into adjudication of the merits in determining the best of alternatives and by that measure determine whether the chosen route was reasonable. We reject this approach.

Reasonable Use of Alternatives

153. Section 171(1)(c) requires the Court to have particular regard to:

> **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.**

154. QPM submits that the interpretation adopted by Transit in CBC[25], that s.171(1)(c) is subsumed by s.171(1)(b) and is therefore effectively 'superfluous', is incorrect. This interpretation reads down the natural and ordinary meaning of "unreasonable". It must be something about the "nature of the public work or project" which means that it would be "unreasonable" to expect the requiring authority to use an alternative site.

155. Mr Ryan argues there is nothing about the nature of this project which makes it unreasonable for the Court to modify the alignment to allow alignment 2A. Alignment 2A will follow the existing SH2 alignment past the Anderson dwelling to the east. The Anderson dwelling is already affected by the noise from SH2 on the east. The orientation of the Anderson's living quarters faces west. The Hearings Commissioner concluded that adverse effects to the Anderson dwelling could not be overcome for alignment 2. QPM submits that this problem is minimised if alignment 2A continues pass the Anderson dwelling on the present SH2 route.

156. QPM accepts that there is evidence of noise effects to residents to the east of the existing railway line if alignment 2A were to be preferred. However, these residents are already subject to noise on their eastern boundary from the existing SH2. Alignment 2A will create no new source of noise for these properties, unlike the situation that will occur for the motorway with alignment 2.

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[24] CBC; see n 7, pages 258-259.
[25] See n 7, page 59.

157. QPM believe that if alignment 2A were preferred it is not unreasonable that a low noise surface could be installed for the 25 residential properties to the east of the existing State Highway. And alignment 2A preserves the option of future collaboration with Tranz Rail to no lesser extent than alignment 2. Finally, alignment 2A promotes an equitable solution because it requires Transit to 'internalise' the adverse effects created by the motorway, allowing compensation for the owners of the Westshore motorcamp under the Public Works Act 1981. Given the conclusions in the 1990 and 1992 ecological reports also, it is not unreasonable that alignment 2A be preferred as it allows for a wider buffer between North Pond and Westshore Lagoon and would better promote Part II of the Act.

158. Alignment 2A will obviously involve the physical loss of the motorcamp. However, it is QPM's case that the amenity attributes and 'bundle of rights' held by the camp will be unreasonably compromised by alignment 2. Alignment 2A, therefore, would better promote the statutory purpose for this unusual site with very limited opportunity for alternate commercial use than would alignment 2. **Mr L W Barker, Consultant Valuer to Transit,** established in evidence that motorcamps are not such a rare or endangered facility that the loss of the Westshore motorcamp would be unreasonable. There are alternate facilities planned or available in the Napier locality to overcome these types of concerns.

159. Further, the word "unreasonable" as contained in s.171(1)(c) is open on a natural and ordinary construction to include elements of fairness and equity.

160. In the event that modification to alignment 2A is not upheld, QPM submits that the requirement should be cancelled on the basis that inadequate consideration of a joint road/rail project by Transit is not unreasonable. The evidence of the need for the road improvement is not so pressing or urgent in the Napier community that intervention is not unreasonable given s.5 objectives and the need to have regard to future generations.

161. Transit, however, draws attention to the "inherent inconsistency" between s.171(1)(b) and (c) which was highlighted by Skelton J in Babington v Invercargill City Council (1993) 2 NZRMA 480, 486 and noted by this Court in the CBC[26] case. It argues that the Court in CBC did not resolve the interpretation issue as it was content to find that Transit's consideration of alternatives was adequate and this Court should do the same.

[26] See n 7 above, page 59.

162. Counsel submits that the inconsistency identified in Babington can be avoided if s.171(1)(c) is regarded as a mechanism to ensure that, in those situations where inadequate consideration has been given to alternatives, the requirement is not rejected out of hand, but instead the further question is asked whether it would be unreasonable to require the requiring authority to use another route. The evidence shows that there has been adequate consideration of alternatives and it would be unreasonable to expect Transit to use an alternative site, route or method.

163. In response to QPM's arguments, Transit asserts that s.171(1)(c) operates on the nature of the work. It is difficult to see what it is in the nature of a road that can be relevant to reasonableness of use of alternatives. Certainly QPM's argument favours no particular alignment. Further, it is unreasonable to destroy an existing amenity and cause greater cost to the public by using an alternative site. It is questionable whether it could be said that it was unreasonable for Transit to avoid destroying an existing amenity.

Evaluation

164. First of all the effect of the motorway on the Anderson dwelling is not the subject of this inquiry. QPM made an application to introduce evidence at the opening of the hearing on the subject but this was rejected. In any event, as Mr Butcher stated in cross-examination, Transit has undertaken to provide noise insulation for the Andersons.

165. Secondly, we consider if and until Tranz Rail seeks involvement with a road/rail option, this is not a viable alternative.

166. Thirdly, we regard QPM's argument for alignment 2A contains an additional purpose in its pursuit for compensation. While the Act provides an express mechanism for the compensation of direct effects (s.185) or incapability of reasonable use (s.85), there is no entitlement to compensation for indirect effects. The motorcamp does not lie in the path of the designation and is therefore not immediately affected.

167. Besides, the Court only has the power under s.174(4) to confirm, cancel or modify a requirement. A "modification" is defined as "an act of making changes to something without altering its essential nature or character".[27] We do not consider an entirely new alignment

[27] **New Shorter Oxford Dictionary** Volume 1, page 1804.

which obliterates the motorcamp and brings it closer to a substantial number of residents accords with the definition of a "modification". It is an alteration.

168. We accept Transit's analysis of s.171(1)(b) and s.171(1)(c), in that the inconsistency between the two subsections which was identified in Babington can be avoided if s.171(1)(c) is regarded as a mechanism to ensure that, in those situations where inadequate consideration has been given to alternatives, the requirement is not rejected out of hand, but instead the further question is asked whether it would not be unreasonable to require the requiring authority to use another route.

169. Thus, s.171(1)(c) provides a requiring authority with a fall-back position whereby it is not fatal for a requiring authority to fail to satisfy s.171(1)(b) because it may be that the nature of the public work or project or work means that it would be reasonable to expect the requiring authority to use an alternative route.

170. We note that this interpretation does not accord with the Babington. However, we also note that Babington was determined on 24 April 1993. This was prior to the Resource Management Amendment Act 1993 which came into effect on 7 July 1993. The amending Act modified s.171 of the principal Act to the effect that s.171 was made subject to Part II (see s.87 of the Resource Management Amendment Act 1993) and hence affords a more balanced approach to s.171 which had previously been weighted towards the needs of requiring authorities.

Finding

171. **Part II issues allow the Court to scrutinise ways of avoiding, remedying or mitigating adverse effects on resources in order to sustain their existence. The situation may arise where the adverse effects are so major that a proposed alignment should be avoided altogether and the designation cancelled, an alternative being suggested. But as we shall see from our analysis of Part II issues, this is not so in this case.**

172. **In this case we do not conclude that inadequate consideration has been given to alternatives or that the effects of the designation are such that it should be avoided altogether. Under these circumstances we conclude it would be unreasonable for Transit to use an alternative route given the nature of the work. And we caution that if we are correct in this, it may be that an alternative route would require formal notification – but without further legal submissions on this question we can take the matter no further.**

Planning Instruments

173. Section 171(1)(d) requires that particular regard be had to:

> **All relevant provisions of national policy statements, New Zealand coastal policy statements, regional policy statements, regional plans and district plans.**

174. In CBC[28], we noted that it is the manner in which the requirement is supported by and will assist to implement the objectives, policies and provisions of the relevant planning instruments that the Court has particular regard to.

The New Zealand Coastal Policy Statement

175. **Ms Paula Hunter, Consultant Town Planner** for QPM states that given that the Ahuriri Estuary is a natural resource of national importance and the proposed motorway will impact upon the estuary, regard should be had to the New Zealand Coastal Policy Statement (the NZCPS). In her opinion of particular relevance in this case is:

> *Policy 1.1.2*
> *It is a national priority for the preservation of the natural character of the coastal environment to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna in that environment by:*
> ...
> *(c) protecting ecosystems which are unique to the coastal environment and vulnerable to modification including estuaries, coastal wetlands, mangroves and dunes and their margins.*

176. Ms Hunter explained that this policy applies to the "coastal environment" which is wider than the limitations imposed by the "coastal marine area". The proposed motorway will encroach on North Pond and there appears to be some discrepancies in how it will impact upon the margins of the Westshore Lagoon. There is a question then as to how the proposal could meet Policy 1.1.2.

177. Counsel for QPM submits that under s.6 of the RMA the Ahuriri Estuary and wetlands is deemed to be a natural resource of national importance. Alignment 2A would better promote the NZCPS and the provisions of s.6 than would alignment 2. Ms Hunter pointed out the statements of concern contained in the 1990 and 1992 ecological reports as to the proximity of alignment 2 to the Westshore Lagoon which indicate the problem.

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[28] See n 7 above, page 61.

178. Transit argue, however, that the NZCPS did not exist at the time of the original hearing for the motorway designation, nor at the time the RMA 200/94 appeal was lodged as the NZCPS was gazetted on 5 May 1994. It is therefore irrelevant to this case.

179. Transit notes further that the area covered by the motorway designation requirement falls outside the coastal marine area, as defined by the RMA and in the Hawkes Bay Regional Coastal Plan. Resource consents have been granted for those parts of the motorway alignment that come within the coastal marine area. It was pointed out issues relating to the effects of the coastal marine area, and the coastal environment in general, were specifically dealt with previously before NCC and the Hawkes Bay Regional Council and are therefore not relevant in this case. All necessary consents and permits were obtained at that time.

180. Transit further considered policy 1.1.1 [sic] cited by Ms Hunter does not stand alone. It must been seen in the context of other policies in the NZCPS, notably those under Chapter 3 which relate to activities involving subdivision and the use and development of areas on the coastal environment.

Hawkes Bay Regional Policy Statement

181. Ms Hunter was of the opinion that the Hawkes Bay Regional Policy Statement (RPS) provides no clear guidance in assessing the proposed motorway. However, the efficient and effective development of land transport and the adverse effects of land transport activities on the environment is identified as a significant issue. The statement also contains policies on promoting compatible land use practices and providing for economic development by maintaining and enhancing network utility operations. Further, it contains policies promoting the preservation of the natural character of the coastal environment from inappropriate development. The motorway is an inappropriate development in this context.

182. Transit also considers that the HBRPS contains no clear guidance in assessing the proposed motorway.

Operative District Plans

Hawkes Bay County Section and City Section

183. For QPM Ms Hunter gave evidence relating to the relevant operative planning instruments. She identified that over its entire length, the proposed motorway is subject to four operative district plans, two of which are transitional. While all four plans were considered by Ms Hunter in terms of general objectives and policies, only the Hawkes Bay County Section of the City of Napier Transitional District Plan Review (the County Plan) was considered in terms of zoning provisions as she regarded that this is the plan which applies to the proposed motorway in the vicinity of the Holiday camp.

184. The County Plan became operative in 1984 and contains an overall planning aim which follows the philosophy of the former Town and Country Planning Act 1977. The City Section of the City of Napier Transitional District Plan Review (the City Plan) also became operative in 1984 and contained the same overall planning purpose as the County Plan.

185. Ms Hunter recognises both plans contain designations in respect of the original motorway alignment. The City Plan recognises the need to provide for essential public works in the vicinity of the Ahuriri Estuary but that such works must be undertaken with the least disruption. However, Ms Hunter considered the overall objectives and policies in both plans provide little assistance in assessing the proposed motorway, apart from a general thrust to provide efficient roading networks, protecting amenities and the natural character of the coastal environment.

186. In her view, the two plans that are relevant are the Bay View Plan which applies to the very northern end of the motorway and the Western Hills Plan, and that neither of these show the proposed motorway designation. The Bay View Plan has an overall objective in terms of network utility operations which is:

> **To provide for the efficient development and maintenance of network operations throughout the district while avoiding, remedying or mitigating any adverse effects of activities on the environment.**

187. Given that the adverse effects of the proposed motorway cannot be avoided, remedied or mitigated particularly in terms of the motorcamp the requirement for the designation does not meet the above objective.

188. Ms Hunter also testified that the land subject to the proposed designation in the vicinity of the camp is zoned Estuary Wildlife Reserve. This zoning was introduced by way of Change No.5 to the County Plan which became operative in June 1990. The aim of the zone is:

> *To protect and manage the natural wetland habitat of the Westshore Wildlife Refuge and the Watchman Wildlife Area for the benefit of birdlife and as a recreational area for the public to observe wildlife in a natural setting.*

It is Ms Hunter's opinion that the establishment of the proposed motorway in this zone would not be consistent with the above stated aim in that it will impact on the estuary and restrict public access. The zone makes no provision for roads, nor are there any general or district wide provisions which would enable the construction of new roads as of right.

189. QPM argue that whilst roads on the scale of the proposed motorway usually are designated works, district plans widely list new roads as permitted or controlled activities, indicating an acceptance of transportation effects. The Estuary Wildlife Reserve Zone does not recognise or provide for this recognition but facilitates only protection of the natural environment and recreation.

190. The Estuary Wildlife Reserve Zone also provides for:

> *the provision and management of natural wetland habitat and bird life as well as informal outdoor recreation sympathetic to the protection of the habitat [as] the primary purpose*

QPM considers that this specific provision also does not assist Transit. The zone statement recognises the constraint imposed by the proximity of the proposed motorway. It is therefore reasonable to infer that the zone encourages attributes and activities free from substantial noise and disturbance based on the predominant uses of the reserve. It therefore protects the amenities of the motorcamp on its western border.

191. In this regard Ms Hunter identified Change No.5 included the Westshore Holiday Camp as a "scheduled site" in the County Plan which provides for the particular activity being undertaken on the site with permitted activity status.

192. However, Transit considered that some of these facts are erroneous in that Change No.5 was in fact a change to the Napier City Plan and not the County Plan.

193. Nevertheless, QPM consider the importance is that the relevant zone and its objectives and policies were identified in Ms Hunter's planning analysis even if the name given to the relevant plan was wrong.

The Proposed Ahuriri Section of the City of Napier District Plan Review

194. Section 78(5) of the Amendment Act provides that these proceedings are to be heard as if the Amendment Act had not been enacted, and the designation is to be assessed under the unamended form of s.176 – which would result in the transitional plan only being considered.

195. Counsel for QPM, however, contends that a purposive construction is required under s.5(j) of the Acts Interpretation Act 1924 whereby, notwithstanding s.78(5), regard should also be had to the proposed plan. The remedial nature of the 1997 amendment to s.171(1)(d) signals a previous drafting error in the legislation which did not reflect Parliament's intention. Regard should be given to the proposed plan as well as the transitional plan given that the designation would be included in the proposed plan under s.175. If this analysis is wrong, counsel submits that in accordance with s.174(4) and Part II considerations, the Court has the discretion to have regard to the proposed plan within which any designation would be included.

196. Transit submits that QPM's contention is plainly wrong and the correct legal approach to the amendment in the present case is to ignore proposed instruments. To suggest the Court interpret s.171(1)(d) as if it contained a mistake and assume a legislative corrective role is merely an attempt by QPM to correct an error made by its planning witness in according greater weight to the proposed plan than any other of the relevant planning instruments.

197. Meanwhile QPM considers that alignment 2 conflicts with the objectives and policies of the Proposed Ahuriri Section of the City of Napier District Plan Review (the proposed plan). According to Ms Hunter, this plan applies to a major part of the realignment and it should be considered as the dominant document in assessing the reference.

198. The witness considered the proposed plan has a stand alone section which applies to Network Utility Operations. The only objective for this section is the same as included in the Bay View Plan and the Western Hills Plan:

> *To provide for the efficient development and maintenance of network utility operations throughout the district while avoiding, remedying or mitigating any adverse effects.*

J.E.K.

As the effects of the proposed motorway cannot be avoided, remedied or mitigated, Ms Hunter considered the proposal cannot meet this objective.

199. Further, the land subject to the designation in the vicinity of the motorcamp is zoned "Estuary Zone" in the Ahuriri Plan. The relevant objectives and policies to that zone are as follows:

> ***Objective 1***
> *To provide appropriate pedestrian access to and along the margins of the Ahuriri Estuary, whilst protecting the estuarine environment.*
>
> *1.2 Encourage the maintenance and enhancement where appropriate of the existing walkway system within the Estuary Zone.*
>
> *1.3 Discourage further legal public road access above the Embankment Road bridge.*
>
> *1.4 Provide access for public works.*
>
> *1.5 Discourage the use of vehicular access adjacent to the Estuary except for land administration purposes.*
>
> *1.6 Have regard to the potential effects of access on the estuarine environment.*
>
> *1.7 Recognise the potential impact of public access on the ecology of the Estuary above the Mean High Water Springs mark.*

200. Ms Hunter maintains that the proposed motorway will cut through the existing public access to the Westshore Domain Recreation Reserve and Wildlife Domain. Transit's plans show a new access on the western side of the proposed motorway and the creation of a new access track along or adjacent to the Westshore Lagoon. Ms Hunter considered it is uncertain to what degree these works will encroach on the estuary or their effects. She states that the severed public access and the provision for alternative access are also in conflict with policies 1.3, 1.5, 1.6 and 1.7.

201. Other objectives and policies which were considered by Ms Hunter to be relevant are:

> ***Objective 5***
> *To ensure that the fragile foreshore environment is safeguarded against the effects of inappropriate land use.*
> ***Policies***
> *5.1 Control activities that may have effects on the ecological values of the Ahuriri foreshore area.*
> *5.2 Support the policies of the Hawkes Bay Regional Coastal Plan.*
> *5.3 Support policies of the National Coastal Policy Statement.*
> *5.4 Mitigate the effects of any development on the amenity values of the foreshore.*

202. QPM maintain the proposal is not considered to be consistent with Objective 5 and its associated policies. It is unlikely that the effects of the motorway on ecological and amenity values can be appropriately avoided, remedied or mitigated. Ms Hunter questions whether the motorway in its proposed location is an appropriate land use given that there is an alternative alignment 2A available that totally avoids North Pond and further encroachment on the margins of the Westshore Lagoon.

203. It is submitted by Transit that the proposed plan is not relevant to this appeal. At the time the appeal in RMA 200/94 was lodged in 1994 the proposed plan did not exist. The latter was notified as a draft document in 1997 but remains to have only proposed plan status. Furthermore, under s.78(5) it is clearly outside the scope of documents to be considered. The transitional Napier City Plan was in existence in 1994 and remains operative in respect of the Westshore area affected by the proposed motorway. It is therefore the dominant planning document to be considered for the purpose of this appeal.

204. In any event, irrespective of which plan is relevant, Transit contends that NCC always intended to include the motorway in the proposed plan. NCC recommended approval of the proposed motorway designation in 1994 and has consistently supported the designation since. The designation (although subject to appeal) appears in the proposed plan being confirmed by Transit in July 1998. As the motorway has been accepted into the plan, NCC must have (intentionally) created policies and rules that would be compatible with the designation.

205. Further, whilst Ms Hunter pointed to the objective for the proposed Ahuriri Section of the plan that applies to network utility operations, she omitted to point to the various policies given to achieve this objective. These include:

> *1.1 Allow the construction, operation or upgrading of network utility operations with no more than minor adverse effects*
> *1.2 Control the construction, operation or upgrading of network utility operations with more than minor adverse effects.*

206. It is apparent from these statements that the plan does not seek to preclude the possibility of network utility operations in the Ahuriri Sub-District. It requires that control should be exercised over operations with more than minor effects.

207. As to Objective 1 of the Estuary Zone, Transit argues these policies need to be seen in the context of the preceding objective. That is, they are specifically concerned with the management of pedestrian access to and along the margins of the estuary and do not relate to

the construction of a motorway. In his additional evidence Mr Tonks referred to the access track to be established adjacent to the lagoon and stated the track in question already existed and would continue to be available. As to the motorway severing pedestrian access to the domain, Transit notes that this would be the case with any of the alignments – including alignments 2A and 4 supported by QPM.

Regional Land Transport Strategy

208. QPM submits that the Regional Land Transport Strategy is relevant under a Part II analysis. Section 29L(3) of the Land Transport Act requires Transit to **ensure that its actions in exercising its functions, duties and powers are not inconsistent with any regional land transport strategy.**

209. In her evidence Ms Hunter stated the establishment of a combined road/rail bridge would be entirely consistent with the Region's Land Transport Strategy, the objective of which is to **promote the integration of road/rail facilities.** Mr Wallis for NCC in cross examination also acknowledged this was a desirable objective.

210. Transit is of the opinion that s.171(1)(d) does not contemplate the Regional Land Transport Strategy to be a planning instrument which must be considered. Nonetheless it is a reflection of the community's representatives' views of a desirable transport future and might have some significance in Part II considerations. What is of importance is that the Strategy assumes there will be a motorway, albeit with the hope Tranz Rail will come to the party sometime.

211. Transit therefore asks the Court to expressly reject QPM's approach.

Evaluation

212. We note that some of the relevant planning instruments were produced by Ms Hunter as an additional bundle of documents. As such they were directly in evidence.

213. With regard to the relevant provisions of the NZCPS (if we understood correctly), Ms Hunter did not accept that given that a regional council coastal permit applies to land within the coastal marine area (CMA) the permit process was the only one with which to address issues relating to the motorway projects. She considered as the NZCPS applies to the coastal environment and covers matters wider than just the coastal marine area, it is a relevant planning instrument

against which to measure the designation. She concluded that as a result more consents might be required for the motorway proposal than have been considered thus far. Both she and Mr Ryan addressed the issue of gravel extraction which emerged from a supplementary question put to her by Mr Ryan.

214. The Scheme Assessment Report of 1998 identifies that the borrowing of 40,000 cubic metres of clean gravel for motorway purposes from the Westshore Domain would take place in an environmentally sensitive area. The report anticipates that interested parties would agree to the removal of the material provided it was carried out as part of the overall enhancement of the Westshore Lagoon. At the stage that the relevant report was written it was decided not to proceed with either proposal – either extraction or enhancement. It also identifies that Transit will have to apply for a separate resource consent to borrow the material.[29]

215. QPM was critical that the notice of requirement failed to identify that consents were required for the extraction of gravel from the Westshore Domain. It is concerned that running gravel may interfere with the public access around the Ahuriri Estuary, what route the trucking might take and other effects which may impact on the motorcamp and its patrons.

216. Transit argues that a resource consent to extract gravel is irrelevant to a notice of requirement as it has nothing to do with the activity for which the designation is required. A collateral construction consent is not required to be notified within a requirement because the exact details of such matters may not be known until construction and they are unlikely to have any relevance to the designation for purposes of the Act. If Transit should elect to source its materials from Westshore Domain and not elsewhere, a consent may be obtained then. Removal of the gravel may also achieve a related purpose of enlarging, enhancing and improving the Westshore Lagoon which are required by the conditions attached to the coastal permit.

217. We accept Transit's point that in relation to the gravel extraction the extraction does not require a determination from this Court, at least at this stage, because it is not in the designation area. We accept collective construction consents for many activities to do with road building are required only at the time of construction, for as Mr MacFarlane has correctly identified, the exact details of such matters may not be known until such time.

[29] See n 1 above – page 24.

218. Because of their tentative locations on the Westshore Domain the gravel extraction areas would be possibly covered by the provisions of either the proposed Ahuriri Section of the plan, the Hawkes Bay Regional Council Coastal Plan or the Hawkes Bay Regional Water Resources Plan. Ms Hunter testified to this. As such they will require resource consent in the future.

219. Ms Hunter also stated that whereas the previous motorway alignment had abutted the western boundary of the Westshore Reserve, alignment 2 is located within the estuary itself. She considered that the resource consent process did not adequately address the wetland fringe of North Pond referring to the background ecological reports.

220. Estuaries such as the Ahuriri are seen as part of the coastal system.[30] The Westshore Lagoon and North Pond therefore form part of the coastal environment. But apart from the fact that the NZCPS did not exist at the time the appeal RMA200/94 was lodged however, we have difficulty in accepting that Transit did not recognise in alignment 2, that there would not be an effect on the coastal environment through the coastal permit and designation process and accepted conditions to mitigate any potential adverse effects in accordance with the relevant plan provisions.

221. Mr Tonks in his evidence-in-chief explicitly stated that the nature of that effect would be a loss of about 3% marginal reed area of North Pond and a minor loss of water surface area around the edge of the high water mark. Evidence given at the HBRC hearing in fact had recognised the fact that the motorway along alignment 2 would remove 3% of the reed bed habitat which was frequented by a variety of water birds and a condition was provided for the designation accordingly to mitigate any adverse effects. This condition was confirmed by Transit. And under s.172 Transit accepted in part the recommendations of NCC in relation to its proposed alteration to the designation subject to conditions relating to drainage issues and construction of the crib wall in respect of the reed area of North Pond, maintenance of settling ponds, runoff to the Westshore Lagoon, as well as the use of fabric curtains to minimise sediment loss in North Pond.[31] None of these were challenged by QPM or the Milnes.

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[30] See definitions under s.2 of the Act.

[31] See Clause 3(a) and (b) and Clauses 6, 7, 8, 9 of Transit's 1994 Confirmation of Alteration To the Designation – Record of Documents, Volume 3, Document 31, page 745.

222. We cannot accept therefore that the sensitivity of the coastal environment of the Ahuriri estuary/motorway interface was not dealt with in a way which did not seek to mitigate potential adverse effects. As such the proposal does not offend the provisions in the plans which are directly in issue. The effects are adequately controlled.

223. We are reminded of the decision of the Environment Court in Shirley Primary School (admittedly relating to a resource consent) where Judge Jackson discussed issues relating to risk and the onus and burden of proof. He stated, in summary:

> *(1) In all applications for a resource consent there is necessarily a legal persuasive burden of proof on the applicant. The weight of that burden depends on what aspects of Part II of the Act apply.*
>
> *(2) There is a swinging evidential burden on each issue that needs to be determined by the Court as a matter of evaluation.*
>
> *(3) There is no one standard of proof, if that phrase if of any use under the Act. The Court must simply evaluate all the matters to be taken into account ...on the evidence before it in a rational way, based on the evidence and its experience; and give its reasons for exercising its judgment the way it does ...*[32]

224. As proponents of the proposal, Transit have an evidential burden to establish that it meets the Act's purpose of sustainable management. In that Transit appeared to satisfy all matters relating to the coastal environment in its application for the coastal permit i.e. they were not appealed, and in light of the fact that QPM has not challenged the mitigation conditions notified by Transit in respect of North Pond by providing any expert evidence to explore these matters in any depth, then we remain satisfied that the natural character of the relevant part of the estuary has been addressed adequately in the relevant forums.

225. In respect of the transitional plans despite the fact that QPM's submissions in reply all relate to the existing designation to the west which is separated from the Westshore Motorcamp by the Wildlife Reserve Zone in between. We have concluded that the motorway is supported by and will assist to implement the relevant planning provisions. In this regard, we disagree with QPM's interpretation of what is the relevant planning instrument considering it is not the Hawkes Bay County Plan, but the Napier City Plan. Counsel for QPM and the Partnership conceded this to be the case in final submissions. But we agree with QPM, that the complicated nature of the plan changes makes it difficult for anyone (even the most experienced) to follow its progression with any equanimity.

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[32] Shirley Primary School v Christchurch City Council [1999] NZRMA 66, page 106.

226. The area encompassing the Estuary Wildlife Reserve Zone was included in the Napier City plan in April 1984 and its zone changed through Change No.5 in June 1990. Transit convincingly argued the Napier City Plan clearly provides for the proposed motorway although Change No.5, which incorporated changes 5.1, 5.2 and 5.3, created the Estuary Wildlife Reserve Zone in the City Plan. This change was inserted into Chapter 7 of the plan which deals with "Reserves Ordinances".

227. From both the plan change itself and the other surrounding rules, aims and policies which interact with it, it is apparent that a motorway is anticipated by the transitional plan and that it will pass through the Estuary Wildlife Reserve Zone.

228. Change No.5 specifically refers to the motorway in both the Zone Statement and Scheme Statement. Transit referred us to the following relevant excerpts:

> *... The reserves are subject to the constraints imposed by their proximity to the Airport, State Highway 2* ***and proposed motorway.***[33]
>
> *...* ***When the motorway is constructed,*** *it is proposed to close and remove that part of Watchman Road which bisects the water areas.*[34]
>
> *... The road link between* ***the future motorway*** *and Domain Road will sever part of this addition from the wetlands and the future use of the remaining balance area will be determined having regard to the circumstances at the time.*
>
> *The dry area of land between Watchman Road Wildlife Area and State Highway 2 is available for limited parking of vehicles for those users of the Watchman Road Wildlife Area.*[35] (Transit's emphasis)

How can the proposed motorway be in conflict with the provisions of plan even the Wildlife Reserve Zone when it is specifically referred to?

229. This conclusion is further supported by other policies and statements contained in the City Plan of 1985. In section 16 of the Scheme Statement, which deals with the "Estuary Sub-District" and into which Change 5.3 was inserted, there are various statements dealing with public works.[36] Statement 16.7.1 for example reads:

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[33] Plan Change No.5.2 (7.7.1 Zone Statement, para 2, 178(a)). Additional Bundle of Documents 1
[34] Plan Change No.5.2 (7.7.1 Zone Statement, para 5, 178(a)). Additional Bundle of Documents 1
[35] Plan Change 5.3 (New Scheme Statement 16.8, Wildlife Reserve. Clause 2., para 3, page 57(a)).
[36] Napier City Plan Section 16.7 (Estuary Sub-District Public Works), page 57.

> *Various public works have been proposed that will impinge on the Inner Harbour, the Estuary and outfall channel, all of which are considered necessary in order to achieve the objectives of the District Scheme within the planning period. Existing public works which are essential to the efficient operation of the present or future land uses shall be retained and upgraded to meet the circumstances.*[37]

230. Section 16.7.3 then sets out the various public works that have been proposed for the inner harbour, estuary and outfall channel. The first of these is:

> *Motorway Alignment: The Heretaunga Plains Transportation Study has recommended that the alignment of the proposed motorway should be located to the west of the Westshore Domain. This will require a new bridge to cross the outfall channel and removal of part of the southern marsh. The bridge and causeways shall encroach the least amount possible and care shall be exercised not to modify the southern pond more than necessary.*[38]

231. The proposed motorway was therefore clearly anticipated at the time of drafting the Napier City Plan. For example, the Scheme Statement says:

> *Napier is a major transport and communications centre for the region, having the only sea port and airport. It is also located on the main East Coast railway and State Highway routes.* ***Consequently, the "Heretaunga Plains Transportation Study", which has been carried out and completed in 1980 has been taken into account in this review of the scheme.***[39] (Transit's emphasis)

The Heretaunga Plains Transportation Study (1980) had included the proposed Napier Northern Motorway Extension (Hawkes Bay Airport to Taradale Road).

232. Section 3.1 of the Scheme Statement also refers to proposed public works. That states:

> *The major public works that are proposed to be constructed during the planning period and shown on the Scheme are:*
> - ...
> - *Motorway extension from Taradale Road to Westshore*
> - ...

233. We agree with Transit that it is incorrect to suggest that the motorway is somehow inconsistent with the plan when the future construction of the road is so explicitly acknowledged. Section 16.7.3 for example contemplates that after completion *of the motorway* the Embankment Bridge and Road is to be removed so that the physical features of the land and waterways are

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[37] Napier City Plan Section 16.7.1 (Estuary Sub-District Public Works), page 58.
[38] Napier City Plan Section 16.7.3 (Estuary Sub-District Public Works) 59 Plan Change 5.3 New Scheme Statement.
[39] Napier City Plan Scheme Statement, Section 1.5 (Regional Planning), page 4.

consistent with the proposals set out in the Management plan for the Estuarine Park (the Park lies between the Pandora and Embankment bridges extending to the junction of Embankment Road and Meanee Quay). The proposed motorway is also noted on Planning Maps E2 and E3.

234. As to the provisions of the proposed plan, in CBC[40] even though the legislation indicated otherwise, we assessed the provisions of both the transitional and proposed plans because the parties agreed that the proposed plan was the dominant planning document. In this case, we acknowledge the Court's lack of jurisdiction in respect of the provisions of the proposed plan relating to the motorway, particularly in light of the fact that the motorway designation should not have been included in the proposed plan where there was an appeal (RMA 200/94) already lodged against a decision of a requiring authority under s.175(1)(a).

235. For the record however, we intend to make observations about the way in which the provisions of the proposed plan are supported by the designation proposed.

236. With regard to the objective for Network Utility Operations in the proposed plan, we note Ms Hunter did not provide a record of the various policies which underpin that objective. As Transit points out, under Section 25 there are two policies in place to achieve the objective and in essence they recognise possible construction of a motorway and controls where the construction has more than minor adverse effects. For in the Explanation, Reasons for the Objectives, Policies and Methods, *transport systems* are included within the definition of Network Utility Operations upon which it is noted the City is dependent (s.166(f) of the Act defines a Network Utility Operator as a person who constructs a road). Thus the proposed designation has a legal foundation for its existence supported by the need for adequate controls.

237. As to questions of access, the existing access to the Westshore Reserve (formerly an accessway to a speedway) is not part of the designation being an associated work. Activities which currently take place on the reserve include a Kiwi breeding house, passive public recreation and a residence for the Manager of the Reserves Department of NCC.

238. Because road access was an issue in December 1993 the Hearings Commissioner recommended a condition (Condition 5(A)) to Transit which states *"Transit shall provide all weather*

[40] See n 7 above, page 61.

vehicular access to the Westshore Wildlife Reserve, taking a route which has the least environmental impact on the Westshore Lagoon". The reason given for that recommendation is that:

> *"The Westshore Wildlife Reserve is a public reserve and access to it must be maintained".*

239. We find even if a new designation will sever the existing vehicular access, so will the alternative designation which QPM promotes. Ms Hunter acknowledged that whatever is built the people will have to cross the motorway to access the reserve. This can be seen from a sketch attached to the additional evidence produced by Mr Tonks which is attached to this decision marked **Appendix 5.**

240. Objective 1 to the Estuary Zone in fact relates not to the designation for the motorway but to providing appropriate pedestrian access to and along the margins of the Ahuriri Estuary. In terms of access to the Westshore Reserve through the camping ground, this has an access gate at the rear of the camp as well as that from the front entrance but as Ms Hunter acknowledged there is no formal access to the reserve provided in any event. Meanwhile we note roads per se are not provided for in the Estuary Zone, as the proposed plan provides for appropriate pedestrian access to and along the margins of the estuary as an objective. The relevant policy requires that the use of vehicle access adjacent to the estuary be discouraged. The explanation states that the ecological values of the estuary are at greater risk with increasing number of users. To that end NCC drew a distinction between maintaining foot access and providing further road access.

241. Whilst Mr Wallis acknowledged that the access track is close to the margins of the lagoon it was Mr Tonks' evidence that the accessway requires no work which would impact on the lagoon itself.

242. We conclude that in the light of the Hearings Commissioner's Condition 5(A) if and when it comes for the road to be formed across the proposed motorway, then at that time NCC can revisit the issue in terms of the provisions of the proposed plan.

243. Finally, as to QPM's contention that the Hawkes Bay Regional Land Strategy applies to the proposal, that document does not require assessment under s.171(1)(d) of the Act and we so find. That provision requires particular regard must be paid (inter alia) to national policy statements, the NZCPS, the RPS, the regional and district plans or proposed district plan. Even

if the document did apply, unless Tranz Rail are prepared to be part of the promotion of the integration of road/rail facilities the option unfortunately remains as part of the wish list for the area.

Finding

244. We find that the motorway designation requirement as proposed, is supported by and will assist to implement the relevant provisions of the planning instruments to which we have had particular regard.

PART II

Chapter 8: Costs and Benefits as a Measure of Efficiency and Sustainable Management

245. QPM considers that *"sustainable management"* as defined in s.5 means managing the use, development and protection of national 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".* It contends the evidence proves the economic wellbeing of the Westshore Motorcamp will not be adequately provided for by Transit's proposal and as a result the designation should be modified (in effect) to bring about the destruction of the motorcamp with the choice of alignment 2A.

246. But QPM was careful to point out that its economic evidence does not go merely to the financial viability of the motorcamp which it considers at risk. We were urged to consider that the benefit/cost ratio is integral to Transit's promotion of the *benefits* of the project and this includes intangible benefits for the wider community some of which are environmental, and which Transit has not accounted for. Intangible costs and benefits which cannot be measured in monetary terms need to be considered by the Court to ensure the efficient use of resources. In this QPM appears to be broadening any economic argument redirecting focus away from its intent – that Transit purchase the motorcamp because it is inefficient for it not to do so.

247. **Mr M Copeland, Economic Consultant to QPM**, gave evidence comparing the economic efficiency of alignment 2 with alignment 2A. He believes that the RMA and the roading improvement project evaluation procedures of Transfund both require the choice between roading improvement project alternatives to be consistent with the efficient use of resources. This requires an evaluation of both tangible and intangible benefits and costs (such as noise and environmental issues). An intangible benefit cannot be measured in monetary units. Mr Copeland explained Transfund more recently removed the 10% cap applying to intangible factors valued using the back calculation methodology which involves determining what an intangible benefit must be worth to achieve a target benefit-cost ratio and valuing it at that level if in the mind of the analyst such a value is a reasonable estimate.

248. Mr Ryan, counsel for QPM, drew on the **Inquiry into the Environmental Effects of Road Transport: Interim Report of Transport and Environment Committee**, New Zealand House of Representatives, 1998. While accepting that the report is *interim*, QPM claims the report echoes the concerns the company raises that Transit is driven by tangible costs when selecting motorways in preference to alternative alignments with less environmental impact

such as alignment 2A with its larger spacial buffer. This is an intangible (uncosted) benefit as is one which would promote a joint road/rail crossing bringing greater overall environmental benefits to the Ahuriri Estuary.

249. QPM pointed out that Mr Cairns also claims that alignment 2 is the *"... least environmentally damaging alignment out of all the options realistically available."* This statement surprised Mr Copeland given conclusions of the early 1990s ecological reports which Transit itself commissioned. These stated that alignments further to the east and passing through the motorcamp were the most acceptable from an ecological perspective. Also Mr Cairns himself had stated in a letter to Tranz Rail dated 17 December 1996 that a combined road/rail crossing has significant merit from an environmental perspective.

250. QPM also argues that in terms of sustainable management, there is room within the concept of economic wellbeing of the motorcamp to have regard to distributional equity. Mr Copeland believes that Transfund's roading improvement project evaluation methodology adopts a single national viewpoint in identifying and valuing costs and benefits. This means that the distribution of costs and benefits arising from a project are ignored. Whilst this may be appropriate in the context of focusing solely on economic efficiency, in terms of economic wellbeing it means that distributional implications may be relevant both to the motorcamp and to the wider public.

251. QPM argues that normally for losses from a motorway alignment on such facilities (as petrol stations) there is an off-setting gain to somebody else somewhere else (in economic terms called a transfer) but it is different for the motorcamp which will suffer adversely in terms of fairness and equity which arise under Part II of the Act.

252. A report prepared by Knight Frank-Turley & Co Ltd attached to the QPM evidence estimates that an (identified) combined loss to the Westshore Camp leasehold owners and the operator will result from alignment 2. In Mr Copeland's view, this loss should be included as part of the national economic costs of alignment 2. It cannot be assumed that this loss will be transferred as an offsetting gain to other camp owners and operators since:

- relocation to alternative sites will mean at least some diminution in value to users;
- there may be costs associated with providing alternative facilities elsewhere; and

- the response of the Westshore Camp operator may be to reduce charges so that much of the same loss is incurred but there is no gain through business being transferred elsewhere.

253. In this case it was alleged the motorcamp has a uniqueness through being in close proximity to various facilities including the Westshore Reserve, and, as a result of the motorway extension, will suffer from major adverse effects resulting in considerable economic loss. QPM also maintains that consumer loss is significant if the visitor can't duplicate elsewhere the experience provided for by the motorcamp.

254. QPM asks, should the motorcamp and the region have to put up with an environmental cost because otherwise there will be a roading project elsewhere in North Auckland which otherwise would have achieved four times as many traffic benefits? Transit had acknowledged in cross examination that the benefits of alignment 2 are *"diffuse throughout the region, but the effects (both tangible and intangible) are relatively concentrated in respect of the Westshore Holiday Camp and possibly the adjacent Anderson dwelling".*

255. Transit's Consultant Economist, Mr Butcher maintained throughout cross-examination that the difference between the benefit/cost ratios was meaningful in any promotion of the proposal. On the Opus recalculations of April 1999,[41] these were estimated to be 3.6 for alignment 2 and 3.2 for alignment 2A. The alignments equally offer similar tangible benefits, namely the vehicle operating costs, savings in time travel costs and accident costs. The difference lay in the tangible costs assessed as being more expensive in the case of alignment 2A and lay in the higher land acquisition costs. Mr Copeland contends a proper application of Transit's project evaluation procedures (incorporating QPM's concerns) would in effect reveal a minor difference between the two alignments.

256. Mr Copeland noted a number of cost adjustments in the 1999 evaluation have been made for alignment 2A such that its design, construction and supervision costs are more than for alignment 2. This is a change from the ranking of these costs by Works Consultancy (the previous name of Opus Consulting) back in 1992.

[41] This refers to Opus Report **AIRPORT MOTORWAY – ESTIMATES and B/C** 21/4/99 – See Record of Documents Vol 3 page 849.

257. Mr Copeland challenged some of the adjustments in his supplementary evidence. He contended that for the *"embankment"* option, a cost of $1,000,000 has been included for the *"cost of demolition of existing embankment bridge – 50% cost included as a TNZ cost"*. However, it was his understanding that Tranz Rail would have to meet this cost at some time in the future given its intention to retain the line. Therefore from a national viewpoint there is no additional cost in demolition of the existing embankment bridge. Only adjusting total costs for this error would increase the embankment option's benefit/cost ratio to 3.5 versus Opus' benefit/cost ratio calculation of 3.6 for alignment 2.

258. Further, the benefit/cost ratios which Opus has calculated for the various alternative alignments vary between 3.1 and 3.6. This is against a background of Transit's benefit-cost ratio for its preferred alignment varying from 5.09 in 1992, 2.8 in 1996, 3.0 in December 1998 and now 3.6 in April 1999. Given that the underlying reason for the difference in the current benefit-cost ratios for alignment 2 is a difference in cost estimates of only 11.3%, Mr Copeland did not believe a strong preference has been established for alignment 2, even on the basis of the Opus analysis of the tangible costs and benefits only.

259. Further in Mr Cairns' evidence, QPM considered there are a number of errors and omissions in Transit's assumptions. Firstly Mr Clentworth considered the purchase price of the motorcamp for options 2A/4 and embankment is excessive. As the camp operator's lease expires in December 2001, some 4 to 5 years before Mr Cairns expects to get full funding for the project, it would be possible at this time to purchase the camp for the value of the land and improvements only, without the need for Transit to compensate the camp operator.

260. Secondly, Mr Clentworth noted $25,000 for alignment 2 has been provided for compensation for work required in the motorcamp. In QPM's view this is nowhere nearly adequate. In 1998, QPM obtained quotations for 1.8 metre high fencing to the west and southern boundaries of the whole camp (Transit amended the proposed height of the fence to 2.4 metres), and the earthworks and drainage required on the site of the proposed extension into the leasehold area to make it suitable for camping purposes. The total cost including QPM's estimated costs of obtaining appropriate resource consents from the council and contingencies amounted to approximately four times Transit's figure. These costs do not include the cost of a fence that had been undertaken by Tranz Rail to erect along the boundary of the motorcamp with the railway embankment. Nor did it include the cost of erecting a new ablutions block or the installation of electricity, gas, water, sewerage, or a suitable internal roading network to facilitate the re-organisation of the camp's activities. Mr Clentworth estimated the value of this

work to be in the order of $150,000. This is in line with the range of cost of redevelopment of the camp contained in Mr Barker's evidence. The cost of compensation included in the estimate should be $220,000. The extra $195,000, if included as a Transit cost, reduces the benefit/cost by 0.09. If this cost is included as a negative benefit, the reduction in benefit/cost ratio is only 0.02, i.e. one quarter of the effect.

261. Mr Copeland for his part was of the view Mr Cairns for Transit also appears to have made a significant mistake in his interpretation of the costs of alignment 2A. He had *"double counted"* the costs of the site by including the financial costs to Transit to settle with the Westshore Holiday Camp leaseholders and the significant adverse effect on the site of routing the motorway through the camp.

262. In Mr Copeland's opinion, from the national economic viewpoint, the actual payment from Transit to the Westshore Motor Camp leaseholders is only a transfer. However, the payment for the land can be used as a proxy for the loss of the land for alternative uses. Therefore it is wrong to include the significant effects on the site as a cost, as well as the payment from Transit. Furthermore, in addition to this double counting, Mr Cairns also takes no regard of the environmental benefits of an alignment passing through the camp compared to alignment 2.

263. On the basis of these shortcomings in Mr Cairns evidence, Mr Copeland believes Transit:

- will face difficulties in convincing Transfund that alignment 2 is the preferred option, having regard to Transfund's project evaluation procedures; and

- has not had proper regard to economic efficiency and economic wellbeing as required by the RMA.

264. Further, QPM noted that even if an alignment passing through the motorcamp is slightly more expensive than alignment 2 due to the acquisition costs of the motorcamp, the growth in traffic benefits over time which is apparent from the various studies which have been undertaken, implies that choosing such as alignment, in preference to alignment 2, will only delay the construction of the motorway extension. It will not rule out funding being available together.

265. Mr Copeland also reviewed the various benefits/costs ratios for the project from 1992 identifying that the benefit/cost reviews of 1996 and 1998 do not appear to reassess the ratio calculation for alignment 2A which consistently carried higher land costs although its construction and supervision costs were estimated to the lower than alignment 2.[42]

266. Accordingly, there is a call for a fresh analysis of the benefit/cost ratios for each of the alignments. A proper analysis of the alignments may well reverse the earlier preference for alignment 2 over 2A. The latest available data on traffic benefits and construction costs, the full economic impacts on land values and the potential cost savings from combined road/rail embankments alone may be sufficient to reverse the earlier preference in terms of benefit/cost ratios. This is further so if adequate weight is given to the comparative noise and other environmental effects.

267. It was pointed out that Transfund's project evaluation procedures allow for the reversal in ranking in such cases once adequate consideration is given to environmental effects. This approach is similar to that of s.171(1)(c) which requires the Court to have particular regard to **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.** If the analysis of tangible costs and benefits indicates only a small, if any, preference for alignment 2 over other alignments, it would not be unreasonable to require an alternative alignment with significantly lower intangible costs.

268. Taking the argument further afield, QPM argued the $300,000 provided for upgrading of the Airport Road intersection is equally applicable to alignment 2, as this alignment also terminates well short of the intersection. The inclusion of this cost in alignment 2 would reduce its benefit/cost ratio by 0.14.

269. The estimate also provides a total of $500,000 to upgrade the Domain Road intersection and provide alternative access approximately 200 metres in length for housing with access onto the eastern side of State Highway 2. Mr Clentworth could only assume that similar access for the remaining 450 metres length has also been provided in the estimate for that option.

270. QPM maintains the combined effect of the three items increases the cost of alignment 2 by $395,000 and reduces the cost of options 2A/4 and the road/rail embankment by $100,000.

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[42] Works Consulting Services Limited **Napier-Hastings Motorway. Hawke's Bay Airport to Taradale Road; Scheme Assessment Report** June 1992, page 21.

271. Mr Copeland also considered whether a designation for the northern motorway extension should be maintained at all, whatever the alignment. He identified that improving the level of service within the Napier City network and for travel to and from the north of the city will encourage, not discourage, use of the roading system. Roading improvements give rise to generated trips as the costs for each trip from the perception of individual motorists is reduced, since they do not take into account the environmental costs they may impose on the community as a whole. Also by making the roading improvements, freight traffic may be diverted from a more fuel efficient form of transport – i.e. rail. Mr Copeland concluded it is therefore by no means certain that the proposed motorway extension will lead to reductions in travel times vehicle fuel consumption and CO_2 emissions as Mr Cairns claims.

272. Finally, Mr Clentworth stated that alignment 2 makes no provision for future traffic growth beyond the capacity of a two lane highway. He noted that the traffic volumes now being predicted for the section of the motorway north of the Meeanee Quay intersection are very close to the volume at which four-lanes would be required. Where might these placed he asked – in North Pond or through the Andersons' property?

273. In relation to benefit/cost analyses QPM also identified several policy matters. It touched on proposed road reforms including pricing, funding and governance.

- *The analysis is based on 'black box' analysis (per Butcher), based on highly subjective 'value laden assumptions', for example estimates of the value of human life. The analysis obscures value judgement.*
- *Grave concern exists that the 'robust' analysis (audited) is not done until the end, at the construction stage, when the proposal is cemented and the dynamics of getting a complex engineering project started becomes an overtaking consideration. In the present case the alternate alignments are mutually exclusive.*
- *The current Transit Transfund programme ranking procedures, in the Resource Management Act setting, mean the need for environmental benefits being required to have a value almost four times the additional cost to Transit before they are sufficient to alter alignment rankings.*

274. Overall QPM suggests a preference for alignment 2A in resource management terms would delay the project a year or two but would nonetheless allow Transit to obtain the project sometime in the future. Alternatively, the Court could intervene and direct that a joint road/rail facility would produce an environmental benefit as foreshadowed in the early 1990 reports.

275. Transit responded that QPM's approach to sustainable management is focussed too narrowly. The Part II approach to effects in particular is necessarily a broad one in which an overall judgement and balance is required. The effects of Transit's proposal on the motorcamp should be examined on a wider scale of the sustainable management of all the resources within an affected community and, in the case of state highways, the national interest.

276. Further focus for this consideration is provided by the principles of the RMA, set out in ss.6-8. Given the nature of the evidence, it is appropriate to consider the issue raised under s.7(b) of the Act as to *the efficient use and development of natural and physical resources* and to which we are required to give particular regard.

277. Transit therefore asks the Court to move directly away from a direct focus on costs and benefits as delineated in alternatives to consider economics generally under s.5 and economic efficiency under s.7(b). It follows from the evidence that Transit's benefit/cost analysis is indicative only and useful for ranking purposes. It precedes the more rigorous commencement and funding analysis to be undertaken in Transit and Transfund's incremental and statutory processes, prior to the actual allocation of funds neither of which are within the domain of the Court.

278. Mr Butcher for Transit reviewed Transit's benefit/costs analyses. He noted that the substantial changes in the ratio, from 5.1 in 1992 to 2.7 in 1996 to 3.6 in 1999 can be explained by a data entry error made in the 1992 analysis which significantly overstated the benefits for all options. Correction of the error meant that benefits in 1996 were considerably reduced. And in 1998, the analysis of benefits was further refined which led to a significant increase in the estimated benefits of the alignment 2.

279. On the question of the position of intangible costs, Mr Butcher was of the opinion that the objective of benefit/cost analyses undertaken by Transit and Transfund is to measure costs and benefits from the *national* viewpoint and not Transit's. As intangible costs and benefits are costs and benefits to the nation, they should be included in the analysis, even if Transit does not have to pay for them. However, if that is the case, the costs should be included in the analysis as a negative social benefit rather than as a cost to Transit.

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280. To use its scarce funds as efficiently as possible, Transit funds those with the highest benefit/cost ratio and at present will not fund projects with a ratio of less than 4.0. Transit will only spend its money where benefits to the community are at least four times as great as the costs to Transit. Since Transit does not have to pay for the intangible value (eg noise) it should be deducted from the total project benefits.

281. Mr Butcher confirmed that the original analyses did not include any intangible noise cost. But states that it is likely this was ignored on the grounds that all options would reduce noise for residents and while alignment 2 would potentially generate more noise for the motorcamp than alignment 2A (because there would be no motorcamp) the additional noise could be mitigated by a noise fence and an extension of the camp site to an area at the rear of the existing camp. While ignoring any residual noise effects at the camp may have led to alignment 2 being favoured over 2A, it should be noted that in other areas alignment 2A has less benefits than alignment 2.

282. In addition, the original analysis did not include the cost of noise control measures in alignment 2. The most recent benefit/cost analysis by Opus allows for the cost of a noise fence. And even if the costs of extending the camp ground to provide a noise buffer (estimated by Mr Cairns as being a maximum of $30-40,000) should have been deducted from the benefits of alignment 2, this omission would reduce the analysis by a mere 0.005.

283. Transit considers that if **Messrs M Hunt, Noise Consultant to Transit**, and **T Remmerswaal, Consultant Valuer to QPM** are correct in assessing the impact of noise nuisance to the motorcamp as being $185,000, and this is deducted from the current estimates of alignment 2 benefits, the ratio would be decreased by only just 0.02. This too will have an insignificant impact on the relative ranking of this option. The difference in noise of various options for residents adjacent to SH2 should be added to the benefits calculated for those options. And this will tend to favour alignment 2 over alignment 2A.

284. The environmental impacts on the reed beds of the North Pond were also not included in the benefit/cost ratio. Mr Butcher maintains that the value of these effects is not sufficiently high to justify positioning alignment 2A over alignment 2 on a benefit/cost analysis. On that point, Mr Butcher explains that in order for alignment 2A to have the same benefit/cost ratio as alignment 2, the costs of expanding the camp, disruption to the camp and other road users during construction, encroaching on North Pond and other environmental effects would have to be in the order of $3.4 million. In light of Mr Tonks' evidence on environmental effects, for

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Transit the estimated *maximum* costs of camp disruption ($60,000), camp extension costs ($40,000) and camp noise effects ($185,000) and the greater traffic disruption during construction, it is unlikely that there is justification for reversing the ranking of projects.

285. In summary, Transit contends that QPM has greatly overstated the importance of the benefit/cost analysis and elevated its RMA significance beyond precedent. The Court has made it clear that benefit/cost analysis has its limitations in the CBC case and others – see also Electricity Corporation v Manawatu Regional Council W 70/90 per Sheppard J.[43] For these reasons, Transit also elects not to be drawn into a policy debate which, while not the Court's province, is invited by QPM's references to the Parliamentary Select Committee papers.

Evaluation

286. There is little doubt that economic considerations are intertwined with the concept of sustainable management and are embodied in the substantive provisions of the Act. Under s.32 Part IV local authorities adopting policies and plans must consider **likely benefits and costs** (s.32(1)(b)) and regard to impacts on **efficiency and effectiveness** (s.32(1)(c)). And in particular, Part II's purpose and principles include s.5(2) which refers to **enabling people and communities to provide for their ... economic ... wellbeing.** Section 7(b) notes that in achieving the purpose of the Act, all persons **shall have particular regard to ... the efficient use ... of resources,** which refers to the economic concept of efficiency. In this case both economists were in agreement that economic wellbeing and efficiency includes an internalisation of both tangible and intangible costs.

287. In a national benefit/cost analysis however all the costs and benefits to the nation which result from a particular action are analysed – and benefit/costs assessed are wider than those assessed in a purely commercial benefit/cost analysis and wider than even the regional community (see Electricity Corporation[44]). Mr Copeland believes that any individual is part of the community so therefore any impact upon the individual company/facility such as QPM and the motorcamp is relevant along with any intangible benefits and benefits to the wider community.

288. We agree that because of the provisions of Part II of the Act we are required to assess the proposal not only in the terms of s.171(b) (alternatives) but in the context of the sustainable management of the region's resources of which the motorcamp is one very small component.

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[43] Pages 161 – 166.
[44] Ibid, page 167.

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This must be then seen in a national context with the benefits and costs of the project assessed at that level. In this regard we note within Part II of the Act is it proper to consider the commercial interest of the motorcamp as part of economic matters, but such consideration is once again to be given at the macro economic level or regional or community level. In this context we note the views of Greig J in New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 310 where he refers to s.7(b) matters in the context of wider economic considerations.

289. The notice of requirement represented that significant benefits from alignment 2 were represented to be a benefit/cost of *"5.1"*. Miscalculations in an underlying transport study were discovered and in consequence the benefit/cost for all alternatives was reduced to figures below the point where Transit was likely to fund the work (the drop in the level of projected benefits was from 5 to between 2 and 3). Transit indicated that there has since been further updating of the transport studies as well as a review of costs methodology so that the present benefit/cost figures for the intended designation is now 3.6. The benefit/cost error impacted equally on both alignments. It seems the benefits of alignments 2 and 2A are reasonably close, with alignment 2 being debated as more expensive with respect to construction costs over construction near North Pond. The higher costs for alignment 2A lie with not previously identified intersections and roundabouts. QPM was critical of the changes in the costing of these two alignments.

290. At one level, benefit/cost analyses are in fact prepared for the comparison of options – they are used for ranking purposes under s.171. The primary purpose of a benefit/cost analysis at this stage in the proposal's evaluation is for assessment of the relevant performance of the motorway option. Detailed analyses are to be undertaken prior to an application for funding the project. Any conclusions on the benefits and costs of the proposal are therefore limited by the current level of information and they may change over the period life of a plan if not implemented.

291. We were told that variations and costs may range from approximately 20% to 30%. The amount of updated data presented in this case indicates the project has received considerable attention both in terms of basic studies and in the assessment of data collected. Transfund in effect reviews funding decisions for a project over the lifetime of the proposal. And as noted Transfund's project evaluation procedures in fact allow for the reversal in ranking in such cases once adequate consideration is given to the intangible and tangible benefits and costs.

292. There is naturally pressure to identify benefits and costs correctly because of the pressure to use the Transfund's funds elsewhere if costs clearly outweigh benefits. And nowhere is the difficulty more apparent with benefit/cost analysis than the chronology in this case. The evidence establishes that it began with a faulty analysis and will end up as a result of this decision with less costs being expended on the lease area (which Mr Milne states is no longer affordable) and more on adverse noise effects as a result of our findings on noise (see below). But if a commercial decision only was to predominate in respect of the motorcamp that may lead to a decision which is not in a national interest. For whilst QPM cloaked many of its concerns about alignment 2 in the guise of costs to the wider community and to the environment of that alignment, there was a clear attempt to persuade us that we should somehow require Transit to purchase the motorcamp which would effectively cancel any tangible cost/savings of a combined road/rail route, whilst resulting in the demolition of the motorcamp itself.[45]

293. QPM effectively maintained its challenge to the motorway extension proposal on a number of fronts. Some of the concerns raised by QPM relate to policy matters which the Court does not intend to address here in this decision. They are for debate in other forums.

294. In comparing alignments 2 and 2A, most of the costs are common to both projects so if there are changes in the capital cost to alignment 2, it is likely that changes will occur in the cost of alignment 2A but that is unlikely to change the ranking. Benefits will also affect both alignments.

295. As to environmental costs, alignment 2A provides a wider spatial buffer between North Pond and Westshore Lagoon. But whilst QPM argues correctly that this is an intangible benefit, this has to be weighed up against the other intangible benefit of lesser noise for the residents along Meanee Quay from alignment 2 and the loss of the motorcamp which has its own value to the community – something Mr Milne and Mr Clentworth clearly identified, in cross-examination. (Mr Clentworth for example sees the motorcamp as *a resource* for the people of Napier and its visitors).

296. QPM takes issue with Transit's claim that environmental impacts and effects would have to be in the order of $3.4 million in order to reverse the ranking of alignments 2 and 2A and the evidence suggests this is not a credible value.

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[45] Volume 1, 1998 Scheme Assessment Report, page 34.

297. Environmental benefits have to value four times the additional costs of Transit. Mr Butcher states:

> *"Don't think you need to simply compare them with costs of Transit. It is the opportunity costs – if Transit had money available it could spend it on some other project which would also have four times the benefit of that money. ... So really what you are trading off is the environmental benefits of North Pond or the noise in the motorcamp or whatever against some other social benefits in some other part of the country or possibly in the nature area which will also be at about 3.4 million.*
>
> *... if Transit does not bear the costs in a financial sense you have to deduct those costs to the rest of society from total benefits. It's strange because Transit is only funded with enough money to undertake projects with benefits of at least four times the costs."*

298. But Mr Copeland stated that he was not saying that there are significant environment costs to this proposal or otherwise or what those costs may be. Such arguments underline the problem associated with evaluating environment effects in monetary terms. Opinion as to the value of particular environments differ from person to person (although we note Transfund requires the assessment to be a *"reasonable one"*). They also change over a period of time. An example of this is found in the estuary itself. What started off as an ugly gravel pit became over a period small ponds surrounded by wetland vegetation and other biota (these are now the New Ponds in the estuary).

299. It is important to remember that this may happen again. Gravel pits may be moved and in time can become almost as interesting and valuable as the original environment, given some assistance along the way. Hence our decision on the coastal permit requiring an additional estuarine area in order to offset potential loss to the estuary by a larger embankment.

300. Meanwhile we did not have before us convincing evidence that environmental impacts on the North Pond or the New Ponds to the south of the camp are impacted upon to the degree which warrants destruction of the motorcamp as an amenity (at North Pond for example we are looking at 20 square metres of reed area). Consequently we see nothing to require us to alter the ranking on that account.

301. We can only accept the most recent costings and assume they have been assessed correctly. Mr Butcher does not require the engineers to re-estimate the costs he is presented with or seek an external review. Nor does he rebuild somebody else's computer model. It was noted by him the benefit/cost ratio will be peer reviewed by Transfund before final decisions are made. It is not in Transit's interest to deliberately mislead. And Mr Butcher was quite clear that desktop computer modelling is necessary in exercises of this kind. We have no evidence to conclude otherwise.

302. In respect to distribution costs QPM maintains that there is a cost to the motorcamp which is not offset by transfers of gains to others. In the case of petrol and shopping and so forth it's a reasonable presumption that as a result of the motorway the amount of shopping and petrol within an area will not change. There is redistribution within that area spread round quite a large number of entities. But Mr Copeland believes that the losses incurred by the owners of the camp due to the proximity of the motorway must be relevant and also consumer loss is significant. For the experience as offered by the Westshore Motorcamp cannot be duplicated elsewhere this is also a community cost or benefit.

303. In this regard there are several factors to consider. In our view benefit/cost would not dictate the demolishing of a physical resource (such as the motorcamp) where any perceived major adverse effects are able to be avoided, mitigated or remedied – s.5(2)(c) matters are qualified by those of s.7(b)). In any event as submitted by Mr McFarlane, to allow for the private economic interests of the motorcamp by requiring Transit to use alignment 2A would be to overlook the broader economic wellbeing Transit seeks by preserving the motorcamp as a resource (even if the present owners do not like that), and thus saving the region's taxpayers the cost of delay and the funding of the motorcamp price.

304. Further as Mr Copeland acknowledged, some businesses take locational risks in order to attract custom. The value of the location may sometimes be traded off against some of its disadvantages such as heavy traffic and the proximity of a railway line. He agreed that one of the risks of having a motorcamp in such a location is that there may be changes either to the use of either the railway or the State Highway which will create adverse effects. In our opinion, these are risks taken by a private commercial operator when locations are identified and custom sought and if those risks become a reality they should not be a burden on the taxpayer.

305. As to distributional effects, we consider these are speculative. Relocation to alternatives may mean a minor diminution in value to users: there may or may not be costs associated with providing alternatives elsewhere: reduced charges at the motorcamp may mean much the same loss without gain elsewhere – but this is only likely if camp users diminish in number. A reduced charge may in fact attract more of a different clientele.

306. We are concerned too that the RMA may become an instrument of business risk amelioration and transfer – not to trade competitors but to the taxpayer generally (as unwilling payers of compensation) and at the cost to local communities (delayed roading benefits, accidents, congestion, fumes). This was a point also well made by Transit's counsel.

307. And in respect of Transit's failure to advance in costs the reconstruction of the additional estuarine area required in HBRC's coastal permit if Transit is unable to accommodate a bridge of 220 metres, the fact remains the cost of doing so would impact on both alignments 2 and 2A.

308. Turning to QPM's wider analysis of costs and benefits, Mr Copeland raised the spectre of induced traffic which was the subject of very detailed evidence in the CBC case.[46] But when questioned about his conclusions in that regard Mr Copeland conceded there was no evidence before the Court which indicated the issue of induced traffic was something to which we should have particular regard in this case, so we put that subject to one side.

309. We further note that Mr Copeland's (and Mr Clentworth's) suggestion that a combined TranzRail/Transit link will lower costs to Transit is a proposition which will not be realised on the current evidence. It is outside the Court's jurisdiction to direct that there should be just such a combined link.

310. Further some of the land redevelopment costs identified by QPM are no longer an issue because the Partnership identified that it no longer wishes to proceed with the lease area.

311. Mr Clentworth then raises the question of compensation for works required in the motorcamp, claiming that the amount allowed for is insufficient. Under this category he has included:
- a new 1.8 metre high fence round the west and southern boundaries of the camp;
- earthworks and drainage required on the site of the proposed 0.8 ha lease area to the south;
- a fence between the camp and the railway embankment.

[46] See note 7, pages 114 – 121.

312. The fence along the camp boundary was an early proposal but appears now to have been put to one side in favour of a fence along the alignment 2 motorway which is considered to be more effective. Mr Clentworth raises costs in connection with the proposed lease but this has never been a confirmed arrangement by the camp authorities.

313. According to Mr Copeland costs of mitigating against the noise effects should be added to alignment 2 (these are about $25,000 for a barrier fence - now 2 metres not 3.4 to 3.9 metres as he quotes) and Mr Hunt's figure of $30,000 every 8 to 10 years for the friction course (see below). There is a need here for some adjustment for if noise effects are to be costed and added to the noise mitigation costs, this is double counting.

314. Elsewhere we consider the Knight Frank Turley report on the estimated loss to the motorcamp is speculative.

315. Detailed environmental impacts we also address in detail elsewhere in this decision. Our evaluation of all of these (except noise) leads us to conclude that they are not major adverse effects. Even cumulatively the impacts do not amount to a major adverse effect. The cost of the noise mitigation we require, is a cost to Transit to be assessed if and when Transfund makes further benefit cost evaluations. Nevertheless, we do not consider that cost will unsettle the current ranking. It is well to remember that we are only deciding whether the designation should be confirmed or not at this stage.

316. Nor are we convinced that compensation for construction is an issue. Conditions on the construction land use consents appear to adequately recognise potential adverse effects (i.e. the hours of operation and limits on construction noise are reasonable) although we readily acknowledge there will be some diminution in amenity for the relevant periods in time. Mr Butcher stated he was informed by Mr Daly that the period during which there is likely to be intensive construction activity in the vicinity of the camp will be less than six months. Given annual camp turnover even if occupancy was down by 50 per cent during the period (which seems unlikely), the costs would be $60,000 or so. If this was deducted from community benefits, then this would reduce the benefit/cost ratio of option 2 by around 0.01. Again, this will not significantly affect the benefit/cost ratio.

317. Mr Copeland refers to the adverse effect of noise on the occupiers of the camp and which is also reflected in the reduced profit to the camp by reduced numbers. These intangibles should be included as part of the costs of alignment 2. If the reduction in numbers takes place to the extent that it can be estimated, costs should be included in the costs of alignment 2. At this stage however the amount is speculative and not very convincing. Presumably there are not two intangibles here but the second (reduction in numbers) reflecting the perception of noise effects. It would not be unreasonable to include a realistic re-estimation in alignment 2 costs. This however does not consider the effect on existing residents of alignment 2A.

318. Mr Copeland argues the reasonableness of the project on the basis that the benefit/cost ratio for the project has fallen between 1992 and 1996. The reduction has been explained as a simple error in the original calculation. The fact that the benefit/cost ratio will reach a point where the project can proceed in 2004 is good reason to establish a designation at this time. If a designation affecting other persons is to achieve its purpose of forewarning, then the time from the present until construction commences is not by any means unreasonably long.

319. QPM also put forward an argument that because the acquisition of land to the north and south east for alignment is zoned estuary reserve (at a cost of $45,000) Transit is effectively allowing a *"free lunch"* on land acquisition costs meanwhile externalising adverse effects (tangible and intangible) to the motorcamp. This, it was alleged, must be questionable in the resource management concept of s.6(a) matters (the preservation of the wetland as a matter of national importance).

320. This proposition may be answered by asking the obvious question - if the road cannot go through the reserve where can it go? It is not feasible to the east of SH 2. Mr Clentworth raised an interesting question as to the provision for future growth. It could only have merit however if 4 lanes could be shown to be necessary in the foreseeable future and what will be required on the SH 2 leading to and beyond the section – and we have no evidence as to that. Four lanes may never be required. In fact Mr MacFarlane in his closing submissions stated the road in question *"is arterial and not a motorway"*.

321. Nor should environmental compensation be an issue. A consequence of QPM's approach would make it impossible for any designation to be costed reasonably. As submitted by Transit, how could the equivalent of s.185 of the RMA and s.40 of the Public Works Act 1981 claim to be identified, assessed, valued and incorporated? How would such claims be dealt with by local authorities? Would competitors be entitled to oppose claims to such

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compensation (for example in the present case all the motorcamps in noisy locations deliberately sited next to State Highways)? There are numerous pitfalls for the national interest in QPM's approach.

322. If the potential cost saving from the combined road/rail bridge and embankments are removed (which we conclude they are) there is no clear evidence to suggest that other possible costs due to noise mitigation and even (as we investigate below) the highly speculative impact on camp business would reduce the cost of alignment 2A below that of alignment 2 particularly if a value could be put on the public amenities of the motorcamp.

323. There is a compensation mechanism within s.185 for direct effects of the motorway extension on the motorcamp. There is no entitlement to compensation for an indirect effect. There is however a remedy if the Court determined under s.171(1) that having regard to all the matters there identified its discretion should be exercised by cancelling the requirement. In that regard benefit/cost ratio is only one of a wide range of factors to be determined. We address those and do not conclude as a result the realignment should be cancelled.

324. QPM raises a number of worthwhile issues for consideration but we conclude it has not put forward sufficiently weighty matters to materially alter the conclusions to be drawn from the benefit/cost ratio identified in 1999. In reality the appellant is saying the owners of the motorcamp would benefit from alignment 2A being chosen over alignment 2.

Finding

325. We conclude from the evidence that there is an overall consistency between alignments 2 and 2A which makes alignment 2 preferable in terms of benefit/cost.

326. We conclude that the proposal Transit has put forward is efficient in terms of s.7(b) and meets the tests of sustainable management in s.5(2).

Avoid, Remedy or Mitigate Adverse Effects

327. QPM considers that s.5(2)(c) contains a hierarchy prioritised firstly on avoidance, followed by remedy and lastly mitigation. In effect, it was alleged alignment 2 does not avoid adverse effects. QPM's argument is that in selecting alignment 2 which skirts the motorcamp, Transit has avoided incurring direct land acquisition costs to itself but created adverse effects to the motorcamp, its proprietors and its patrons.

328. QPM considers by way of contrast that alignment 2A will remedy the adverse effects by effectively providing for environmental compensation whereby the affected motorcamp proprietors may make a claim for compensation under the Public Works Act 1981. QPM submits compensation would 'internalise' the adverse effects to the builder of the motorway and provide a remedy within the meaning of s.5(2)(c).

329. QPM made it clear that it is not alleging that it is noise effects alone that create the adverse effects. It contended the Court is entitled to have regard to "cumulative effects" in respect of the definition of "effects". The adverse effects created by noise and diminished amenity values and the effects caused by severance and the related effects of being caught between two designations and reasonable fears of loss of business and the effects to the Westshore Lagoon and North Pond taken together indicate that alignment does not promote the sustainable management of the natural and physical resources of the area.

330. As far as Transit is concerned, the company considers the Court has already satisfied itself as to Part II matters in Transit v Hawkes Bay Regional Council (W 116/94). The issues raised by QPM are not new and have been addressed in the conditions imposed with the resource consents, coastal permit and in respect of noise, the designation itself. Indeed QPM's preferred option of having the alignment passing through the motorcamp is contrary to the purpose of Part II. Such a proposition has no validity if it is accepted that the motorcamp has some value as a resource.

331. In the context of these submissions therefore it is necessary to look at each of the effects of the motorway proposal as alleged by the appellant.

Noise Effects

Background

332. Situated as it is, close on its northern end to a busy State Highway (SH2) and alongside a railway line, the Westshore Motorcamp of 2.12 hectares can hardly be described as the quietest of such camps although admittedly the present rail traffic is intermittent.

333. To the west, apart from a little used unsealed access road, is the Westshore Domain Recreation Reserve from which bird calls and wind would be the major noise sources. Hence the prospect of a motorway on the west side of the motorcamp, with apparently very close if not actually clipping the west side edge, was a matter of major concern to the appellant.

334. The concern is that traffic noise from the proposed motorway (alignment 2) will change the noise level contours affecting the motorcamp for the worse and thus affect its marketability. This is based on the premise that the motorcamp operation is *"noise sensitive"* and that alternative commercial use is not possible in terms of the existing lease.

Transit

335. **Mr Neville Hegley, an Acoustic Consultant** gave evidence on behalf of Transit. He had been earlier involved in noise assessment of the proposal and his evidence referred to earlier documents relating to evaluation of traffic noise effects from the motorway on the motorcamp. We make reference below to a number of the documents supplied by Transit.

336. The likely effect of the preferred alignment on the motorcamp was recognised in the notice of requirement for a new designated route dated August 1993.[47] The document states:

> *4.12 Noise*
>
> *The motorway will have an almost entirely positive effect on noise – both within the greater Napier City area (where heavy traffic volumes will be reduced) and in the vicinity of the motorway itself.*
>
> *For houses which front onto the eastern side of the existing State Highway at Westshore, there will be an overall reduction in noise of approximately 10 dBA (from the existing 70 dBA down to around 60 dBA, L10). For the three houses on the existing side of the existing State Highway, noise levels will be much the same as they currently are not slightly reduced.*

[47] See Record of Documents - Volume 3, Document 24, pages 595 - 596. See also Schedule I

The main exception is the Westshore Motorcamp. Although noise levels on the north-eastern side of the motorcamp will remain essentially unchanged (at around 60 dBA), the introduction of traffic to the south-western side of the camp (adjacent to where the motorway will be constructed) will result in an increase of approximately 10 dBA along this boundary.

337. The original notice of requirement for the altered designation was publicly notified in October 1993. This was followed in February 1994 by a recommendation to Transit by the council which confirmed Transit's requirements for a motorway on alignment 2 subject to certain conditions among which was the following which applied to the boundary of the motorcamp:

Leq (24 hour) 57 dBA
Leq (10.00 pm to 6.00 am) 47 dBA

338. Transit confirmed its requirement to alter the designation in March 1994 but in so doing modified a number of the council's conditions.[48] The one relating to noise levels was changed to:

2(a) **Leq (6.00 am to 12 midnight) 57 dBA**
L_{max} (10.00 pm to 6.00 am) 72 dBA

339. (These figures appear to be the same as those recommended by Mr Hegley in a report dated March 1995 and forming part of the document entitled *"Scheme Assessment Report"* revised June 1998.)

340. In commenting on its suggested modifications Transit stated that it objected to making noise standards specific to particular properties: viz the Anderson property and the Westshore Motorcamp.

341. Transit also considered the daytime Leq should be reduced to an 18 hour period (6.00 am to midnight) and that the night time Leq was unreliable where traffic flows are low. This condition was therefore replaced with the L_{max} which was stated to be one which *"more accurately reflects the critical level at which sleep disturbance is likely to occur under low traffic flows."*

[48] Record of Documents - Volume 3, Document 31, page 745 and Volume 4, Document 47, page 1106.

342. The reference to New Zealand Road Traffic Noise Standards was deleted from the conditions *"as it is a redundant condition"*. Conditions 2(c), 2(d) and 2(e) were also modified slightly. Condition 2(f) was added. This read:

> *Unless a lesser standard is agreed to by the owner of the Westshore Motor Camp, the fence along the boundary of the Motor Camp (Lot 1 DP 6408) and the motorway shall be upgraded at Transit New Zealand's expense and shall be battened with timber at least 15 millimetre thick so that there are no gaps between the boards.*

343. When the council issued a further confirmation of the motorway requirement in July 1998 it stated that the conditions remain unchanged from those issued in its February 1994 decision.

344. In August 1998 Transit confirmed the requirement and accepted the recommendation by the council *"in whole"*. This means that road traffic noise from the motorway extension was not to exceed the following at any boundary of the Westshore Motorcamp.

Leq (24 hour) 57 dBA
Leq (2200 hours to 0600 hours the following day) 47 dBA

No reference to this acceptance was made at the hearing before the Court.

345. It was Mr Hegley's evidence (referring back to Transit's modification of NCC's conditions) that:

> *These measurements were to be measured at 1 metre from the façade of any permanent dwelling and 1.2 metres above ground level. In addition, the* L_{max} *is to be calculated using a design vehicle defined as generating 88 dBA* L_{max} *at a distance of 15 m.*

346. In November 1994 Transit issued a Draft Working Document entitled *"Transit New Zealand's Guidelines for the Management of Road Traffic Noise – State Highway Improvements"*. Under the heading *"Application of Criteria to State Highway Improvements"* is the statement:

> *These road traffic noise criteria apply to noise sensitive facilities adjacent to new State Highway alignments and any other State Highway improvements which require a new designation.*

347. The Guidelines are referred to in more detail below.

348. Mr Hegley also gave the Guideline's reasoning with respect to the L_{max}. The design vehicle level is now 82 dBA at 7.5 metres from the carriageway. The criteria is to achieve 78 dBA at 1 metre from the most exposed façade.

349. His recommendation is now that Condition 2(b) be modified to reflect the design year and would be as follows:

> *Subject to Condition 2(c) road traffic noise from the motorway extension shall not exceed the following noise limits 10 years after the motorway has been opened.*
>
> **Leq (6.00 am to 12 midnight) 57 dBA**
>
> **L_{max} (10.00 pm to 7.00 am) 78 dBA**

350. Mr MacFarlane indicated in his final submission that Transit was in agreement with this approach.

351. In his brief of evidence Mr Hegley further analysed traffic noise effects on the motorcamp using recorded data provided by Mr Hunt, Acoustic Consultant for Transit. Mr Hegley adopted updated traffic flow figures for SH2 (Meeanee Quay) and the proposed motorway for the year 2012, together with other parameters as follows:

- SH2 (Meeanee Quay) predicted traffic 11,500 vpd
- Motorway predicted traffic 2,900 vpd
- 8% heavy commercial traffic
- Two coat chip seal surface
- Level road
- 180° view of road from receiver position

352. In addition, it became clear from diagrams that Mr Hegley had positioned the motorway approximately 9 metres clear of the camp's most western point and also that he had assumed the carriageway level of the motorway was level with the camp site or not significantly different.

353. From the above, Mr Hegley produced three diagrams showing noise contour levels for three scenarios as follows:

Figure 1 All future traffic remaining on SH2 i.e. no motorway

Figure 2 With future traffic divided between the motorway and SH2 but with a 2.4 metre high wooden noise barrier adjacent to the motorway alignment

Figure 3 As for Figure 2 but with the noise barrier on the motorcamp boundary

354. Mr Hegley included in the area occupied by the camp a strip of land at its south end not part of the present camp site lease. He also included a further area to the south of the camp of 0.8 hectares referred to as the *"proposed lease"* area (see Appendix 4). The history of this 0.8 hectares is that it is an area in which the camp could expand which would be further from the motorway than the western extremity of the present camp site, and hence where traffic noise levels would be lowest. We were advised that although the necessary procedure to enable this reserve area to be leased by the camp operators has taken place, they have not agreed to expand into this area for commercial reasons. It was always intended that the camp owners would lease this area from the council, as part of an agreement between the parties to settle the appeal which had been initiated in 1994. The agreement between the Westshore Motorcamp lessees, the council, the Hawkes Bay Regional Council, the Department of Conservation and Transit, however, fell through in 1998. The appellant believed the price of the rental of the land was too high when it was already occupying some of it under an old licence agreement which was renewed annually and fixed at a much lower price and that the conditions relating to noise mitigation were not satisfactory. The appellant also sought a greater contribution from Transit towards the cost of improving the area and making it usable for camping purposes. Transit found those costs too high them to accommodate.

355. On the assumption that the proposed lease area was included in the proposal however Mr Hegley deduced from his noise contour plans that:

> *The camp site is not disadvantaged from the development of the motorway. In fact overall there is now more area available in the lower noise exposure levels than was previously the case.*

356. This conclusion now requires modification in the light of the advice that the proposed lease area cannot be assumed to be added to the existing camp.

357. Nevertheless, comparing the noise contour levels in Mr Hegley's Figures 1 and 2 and omitting the proposed lease area, it can be readily seen that the area where 24 hour Leq noise levels are greater than 55 dBA is reduced. The area in the 53-55 dBA range is increased and the area in the 50-53 dBA range may be very slightly increased. On the 0.1 hectare of land the noise

contour less than 50 dBA has disappeared. As Mr Hegley points out, only 25% of this 0.1 hectare is on land covered by the existing lease. The remainder is on land that is not part of the legally leased camp site.

358. When Figure 3, (which shows the noise barrier on the camp boundary), is also compared with Figure 1, and the proposed lease area again omitted, it can be seen that the area occupied by noise levels greater than 55 dBA has been reduced, the area in the 53-55 dBA range is increased and the area 50-53 dBA is reduced. These results indicate that a noise barrier adjacent to the motorway produces the better result because it is closer to the noise source.

359. In both Figures 2 and 3 however i.e. with barriers adjacent to the motorway and on the camp boundary respectively, the areas described by Mr Hegley as being in the 50-53 dBA range are somewhat indeterminate because the 50 dBA contour is not shown in either figure.

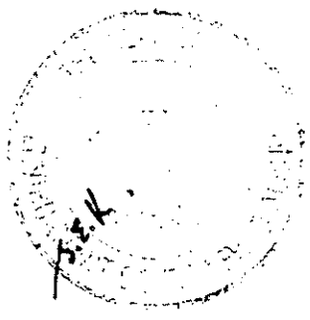
360. The matter of a friction course surface on the section of the motorway adjacent to the camp site as a mitigation measure to further reduce traffic noise levels was examined in Mr Hunt's evidence but Mr Hegley's comment on this was that the cost was beyond what the project could economically justify and in his opinion was not warranted.

361. Mr Hegley considered that the requirement of the Transit Guidelines and the original council planning conditions would be more than complied with. If necessary, an even higher screen fence could be constructed. He concluded that for all existing buildings on the site the noise level would be no worse, and would be quieter in the year 2012, with the motorway screened, than it would be without the motorway constructed.

362. Mr Hegley agreed that some parts of Transit's confirmation of the alteration to the designation could be seen as imprecise but he believes the intentions are quite clear and that they have been adopted in the acoustic design.

363. As regards the Noise Management Plan, Mr Hegley believes:

> *... it should not be a fixed condition if it is to manage noise. It should be a living document that takes into account the latest skills available and should supplement the noise conditions.*



364. Alignment 2 Mr Hegley believed would result in some increase in noise for the motorcamp which would only be minor when taking an overall view of the site. He believed *"the total effects for the permanent residential community along with the upgrade would be positive with respect to noise."*

365. Mr Hunt, acoustic consultant to QPM, measured 24 hour Leq noise levels and two points on the camp site. Position 1 was within 4 metres of the existing manager's residence facing in the direction of SH2. Position 2 was to the rear of the property within 3 metres of the western site boundary. The 24 hour Leq level for the two sites was found to be:

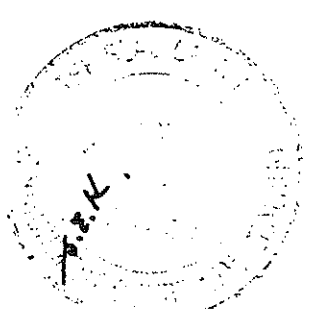
Site 1 – 55.8 dBA

Site 2 – 46.6 dBA

366. Also taken at the two sites were short duration snap shots of variations in measured sound levels. As stated by Mr Hunt:

> *These two figures indicate variations in sound levels that accorded with subjective judgements made on site namely that sound levels were found to be higher and more variable towards the northern end of the site closest to Meeanee Quay (SH2). Traffic along the existing SH2 being the predominant sound noted toward this end of the site. One aspect of this traffic noise is the intermittent high sound levels caused by vehicles traversing the railway crossing. The unevenness of the road surface appears to be the cause of these noise peaks ...*
>
> *Position 2 was found to be subjectively much quieter than Position 1. Position 2 was affected by distant traffic sounds within which individual vehicle sounds are less pronounced (more akin to a low level continuous type of traffic noise). Other sounds included sounds of birds and leaves rustling in the substantial number of trees on the property. The reason why traffic noise was noticeably lower at position 2 is related to the railway embankment running along the eastern site boundary. That embankment appears to be 2 to 3 metres above the local ground level at the southern end of the camp with this screening reducing to zero at the northern end of the site (SH2 is essentially the same level as the camp ground at this northern end where the site entrance is located). Thus, while the southern (rear) portion of the site is physically further from the existing State Highway, it is also acoustically screened by the railway embankment resulting in an average 24 hour sound climate that is 9 dBA quieter. It is worth noting that a 10 decibel reduction equates to a subjective halving in apparent loudness.*

367. Mr Hunt also produced a series of noise level contours showing patterns of variation in traffic noise across the camp site for a number of conditions.



368. His Figure 6 is a plot of contours reflecting the existing traffic flow noise levels on SH2 adjusted in accordance with noise levels measured at the two locations on the site. Figure 7 shows future predicted traffic noise levels 10 years after construction for the motorway alone. No barriers are in place and the maximum traffic noise is close to 63 dBA (24 hour Leq) in the south west corner of the site. Figure 8 combines the effect of Figures 6 and 7, again with no barrier. This changes the contours for the main body of the camp but not greatly along the southern boundary. Figure 9 illustrates the predicted noise level contours for SH2 plus the motorway as in Figure 8, but with a noise barrier in place along the camp western boundary. Figure 10 shows the predicted increase in existing traffic noise levels (24 hour Leq) with the noise barrier in place along the camp western boundary. Figure 12 (produced during the hearing) shows noise level contours for SH2 plus the motorway with a noise barrier in place along the motorway and a friction course surface on the motorway.

369. Mr Hunt described in some detail the sources of traffic noise. At low speeds these are, exhaust noise, air intake noise, fan noise, gearbox and other accessories. At the higher road speeds and with reduced engine speed, the tyre road interaction predominates. Thus road texture has a considerable effect on the total traffic noise depending on traffic speed and traffic conditions.

370. Mr Hunt expressed a concern that whereas now the southern end and western parts of the camp receive only a low level of noise *"... future forecasts indicate that large portions of the western side of the camp will be adversely affected in future by traffic noise particularly those areas used for tenting and caravan sites where noise is not readily reduced by a building structure ..."*.

371. Mr Hegley's conclusions in his report of 1993 are criticised by Mr Hunt in his evidence-in-chief. However, many of his remarks do not apply to Mr Hegley's evidence as presented at the Court hearing. Mr Hunt contends nevertheless, that this earlier assessment has affected Transit's own assessment of intangible factors and possibly Transit's economic assessment in that methods to mitigate noise were not incorporated into the original design.

Evaluation

1. Preliminary

372. We sought initially to determine, from evidence provided, effects on the motorcamp under the following alternatives.

(i) The traffic noise levels from existing traffic on SH2 (Meeanee Quay).

(ii) The likely traffic noise levels from SH2 in the year 2012 without a motorway.

(iii) The likely traffic noise levels in the year 2012 for SH2 and the motorway on alignment 2 without a noise barrier but with a chip seal surface.

(iv) The likely traffic noise levels in the year 2012 for SH2 and the motorway on alignment 2 with a noise barrier on the camp western boundary and with a chip seal surface.

(v) As for (iv) above but with the noise barrier adjacent to the motorway.

373. Noise can affect the amenity of an area producing effects such as communication interference, sleep disruption, task interference and general annoyance.

374. For (i) above, Mr Hunt's Figure 6 indicates that the noise levels vary across the site in a direction away from the entrance on SH2 from a high of 60+ dBA to 45 dBA (24 hour Leq).

375. For (ii) Mr Hegley's Figure 1 shows noise levels varying from 55+ dBA to less than 50 dBA in the south west corner of the camp which includes the strip of land occupied by the camp but not part of the original lease. Mr Hegley's Figure 1 does not show a 60 dBA contour, but if we accept Mr Hunt's Figure 6 there should be a 60 dBA contour line somewhere on the camp site.

376. For (iii) there is Mr Hunt's Figure 8. This shows that parts of the camp nearest to SH2 and in the west nearest to the proposed motorway have noise levels of 60 dBA plus while the greater part lies between 55 and 60 dBA. The south west corner has a level less than 55 dBA.

377. For (iv) we have Mr Hegley's Figure 3 and Mr Hunt's Figure 9 but here there is some difficulty because the two diagrams bear little resemblance to each other. Part of the reason for this could be because Mr Hunt, in his Figure 9 has assumed the motorway clips the western edge of the camp, whereas Mr Hegley's Figure 3 shows the motorway clear of the camp by approximately 9 metres. Even allowing for this however, it is difficult to reconcile the two diagrams. The closest area of agreement would be the 55 dBA level along the camp's western fence line.

378. For (v) Mr Hegley's Figure 2 demonstrates the noise barrier 8 metres from the motorway carriageway. This shows under half of the camp site at the northern end with levels greater than 55 dBA and more than half in the 53-55 dBA range with a small area just over 55 dBA at the western tip of the camp (all the figures quoted above are 24 hour Leq levels).

379. The extent of disagreement in the only diagram based apparently on the same parameters by the two expert witnesses was a matter of some concern to us.

380. We noted that Mr Hunt based his noise contour diagrams on scheme plans which showed the motorway clipping the western edge of the camp. It was his understanding that this was to achieve minimum disruption to the Westshore Lagoon. Mr Hunt also assumed the new carriageway to be 1 – 1½ metres above existing camp level. Mr Hegley's diagrams however show the motorway clear of the camp by approximately 9 metres as scaled from a dimensioned diagram provided in evidence by Mr Barker.

381. This difference we found surprising in the light of Mr Cairns' reference to a public meeting dated 19 May 1993 at which he said the decision was taken that alignment 2 would not skim the corner of the camp.[49] The minutes of the same meeting record that Mr Daly for Transit, in reply to a question as to the elevation of the motorway, said that it would be running at ground level except on approach to the estuary. It seems that Mr Hunt was not made aware of these changes prior to the hearing.

382. To clarify the issue we requested of the two acoustic experts the following noise contour diagrams which they both agreed on:

(1) The predicted traffic noise contour levels (dBA Leq 24 hour) for the year 2012 with a 2 metre noise barrier fence and a chip seal surface on the motorway (see **Appendix 6**

[49] Record of Documents - Volume 2, Document 16, page 501.

taken from the diagrams contained in the joint Memorandum to the Court of the two consultants dated December 1999. This memorandum was requested by the Court.)

(2) As for (1) above but with a friction course replacing the chip seal surface (see Appendix 7 also taken from the joint Memorandum).

383. The two diagrams were agreed to by Messrs Hegley and Hunt. The position of the motorway is shown clear of the camp boundary although no precise dimensions are given. We note that the barrier fence referred to is 2 metres high as requested, whereas in previous diagrams Mr Hegley refers to a 2.4 metre high barrier.

384. The diagram labelled Appendix 6 above shows that with a 2 metre noise barrier and a chip seal surface, at the western edge of the motorcamp, the 24 hour Leq would be 56 dBA.

385. Appendix 7 shows that with the friction course in place, the 24 hour Leq at the western-most point would be 52 dBA.

386. Mr Hunt questions Mr Hegley's approach in comparing traffic noise levels in 2012 under a *"do nothing"* scenario, with the situation when the motorway is established on the proposed route also in the year 2012. Mr Hunt claims this is not the approach recommended in Transit's traffic noise *"Guidelines"*. He says:

> *The approach recommended in the above mentioned Traffic Noise Guidelines, is to compare the future traffic noise levels at the design year (being 10 years after the route opens) with ambient noise levels existing at the time construction of the new route begins.*

Although this is not spelt out in the copy of the *"Guidelines"*[50] available to the Court, in Table 1 areas are classified as low, medium and high and the ambient noise level for that particular area is made the basis for a design level to be determined. The problem here is that the range of levels found at the camp site is not adequately represented in Table 1.

Mr Hunt also considers Mr Hegley's comparison of forecast noise levels without the motorway at the year 2012 may not hold true. He says in his supplementary evidence:

> *Noise from the existing SH2 mainly affects the front (northern end) of the site. This noise already causes some negative impacts on guests (paragraph 7 – evidence of Mark Milne). The noise from traffic on the existing State Highway can be effectively reduced by a noise barrier which would involve re-designing the*

[50] Transit's **Guidelines for the Management of Road Traffic Noise** dated November 1994 is labelled a Draft Working Document.

> ***entranceway (taking into account important road safety considerations). A noise barrier fence may reduce noise affecting the camp ground to a level (in the future) lower than that currently experienced.***

387. Regarding the extent to which the *"Guidelines"* are intended to protect caravan parks as distinct from residential buildings, there was some difference of interpretation between Messrs Hegley and Hunt. This was not greatly clarified by Mr MacFarlane's cross-examination of Mr Hunt. Mr Hunt finally agreed that because of the proximity of an existing State Highway, the camp situation is probably not covered by the *"Guidelines"*.

388. Having examined the wording of the *"Guidelines"* we agree with Mr Hunt's original statement in his supplementary evidence namely that hotels, motels and caravan parks alongside new State Highway alignments are noise sensitive activities to be protected. The fact that the camp is already affected by an existing State Highway does not preclude consideration of protection from the new alignment. Explaining this further, we refer to the wording of the *"Guidelines"*.[51]

389. Alongside a heading *"Noise Sensitive Facilities to be protected"*; the Guideline reads:

> *These road traffic noise criteria apply to the following types of existing facilities adjacent to State Highway improvements.*
>
> - *residential buildings excluding:*
>
> - *garages and other ancillary buildings;*
> - *short term accommodation (such as hotels, motels, hospitals and caravan parks) adjacent to existing State Highways (but not on new State Highway alignments); and*
> - *residential accommodation in buildings which have other uses (such as residential accommodation in commercial buildings).*
>
> - *teaching areas in educational facilities.* (our emphasis)

390. Thus State Highway improvements on the existing alignment aim to protect residential buildings but not short term accommodation adjacent to the existing State Highway. On new alignments however they do aim to protect short term accommodation. The new alignment, in this particular case the camp, is to be protected from that additional factor, not that Transit has the same degree of responsibility with regard to SH2.

391. However, the Guidelines are just that – *"Guidelines"* and we have the Act's requirements to consider. We favour the view expressed by Mr Hunt in cross-examination where he said:

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[51] Ibid, page 7.

> *... my recommendation would be for the Court to accept that there needs to be an assessment of noise before a development takes place and an assessment or a prediction of the noise after the development takes place and that those changes be assessed as part of the noise impact assessment ...*

2. Evaluation of the Noise Contour Diagrams (all dBA levels are 24 hour Leqs).

392. Looking first at the manager's house site from Mr Hunt's Figure 6 we see that the situation as it exists at present is that the house lies in a band 52-53 dBA (24 hour Leq). Mr Hegley's Figure 1 shows the house at approximately 56 dBA at the year 2012 with no new motorway alignment. With the motorway in place in alignment 2 but clear of the camp site, Mr Hegley's Figure 2 shows the house on a contour at approximately 54.5 dBA. In Mr Hunt's Figure 9 for the same situation but with the motorway clipping the edge of the camp, the house appears on a noise contour of approximately 57.5 dBA. This latter figure is a scaled estimate because there is no contour line near the house. If we make an allowance for the fact that it has been agreed since the public meeting in May 1993, that the motorway would be clear of the camp and that the road will be level with the camp, we could accept Mr Hegley's figure of 54.5 dBA.

393. This figure compares reasonably favourably with the existing noise level of 52-53 dBA at the house as measured by Mr Hunt in his Figure 6. Hence the proposed motorway on alignment 2 with a noise barrier in place adjacent to the motorway would result in noise levels which would be tolerable inside the manager's residence. This assumes the 20 dBA reduction with windows closed.

394. Much of the rest of the camp however, is occupied by tourist flats, cabins, caravan and tent sites. Apart from tent sites these are fairly evenly spread over the site. It is doubtful whether the cabins are constructed to reduce external noise to the same extent as a normal residence and there can be no doubt that caravans and tents are not so constructed either.

395. There have been some complaints from occupiers of the tourist flats which are close to the front (northern end) of the camp site. This is due in part, as Mr Hunt has recorded, to empty trucks crossing the railway line. According to Mr Remmerswaal, Consultant Valuer to QPM, the construction of the motorway is unlikely to affect these units adversely as they are already affected by road noise. A noise barrier fence at the SH2 end has already been referred to by Mr Hunt. In this northern half of the camp there are also caravan sites which have been occupied in the past and which are also affected by SH2 traffic noise. We must assume that persons who have rented space in this area have found the traffic noise tolerable if not desirable.

396. We now consider that part of the camp site most distant from SH2. This could amount to perhaps a third of the camp site and includes the strip of land at the south end which is occupied but is not part of the main camp lease.

397. The south east corner of the camp obtains some noise abatement from the railway embankment and is only affected by intermittent trains. This corner and the south west corner of the camp site are its quietest parts and is an area where tents can be located and also the more noise sensitive persons can be provided for.

398. Here the ambient (existing) noise level is, from Mr Hunt's Figure 6, 45-47 dBA. From the new agreed diagram (1) the noise levels with the proposed motorway in place and with a noise barrier plus a chip seal surface the noise levels at the southern end of the existing camp are 53-54 dBA Leq. The levels with the friction course from agreed diagram (2) are 51-52 dBA (all figures are 24 hour Leq).

399. Thus even with the friction course the increase in noise level at the south end would increase by about 5 dBA.

3. Noise Conditions

400. Resulting from the notice of requirement to alter the designation publicly notified in October 1993, the council recommended to Transit in February 1994 that (inter alia) the noise level at the boundary of the Westshore Motorcamp be:

Leq (24 hour) 57 dBA
Leq (10.00 pm – 6.00 am) 47 dBA

401. As noted above Transit's confirmation of its requirement in March 1994 modified the council's noise condition to read:

Leq (6.00 am to 12 midnight) 57 dBA
L_{max} (10.00 pm to 6.00 am) 72 dBA

402. In the Scheme Assessment Report described as revised June 1998 is included Appendix 10 which is a *"Noise Management Plan"* by Mr Hegley dated March 1995. In this appendix it stated:

The operation must comply with an Leq (6.00 am – 12 midnight) of 57 dBA plus an L_{max} (10 pm to 6.00 am) of 72 dBA.

403. Traffic noise predictions at that time were for the year 2006 and it was predicted that *"without any noise barrier except the concrete lane barrier"* that the house on the Westshore Motorcamp property would have an 18 hour Leq of 62 dBA and an L_{max} of 78 dBA. A wooden noise barrier was recommended in order to meet the 57 dBA and the L_{max} 72 criteria. [No reference was made during the recent Court hearing about the concrete lane barrier which we assume was for a four lane highway. What is proposed at least initially is a two lane road.]

404. In the *Guidelines* the 18 hour L_{10} value previously used to predict traffic noise has been replaced with the 24 hour Leq value.

405. As Mr Hegley states, the criterion on which the noise is based is the ambient sound as measured over a 24 hour period. He says: *"If the Guidelines were to be undertaken today the design level at the motorcamp would vary between a low of 59 dBA (24 hour Leq) to a high of 65 dBA (24 hour Leq)."* Mr Hegley concludes also: *"... it is apparent that the noise control is not aimed at protecting either tent or caravan sites."* He adds: *"However, where practical and keeping in mind the requirements of section 16 of the Resource Management Act to adopt the best practical option to minimise noise, the total site has been considered in the analysis."*

406. This latter principle we consider is the one to apply in this case. The question is what is the *"best practical option"* to reduce noise.

407. Mr Hegley has recommended the barrier fence extending for the distance the motorway is opposite the occupied area of the camp, and possibly opposite the proposed lease area to the south if that option is taken up at a later date. Any further noise reduction such as a friction course surface he considers unnecessary and understands it is too costly.

408. Mr Hunt calculates that the cost of the friction course would add an additional $30,000 to the cost and would achieve a benefit of 6 - 7 dBA. We understand renewal of the friction course is necessary every 8 to 10 years. This cost, Mr Hunt considers would not be out of order considering the total cost of the road reconstruction.

409. From the various noise contour diagrams supplied in evidence and the most recently agreed diagrams (1) and (2) we conclude that the wooden barrier plus the friction course is likely to

result in a traffic noise situation where there a useful variation across the camp from north to south as at present, even though the 5 dBA increase in the 24 hour Leq at the southern end produces a noise environment higher than desirable for tents and caravans..

410. We are of the opinion that a noise level condition which is aimed solely at protecting the normal residential type of dwelling, is inadequate for a motorcamp where, as is the case here, many of the facilities in the quieter part are not of normal residential design and construction.

411. We note that NZS 6802:1991 *"Assessment of Environmental Sound"* Clause 4.2.2 gives guideline figures for the "*desirable upper limit of sound exposure to environmental noise for the reasonable protection of community and amenity"* as:

> *Night time 45 dBA L_{10} and an L_{max} of the lower of 75 dBA or the background sound level plus 30. Day time 55 dBA L_{10}.*

412. If we take the day time period as 6.00 am to 12.00 midnight i.e. 18 hours, we have an 18 hour L_{10} of 55 dBA. (The L_{10} would be measured over an interval not exceeding 60 minutes). We can obtain the equivalent 24 hour Leq by subtracting 3 dBA i.e. the 24 hour Leq becomes 52 dBA.

413. Thus the 52 dBA 24 hour Leq which is obtained at the western edge of the motorcamp with the barrier fence and the friction course corresponds reasonably well with the NZS *Guideline*.

414. The guideline refers to the figures given as the upper limit at or within the boundary of any residential land use. It further states:

> *In some circumstances, taking into account community expectations and other local conditions, greater protection may be appropriate.*

415. The situation within the motorcamp is a circumstance which, in our opinion, warrants this greater protection but we make allowance for the practicality of further increasing the noise protection over and above the barrier fence and the friction course.

416. In essence there will be three transport corridors providing the camp within noisy boundaries of 640 metres with a resulting diminution in amenity. Ms Hunter considered that this camp bounded on 3 sides by designated transportation corridors was a great deal different from a camp being located on a busy road along one frontage only.

417. Mr Milne told us one of the reasons his family was attracted to the motorcamp's location in the first place was its location i.e. its proximity to SH2 (we note alongside which the railway line was already located).

418. Mr Milne also stated that noise impacts have been felt at the front of the camp for many years and have increased steadily over that time. But he stated buildings at front of the camp are a lot better constructed than those in the back upon which the noise from the motorway is now going to impact.

419. Mr Milne further mentioned the fact that currently there is not much that can be done to reduce noise in the general environment of SH2. He mentioned that his main trouble as far as the noise environment of the camp is concerned is with the empty trucks on the current highway bouncing across the railway lines with resulting clatter. He also stated that there is a "no air brake sign" in the area (which apparently most other tourist camps on major highways have required).

420. But the motorcamp site is always within 100 metres of the railway line (even if it is used infrequently) and within 150 metres of SH2 at any given point. Effectively there is currently only one noisy boundary. Therefore when the motorway begins carrying a large proportion of through vehicles, the amenity on the SH2 boundary will considerably improve. Meanwhile, Mr Barker identified motorcamps that have a common feature – proximity to very busy roads, some considerably busier than roads in the vicinity of Westshore.

421. Nevertheless we have here an operating motorcamp with a State Highway and a railway line on one side faced with a motorway in close proximity on the other side. This we understand to be rare in the country.

422. Whether the necessity to achieve the 52 dBA 24 hour Leq level at the westernmost edge of the camp site would govern all the noise levels as shown in the agreed diagram (2), we are not certain. We assume from the agreed diagram (2) that the barrier would extend the entire length of the camp and a little beyond. We take it that the friction course required to produce the results shown in agreed diagram (2) would extend a similar distance. In any case we are of the opinion that the aim should be to achieve the noise level picture as shown in the agreed diagram (2).

423. The camp authorities have the option at some point in the future of constructing at their own expense a noise barrier across the north end of the camp which could further improve the situation at the north end with respect to traffic noise from SH2 and from trucks crossing the north end of the camp to get onto the motorway.

The Lmax

424. Transit originally (March 1994) in commenting on Napier City's proposals suggested that:

> *The night time Leq as formerly recommended is unreliable where traffic flows are low and has therefore been changed to Lmax. The specific value adopted in this instance more accurately reflects the critical level at which sleep disturbance is likely to occur under low traffic flows.* (see Schedule 2 to this decision)

425. The figure recommended at that time was 72 dBA Lmax over the period 10.00 pm to 6.00 am. On the basis of the Transit *Guidelines* Mr Hegley recommends that the design vehicle noise level should be taken as 82 dBA at 7.5 metres from the carriageway. According to information contained in the agreed statement of December 1999 this translates as 76 dBA at 15 metres and 76 minus 5 = 71 dBA at 1 metre inside the camp's most western boundary "*when taking account of the proposed screen fence*".

426. The agreed statement (December 1999) however points out that the design vehicle noise value represents only the 75 percentile Lmax value which by definition is exceeded by 25% of the truck fleet.

427. This amounts to a statement by Transit that the adjacent camp must accept an Lmax of 71 dBA at 1 metre inside the boundary plus an unstated higher figure which relates to the 25% of heavy commercial vehicles with noise characteristics greater than that of the design vehicle. This makes a stated Lmax of 71 of limited value, and is not a condition imposed by a consenting authority on the basis of the needs of an adjacent owner but an indeterminate noise level imposed by Transit.

428. Thus while 71 dBA Lmax might seem a reasonable night time figure for the camp (NZS6802:1991 suggests 75 dBA for residential areas) it does not in fact represent what could reasonably be expected.

429. We have concluded above that the 24 hour Leq of 52 dBA is warranted for a point just inside the westernmost point of the camp. This requires a friction course as well as a barrier fence.

We have been told, the friction course can lower the tyre/road noise by 6-7 dBA. We have been told that the friction course can lower the tyre road noise by 6-7 dBA. If we take a more conservative figure of 5dBA we consider we are justified in lowering the allowable Lmax at 1 metre inside the western extremity of the camp by 4 dBA to 67 dBA for the design vehicle. This is still a significantly high Lmax for the night hours for caravans and tents and still does not cover the noise produced by 25% of heavy commercial vehicles or the coincident effect of two or more design vehicles.

430. Just how far to press Transit to implement noise reduction techniques for a particular situation, bearing in mind the nation-wide nature of Transit's operation and the fact that it is financed by the taxpayer, is a matter for concern. It opens up some of the economies of a project, benefits, costs direct and indirect and government policy as to the benefit/cost ratio at which the green light is given for the operation to proceed. This policy however applies when a project is considered viable and itself takes into account additional external costs which a community might wish to be allowed for. Thus while benefits as seen by Transit are allowed for, it seems logical for costs involved in remedying concomitant damage to be regarded as negative benefits or disbenefits and the benefit/cost ratio calculated accordingly.

431. We have given considerable thought to this matter but have concluded that the case of the Westshore Motorcamp is sufficiently rare for it to be considered a case where additional mitigation of noise effects is called for – and not avoided by demolishing the motorcamp.

432. From the notes of cross-examination we see Mr MacFarlane asked Mr Clentworth for the Partnership:

> *... would you be happy with the continuing monitoring and sticking to (amended) conditions? ... Certainly, I mean, if you look, the road, Transit are predicting a virtual, almost doubling of traffic around the motorcamp in the next ten years. It is currently about 10,500 vehicles and I think they're talking close to 21,000 vehicles one or other of the roads by the year 2012. If we could get something, if we could get a noise level that was more appropriate to the activities of a motorcamp than to residential housing bearing in mind that a lot of the structures temporary and permanent in the camp are only going to have half the noise reduction effect that a house does and people could live there certainly and it's going to be held out and monitored for ten years - we could be quite happy. I mean that's not so unusual.*

433. We found this to be a very positive response by QPM and the Partnership and one echoed by their counsel in a memoranda filed on the noise issue. Mr Milne in cross-examination stated that in effect his family did not believe they would have a business chance if things do not go

correctly and the noise was not reduced. We accept that conclusion on this issue and it is our judgment that the noise is able to be adequately mitigated if a friction course is implemented.

434. We have conflicting evidence on the likely economic effects resulting from this lowered perception of the value of the camp as a holiday destination with the motorway in place.

435. As we shall see some of Mr Remmerswaal's conclusions from a valuer's point of view are based on noise being a large factor in the marketability of the camp. If the mitigating factors discussed above are in place, namely the noise barrier and the friction course however, we consider traffic noise as an annoyance factor may not be of overriding importance.

436. We have made no reference to the condition relating to construction noise in the council's original conditions which refers to NZS6803P 1984. We do not wish to change this condition but would point out that s.16 of the Act applies. Excessive noise may call for some abatement. This should be negotiated between the contractor and the appellant or other persons affected and the council. Construction of this form of civil work of necessity results in noise but if amelioration is practicable it should not be avoided. Conditions of contract should make reference to reducing construction noise wherever possible.

Finding

437. **Transit contended that the whole thrust of the appellant's case is related to private commercial concerns and that it cannot be required in the case of motorways to elevate the interests of one individual party beyond the interests of the region. But the question of noise has to be assessed in the context of s.5(2)(c) – and whether, when it has adverse effects, they can either be avoided, remedied or mitigated. Taking noise as an issue we consider the adverse effects of the motorway are not so severe that they cannot be mitigated.**

438. **Transit itself in its 1994 Confirmation of Alteration to the Designation set a number of detailed noise conditions singling out the motorcamp for quite special treatment on that occasion and from all the documentation it is clear Transit saw the motorcamp as a special case. If the Transit case is to retain its integrity then we consider if there are noise effects which are major, it should be required to meet even tighter noise conditions.**

439. Accordingly, from the evaluation given above, if the motorway is to proceed on alignment 2, we require its construction to provide traffic noise amelioration measures to achieve:

1. **A 24 hour Leq of 52 dBA at the westernmost edge of the motorcamp.**
2. **An Lmax of 67 dBA at 1 metre inside the westernmost edge of the camp for the design vehicle over the period 10.00 pm to 7.00 am.**

440. We also consider it would be beneficial for Transit to locate air brake signs for transporters near the gates to the motorcamp as a mitigating factor in transferring noise impacts from SH2 to another corridor.

441. We require submissions from the parties as to whether any other noise related conditions by Napier City Council require modification in the light of the above decision.

Amenities

442. Under this heading we have grouped general amenity issues such as views over the Westshore Domain and New Pond, increase in and effects of purported vehicle emissions, increase in midges and mosquitoes, and severance. QPM relies on the evidence of Mr Clentworth, Mr Hunt, Mr Remmerswaal, Ms Hunter and Mr Milne as collectively establishing that amenity values will not be maintained or enhanced by alignment 2.

Views

443. Ms Hunter testified the Westshore Holiday Camp has always enjoyed the open aspect of the wildlife reserve and estuary to the south. These existing amenity values will be lost by the construction of the motorway. It will provide a permanent, physical barrier to camp occupants wishing to enjoy the natural areas and open space and will be a visual detraction.

444. Although not clear from the information provided by Transit, Ms Hunter is of the opinion that there is a likelihood that the motorway will be constructed at a height above existing ground levels. The constant movement of vehicles at a higher level than the facilities of the camp and along a boundary which was previously a reserve will have an adverse effect on existing amenity values and on the privacy of the camp (the Minutes of a public meeting on 19 May

1993 record Mr Daly of Transit saying that the motorway would be running at ground level except on approach to the estuary).[52]

445. Ms Hunter also believes that a fence of 2.4 metres in height for noise mitigation purposes will enclose the camp and result in further loss of the outlook and further visual intrusion. Consideration should be given to the excessive height of this structure and the possible effects of shading along the western boundary of the site. (The agreed diagrams of noise contours since produced allow for a 2 metre high barrier).

446. Mr Remmerswaal in his evidence stated that the motorway will be in the immediate line-of-sight of the western boundary of the camp property – ranging from a distance of nil to some 50 metres. At present he alleged the western boundary of the property overlooks the Estuary Domain. Consequently the appeal of the camp as a holiday destination is likely to be diminished as a result of being situated immediately adjacent to a motorway. Moreover, the impact of aesthetics on value is significant (this issue is addressed below).

447. Mr Ryan also submits that the passage of up to 10,000 vehicles a day, including 800 heavy commercial vehicles along the motorway, will do little or nothing to contribute to people's appreciation of the area's pleasantness, aesthetic coherence and recreational attributes.

448. Counsel further submits that Mr MacFarlane established in cross examination of Mr Milne that sight lines to the west looking towards the Westshore Lagoon are partly affected by trees planted by the council's Reserves Manager. It was acknowledged in cross examination of Mr Tonks that these trees also act to screen cars and people travelling along the present gravel access road to the west of the motorcamp when accessing Westshore Domain and the Kiwi House and that this would screen the movement of cars and people from the water fowl in Westshore Lagoon. To the extent that this line of trees will be removed by alignment 2, Mr Ryan suggested that there is a reasonable inference that this present westerly aspect will be adversely affected by alignment 2.

449. In response to these contentions, Transit finds it extraordinary that QPM complain of the effects on the amenity of the camp, yet prefer the complete destruction of that amenity and asks the Court in the name of Part II to facilitate it. This approach is alien to the purpose of the Act and there is no authority to support it.

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[52] Record of Documents - Volume 2, Document 16, page 501.

450. A correct amenity analysis would recognise that the camp can have an inherent amenity value (as recognised by Mr Copeland), to its users and the community within which it is located. The fact that the camp might be less successful (which is not accepted in any event) is irrelevant. The inherent amenity value is not affected by the requirement. Or if it is, it is submitted the effect is neutral.

451. Transit argues that QPM err in assuming that the only amenity value of relevance is the users who might enjoy the west side of the camp when the road is built. This assumption fails to recognise that other parts of the camp are enhanced and there is increased safety in accessing the beach.

452. Transit also disputes the submission that the trees on the camp boundary are to be removed. There is no evidence to support this allegation, or if there is it is erroneous. It is not necessary to remove either the line of trees or the gravel track. Both will remain for the benefit of the camp users and others as a screen and visual amenity, as well as providing access to the southern part of the refuge. The aerial photos demonstrate these points.

453. In conclusion, Transit submits visual amenity is barely affected at all. It is only with some effort that access to the wider visual amenity (the lagoon itself) can be achieved from the camp. Nothing is lost.

Evaluation

454. The inherent inconsistency in QPM's case is that it argues at one level for the complete destruction of the camp (as a compensation issue) and at another that the motorway will have adverse effects on the motorcamp which are major, which means it should be demolished in any event. But we do not accept that the motorway will impact on the amenities of the motorcamp in the way QPM suggests. We now know that the motorway will be clear of the camp site.

455. From the noise evidence we ascertained that the motorway will be constructed at the same level as the motorcamp so it is likely to be somewhat visible in places. From the more general evidence and our site visit however we ascertained that views of the Westshore Domain from inside the camp are currently glimpse views at best and only by going outside the camp and into the open space do views over the domain become clearly apparent despite the fact that some of the trees have a high canopy. Mr Milne acknowledged visitors can't see the birds in

the reserve now – that they have to walk outside the camp. He stated too that visitors don't have a clear view of either North Pond or Westshore Lagoon due to the planting by NCC (although he did state visitors can see North Pond clearly from behind family cabins 10-12 and from power sites along that boundary as well).

456. What we found rather remarkable about the motorcamp in its setting is what a closed-in, discrete world it presents. The visitors' focus is not necessarily over *"beautiful views"* to the west (although the visitor is aware of its open space aspects), but rather the paths, walkways and shrubs, trees and buildings contained within the camp. This is partly explained because the motorcamp is set down from the railway embankment and the western planting on the boundary already obscures views in several areas. The issue is therefore to retain the amenities this discrete world presents when the motorway is positioned in parallel to the camp.

457. Mr Milne considered that to screen the motorway from the motorcamp where it might be seen would be the best option in his view. Mr Remmerswaal also considered trees would distance the impact of the motorway (but we do not consider, as he did, they will necessarily lessen other amenities). Mr Tonks for Transit also stated that there will also be further tree and shrub planting as part of an overall landscape plan to provide (a further) effective visual screen. Mr Barker, Consultant Valuer to Transit, stated that belts of trees will have a psychological (positive) effect on the visitors to the camp - and we agree. The 2 metre fence proposed will also obscure views of the motorway (we note the current camp fence is already 1.8 metres high).

458. Finally, we have no evidence to suggest that either the existing line of trees outside the camp will be removed so reject Mr Ryan's contention in that regard. The existing landscaping is to be enhanced.

459. With these mitigating factors in place we concluded there will be no major adverse effects on views from within the camp from the motorway but consider further landscaping both inside and outside the camp should be revisited as a result of this decision.

Vehicle Emissions

460. In respect of vehicle emissions, it was Ms Hunter's view that vehicle emissions on the motorway will have an adverse impact on the motorcamp because there is a total length of boundary with westerly aspects now adjacent to the motorway. She was also concerned with

heavy traffic slowing down to make a turn to go to Meeanee Quay, likewise the traffic coming from Meeanee Quay choosing whether to go north up the new motorway or go south towards Hastings and also other traffic coming up and utilising the old SH2, so that there are two intersections in close proximity to the camp where vehicles will be slowing down and changing gear and create further fumes and emissions.

461. In response to Mr Tonks' evidence on vehicle emissions (he had concluded the overall effect of emissions is likely to be the same if not less impact from vehicle emissions as with the present road) Mr Clentworth stated the wind wand measurements for the area indicate that winds blow from a westerly quarter for 40% of the time. Thus the motorway along the western boundary would expose the camp to significantly increased traffic fumes. In addition, the camp will continue to be exposed to fumes from the north.

462. Mr Milne however threw some doubt on Mr Clentworth's statement. He stated the motorcamp does not really suffer from fumes and pollutants from SH2 now, and he therefore does not regard them as a problem. He considered however if traffic was relocated from SH2 to the motorway, the westerly winds might enhance their impact on the motorcamp. On the other hand, Mr Remmerswaal considered there would be minimal effect from vehicle fumes.

Evaluation

463. Ms Hunter's evidence on the potential for fumes and emissions from the new alignment on SH2 was given as a planner. She acknowledged in cross-examination that no-one had taken measurements to show that there would be adverse effects from the fumes from the motorway on the motorcamp. And whilst Mr Clentworth acknowledged that there are research papers on air quality limits and levels which are acceptable in the vicinity of roads, Ms Hunter was not aware of them. She did not know, for example, of the Minister of Transport's 1997/1998 reports on the issue and she was unable to answer whether such matters as the surrounding hills, buildings, and relevant levels of traffic flows control air emissions (fume corridors) from motorways or not.[53]

464. In fact none of the evidence from QPM, or from Transit on vehicle emissions, was scientifically based. We accept however that the question of vehicle emissions was directly in issue once Ms Hunter's evidence-in-chief had been circulated. Mr Tonks for Transit gave only

[53] In cross-examination it was established that these reports are entitled "Vehicle Fleet Emissions .. Strategy & Local Air Quality Management Impact from the Road Transport Sector" but they weren't produced in evidence.

very generalised evidence in response. If Transit wanted to displace the doubt raised by Ms Hunter with its own expert evidence it had every opportunity to do so. As a consequence of this unsatisfactory state of affairs, we find the case of fumes and vehicle emissions effects from the motorway on the motorcamp inconclusive, with QPM having raised a doubt.

Swale Areas as Midge/Mosquito Breeding Grounds

465. Ms Hunter for QPM identified that one of the plans provided by Transit shows a swale located between the motorcamp and the eastern edge of the motorway. She assumed that this area will be used for the collection for stormwater discharged from the motorway but was unclear about the fact.

466. Mr Clentworth for QPM was critical that Mr Tonks describes the so-called "swale" drains as being areas for the settlement of runoff water from the motorway. He considered these drains are constructed with virtually no fall, so that runoff water is retained in them for extended periods, allowing time for any suspended settlements to settled. Mr Clentworth considered it well known that areas of stagnant water provide a fertile environment for the breeding of mosquitoes. The Partnership questions the advisability and desirability of placing such drains so close to a camping ground, particularly in view of the current invasion of the region by Australian mosquitoes capable of carrying Dengue and Ross River Fevers.

467. Mr Milne indicated that the present swales are in effect old bits of the old road where it used to return to the camp. He stated that if there is any significant rainfall, the water from the camp run off drains away to a pond (not the estuary) because the camp is on a slight angle.

468. Mr Tonks for Transit stated that the so called current swale areas beside the motorcamp are actually sited on pre-existing depressions in the ground and are unlikely to require much, if any, excavation.

Evaluation

469. From Mr Milne's evidence it seems that currently if there is a significant downpour water drains away from the camp now. But if silt from road construction tends to seal the swales, we consider water may tend to pond. It should be a condition of construction that the swales are kept clear of silt. This should also be a matter for future maintenance when the motorway is operating.

470. We are satisfied from Mr Tonks' evidence that condition 4 in Consent LU930211R issued as part of the regional council's consent will also help take care of any perceived adverse effect by avoiding it. It specifically requires that runoff water from the motorway be collected prior to discharge.

471. It is Transit's responsibility to provide proper drainage for the motorway. If both construction and the regional council's consents contain conditions about run-off we fail to see therefore that (properly maintained) swale areas will have a major adverse effect on the amenities of the camp because there is no expert evidence to suggest they will produce stagnant pools of water. Only an assertion.

Severance

472. Ms Hunter maintains that the establishment of the proposed motorway will place a physical barrier between the camp and the reserve, thereby severing all access to the reserve for camp occupants and isolating the camp from the surrounding locality. The raised railway embankment currently provides a physical separation to the east. The proposed intersections will provide additional barriers to the north and the motorway will enclose the camp along its western boundary. The only remaining open land will be a narrow corridor between the railway and the motorway adjoining the camp's rear boundary.

473. QPM claims therefore that the Westshore motorcamp will be severed by being bounded on three sides by transport corridors, two of which are designations. Significant disadvantages will be imposed on the camp above and beyond what is reasonably contemplated by the sustainable management objective of the Act. In this respect, QPM alleges Transit's motorway proposal creates a planning blight and makes this case particularly unusual.

474. Counsel submits that the effects of this planning blight must be assessed in relation to the zoning of the camp site and the activities permitted within it. These include camping grounds and travellers accommodation. It is alleged that the effects of the planning blight undermine the certainty which QPM is entitled to of these permitted activities. Counsel cites the following statement from the Court of Appeal in Foodtown Supermarkets Limited v Auckland City Council (1994) 10 NZTPA 262, 267, per Cooke J:

> *Certainty is one desideratum in planning law, but in zoning matters it is given effect primarily by predominant uses.*

475. To conclude, QPM submits that considerable uncertainty is created for any owner/occupier of the Westshore Holiday Camp and Transit did not factor these considerations into its evaluation of options for the alignment of its motorway because these were costs which were not met by it. Transit's evaluation lacked an appreciation of the planning significance of the severance caused by locating two designations around the motorcamp.

476. Transit refutes the suggestion that this case presents an unusual situation. The camp may be technically bounded on three sides but in fact will be bounded by only two transport corridors (the existing SH2 and the rail are really a joint corridor). Transit recognises that a significant new road will be the dominant transport corridor to the west of the camp. But it does not accept that this occurrence will necessarily be bad. From a commercial point of view, this site will be a prime location for an accommodation business seeking to feed off the travelling and holidaying public. In fact, this situation is no different from many motels and camping grounds found on busy roads and often on corners.

477. In Transit's opinion, those attracted to the camp for holidays at the beach would have better access to the Westshore shops and the beach itself. Those who sought access to the refuge and wetland to the south would not be affected. Those few who used the camp for access to the refuge to the west would be affected and have to cross the new road to utilise the new accessway on the western side of that road. However, this would be the case for both alignments 2 and 2A.

478. None of this presents as unusual or difficult for a motorcamp the location for which was busy and had some degree of severance from the outset. Indeed, this begs the question, what does the new road sever the camp from? Transit suggests it is the beach to the east - which is not the kind of community severance which was rightly the concern of the Court in the CBC case.[54]

479. Transit does not understand QPM's link between the "planning blight" and severance. An effect or outcome is not a planning blight. Once the designation is in place there is certainty for all those whose lives and businesses might be affected. If there is any uncertainty, it is that caused by QPM's appeal.

480. Transit finds remarkable QPM's proposition that because as a network utility operator Transit is given express rights by the Act, the general principle of certainty in planning is undermined.

[54] See n 7 above, pages 217-225.

Statutory interpretation and legal principles requires the general to give way to the specific. Transit suggests the Court is not the vehicle through which QPM should seek changes to Transit's ability under the Act to approach a property at close proximity while not being obliged to acquire that property. The legislative intention enabled the avoidance of such costs.

Evaluation

481. Our evaluation of the severance issues leads us to conclude that the occupants of the camp will not be severed from outside activities by virtue of the motorway to an untoward extent.

482. Mr Milne acknowledged that diverting traffic to the motorway is probably going to make the road outside the camp's entrance far less busy, particularly in the off season. He acknowledged that the campers are mainly at the Westshore Motorcamp because they come to the beach (particularly younger people with families) and that they mainly walk. He also acknowledged that Transit in its design for the motorway also designed a roundabout in front of the camp entrances to ensure that access for the camp and its use is enhanced.

483. Mr Milne stated that the access track to the Wildlife Reserve is accessed from Watchman Road. If visitors want to see more than a section of the pond, motorway or lagoon they would walk down the access track into the reserve into the bird watching huts and the Kiwi House which is what they do now. Effectively with a motorway in place they would go down to where there is a planned intersection (a little further down from Watchman Road) and then come back up to the reserve.

484. Effectively too the old access track could be used to ensure continuing public access to the reserve but across the motorway and once they reached the open space. Mr Milne in cross-examination acknowledged that it is probably almost as unsafe as walking across SH2 now but with half the traffic (depending on the time of year). We also note the situation would exist for both alignment 2A and alignment 2.

485. The evidence established that there is currently no pedestrian crossing for people in the vicinity of the motorcamp to cross SH2. Mr Milne considered there should be a crossing further up the road towards Napier from the camp as most people go out the side gate if they are walking to the beach (there being too many things to look out for otherwise). We consider that Transit, if it has the requisite jurisdiction, should implement such a crossing to assist in promoting the motorcamp's amenities.

486. As to general traffic, Mr Barker for Transit, whose professional experience encompasses valuations of a number of hotels, motels and camping grounds, was very positive about the future for the motorcamp when the motorway is built. He saw its proximity to the city centre, the beach and (possibly) the domain as one of its real attributes. And whilst he could give no examples of a camping ground bound by three strategic transport corridors in a provincial setting, he gave some urban examples throughout New Zealand which have some similar features to Westshore. He detailed that those camping grounds are in proximity to three times the projected volumes of traffic at the Westshore and his research demonstrated that people do camp close to noisy highways from choice.

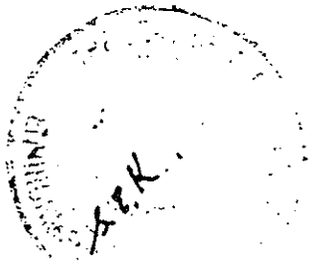
487. Mr Barker also pointed out that in terms of location the motorcamp is within 700 metres walk of Westshore Beach and Surf Lifesaving Club. There is a service station and hotel almost opposite on SH2 and neighbourhood shopping facilities within 500 metres.

488. Mr Barker stated that as SH2 moves away from its alignment with the motorcamp at an oblique angle so it does not continue the full length of the north-eastern boundary. And Mr Barker did not see the frequency of day to day trains as a major issue. Mr Milne in cross-examination also acknowledged that trains are often an infrequent event (sometimes none for days, sometimes none for three weeks and sometimes two - three trains a day if that). We accept Transit's argument that the rail and SH2 are effectively one transport corridor where they parallel each other.

489. Finally we concluded that the camp's location will continue to provide a locational amenity – both to the holiday visitor and to the itinerant traveller and long-term stayer.

490. Mr Barker said this:

> *The re-routing of approximately half the future traffic volumes to the west of the development has a benefit in that it reduces the traffic volumes to the east; thereby allowing easier pedestrian access through to the beach and commercial facilities. In my opinion one of the major attractions of this motorcamp is its proximity to the Westshore Beach. If the motorway was not constructed then SH2 would be carrying around 20,000 vehicles per day by 2012. This level of traffic would be a significant barrier for pedestrians to the beach.*



Overall Findings on Amenities

491. It is difficult to establish there will be a major loss of amenity due to the proximity of the motorway – particularly if views of it are mitigated, noise levels are properly controlled, there is less traffic on SH2 in proximity to the front of the camp, and along the eastern boundary, swales are kept free from silt and there is no expert evidence that additional vehicle emissions and fumes will affect the camp residents.

492. Nor do we consider severance will be a major issue although we consider a pedestrian crossing should be provided on SH2 towards Napier to allow easier access for pedestrians and as a mitigation measure for having the motorway located on the camp's western boundary.

493. We conclude there may be some diminution in the existing amenity and pleasantness due to the presence of the motorway but cannot conclude that it will be major.

494. We do not accept therefore that there are adverse effects, which even if assessed cumulatively, would require us to cancel the designation.

<u>Loss of Business and Value</u>

495. QPM submits that it has a right to have a reasonable apprehension that alignment 2 on its western boundary will negatively impact on its current and future business.

496. Mr Remmerswaal for QPM wrote a Market Value Impact Assessment for the Westshore Holiday Camp as a result of Transit's proposal. Throughout, the witness emphasised the special nature of this motorcamp being potentially located on 3 designated transport corridors. Mr Remmerswaal's assessment included a comparison of a "*before*" (the motorway) and "*after*" situation.

497. Mr Remmerswaal stated that a comparative environmental assessment method indicates an anticipated drop in turnover corresponding with a loss in value in relation to the impact of the motorway on the value of the land and buildings. In respect of the impact on the operator's business, his report concluded profitability will fall as a result of the anticipated drop in turnover, resulting in a decline in the value of the business component of the camp to an extent that there may be no market interest in a new lease on expiration of the current one in

December 2001. A drop in turnover would have the effect of reducing the net income per annum. As a consequence, the goodwill in the business would be reduced significantly.[55]

498. From his evaluation, Mr Remmerswaal concluded the holiday camp is likely to suffer from the effects of the motorway in visual terms as it overlooks the Estuary Domain, and he foresaw a detriment to privacy, ambient noise levels and development potential. He concluded the proximity of the motorway would directly affect 8 cabins and 56 powered or caravan sites. He also considered the restrictive zoning is unlikely to permit significant expansion or redevelopment of the site. In this respect, he considered the property differs from other commercial properties where there may either be no effect or where there is a development potential for an alternative use. He predicted an anticipated combined loss to the leasehold owners and the operator of the motorcamp in 3 figures.[56]

499. The valuation witness for Transit, Mr Barker, also researched the implications of the proposed motorway on the camp's viability and value. His brief was to assess whether a camp ground business like this would attract sufficient business in the year 2012 and his answer was yes. Mr Barker was of the opinion however that the failure over the last 20 years of the camp owners to progressively modernise has probably impacted on the business in any event. He considered that a large number of the cabins and bunk rooms are near the end of their economic life. The long term prospects of the camp are therefore limited by the past failure to reinvest in new and upgraded facilities in a progressive manner.

500. Mr Barker states that the proposed motorway bypass extending to the west of the campsite has both negative and positive impacts on the property. As noted earlier he considered it was significant that the re-routing of approximately half the future traffic volumes to the west of the site will reduce the traffic volumes to the east, thereby allowing easier pedestrian access through to the beach and commercial facilities.

501. In response to Mr Remmerswaal's report, Mr Barker says that the assumption that turnover will decrease significantly is arbitrary and not supported by his (Mr Barker's) market research of 17 other motorcamps in the North Island on main road locations. This indicates there were no camp grounds on busy roads which offered any discount on rates for those camp sites next to the road. The one exception was the Orewa camp ground near Auckland where there are a number of sites which are generally recognised will carry lower levels of occupancy

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[55] QPM sought and was granted Confidentiality Orders in respect of its commercially sensitive evidence. Accordingly few direct figures are recorded in the evidence – only percentages.

[56] The exact figure is noted.

than those further away from the road. The sites overall however do not have any acoustic treatment to the road boundary and the distance between the camp site and the road shoulder is approximately 5 metres. The nearby highway carries 31,049 vehicles on an average daily total.

502. Mr Barker was of the opinion that it would be fair to allow a 10% fall in occupancy rates on the 17 Westshore camp sites closest to the motorway and a 5% fall in occupancy on the three tourist flats affected. He calculated this decline in turnover and the possible loss in income resulting in an overall fall in value to the sub-lessee's business and head lessee's interest to be about third that predicted by QPM. Mr Barker considered Transit's proposed mitigating measures would adequately compensate for this potential loss (but these include development of the lease area (which QPM now does not intend to do), the timber fence on the western boundary and works to the maximum cost of $25,000 to remedial or development works on either the existing leased land or proposed extra lease area).

503. Transit therefore submits that there is no reasonable apprehension of a loss of business. Mr Remmerswaal has also overlooked the fact that motel and hotel or mixed uses of the site are possible in the future and that there are positive factors to the motorway proposal from a business point of view which are enhanced by the council, Department of Conservation and Transit's preparedness to facilitate a larger site by way of the proposed lease area.

504. In response, QPM submits that Mr Barker's analysis is flawed because it assumes a willingness to uptake leasing of the land to the south of the site. Mr Milne does not wish to take up the extended lease area because he cannot afford it. Moreover, there is no legal obligation for the *polluted* to pay to offset effects created by alignment 2.

Evaluation

505. In terms of the Westshore Motorcamp the future traffic levels for SH2 for the year 2012, these will be very similar to what they are today – approximately 10,000 vehicles per day if the motorway goes ahead.

506. As Mr Barker acknowledged, there is limited evidence available to suggest that in some cases occupancy rates of motorcamps located close to busy highways may be lower, but logic would suggest that most camp ground patrons would prefer a quieter to a busier site.

507. Like Mr Remmerswaal, Mr Barker from his examples was also unable to give a directly comparable situation to that of Westshore, able only to point to those that have some similar features. And he acknowledged that in valuation matters there was room for honest but different opinions.

508. In spite of these acknowledgements, we had some difficulty nevertheless in accepting QPM's evidence relating to a major loss of business and value of the motorcamp as a result of the motorway on its western boundary.

509. Mr Remmerswaal claims that the adverse effects of the motorway will cause a reduction in the value of the camp, both as land or as a business in its present use and in turnover. However, under cross-examination it was apparent that the quantum of this reduction and means by which it was arrived at could not be substantiated. Mr Remmerswaal could not say for certain how the reduction was comprised, for example, how much of that was attributable to fumes or noise or otherwise reduction in amenity, although he did say a great deal was due to noise. He acknowledged his conclusions on the issue were quite subjective (from his experience and knowledge of properties of this type). But he was not able to point to a comparable property with which to form a valid comparison. His was opinion evidence based on no facts. He discussed market trend indicators but the Hastings example he gave was not beside a railway line or a state highway.

510. Further, Mr Remmerswaal considered all the power sites and some of the bunk sites would be affected by noise despite the fact that many will be located away from the motorway boundary. He did not distinguish between the parts of the camp which are more noise sensitive than others.

511. Instead of Mr Remmerswaal's conclusion that all the powered sites would be affected and a number of the cabins, we prefer Mr Barker's evidence (which supports our conclusions from our site visit) that given the layout of the camp, the bunk cabin income may not be affected at all (the majority are located on the railway or eastern side of the development) and a much lesser number of powered sites may be affected – namely 11 which are immediately adjoining the western boundary. In this regard we note that both Mr Hunt and Ms Hunter seem to be in agreement as to how effective the embankment is in protecting the camp from the traffic noise on Meeanee Quay. Nevertheless we accept however that tourist flats numbers 4, 5 and 7 may be affected from proximity to the motorway.

512. There were also a number of factors Mr Remmerswaal did not appear to have taken into account when assessing the loss in valuation to the camp. His assessment did not allow for the positive effects of the motorway, such as the improved access the motorway would provide for campers going to the beach. Nor did it allow for the noise reductions to the SH2 boundary of the camp if traffic was diverted to the motorway (quantum was never discussed but Mr Remmerswaal was in no doubt there would be less traffic). Furthermore, Mr Remmerswaal's valuation did not make allowance for Transit mitigating some of the potential adverse effects of the motorway, such as the use of a friction cause which would reduce noise impacts and planting trees or screening materials which would reduce visual effects. He did agree in cross-examination however that if there were mitigating circumstances he might change his view.

513. Mr Remmerswaal's evidence had also not taken account of a possible alternative use of the motorcamp site as a site for a future motel or hotel. He had considered the underlying zoning is very restrictive (although we note in his evidence-in-chief he acknowledged travellers' accommodation was a permitted activity). Travellers' accommodation is now permitted on the site due to submissions to the council by the Partnership (supported by Transit) on the proposed Ahuriri Section of the plan and the motorcamp's subsequent scheduled site status. We consider a reasonable sized motel with good insulation on the site would benefit from access to and egress from the proposed motorway – should that option ever need to be explored.

514. Subject to what we say below moreover, the development of competition and the fact that new and more modern camps such as one to the north of the site (Bayview Motor Camp) may supersede the popularity of Westshore was not considered as a possible explanation as to why people may not patronise the older facility, rather than because a motorway runs alongside.

515. Further, if Mr Remmerswaal considered a drop in turnover and loss in value to the motorcamp would occur as a result of the motorway and that a great deal of this was due to noise, then it is reasonable to suggest that if the noise is mitigated to the extent we consider it should be, then there should not be such a diminution in value as he anticipates. And in view of our findings on amenity issues also, we consider his conclusions are also too pessimistic.

516. As to the visual impact of the motorway on the views over the wildlife reserve, for reasons given earlier we found Mr Remmerswaal's conclusions to be less than persuasive. Mr Barker considered that the Westshore Camp does not appear to be valued for its proximity to the reserve now (the motel/camping ground guides for the area highlight the motorcamp's proximity to the Napier beaches only).

517. Finally and significantly, Mr Remmerswaal admitted in cross-examination that even if the new road did go ahead and created adverse effects on the camp, the business would continue to be viable in providing a return and remuneration to the proprietor – just not as profitable.

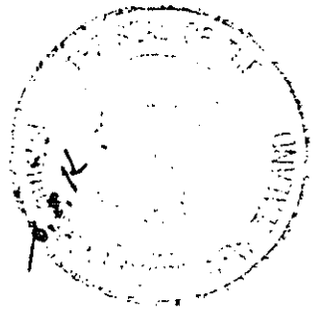
518. Messrs Remmerswaal and Milne and Barker all made the point that the Westshore Motorcamp is an older style camp and trades to that market. Both Messrs Remmerswaal and Mr Barker agreed that nevertheless a number of the old buildings need upgrading with Mr Remmerswaal stating that it would be difficult to attempt an upgrade without starting afresh.

519. But Mr Milne did not see upgrading the motorcamp is necessary because most people (90%) are quite happy with what is there now. He stated the Westshore Motorcamp does not even try to compete with facilities like Kennedy Park and the Partnership is quite happy to carry on with the low cost camp as it is "*for that's where the money is at*" and he welcomed the competition.

520. We note from Mr Milne's evidence that the camp has long term clients and others such as fishermen and horticulturists. Clearly the motorcamp is popular now and caters to some long established clientele. Our site visit and the photographic evidence attached to Mr Barker's evidence demonstrates some well maintained if older style cabins and motel units which do not in any way present neglect. If they continue to be well maintained, slowly upgraded or replaced and planting of the area is enhanced, the motorcamp may well continue to attract the kind of custom here identified. Mr Milne stated that (even) if the noise levels aren't reduced, several people are (still) interested in what's left of the head lease. Much more significantly, he foresaw prospects of increased business as a result of the motorway extension!

<u>Finding</u>

521. In conclusion we found the evidence on loss of value and turnover from the motorway extension altogether speculative. It lacked credible substance and was confusing in many of its aspects. And we concluded as a result that QPM's evidence surrounding the adverse costs to the motorcamp in terms of loss of business and value is less than persuasive.



Ecology

522. In terms of Part II QPM considers that when the objectives of the transitional and proposed plans and the 1990 and 1992 ecological studies are read together, alignment 2A clearly better promotes the statutory objectives. In the alternative, alignment 2 should be cancelled to allow investigation of the embankment option referred to by Mr Clentworth.

523. In reply, Transit invites the Court to read the full ecological reports of 1990, 1992 and reviewed in the Scheme Assessment Report 1998. By meeting the terms of the resource consent and permit conditions, Transit will be adding to the Westshore Lagoon and New Ponds. It will be rehabilitating and improving them, which is expected under Part II in avoiding and mitigating effects. What is more, Transit contends it is not at all clear that the proposal will create any real adverse effects except at North Pond and those effects would be the same for alignments 2 and 2A.

524. North Pond has been the subject of Part II consideration in detail. Expert scrutiny gave rise to the imposition of special conditions to avoid the margin of the pond and reed area.

525. As to ecological matters surrounding the estuary, as indicated by Mr MacFarlane, the 1990 ecological report commissioned by Transit refers to the original designation to the west of the lagoon and is to be read with care. It mentions no adverse impact on Westshore Lagoon arising from alignment 2 referring instead to the disturbance to wildlife in the *"New Ponds"* which are the newly created ponds immediately to the east of the Westshore Lagoon south of the camp, and which were created as a result of quarrying gravel. As noted alignments 2 and 2A will have the same effect on the New Ponds because as Mr MacFarlane submitted along this particular section of the motorway route the two alignments are identical. This is quite evident from the Scale map (1 cm = 25 metres) attached to this decision marked Appendix 3. Alignment 2A will have a similar proximity to the Westshore Lagoon as alignment 2. The proximity of alignment 2 to the Westshore Lagoon is less than to the North Pond, and according to the 1990 ecological report that proximity has minimal effects. The later (1992) ecological report recognises that alignment 2 cuts through the ponds and wildlife reserve amenities to the east of Westshore Lagoon.[57]

[57] **Environmental Impact Statement – Further Studies of Alignment Options** June 1992, Record of Documents - Volume 1, Document 4, page 214.

526. Ms Hunter stated the regional council assessed the impact on the North Pond but not its wetland fringe Pond and that the background discussion of the issue in the 1992 ecological reports did not follow through into the assessment of effects.

527. Alignment 2 will cause the loss of 3% of the marginal reed area and a minor loss of water surface area around the edge of the high water mark. Mr Tonks for Transit, identified that the reed beds around the North Pond are used as a nesting area by black swan, mallard and shovellor duck. They are also occupied by pukeko and believed to be occupied by marsh crake and spotless crake.

528. In relation to the 1992 ecological report Transit makes similar observations. Counsel quotes from the report:

> *Causeway sections of the motorway crossing at alignment 2 or 4 will destroy an area of the Sarcocornia covered sand-flats, important for bird feeding and as a breeding habitat for black-backed gulls. The area affected represents about 2% of the total high tide mud-and sand-flat habitat in the middle and lower estuary. It is unlikely that this will cause any adverse long-term impact. Of far greater concern is the fact that alignment 2 cuts through the ponds and wildlife reserve amenities to the east of Westshore lagoon, and the proximity of the alignment to the lagoon. The advantages of alignment 4 are that it does not impinge upon the high quality bird habitats of Southern Marsh, Westshore Lagoon or North Pond.*

529. Transit acknowledges that alignment 2 would have a greater impact on the New Ponds than alignment 4. Alignment 2 is also closer in proximity to the Westshore Lagoon than alignment 4. However, Transit reiterate, alignment 2A would have the same impact on the New Ponds as alignment 2 and would be in a similar proximity to the Westshore Lagoon as alignment 2.

530. In fact the issue had been addressed at the original joint council hearing by **Mr J Adams, a Senior Conservation Officer and representative of the Minister of Conservation** and whose evidence was included in Volume Three of the Record of Documents.[58]

531. Mr Tonks stated that as a result of Mr Adams' three recommendations, the Hearing Committee included a specific condition relating to batter slopes in the relevant regional council resource consent and confirmation of the designation by Transit. The condition is that:

> *Where the motorway impinges upon the reeds of the North Pond to the extent of reducing the width of the reed bed to less than 5 metres, the area of impact shall be minimised by constructing the motorway using a crib wall unless it can be shown, to the satisfaction of the Council, that a batter of 2:1 slope will have a*

[58] Record of Documents – Volume 3, Document 28, page 712.

lesser adverse environmental effect on the reed area, in which case batters shall be used. In either case the construction of the motorway shall not cause the reed area to become discontinuous or in the event that it does, Transit New Zealand shall undertake to reinstate a continuous reed bed.

Evaluation

532. Section 5(2)(c) of the Act allows for the mitigation of the perceived adverse effects of a proposal. In this case Mr Adams at the 1994 hearing suggested a number of mitigating conditions. The council opted for a variation of these and included a condition on the coastal permit which was not appealed by the appellant. The condition includes one that requires Transit to reinstate a continuous reed bed if the reed area of North Pond is adversely impacted upon.

533. QPM was critical that Mr Adams had not been called by Transit to give evidence. But in his opening submissions, counsel for Transit, identified that the record for the hearing was comprised of four volumes of documents including Volume Three which provides the record showing the path taken by the requirement and associated resource consents through to the provisions Environment Court hearing and appeals. Volume Three of the documents includes the evidence for the designation hearings before the NCC *"which is adopted for the present hearing."*

534. In his preliminary comments given before giving his formal opening submissions, counsel for QPM advised the Court he took no issue with what he termed the agreed Record identifying for the Court that QPM had taken the view that it was not challenging Transit's 1994 case. Counsel advised from the bar it did not require the authors of those relevant documents to be present to verify the truth of their contents. As noted, Mr Adams' brief of evidence was included in Volume Three of the documents. The Court does not need the presence of Mr Adams to verify what is now part of the public record particularly in view of the fact that QPM had withdrawn its appeal on the coastal permit related to the designation.

535. The Court therefore does not intend to revisit the issue of ecological effects.

Finding

536. We find for the above reasons that QPM has not made out a sustainable case in regard to ecological effects.

SUMMARY

537. Procedurally, the case has provided a number of legal issues for determination. We have found that the provisional notice lodged by Transit is null and void and of no legal effect. We have also found that the designation in the proposed plan which gave rise to the appeal in RMA 613/98 was invalid. This finding is reinforced by s.175(2). The First Schedule does not apply to any designation where there is an appeal outstanding. We concluded that the designation the subject of the Court's determination was that which proceeded outside the plan review and which gave rise to the 1994 appeal (RMA 200/94).

538. We have concluded that the notice of requirement per se does not delineate Transit's proposal in a way which requires it to be undertaken according to the notice provisions from the outset. The assessment of the project is ongoing and not limited by the statements in the notice itself. Accordingly, we determined to limit our inquiry to the council's recommendation under s.171 and Transit's decision under s.174, which effectively incorporates the issues raised by QPM under s.168(3).

539. The proposal meets the tests set out in s.171. In particular the designation is reasonably necessary for achieving the objectives of the public work. We also find Transit gave adequate consideration to alternative routes and methods. It would be unreasonable to require Transit to seek alignment 2A and demolish the motorcamp. Transit is not required to show that the alternative chosen was the best of all alternatives. We conclude it would be unreasonable for Transit to use an alternative route given the nature of the work. We find that the designation requirement as proposed, is supported by and will assist to implement the relevant provisions of the planning instruments to which we have had particular regard.

540. In terms of the relevant provisions of Part II of the Act, the proposal promotes the sustainable management of Napier's natural and physical resources. It provides for management of their use in a way and at a rate which enables the people of Napier and the community of Ahuriri and Westshore to provide for their social and economic wellbeing and for their health and safety. It sustains the potential of these resources to meet the reasonably foreseeable needs of future generations.

541. The details of the proposal and the conditions we intend to impose, avoid, remedy, or mitigate the identified major adverse effect to a sufficient degree that we are able to confirm the requirement. The major adverse effect in this context is noise and we require Transit to

implement a friction course as well as provide for acoustic fencing which will both mitigate projected noise levels.

542. In essence QPM wish Transit to acquire the Westshore Motorcamp on environmental grounds. This is neither practical (unless a joint road/rail bridge is possible) nor is it warranted - on environmental and economic grounds.

Additional Conditions

543. We require the following amendments to the Terms and Conditions already provided in Transit's Notice of Confirmation to the Designation attached to this decision as Schedule B.

- Noise Amelioration

544. Accordingly, from the evaluation given above, if the northern motorway extension is to proceed on alignment 2, we require traffic noise amelioration measures to achieve:

1. A 24 hour Leq of 52 dBA at the westernmost edge of the motorcamp.
2. An Lmax of 67 dBA at 1 metre inside the westernmost edge of the camp for the design vehicle over the period 10.00 pm to 7.00 am.

545. This indicates a friction course is required.

- Landscape

546. We require Transit in conjunction with NCC, QPM and Mr Milne, to provide additional landscaping on the external boundary of the acoustic fence to the satisfaction of NCC.

- Roading Amenity in Proximity to the Motorcamp

547. We require Transit to provide appropriate air brake signs for transporters in the vicinity of the motorcamp - if appropriate in traffic safety terms.

548. We require Transit to provide a pedestrian crossing across SH2 towards the City of Napier providing access from the motorcamp to the route to the beach – if appropriate in safety terms.

Interim Determination

549. Appeal RMA 613/98 is struck out. It is null and void and of no legal effect.

550. Pursuant to s.174(4)(b) of the Act we confirm but modify the requirement set out in RMA 200/94 in the terms set out above but as yet subject to conditions being agreed to.

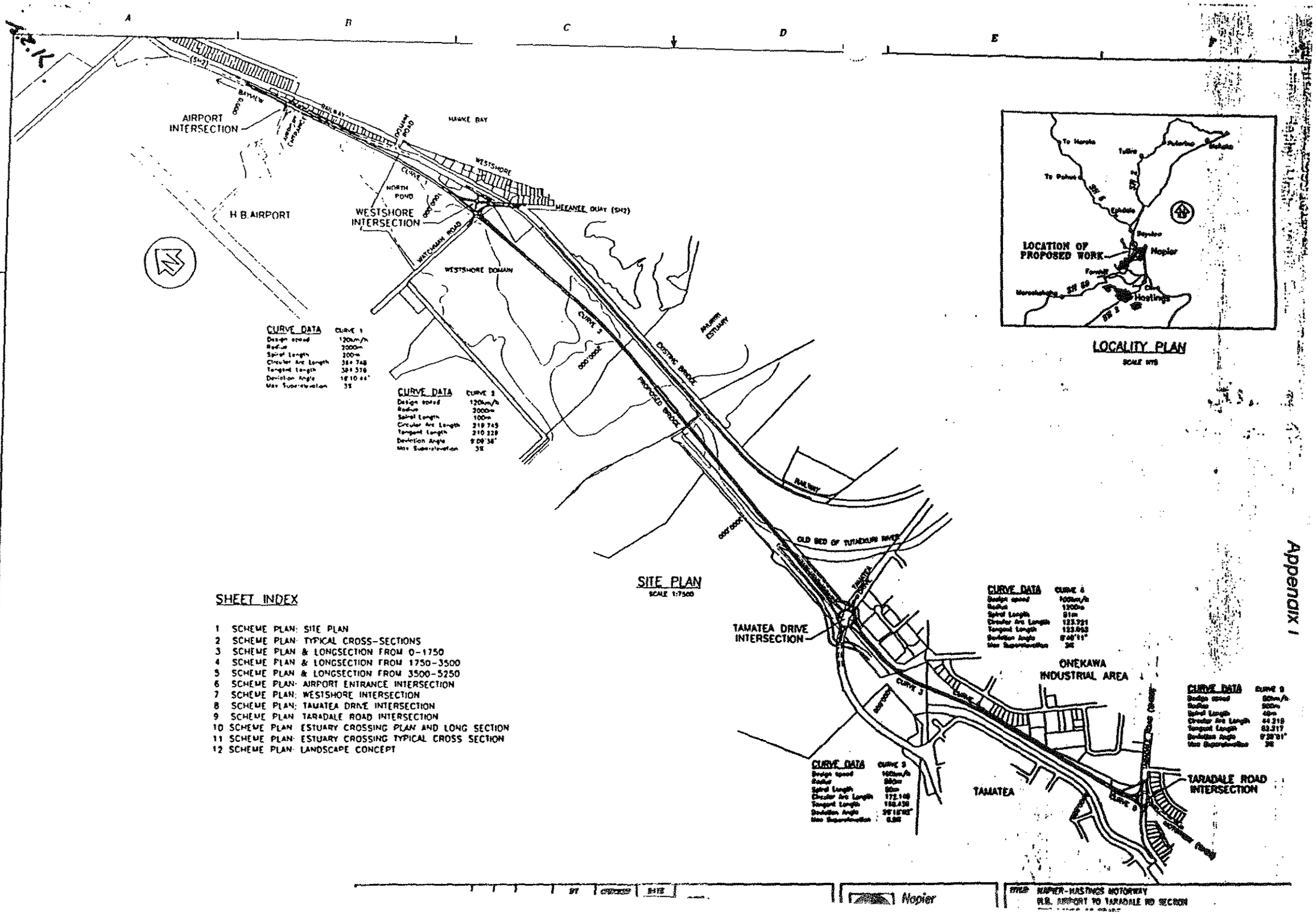
551. Leave is hereby granted for the parties to seek clarification of any of these issues if necessary. Otherwise if the parties are in agreement we require a memorandum of consent a month from the date this decision is received resolving all of the above.

DATED at WELLINGTON this 29th day of May 2000

S E Kenderdine

Environment Judge

rma20094-2.doc



SITE PLAN
SCALE 1:7500

LOCALITY PLAN
SCALE NTS

SHEET INDEX

Napier

NAPIER-HASTINGS MOTORWAY
H.B. AIRPORT TO TARADALE RD SECTION

Appendix I

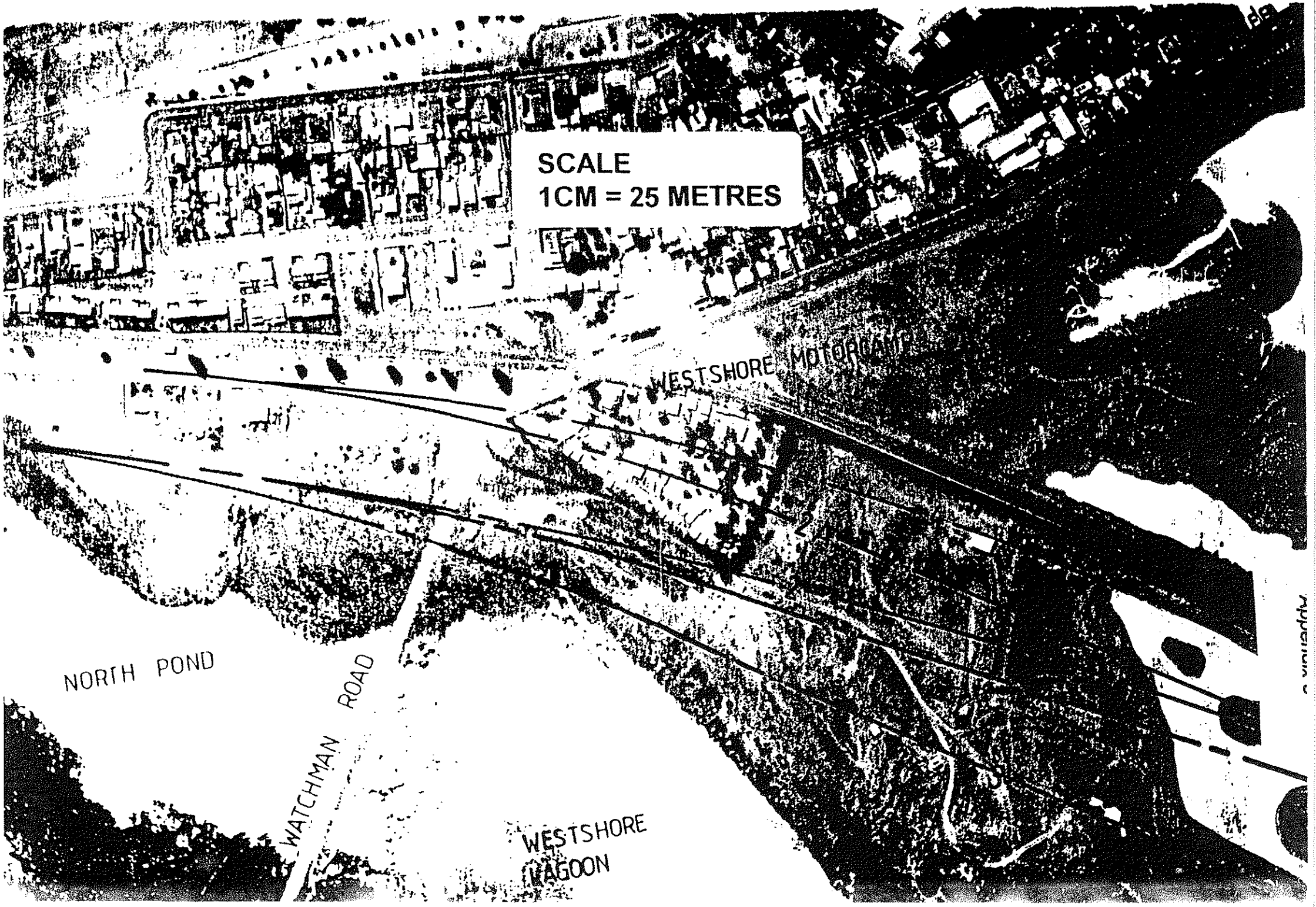
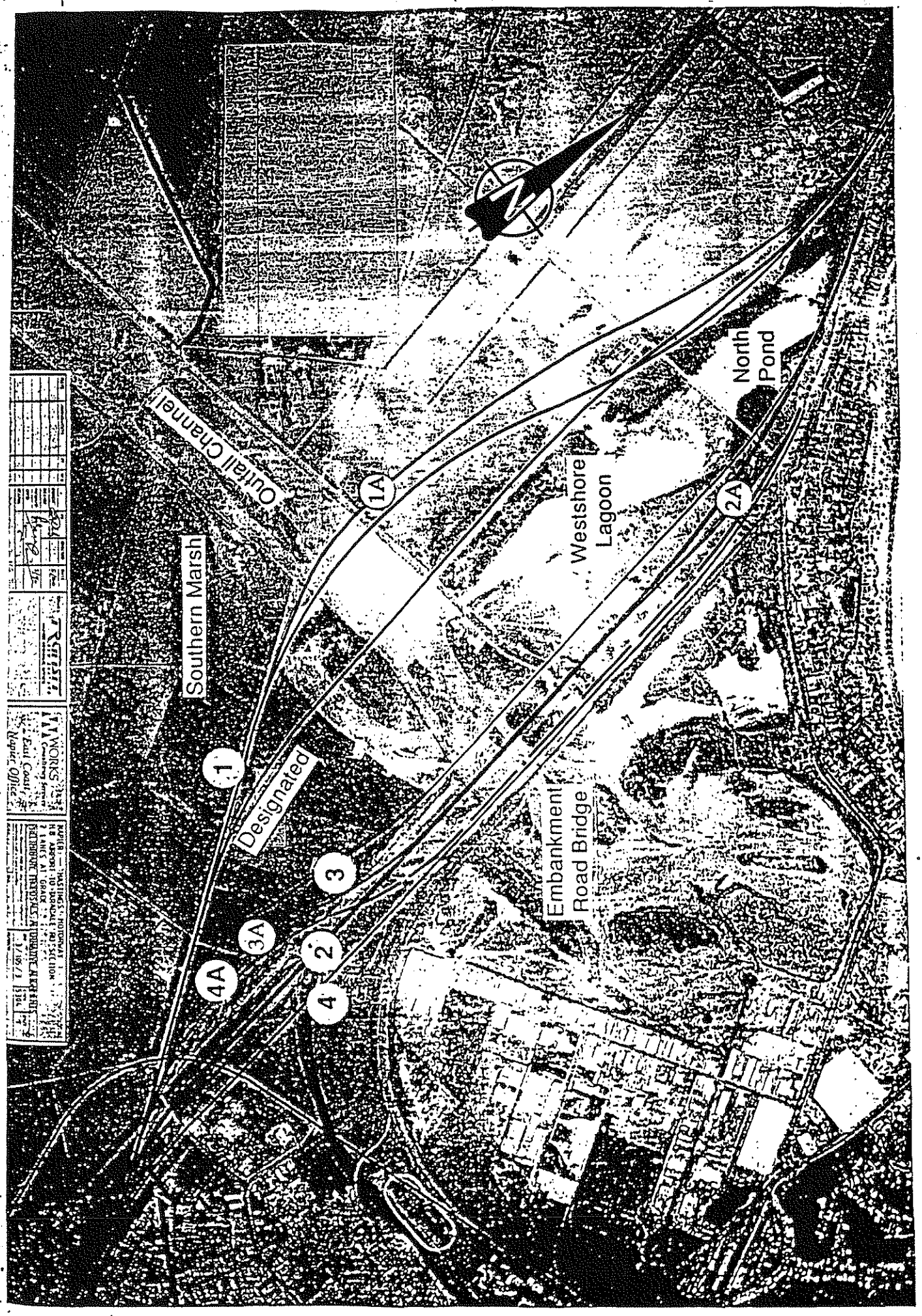
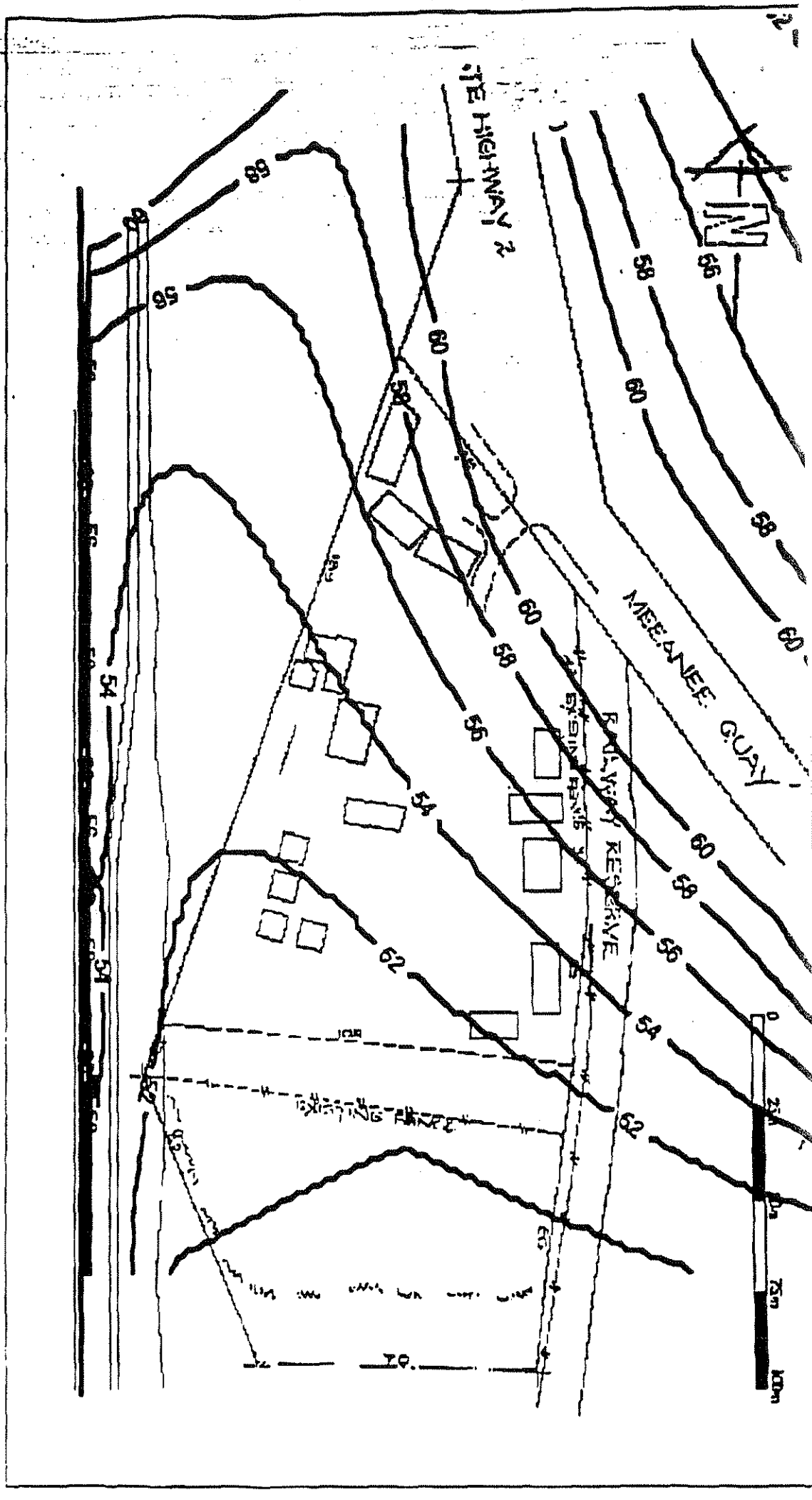

SCALE
1CM = 25 METRES
WESTSHORE MOTORCAUT
NORTH POND
WATCHMAN ROAD
WESTSHORE
LAGOON

Figure 1



Napier - Hastings Motorway: Hawke's Bay Airport to Taradale Road Section:
Alternative Alignments

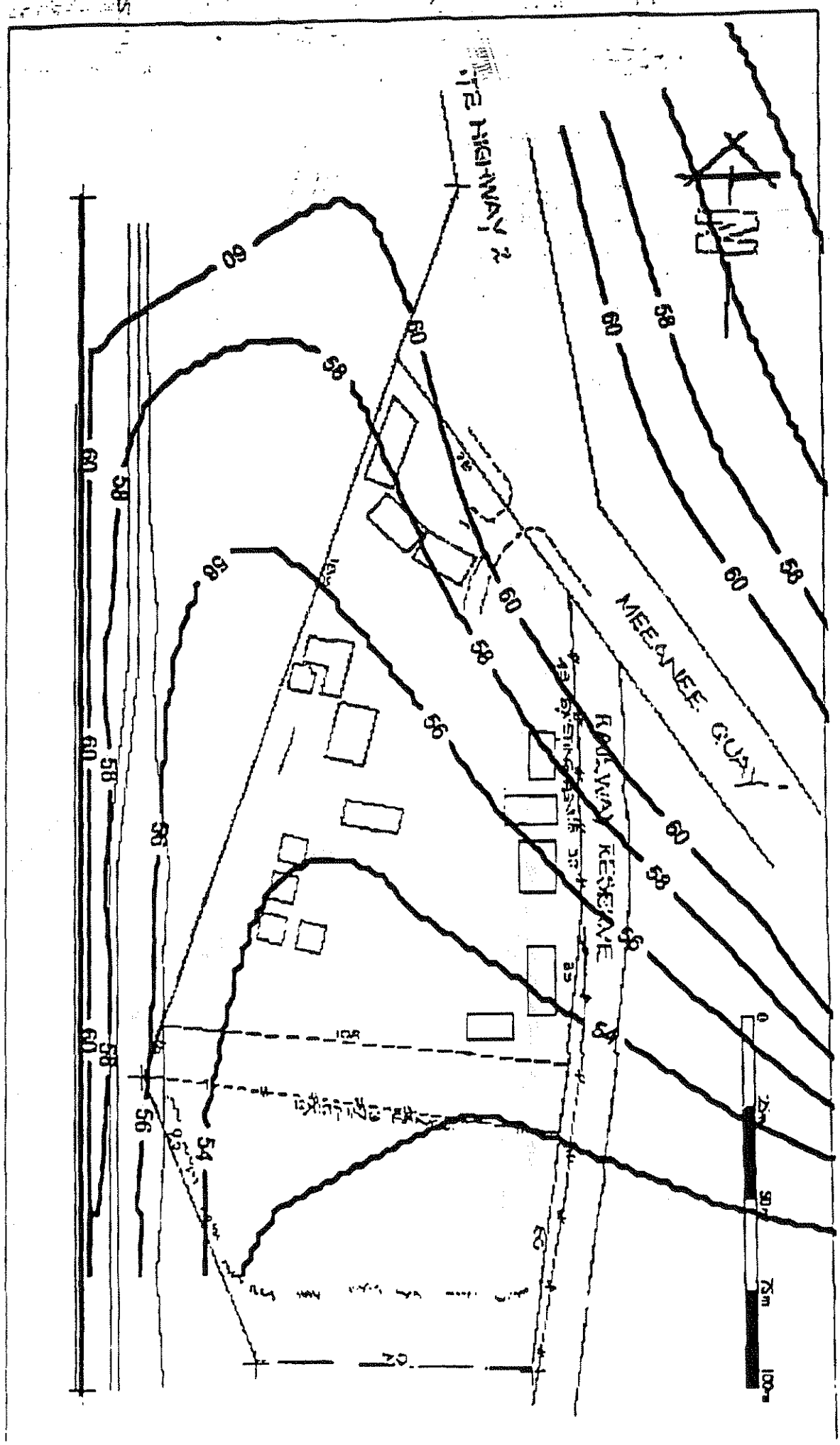
APPENDIX 7



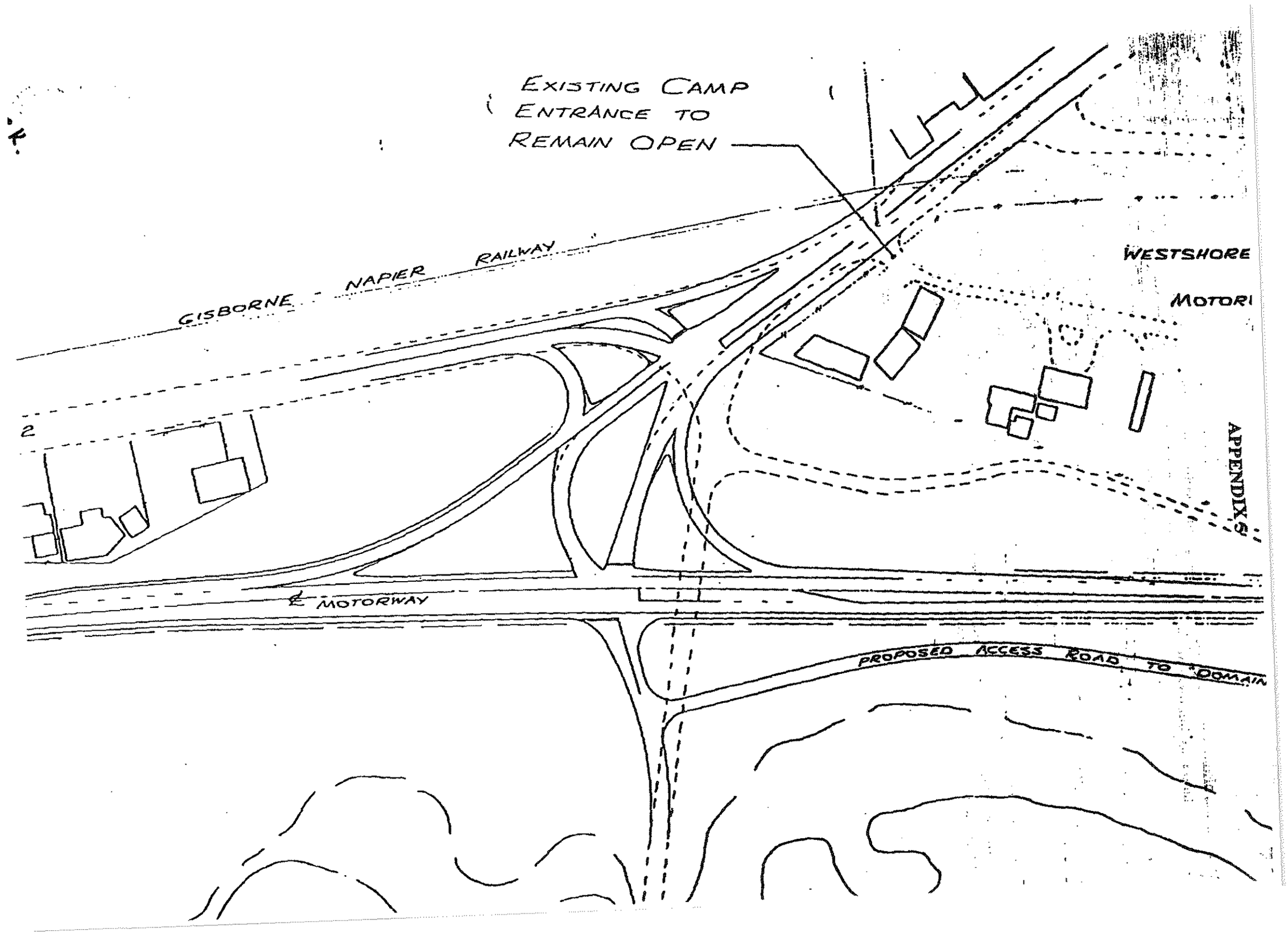
Predicted Traffic Noise Level Contours (dBA Leq(24 hour))
Motorway with Friction Course

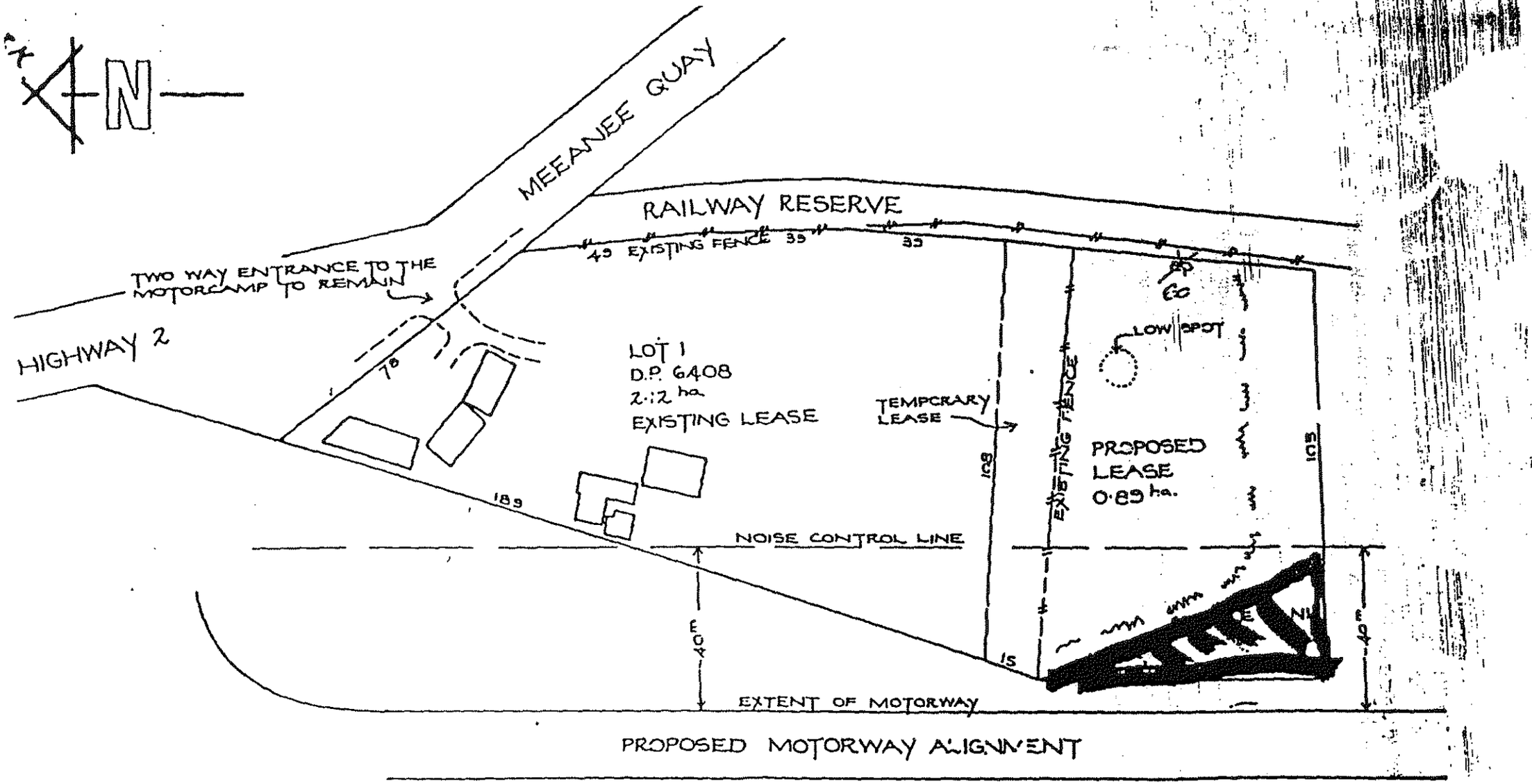
S.E.K.

APPENDIX 6



Predicted Traffic Noise Level Contours (dBA Leq(24 hour))
Motorway with Chipseal Surface


EXISTING CAMP
ENTRANCE TO
REMAIN OPEN
GISBORNE - NAPIER RAILWAY
WESTSHORE
MOTORI
APPENDIX 5
MOTORWAY
PROPOSED ACCESS ROAD TO DOMAIN



PROPOSED EXTENDED LEASE

PREPARED: LANCE LEIKIS ENVIRONMENTAL PLANNING

NOTE: NOISE CONTROL LINE RELATES TO A CONDITION ATTACHED TO

SCHEDULE A

Address Reply to:
NAPIER CITY COUNCIL
Private Bag 6010, NAPIER
NEW ZEALAND

Our Ref TS

If calling ask for:—
E Lambert

City of Napier

HASTINGS STREET, NAPIER, NEW ZEALAND
Telephone (06) 835-7579 — Facsimile (06) 835-7574
Facsimile International + 64 6 835-7574

2 February 1994

Regional Manager
Transit New Zealand
PO Box 740
NAPIER

Dear Sir

NOTICE OF REQUIREMENT - NORTHERN MOTORWAY EXTENSION

*** Pursuant to Section 171(2) of the Resource Management Act 1991, please find enclosed recommendation of the Napier City Council in respect of the Notice of Requirement by Transit Zealand for an alteration to the designation of the "Proposed Motorway" between Hawkes Airport and Taradale Road, Napier.

Yours faithfully

A THOMPSON
PLANNING MANAGER

Enc.

COPY

A.E.L.

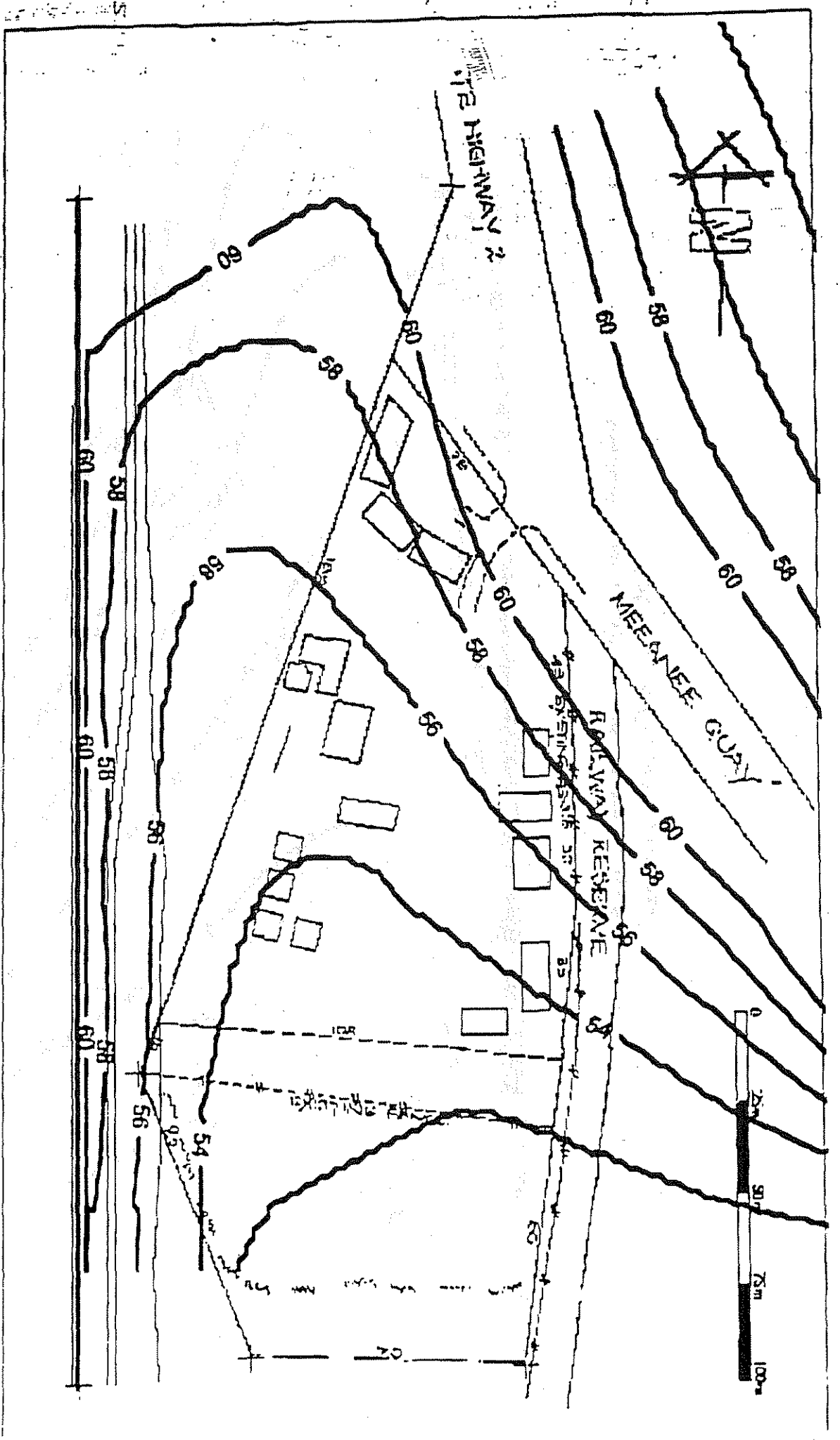
NAPIER CITY COUNCIL

Notice of Recommendation

Hearing of Notice of Requirement pursuant to Section 171 of the Resource Management Act 1991.

REQUIRING AUTHORITY:	Transit New Zealand
APPLICATION:	Notice of Requirement for an alteration to the designation of the Proposed Motorway extension between Hawkes Bay Airport and Taradale Road.
SITE:	Generally a strip of land totalling 5.5 kms in length between the Hawkes Bay Airport and Taradale Road as shown on the attached plan.
LEGAL DESCRIPTIONS:	Pt.Lot 1 DP 11043, CT B2/812 Pt.Lot 2 DP 11043, CT J4/1225 Pt.Sec.17 Blk IV, Heretaunga S.D., SO 2652, CT E2/1352 Pt.Sec.23, Ahuriri Lagoon Gaz.1958 p.564 Pt.Sec.2 SO 10425, CT K1/991 Pt.Sec.1 SO 10425, CT K1/991 Pt.Lot 1 DP 13036 Gaz.319682.3 Lot 1 DP 17250, CT K3/1131 Lot 2 DP 17250, CT K1/990 Pt.Lot 2 DP 14906, CT K1/991 Lot 1 DP 17249, CT K1/979 Lot 5 DP 17249, CT K1/982 Lot 1 DP 18081, CT K3/1066 Lot 2 DP 18081, CT K3/1067 Pt.Lot 1 DP 14906, CT J3/130 Pt.Lot 1 DP 13036, Gaz.374110.1 Pt.Lot 2 DP 6562, Gaz.343187.1 Pt.Lot 5 DP 6562, Gaz.343187.1
DATE OF COUNCIL HEARING:	13-14, 21 December 1993, by way of a Joint Hearing with the Hawkes Bay Regional Council, pursuant to Section 102 of the Resource Management Act 1991.

APPENDIX 6



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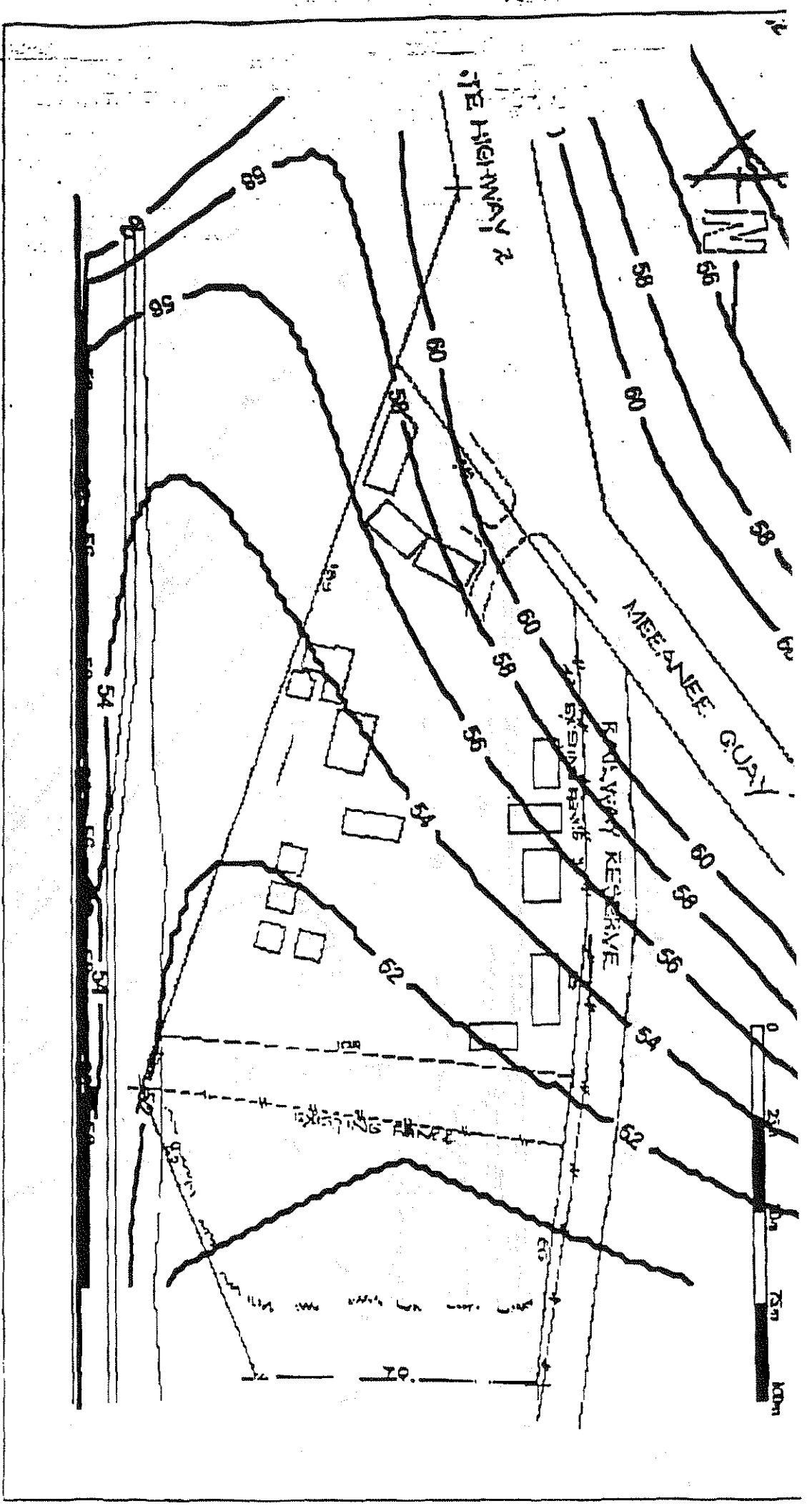

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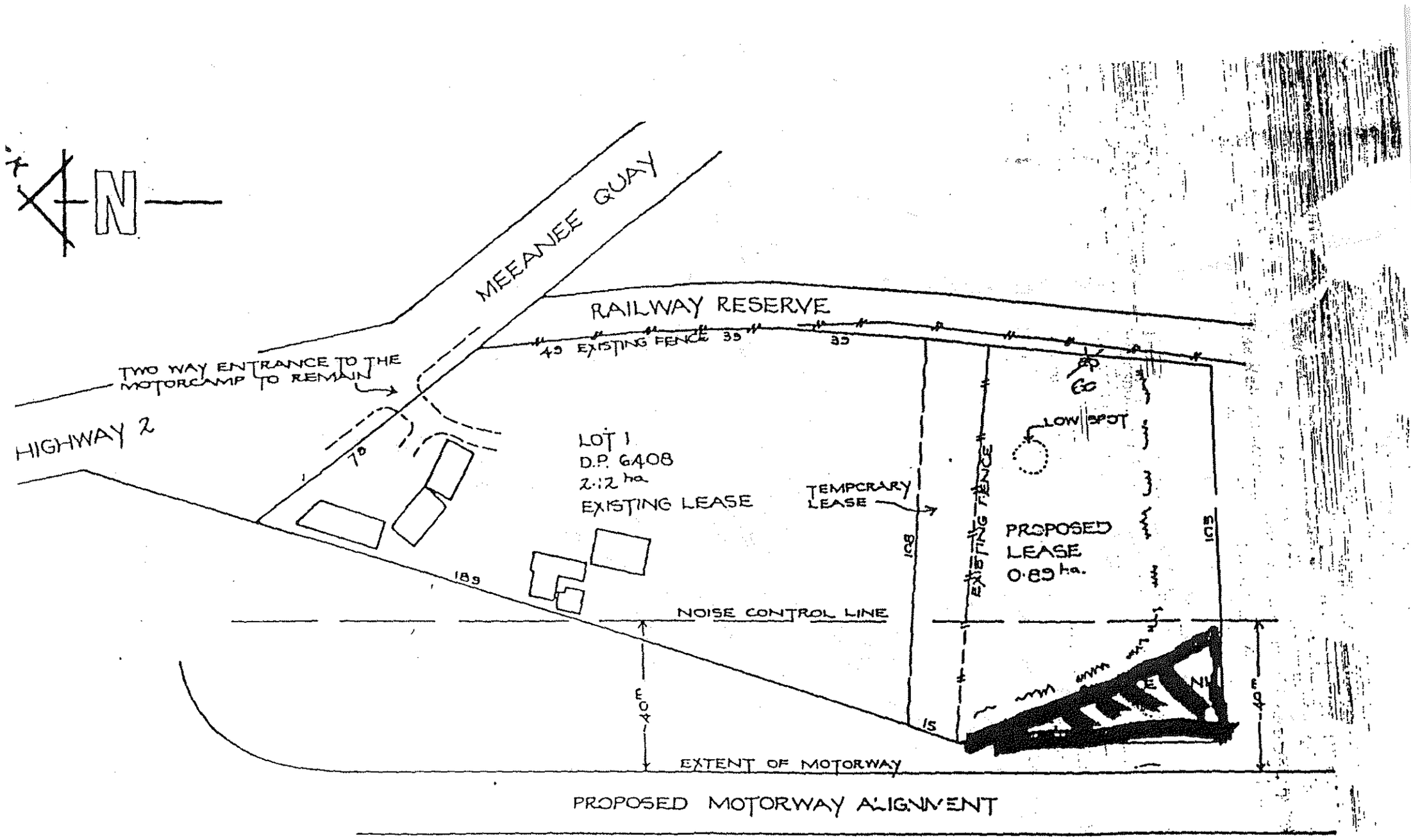

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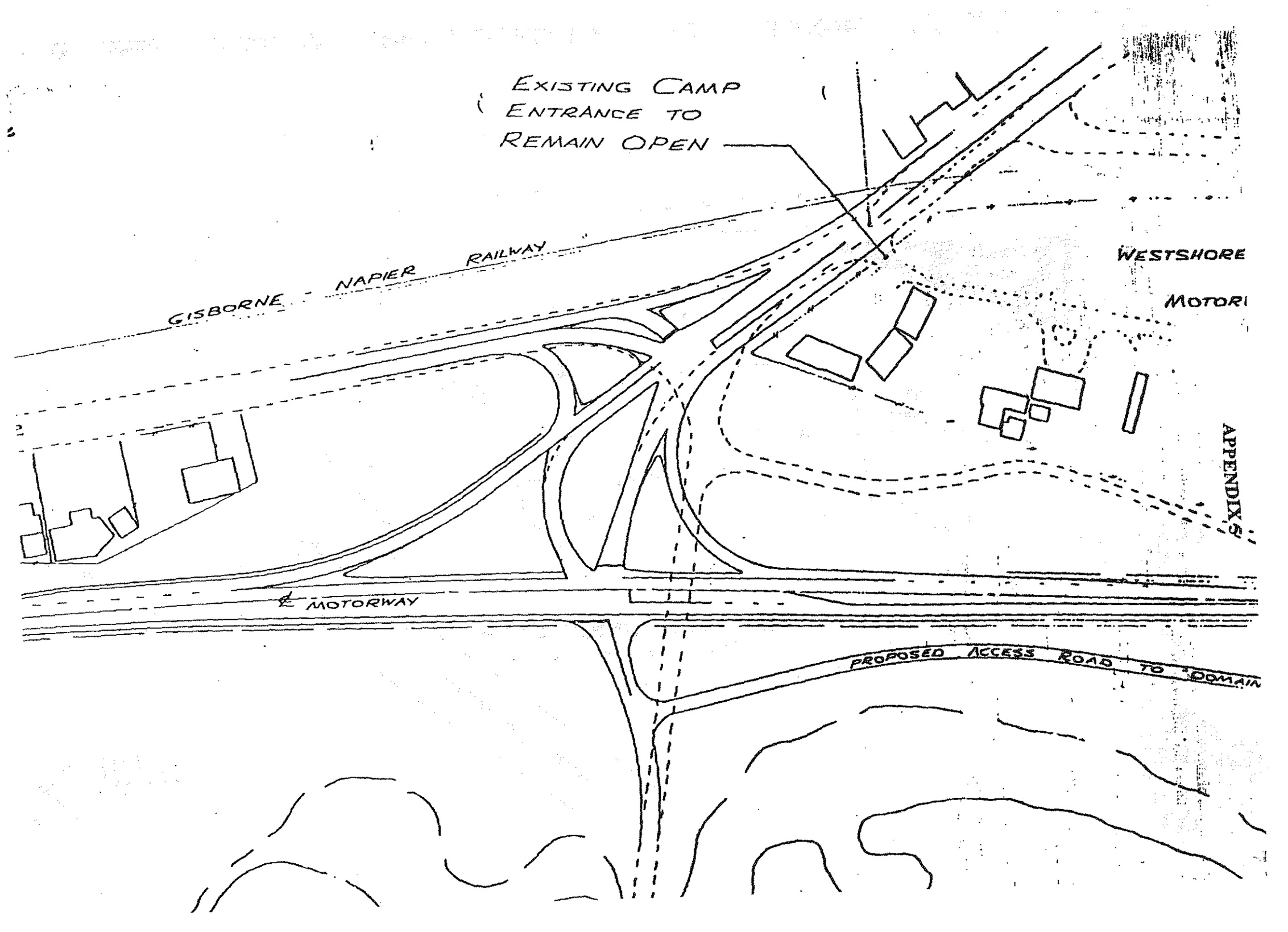
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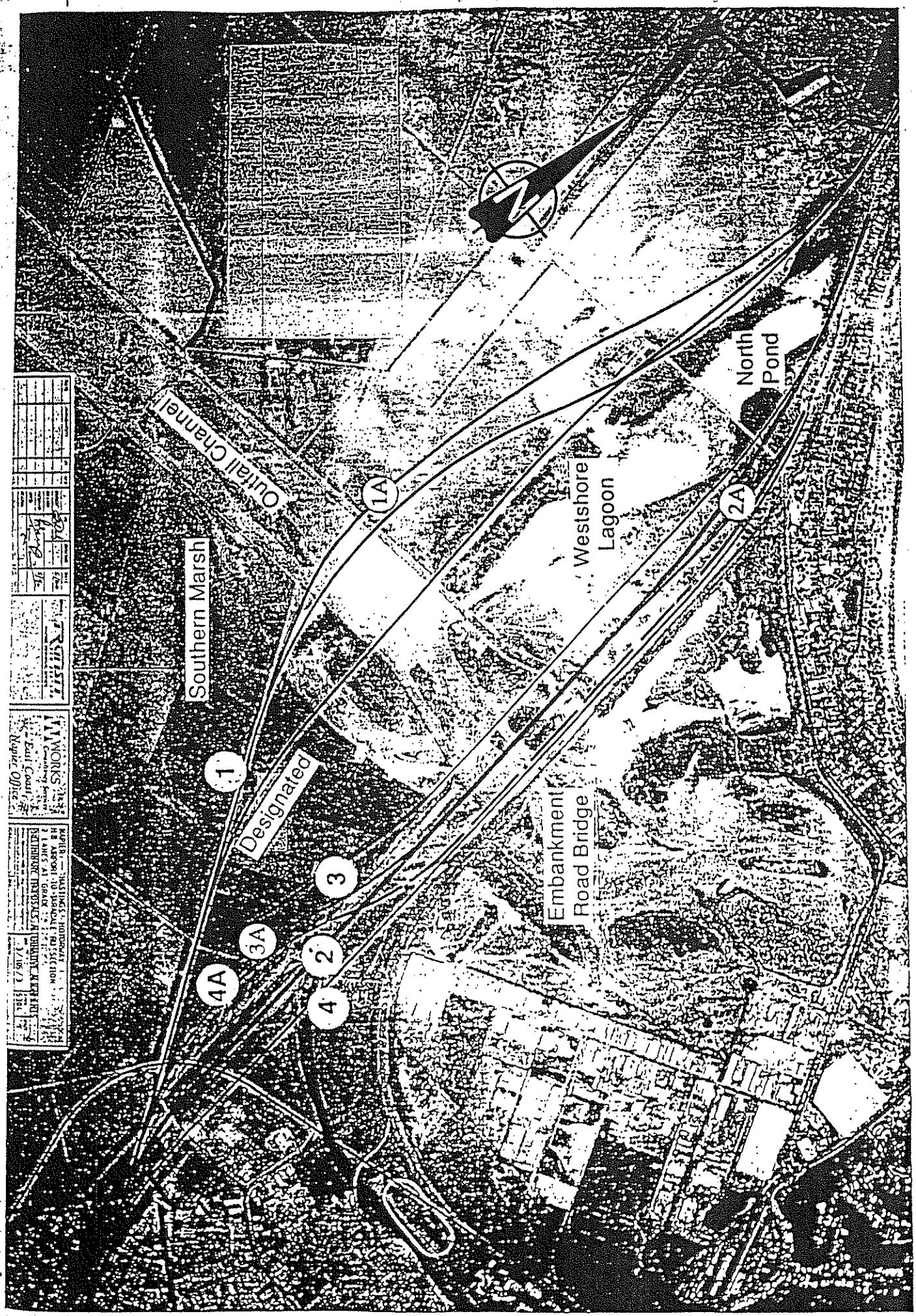
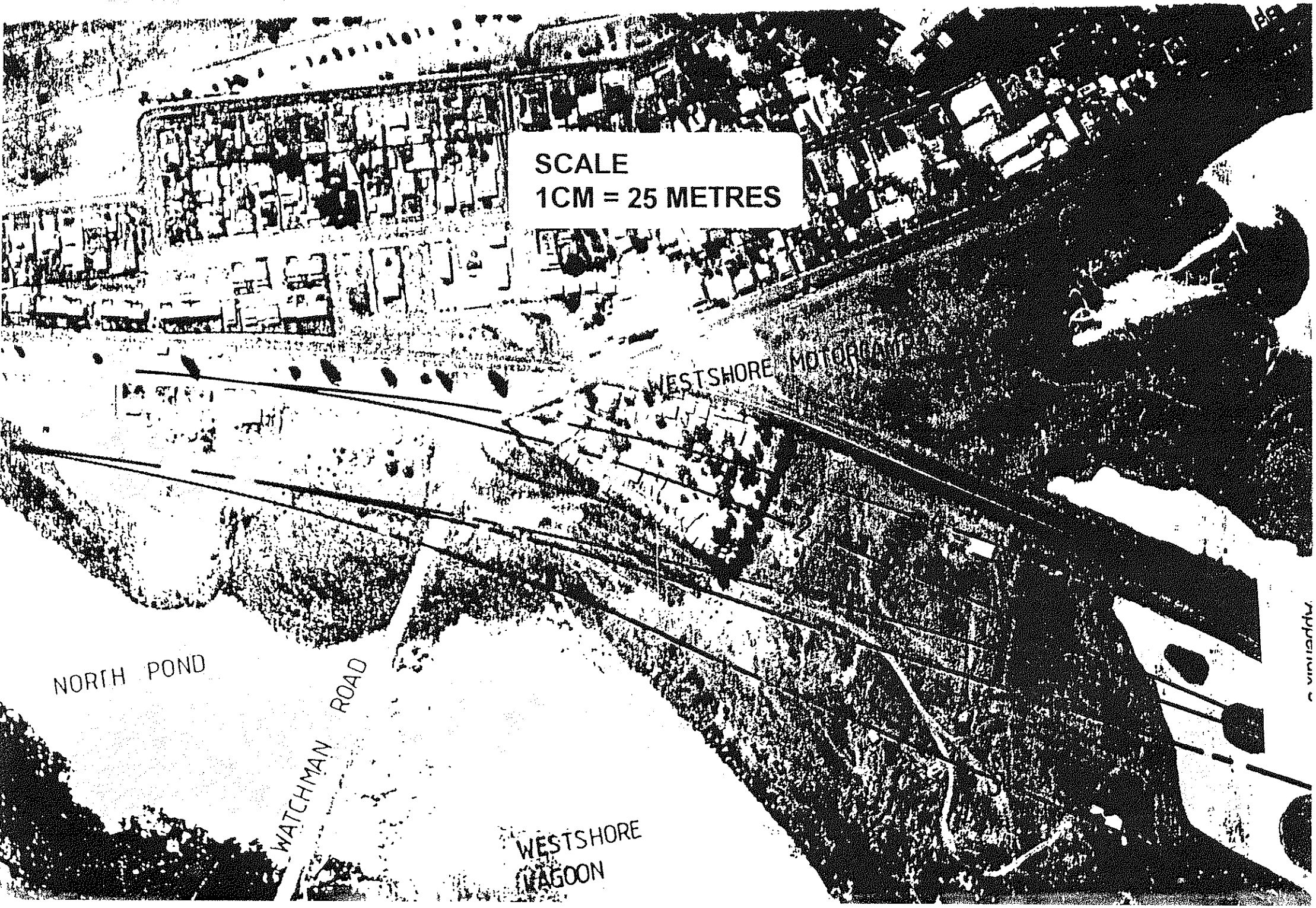


Napier - Hastings Motorway: Hawke's Bay Airport to Taradale Road Section:
Alternative Alignments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NAPIER CITY COUNCIL

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DATE OF COUNCIL HEARING:	13-14, 21 December 1993, by way of a Joint Hearing with the Hawkes Bay Regional Council, pursuant to Section 102 of the Resource Management Act 1991.

SCHEDULE A

734

Address Reply to:
NAPIER CITY COUNCIL
Private Bag 8010, NAPIER
NEW ZEALAND

Our Ref TS

If calling ask for:—
E Lambert

City of Napier

HASTINGS STREET, NAPIER, NEW ZEALAND
Telephone (06) 835-7579 — Facsimile (06) 835-7574
Facsimile International + 64 6 835-7574

2 February 1994

Regional Manager
Transit New Zealand
PO Box 740
NAPIER

Dear Sir

NOTICE OF REQUIREMENT - NORTHERN MOTORWAY EXTENSION

*** Pursuant to Section 171(2) of the Resource Management Act 1991, please find enclosed recommendation of the Napier City Council in respect of the Notice of Requirement by Transit N Zealand for an alteration to the designation of the "Proposed Motorway" between Hawkes I Airport and Taradale Road, Napier.

Yours faithfully

A THOMPSON
PLANNING MANAGER

Enc.

COPY

S.E.K.

THE HEARING

The Napier City Council Hearing into the Notice of Requirement by Transit New Zealand to designate the proposed northern extension of the Napier-Hastings motorway was held jointly with the Hawkes Bay Regional Council who were considering four resource consent applications by Transit New Zealand.

While the Notice of Requirement referred to an alteration to an existing designation, the application was presented on the basis that the proposal amounted to a new designation under Section 171 of the Act. No exception was taken to this approach and the Council is satisfied that notification was adequate.

The City Council was represented by a Commissioner as the Council has interests in properties included in the requirement. The Commissioner has the delegated power to make a recommendation to the Council. The Council then recommends to Transit New Zealand that the requirement either be confirmed, inclusive of any conditions imposed, or be withdrawn.

THE DECISION AND REASONS

The Napier City Council has resolved to recommend to Transit New Zealand that it confirm its requirement for a motorway on the route identified as Alignment 2 subject to the conditions detailed later in this decision which are intended to avoid, remedy, or mitigate any adverse effects on the environment. In considering the Notice of Requirement the Council must have regard to the matters set out in Section 171(1) of the Resource Management Act 1991.

The Napier City Council accepts that the construction of the northern extension of the motorway is reasonably necessary for achieving the objectives of Transit New Zealand. Completion of the motorway is essential to the continuing development and sustainable management of the region's infrastructure. The social and economic well-being of the Heretaunga Plains includes providing for alternative routes which reduce traffic volumes in residential areas, thereby reducing the adverse effects of traffic in those areas.

The proposed route promotes a more sustainable use of resources than the existing designation which detrimentally affects the Southern Marsh, a unique wildlife habitat. The Council believes that the environmental costs of Alignment 2 are less than those of the existing designation.

The Council notes that Transit New Zealand has undertaken extensive public consultation prior to the lodging of the Notice of Requirement and is satisfied that Transit New Zealand has adequately considered alternative routes and methods. It is also satisfied that it would be unreasonable to expect Transit New Zealand to use alternative routes or methods. Such matters were addressed in the information placed before the Council.

In arriving at its decision the Council has taken into account the provisions of the District Plan, the proposed Hawkes Bay Regional Council Policy Statement, as well as Part II of the Resource Management Act.

SUBMISSIONS

The Notice of Requirement was publicly notified in October 1993. Twelve submissions were received, including those made to the resource consent applications being considered by the Hawke's Bay Regional Council.

Submissions were received from:

Ahuriri Estuary Protection Society
Owen and Margaret Anderson
Napier Environment Centre
Quay Property Management
Mr.and Mrs.B. Milne
N.Z. Historic Places Trust - H.B. Branch
Royal Forest and Bird Protection Society
N. and C.Day
Janette Larrington
M.P.Nee
Department of Conservation
Mr.and Mrs.P. Lees

COMMISSIONER:

Mrs.Dorothy Wakeling
Planning Consultant
Hamilton.

DISCUSSION

Benefit/Cost Ratio

The Council wishes to comment generally on the basis by which Transit New Zealand determines its funding priorities. The current determination of benefit/cost ratios takes no account of conservation values and loss of amenity. While these are factors in almost any roading project they are particularly important in the Ahuriri Estuary which is a nationally-significant wetland area. The Council is concerned that any measures taken to protect the amenity and conservation of this unique area are detrimental to the project's standing in national funding priority. There should be some attempt by Transit New Zealand to value important environmental assets, and to include this value as a benefit in the benefit/cost ratio.

Alternative Routes

The Council agreed with the process of evaluation of the alternative routes which arrived at the preference for Alignment 2. The avoidance of the Southern Marsh and a reduction in the risk of bird-strikes near the airport are accepted as sound reasons to remove the presently-designated alignment and Alignments 1 and 1A from further consideration.

The alternative Alignment 2A was given serious consideration but because it would have given rise to more extensive detrimental effects on the environment it was decided that Alignment 2 was the best practicable option available. More extensive detrimental effects on the environment would include noise and a reduction in traffic safety both caused by an increase in the number of intersections, and a closer proximity to residences. It was also possible that Alignment 2A would give rise to a need for re-notification.

The protection of the structural integrity of the existing rail bridge meant that Alignments 4 and 4A were not possible (see below as to possibility of a combine crossing).

Combined Road/Rail Crossing

During the course of the Hearing the Council sought evidence of Transit New Zealand's consultation with New Zealand Rail over a combined road/rail crossing of the Estuary.If feasible this would produce a more efficient use of resources and avoid multiple crossings of the Estuary.

The Council is satisfied that Transit New Zealand is unable to take this matter any further.

Anderson Property

There do not seem to be measures available to mitigate the loss of views and privacy which are currently enjoyed by Mr. and Mrs. Anderson on their westerly aspect. Any measures taken to reduce the level of noise received at the Andersons' property may well impact negatively upon the visual amenity of and from their property.

Westshore Motorcamp

The Council cannot see an easy resolution to the noise problems which are likely to affect campers in the motorcamp without affecting other amenities and imposing an unreasonable constraint on the motorway's development.

The noise levels which are recommended in the conditions are designed to provide a level of protection that is considered to be reasonable having regard to all factors. In arriving at this conclusion the Council has taken into account the evidence of the noise consultants.

North Pond

Transit New Zealand submitted at the hearing that a land use consent from the Regional Council to reclaim areas of the North Pond was unnecessary and any conditions regarding the North Pond should be part of the designation. The Council recognises that the Regional Council does not accept this argument and is ensuring that any conditions imposed as part of the designation are consistent with those of the resource consent. Consequently the City Council has recommended that a crib wall rather than a batter should be used in areas of the North Pond where the use of a batter would cause the reed area to reduce to less than 5 metres in width.

Westshore Lagoon

The current state of deterioration of the Westshore Lagoon became an issue during the hearing because of the need to provide new vehicular access to the Westshore Wildlife Reserve. Means of improving the water quality in the Lagoon have not yet been found. At this time the Council is not sure what approach should be taken to improve the Lagoon water quality, nor how much this would cost.Consequently it will require only that Transit New Zealand take measures to ensure that no further contaminants are added to the water as a result of the construction and use of the vehicular access.

Lapsing of Designation

Transit New Zealand requested that the designation for Alignment 2 be included in the District Plan for a period of thirty-five years. Section 184 of the Act states that a designation lapses after five years unless: (i) it is given effect to before the end of that period; (ii) substantial progress or effort has been made; or (iii) the designation specified a different period when incorporated in the plan.

The Council considers that it is would be appropriate in all the circumstances for a period of ten years to be specified as the period on expiry of which the designation will lapse pursuant to Section 184 of the Act. The Council is concerned that any period greater than ten years imposes a greater level of uncertainty on affected private property owners.

Review of Conditions

Aligned with the Council's decision on the length of time before the designation lapses is the legal opinion obtained which stated that conditions imposed upon designations are unable to be reviewed by a territorial authority.

CONDITIONS

Pursuant to Section 171(2) of the Resource Management Act the Napier City Council recommends that Transit New Zealand confirms its requirement to alter the proposed designation of the northern motorway extension between Taradale Road and the Hawkes Bay Airport subject to the following conditions:

1. **The designation of the proposed motorway shall not lapse for a period of ten years, expiring on 31 December 2003.**

   Reason:

   It is considered that this period is appropriate having regard to the scale of the motorway.

2. (a) A Noise Management Plan, to be approved by a duly-qualified Noise Consultant, is to be prepared by Transit New Zealand no later than 31 March 1995, showing any noise mitigation steps to be taken to ensure that the standards specified in)b) below are met.

   Reason:

   The Council wishes to ensure that anticipated noise level mitigation is incorporated in the design and any remedial work can commence as early as possible.

   (b) Road traffic noise from the motorway extension shall not exceed the following limits, (including at any boundary of Lot 1 DP 8156 (the Anderson property) and Lot 1 DP 6408 (Westshore Motor Camp) unless different limits are agreed to by the owners for the time being of these two properties), and subject to condition 2(c):

Leq (24 hour)	57dBA
Leq (10p.m.to 6a.m.)	47dBA

   If New Zealand Standards on Road Traffic Noise adopted subsequent to this recommendation impose standards less stringent than those set out above in respect of motorways then such standards shall apply in respect of this designation.

   Reason:

   The impact of road traffic noise on the Andersons property and the motorcamp is likely to have an adverse effect those properties and the standards set are designed to provide a level of protection considered to be reasonable to the occupants. The standards may be altered by agreement between Transit New Zealand and the owners or where the New Zealand Standard on Road Traffic Noise, currently being prepared, requires a less stringent standard or standards

(c) Where the existing road traffic noise level exceeds any of the limits in condition 2(b) road traffic noise from the motorway extension shall not increase the existing road traffic noise level. Any predictions used to determine the existing road traffic noise level shall be validated by on-site measurements.

(d) Subject to the express provisions of these conditions, noise shall be measured in accordance with New Zealand Standard NZS 6801:1991 Measurement of Sound. The measurement location shall be 1 metre from the facade of any dwelling and 1.5 metres above ground level.

(e) Construction noise shall meet the limits recommended in, and shall be assessed in accordance with, NZS 6803P:1984 The Measurement and Assessment of Noise from Construction, Maintenance and Demolition.

3. (a) The section of the motorway adjacent to North Pond shall incorporate positive drainage, whereby all runoff and spills will be collected and passed, via controlled outlets, through settlement areas and appropriate vegetation before being discharged to water. When designing and selecting these areas Transit New Zealand shall have regard to the advice of the Department of Conservation and the Hawkes Bay Regional Council.

(b) The maintenance of the settling ponds shall be undertaken at the expense of Transit New Zealand.

Reason:

In order to safeguard the life-supporting capacity of the ecosystems in the vicinity of the motorway and to minimise the risk of contamination of the aquatic environment, positive drainage will be required.

4. (a) Transit New Zealand shall undertake an archaeological survey of the route to determine whether or not works associated with the proposed motorway will damage, disturb or modify archaeological sites. This survey is to be undertaken by a person or persons approved by the New Zealand Historic Places Trust.

(b) Transit New Zealand shall obtain an authority from the New Zealand Historic Places Trust under the Historic Places Act 1993 prior to any works being undertaken on any identified archaeological site or group of sites.

(c) Prior to construction commencing:

(i) The contractors shall be briefed by a representative of the New Zealand Historic Places Trust; and

(ii) Procedure on how to recognise archaeological sites shall be written into contract documents.

Reason:

The Resource Management Act requires the recognition and protection of the heritage values of sites, buildings, places or areas. Condition 4 (a-c) will ensure that every endeavour is made to achieve this.

5. (a) Transit New Zealand shall provide all-weather vehicular access to the Westshore Wildlife Reserve taking a route which has the least environmental impact upon the Westshore Lagoon.

(b) All runoff from the all-weather vehicular access shall pass through a settling pond or ponds and appropriate vegetation prior to entering the Westshore Lagoon. Transit New Zealand shall have regard to the advice of the Department of Conservation in relation to the location of this site or sites and the vegetation required.

Reason:

The Westshore Wildlife Reserve is a public reserve and access to it must be maintained. The new designation will sever the existing vehicular access.

6. Where the motorway impinges upon the reeds of the North Pond to the extent of reducing the width of the reed bed to less than 5 metres, the area of impact shall be minimised by constructing the motorway using a crib wall unless it can be shown, to the satisfaction of the Council, that a batter of 2:1 slope will have a lesser adverse environmental effect, in which case batters shall be used. In either case the construction of the motorway shall not cause the reed area to become discontinuous or in the event that it does, Transit New Zealand shall undertake to reinstate a continuous reed area.

Reason:

The importance of the reed area to the birdlife of the North Pond was emphasised in several submissions. A crib wall will minimise the impingement of the motorway into the North Pond and preserve a continuous reed area.

7. The drain which currently serves the North Pond shall be re-routed in order to maintain flows into that pond.

Reason:

The maintenance of waterflows into the North Pond is necessary to safeguard the life supporting capacity of the water.

8. The recommendations of the June 1993 report prepared by Works Consultanc Services detailing mitigation options for motorway construction shall be observed including the use of fabric curtains to minimise sediment loss into the North Pond.

9. **Sediment discharges shall be minimised during construction by erecting fabric curtains at the western edge of construction areas prior to commencement of construction activities in the North Pond and Westshore Lagoon.**

Reason:

The implementation of mitigation options during construction will allow the construction of the motorway to take place while avoiding, remedying or mitigating any adverse effects on the environment, particularly in the areas of wetlands.

10. (a) **Notwithstanding any other conditions on this Requirement Transit New Zealand shall undertake all works in accordance with the drawings, specifications, statements of construction technique and other information supplied as part of this Notice of Requirement.**

(b) **Works or construction techniques that do not comply with condition 10 (a) may be carried out or used with the written approval of the Napier City Council, provided the environmental effects of those non-complying works and construction techniques are minor.**

11. Transit New Zealand shall pay the actual and reasonable costs incurred by the Council in the monitoring of this designation, including the costs associated with direct compliance monitoring, inspections and auditing, interpretation and reporting on the monitoring data obtained; provided that:

(i) monitoring (including inspecting, auditing, interpretation and reporting) liability imposed upon Transit New Zealand shall be limited to:

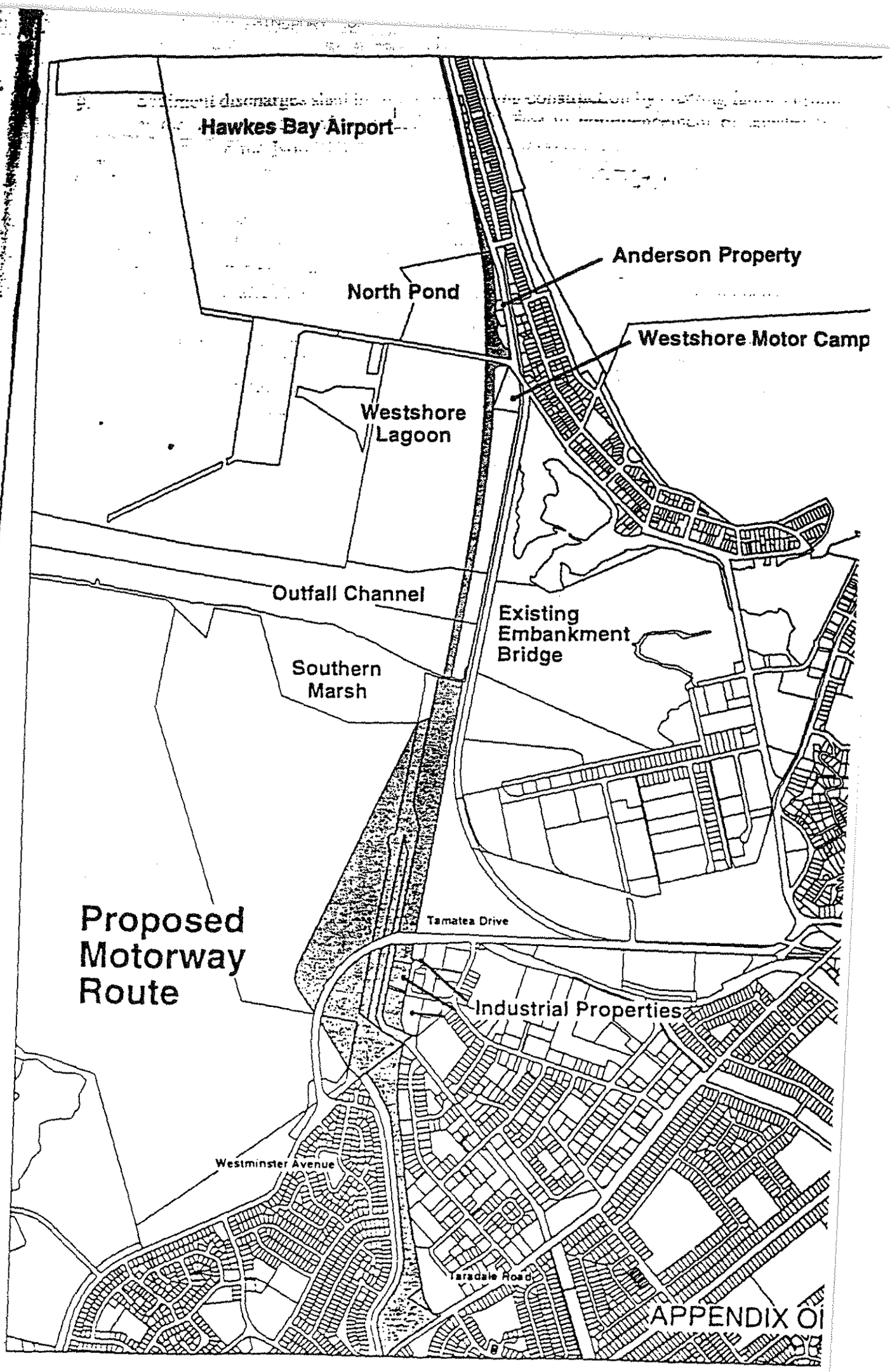
(aa) The period of construction, and
(bb) Either the maintenance period under the construction contracts or three years following completion of construction whichever is the longer;

and

(ii) Monitoring shall be limited to assessing compliance of Transit New Zealand with the foregoing conditions.

Robin Wakelin
COMMISSIONER

1st Feb 1994
DATE


Hawkes Bay Airport
Anderson Property
North Pond
Westshore Motor Camp
Westshore Lagoon
Outfall Channel
Existing Embankment Bridge
Southern Marsh
Proposed Motorway Route
Tamatea Drive
Industrial Properties
Westminster Avenue
Taradale Road
APPENDIX O1

SCHEDULE B

RESOURCE MANAGEMENT ACT 1991

CONFIRMATION OF ALTERATION TO THE DESIGNATION OF THE NAPIER HASTINGS NORTHERN MOTORWAY EXTENSION

TRANSIT NEW ZEALAND

Pursuant to Section 172 of the Resource Manager Act 1991, Transit New Zealand accepts in part the recommendations of the Napier City Council, in relation to the proposed alteration of designation for the northern motorway extension between Hawkes Bay Airport and Taradale Road.

The requirement is hereby confirmed, subject to the following conditions:

1. The designation of the proposed motorway shall not lapse for a period of ten years, expiring on 31 December 2003.

2. (a) A Noise Management Plan, to be approved by a qualified Noise Consultant, is to be prepared by Transit New Zealand at least 12 months prior to construction of the motorway.

Modification

This condition has been modified from that recommended by the Napier City Council, which formerly required that a Noise Management Plan be prepared by no later than 31 March 1995. This modification has been made because a management plan prepared in March 1995 risks becoming out of date if prepared too far in advance of physical construction. The requirement for this management plan to be prepared twelve months prior to construction overcomes that risk.

(b) Subject to condition 2(c), Road traffic noise from the motorway extension shall not exceed the following limits:

Leq (6am to 12 midnight) 57dBA
Lmax (10pm to 6am) 72dBA

S.E.K.

Modification

This condition has been modified from that recommended by the Napier City Council, which formerly proposed noise standards specific to two individual properties (the Anderson property and Westshore Motor Camp) - measured from the respective boundaries of those properties. The standards proposed by the recommendation were for an Leq (24 hour) level of 57dBA, and an Leq (10pm to 6am) level of 47dBA. As a contingency, the recommended condition also included reference to the later adoption of New Zealand Road Traffic Noise Standards - if these allow a lower standard.

The reference to specific properties has been deleted because there is no justification for singling out isolated properties in reference to a general noise standard. Specific mitigation measures have been adopted in respect of the Westshore Motor Camp (refer condition 2(f)).

The daytime Leq has been reduced to an 18 hour period (6am to 12 midnight), as the current approved prediction model uses an 18 hour traffic flow.

The night time Leq (as formerly recommended) is unreliable where traffic flows are low, and has therefore been changed to Lmax. The specific value adopted in this instance more accurately reflects the critical level at which sleep disturbance is likely to occur under low traffic flows.

The reference to New Zealand Road Traffic Noise Standards has been deleted, as it is a redundant condition.

(c) Where the existing road traffic noise level exceeds the night-time Lmax limit in condition 2(b), road traffic noise from the motorway extension shall not increase the existing road traffic noise level. The UK DoE model for calculation of road traffic noise (as adapted for New Zealand) shall be deemed to be acceptable as a method for predicting road traffic noise and barrier insertion loss.

Modification

This condition has been modified from that recommended by the Napier City Council. In this case, the words "the night-time Lmax limit" have replaced the words "any of the limits", which were used in the NCC recommendation, and the prediction of noise is now based on the modified DoE model, rather than on "on-site measurements".

The change to Lmax as opposed to Leq values has been made for the reason that Leq modelling is unreliable when applied to low traffic flows. The modified DoE model is the currently approved prediction model for New Zealand.

(d) Subject to the express provisions of these conditions, noise shall be measured in accordance with New Zealand Standard NZS 6801:1991 Measurement of Sound. The measurement location shall be 1 metre from the facade of any permanent dwelling and 1.2 metres above ground level. For the purposes of determining compliance with the Lmax limit, noise levels shall be calculated using a design vehicle, defined as generating 88 dBA Lmax, at a distance of 15 metres (note: the Lmax is not intended to be enforced on individual vehicles).

Modification

This condition has been modified from that recommended by the Napier City Council by changing the words "...any dwelling and 1.5 metres above ground level..." to "...any permanent dwelling and 1.2 metres above ground level...". The 1.2 metre height is a standard for the measurement of road traffic noise. The inclusion of the word "permanent" is to distinguish permanent from temporary dwellings.

The condition has also been modified by the addition of the last sentence, referring to the prediction of noise using a design vehicle. The value adopted has been based on a test vehicle driven in accordance with ISO 362 requirements.

(e) Construction noise shall meet the limits 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.

Modification

This condition has been modified by the addition of the word "measured". This addition is simply a technical criteria.

(f) Unless a lesser standard is agreed by the owner of the Westshore Motor Camp - the fence along the boundary of the Motor Camp (Lot 1 DP 6408) and the motorway shall be upgraded at Transit New Zealand's expense, and shall be battened with timber at least 15 millimetres thick, so that there are no gaps between the boards.

Modification

This is a new condition, and has been included to mitigate noise impacts on the Westshore Motor Camp.

3. (a) The section of the motorway adjacent to North Pond shall incorporate positive drainage, whereby all runoff and spills will be collected and passed, via controlled outlets, through settlement areas and appropriate vegetation before being discharged to water. When designing and selecting these areas Transit New Zealand shall have regard to the advice of the Department of Conservation and the Hawkes Bay Regional Council.

(b) The maintenance of the settling ponds shall be undertaken at the expense of Transit New Zealand.

4. (a) Transit New Zealand shall undertake an archaeological survey of the route to determine whether or not works associated with the proposed motorway will damage, disturb or modify archaeological sites. This survey is to be undertaken by a person or persons approved by the New Zealand Historic Places Trust.

(b) Transit New Zealand shall obtain an authority from the New Zealand Historic Places Trust under the Historic Places Act 1993 prior to any works being undertaken on any identified archaeological site or group of sites.

(c) Prior to construction commencing:

(i) The contractors shall be briefed by a representative of the New Zealand Historic Places Trust; and

(ii) Procedure on how to recognise archaeological sites shall be written into contract documents.

5. (a) Transit New Zealand shall provide all-weather vehicular access to the Westshore Wildlife Reserve taking a route which has the least environmental impact upon the Westshore Lagoon.

(b) All runoff from the all-weather vehicular access shall pass through a settling pond or ponds and appropriate vegetation prior to entering the Westshore Lagoon. Transit New Zealand shall have regard to the advice of the Department of Conservation in relation to the location of this site or sites and the vegetation required.

6. Where the motorway impinges upon the reeds of the North Pond to the extent of reducing the width of the reed bed to less than 5 metres, the area of impact shall be minimised by constructing the motorway using a crib wall unless it can be shown, to the satisfaction of the Council, that a batter of 2:1 slope will have a lesser adverse environmental effect, in which case batters shall be used. In either case the construction of the motorway shall not cause the reed area to become discontinuous or in the event that it does, Transit New Zealand shall undertake to reinstate a continuous reed area.

7. The drain which currently serves the North Pond shall be re-routed in order to maintain flows into that pond.

8. The recommendations of the June 1993 report prepared by Works Consultancy Services detailing mitigation options for motorway construction shall be observed - including the use of fabric curtains to minimise sediment loss into the North Pond.

9. Sediment discharges shall be minimised during construction by erecting fabric curtains at the western edge of construction areas prior to commencement of construction activities in the North Pond and Westshore Lagoon.

10. (a) Notwithstanding any other conditions on this Requirement Transit New Zealand shall undertake all works in accordance with the drawings, specifications, statements of construction technique and other information supplied as part of this Notice of Requirement.

(b) Works or construction techniques that do not comply with condition 10 (a) may be carried out or used with the written approval of the Napier City Council, provided the environmental effects of those non-complying works and construction techniques are minor.

11. Transit New Zealand shall pay the actual and reasonable costs incurred by the Council in the monitoring of this designation, including the costs associated with direct compliance monitoring, inspections and auditing, interpretation and reporting on the monitoring data obtained; provided that:

(i) monitoring (including inspecting, auditing, interpretation and reporting) liability imposed upon Transit New Zealand shall be limited to:

(aa) The period of construction, and

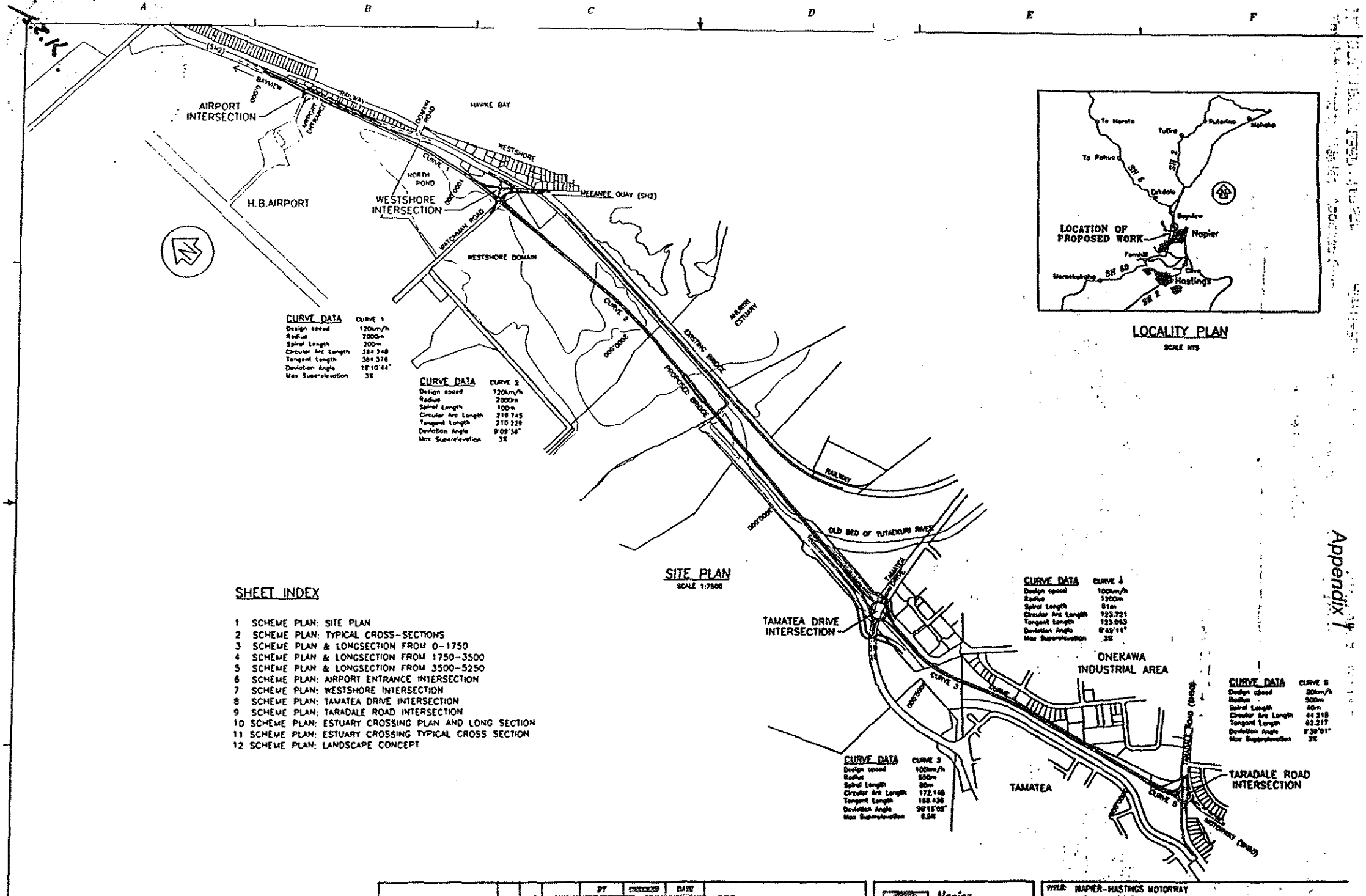
(bb) Either the maintenance period under the construction contracts or three years following completion of construction whichever is the longer;

and

(ii) Monitoring shall be limited to assessing compliance of Transit New Zealand with the foregoing conditions.

D.R. Rendall
REGIONAL MANAGER

Date: 22.3.94



SITE PLAN
SCALE 1:7500

LOCALITY PLAN
SCALE NTS

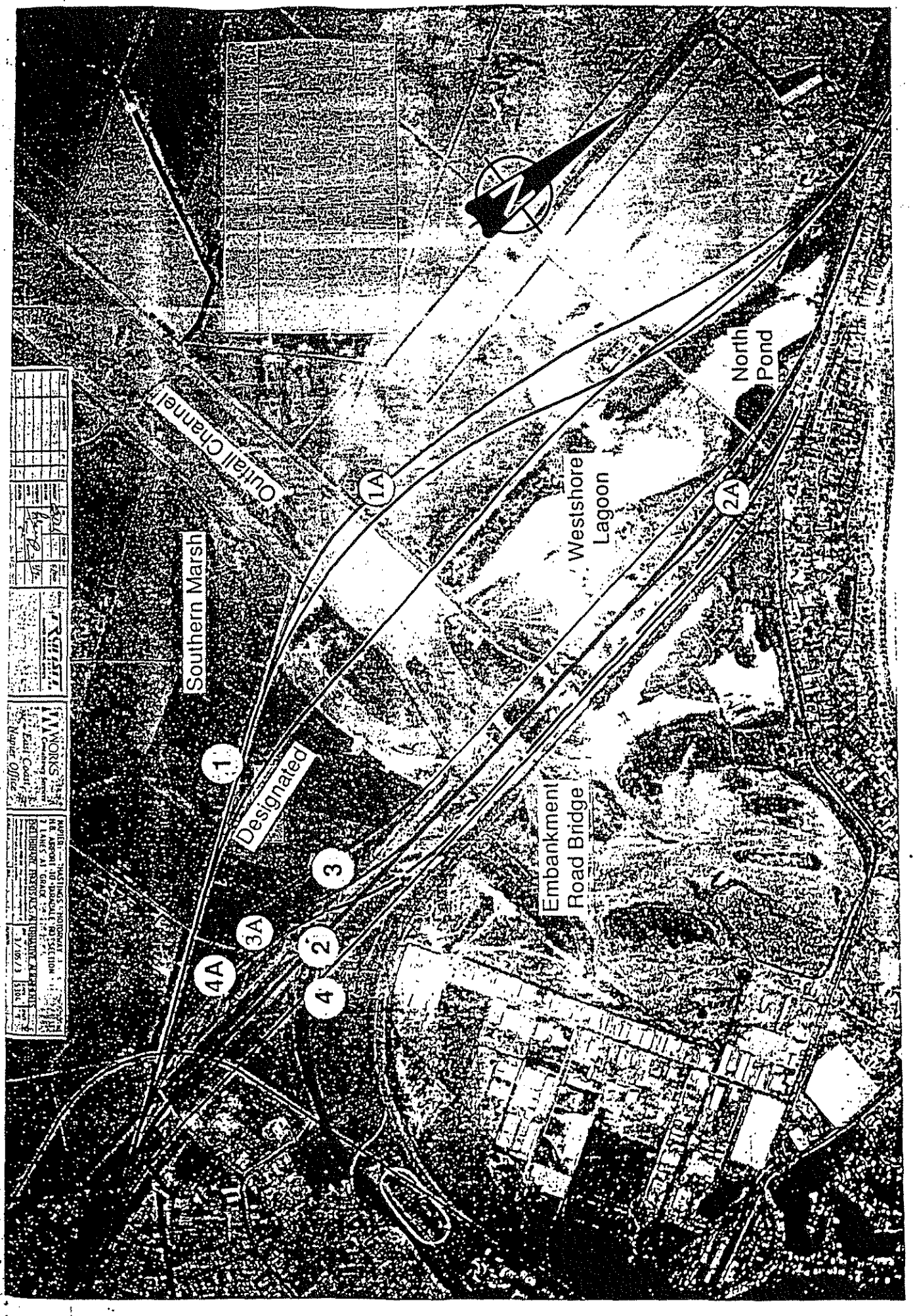
SHEET INDEX

Napier

TITLE: NAPIER-HASTINGS MOTORWAY
H.B. AIRPORT TO TARADALE RD SECTION
TWO LANES AT GRADE

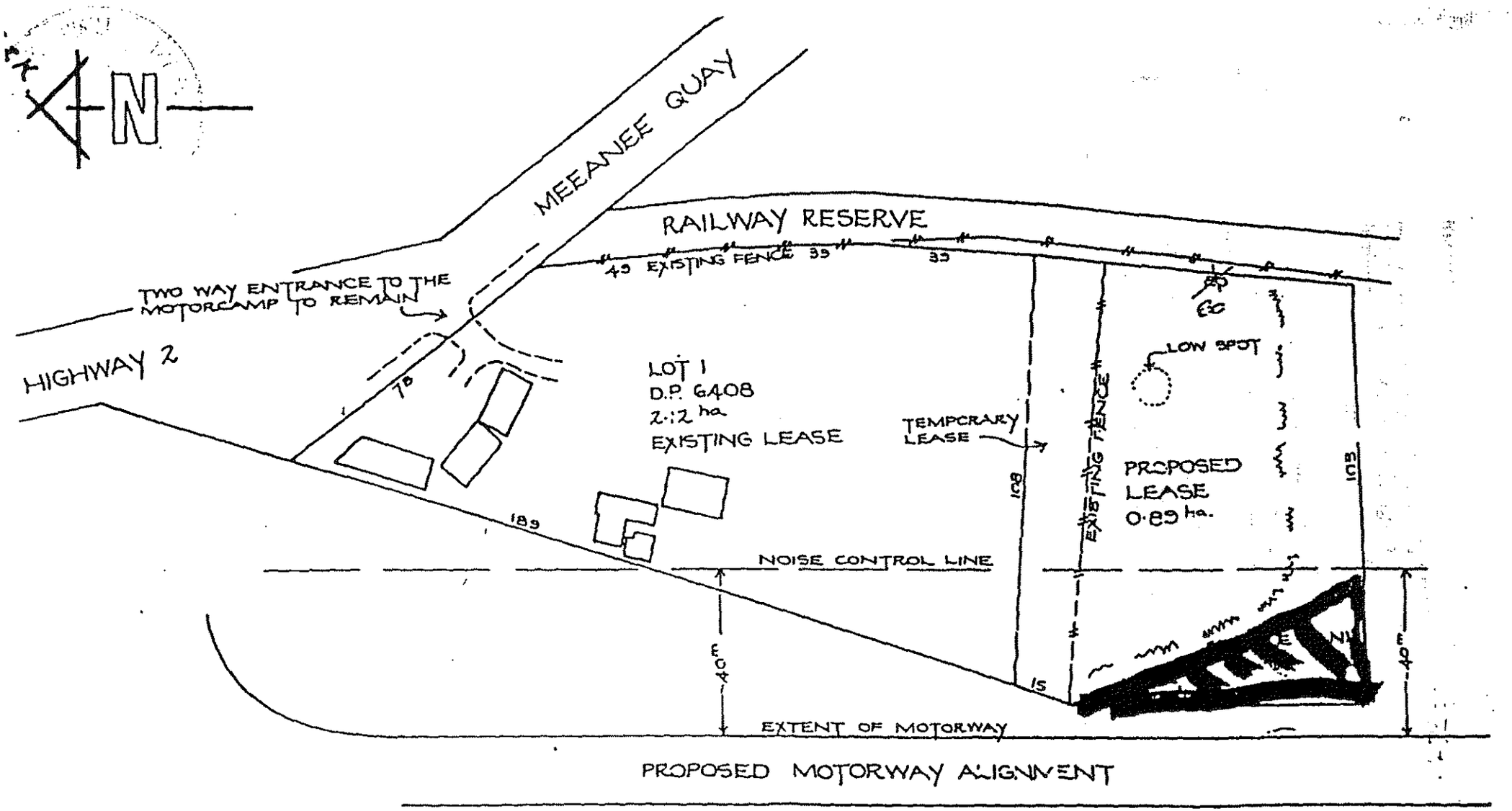
Appendix 1

Figure 1



Napier - Hastings Motorway: Hawke's Bay Airport to Taradale Road Section:
Alternative Alignments

SCALE
1CM = 25 METRES
WESTSHORE MOTORWAY
WESTSHORE LAGOON
WATCHMAN ROAD
NORTH POND

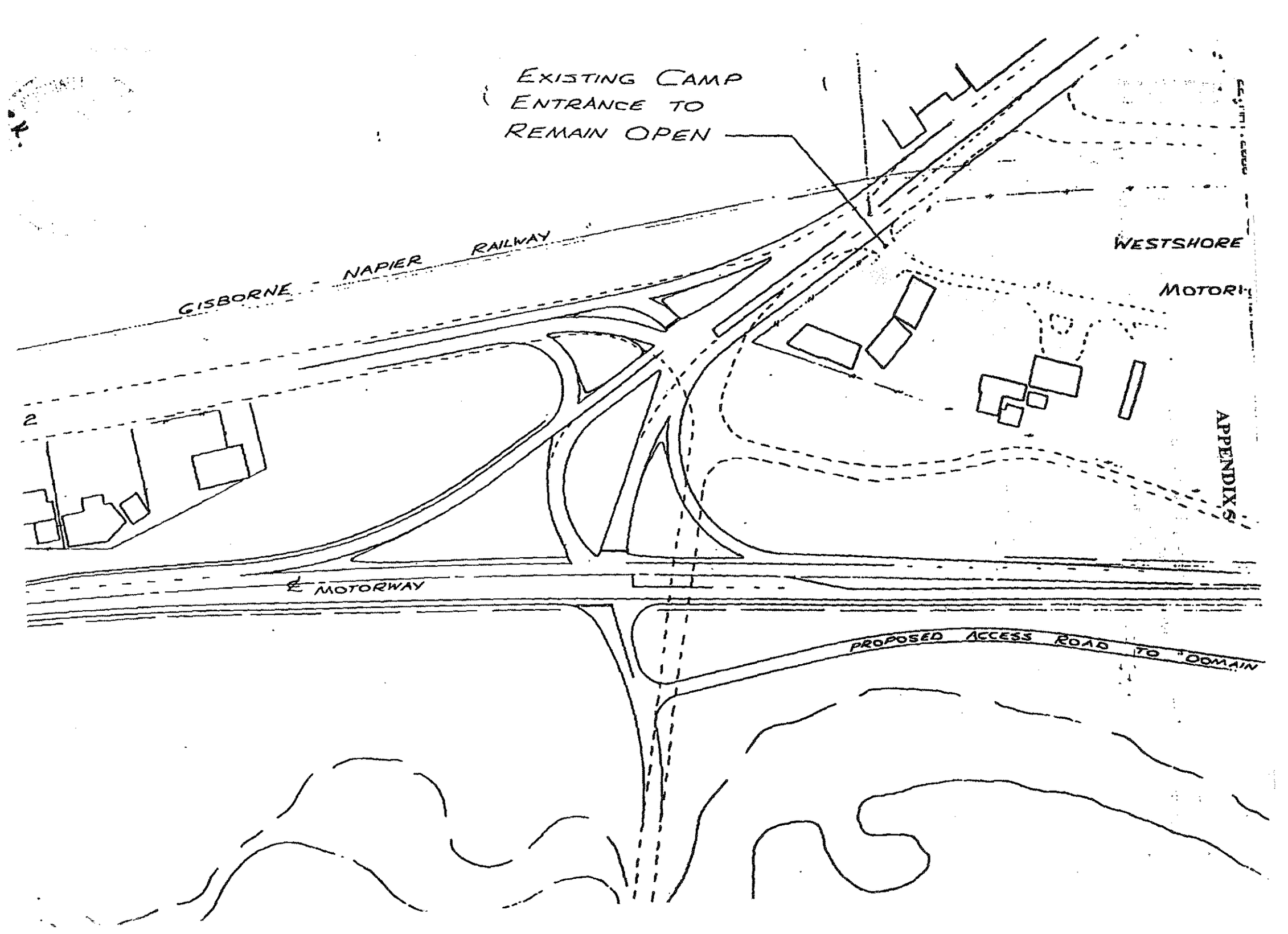


NOTE: NOISE CONTROL LINE RELATES TO A CONDITION ATTACHED TO THE DESIGNATION OF THE

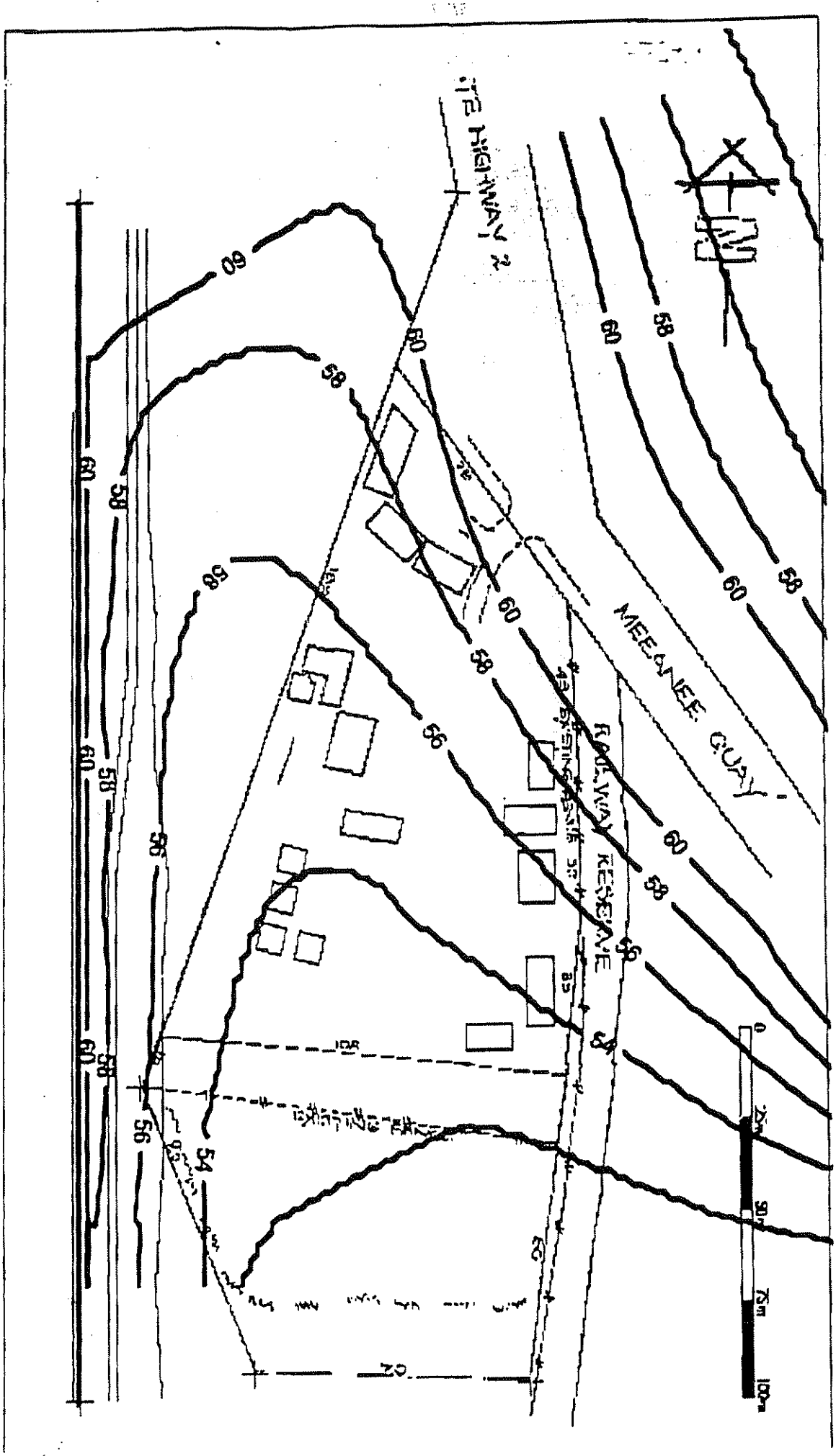
PROPOSED EXTENDED LEASE FOR WESTSHORE MOTORCAMP

PREPARED: LANCE LEIKIS ENVIRONMENTAL PLANNING & ASSESSMENT

Appendix 4

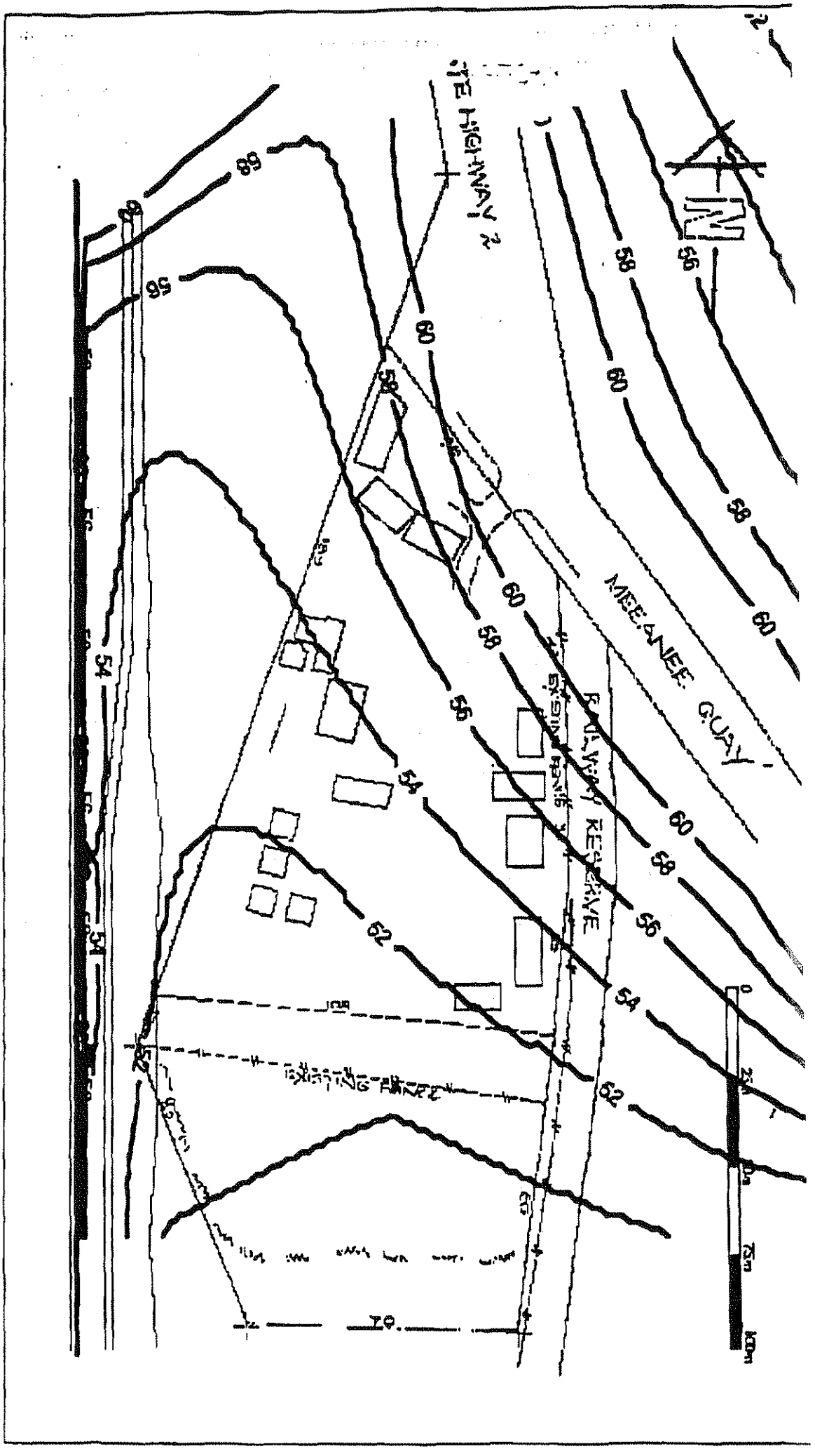

EXISTING CAMP
ENTRANCE TO
REMAIN OPEN
GISBORNE - NAPIER RAILWAY
WESTSHORE
MOTOR
APPENDIX 5
℄ MOTORWAY
PROPOSED ACCESS ROAD TO DOMAIN

APPENDIX 6



Predicted Traffic Noise Level Contours (dBA Leq(24 hour))
Motorway with Chipseal Surface

APPENDIX 7



Predicted Traffic Noise Level Contours (dBA Leq(24 hour))
Motorway with Friction Course

3.2.K.

SCHEDULE A

734

Address reply to:
NAPIER CITY COUNCIL
Private Bag 6010, NAPIER
NEW ZEALAND

Our Ref TS

If calling ask for:—
E Lambert

City of Napier

HASTINGS STREET, NAPIER, NEW ZEALAND
Telephone (06) 835-7579 — Facsimile (06) 835-7574
Facsimile International + 64 6 835-7574

2 February 1994

Regional Manager
Transit New Zealand
PO Box 740
NAPIER

Dear Sir

NOTICE OF REQUIREMENT - NORTHERN MOTORWAY EXTENSION

*** Pursuant to Section 171(2) of the Resource Management Act 1991, please find enclosed the recommendation of the Napier City Council in respect of the Notice of Requirement by Transit New Zealand for an alteration to the designation of the "Proposed Motorway" between Hawkes Bay Airport and Taradale Road, Napier.

Yours faithfully

A THOMPSON
PLANNING MANAGER

Enc.

COPY

NAPIER CITY COUNCIL

Notice of Recommendation

Hearing of Notice of Requirement pursuant to Section 171 of the Resource Management Act 1991.

REQUIRING AUTHORITY:	Transit New Zealand
APPLICATION:	Notice of Requirement for an alteration to the designation of the Proposed Motorway extension between Hawkes Bay Airport and Taradale Road.
SITE:	Generally a strip of land totalling 5.5 kms in length between the Hawkes Bay Airport and Taradale Road as shown on the attached plan.
LEGAL DESCRIPTIONS:	Pt.Lot 1 DP 11043, CT B2/812 Pt.Lot 2 DP 11043, CT J4/1225 Pt.Sec.17 Blk IV, Heretaunga S.D., SO 2652, CT E2/1352 Pt.Sec.23, Ahuriri Lagoon Gaz.1958 p.564 Pt.Sec.2 SO 10425, CT K1/991 Pt.Sec.1 SO 10425, CT K1/991 Pt.Lot 1 DP 13036 Gaz.319682.3 Lot 1 DP 17250, CT K3/1131 Lot 2 DP 17250, CT K1/990 Pt.Lot 2 DP 14906, CT K1/991 Lot 1 DP 17249, CT K1/979 Lot 5 DP 17249, CT K1/982 Lot 1 DP 18081, CT K3/1066 Lot 2 DP 18081, CT K3/1067 Pt.Lot 1 DP 14906, CT J3/130 Pt.Lot 1 DP 13036, Gaz.374110.1 Pt.Lot 2 DP 6562, Gaz.343187.1 Pt.Lot 5 DP 6562, Gaz.343187.1
DATE OF COUNCIL HEARING:	13-14, 21 December 1993, by way of a Joint Hearing with the Hawkes Bay Regional Council, pursuant to Section 102 of the Resource Management Act 1991.

SUBMISSIONS

The Notice of Requirement was publicly notified in October 1993. Twelve submissions were received, including those made to the resource consent applications being considered by the Hawke's Bay Regional Council.

Submissions were received from:

Ahuriri Estuary Protection Society
Owen and Margaret Anderson
Napier Environment Centre
Quay Property Management
Mr.and Mrs.B. Milne
N.Z. Historic Places Trust - H.B. Branch
Royal Forest and Bird Protection Society
N. and C.Day
Janette Larrington
M.P.Nee
Department of Conservation
Mr.and Mrs.P. Lees

COMMISSIONER:

Mrs.Dorothy Wakeling
Planning Consultant
Hamilton.

THE HEARING

The Napier City Council Hearing into the Notice of Requirement by Transit New Zealand to designate the proposed northern extension of the Napier-Hastings motorway was held jointly with the Hawkes Bay Regional Council who were considering four resource consent applications by Transit New Zealand.

While the Notice of Requirement referred to an alteration to an existing designation, the application was presented on the basis that the proposal amounted to a new designation under Section 171 of the Act. No exception was taken to this approach and the Council is satisfied that notification was adequate.

The City Council was represented by a Commissioner as the Council has interests in properties included in the requirement. The Commissioner has the delegated power to make a recommendation to the Council. The Council then recommends to Transit New Zealand that the requirement either be confirmed, inclusive of any conditions imposed, or be withdrawn.

THE DECISION AND REASONS

The Napier City Council has resolved to recommend to Transit New Zealand that it confirm its requirement for a motorway on the route identified as Alignment 2 subject to the conditions detailed later in this decision which are intended to avoid, remedy, or mitigate any adverse effects on the environment. In considering the Notice of Requirement the Council must have regard to the matters set out in Section 171(1) of the Resource Management Act 1991.

The Napier City Council accepts that the construction of the northern extension of the motorway is reasonably necessary for achieving the objectives of Transit New Zealand. Completion of the motorway is essential to the continuing development and sustainable management of the region's infrastructure. The social and economic well-being of the Heretaunga Plains includes providing for alternative routes which reduce traffic volumes in residential areas, thereby reducing the adverse effects of traffic in those areas.

The proposed route promotes a more sustainable use of resources than the existing designation which detrimentally affects the Southern Marsh, a unique wildlife habitat. The Council believes that the environmental costs of Alignment 2 are less than those of the existing designation.

The Council notes that Transit New Zealand has undertaken extensive public consultation prior to the lodging of the Notice of Requirement and is satisfied that Transit New Zealand has adequately considered alternative routes and methods. It is also satisfied that it would be unreasonable to expect Transit New Zealand to use alternative routes or methods. Such matters were addressed in the information placed before the Council.

In arriving at its decision the Council has taken into account the provisions of the District Plan, the proposed Hawkes Bay Regional Council Policy Statement, as well as Part II of the Resource Management Act.

DISCUSSION

Benefit/Cost Ratio

The Council wishes to comment generally on the basis by which Transit New Zealand determines its funding priorities. The current determination of benefit/cost ratios takes no account of conservation values and loss of amenity. While these are factors in almost any roading project they are particularly important in the Ahuriri Estuary which is a nationally-significant wetland area. The Council is concerned that any measures taken to protect the amenity and conservation of this unique area are detrimental to the project's standing in national funding priority. There should be some attempt by Transit New Zealand to value important environmental assets, and to include this value as a benefit in the benefit/cost ratio.

Alternative Routes

The Council agreed with the process of evaluation of the alternative routes which arrived at the preference for Alignment 2. The avoidance of the Southern Marsh and a reduction in the risk of bird-strikes near the airport are accepted as sound reasons to remove the presently-designated alignment and Alignments 1 and 1A from further consideration.

The alternative Alignment 2A was given serious consideration but because it would have given rise to more extensive detrimental effects on the environment it was decided that Alignment 2 was the best practicable option available. More extensive detrimental effects on the environment would include noise and a reduction in traffic safety both caused by an increase in the number of intersections, and a closer proximity to residences. It was also possible that Alignment 2A would give rise to a need for re-notification.

The protection of the structural integrity of the existing rail bridge meant that Alignments 4 and 4A were not possible (see below as to possibility of a combine crossing).

Combined Road/Rail Crossing

During the course of the Hearing the Council sought evidence of Transit New Zealand's consultation with New Zealand Rail over a combined road/rail crossing of the Estuary.If feasible this would produce a more efficient use of resources and avoid multiple crossings of the Estuary.

The Council is satisfied that Transit New Zealand is unable to take this matter any further.

Anderson Property

There do not seem to be measures available to mitigate the loss of views and privacy which are currently enjoyed by Mr. and Mrs. Anderson on their westerly aspect. Any measures taken to reduce the level of noise received at the Andersons' property may well impact negatively upon the visual amenity of and from their property.

Westshore Motorcamp

The Council cannot see an easy resolution to the noise problems which are likely to affect campers in the motorcamp without affecting other amenities and imposing an unreasonable constraint on the motorway's development.

The noise levels which are recommended in the conditions are designed to provide a level of protection that is considered to be reasonable having regard to all factors. In arriving at this conclusion the Council has taken into account the evidence of the noise consultants.

North Pond

Transit New Zealand submitted at the hearing that a land use consent from the Regional Council to reclaim areas of the North Pond was unnecessary and any conditions regarding the North Pond should be part of the designation. The Council recognises that the Regional Council does not accept this argument and is ensuring that any conditions imposed as part of the designation are consistent with those of the resource consent. Consequently the City Council has recommended that a crib wall rather than a batter should be used in areas of the North Pond where the use of a batter would cause the reed area to reduce to less than 5 metres in width.

Westshore Lagoon

The current state of deterioration of the Westshore Lagoon became an issue during the hearing because of the need to provide new vehicular access to the Westshore Wildlife Reserve. Means of improving the water quality in the Lagoon have not yet been found. At this time the Council is not sure what approach should be taken to improve the Lagoon water quality, nor how much this would cost.Consequently it will require only that Transit New Zealand take measures to ensure that no further contaminants are added to the water as a result of the construction and use of the vehicular access.

Lapsing of Designation

Transit New Zealand requested that the designation for Alignment 2 be included in the District Plan for a period of thirty-five years. Section 184 of the Act states that a designation lapses after five years unless: (i) it is given effect to before the end of that period; (ii) substantial progress or effort has been made; or (iii) the designation specified a different period when incorporated in the plan.

The Council considers that it is would be appropriate in all the circumstances for a period of ten years to be specified as the period on expiry of which the designation will lapse pursuant to Section 184 of the Act. The Council is concerned that any period greater than ten years imposes a greater level of uncertainty on affected private property owners.

Review of Conditions

Aligned with the Council's decision on the length of time before the designation lapses is the legal opinion obtained which stated that conditions imposed upon designations are unable to be reviewed by a territorial authority.

CONDITIONS

Pursuant to Section 171(2) of the Resource Management Act the Napier City Council recommends that Transit New Zealand confirms its requirement to alter the proposed designation of the northern motorway extension between Taradale Road and the Hawkes Bay Airport subject to the following conditions:

1. The designation of the proposed motorway shall not lapse for a period of ten years, expiring on 31 December 2003.

   Reason:

   It is considered that this period is appropriate having regard to the scale of the motorway.

2. (a) A Noise Management Plan, to be approved by a duly-qualified Noise Consultant, is to be prepared by Transit New Zealand no later than 31 March 1995, showing any noise mitigation steps to be taken to ensure that the standards specified in)b) below are met.

   Reason:

   The Council wishes to ensure that anticipated noise level mitigation is incorporated in the design and any remedial work can commence as early as possible.

   (b) Road traffic noise from the motorway extension shall not exceed the following limits, (including at any boundary of Lot 1 DP 8156 (the Anderson property) and Lot 1 DP 6408 (Westshore Motor Camp) unless different limits are agreed to by the owners for the time being of these two properties), and subject to condition 2(c):

Leq (24 hour)	57dBA
Leq (10p.m.to 6a.m.)	47dBA

   If New Zealand Standards on Road Traffic Noise adopted subsequent to this recommendation impose standards less stringent than those set out above in respect of motorways then such standards shall apply in respect of this designation.

   Reason:

   The impact of road traffic noise on the Andersons property and the motorcamp is likely to have an adverse effect those properties and the standards set are designed to provide a level of protection considered to be reasonable to the occupants. The standards may be altered by agreement between Transit New Zealand and the owners or where the New Zealand Standard on Road Traffic Noise, currently being prepared, requires a less stringent standard or standards.

(c) Where the existing road traffic noise level exceeds any of the limits in condition 2(b) road traffic noise from the motorway extension shall not increase the existing road traffic noise level. Any predictions used to determine the existing road traffic noise level shall be validated by on-site measurements.

(d) Subject to the express provisions of these conditions, noise shall be measured in accordance with New Zealand Standard NZS 6801:1991 Measurement of Sound. The measurement location shall be 1 metre from the facade of any dwelling and 1.5 metres above ground level.

(e) Construction noise shall meet the limits recommended in, and shall be assessed in accordance with, NZS 6803P:1984 The Measurement and Assessment of Noise from Construction, Maintenance and Demolition.

3. (a) The section of the motorway adjacent to North Pond shall incorporate positive drainage, whereby all runoff and spills will be collected and passed, via controlled outlets, through settlement areas and appropriate vegetation before being discharged to water. When designing and selecting these areas Transit New Zealand shall have regard to the advice of the Department of Conservation and the Hawkes Bay Regional Council.

(b) The maintenance of the settling ponds shall be undertaken at the expense of Transit New Zealand.

Reason:

In order to safeguard the life-supporting capacity of the ecosystems in the vicinity of the motorway and to minimise the risk of contamination of the aquatic environment, positive drainage will be required.

4. (a) Transit New Zealand shall undertake an archaeological survey of the route to determine whether or not works associated with the proposed motorway will damage, disturb or modify archaeological sites. This survey is to be undertaken by a person or persons approved by the New Zealand Historic Places Trust.

(b) Transit New Zealand shall obtain an authority from the New Zealand Historic Places Trust under the Historic Places Act 1993 prior to any works being undertaken on any identified archaeological site or group of sites.

(c) Prior to construction commencing:

(i) The contractors shall be briefed by a representative of the New Zealand Historic Places Trust; and

(ii) Procedure on how to recognise archaeological sites shall be written into contract documents.

Reason:

The Resource Management Act requires the recognition and protection of the heritage values of sites, buildings, places or areas. Condition 4 (a-c) will ensure that every endeavour is made to achieve this.

5. (a) Transit New Zealand shall provide all-weather vehicular access to the Westshore Wildlife Reserve taking a route which has the least environmental impact upon the Westshore Lagoon.

(b) All runoff from the all-weather vehicular access shall pass through a settling pond or ponds and appropriate vegetation prior to entering the Westshore Lagoon. Transit New Zealand shall have regard to the advice of the Department of Conservation in relation to the location of this site or sites and the vegetation required.

Reason:

The Westshore Wildlife Reserve is a public reserve and access to it must be maintained. The new designation will sever the existing vehicular access.

6. Where the motorway impinges upon the reeds of the North Pond to the extent of reducing the width of the reed bed to less than 5 metres, the area of impact shall be minimised by constructing the motorway using a crib wall unless it can be shown, to the satisfaction of the Council, that a batter of 2:1 slope will have a lesser adverse environmental effect, in which case batters shall be used. In either case the construction of the motorway shall not cause the reed area to become discontinuous or in the event that it does, Transit New Zealand shall undertake to reinstate a continuous reed area.

Reason:

The importance of the reed area to the birdlife of the North Pond was emphasised in several submissions. A crib wall will minimise the impingement of the motorway into the North Pond and preserve a continuous reed area.

7. The drain which currently serves the North Pond shall be re-routed in order to maintain flows into that pond.

Reason:

The maintenance of waterflows into the North Pond is necessary to safeguard the life-supporting capacity of the water.

8. The recommendations of the June 1993 report prepared by Works Consultancy Services detailing mitigation options for motorway construction shall be observed - including the use of fabric curtains to minimise sediment loss into the North Pond.

9. Sediment discharges shall be minimised during construction by erecting fabric curtains at the western edge of construction areas prior to commencement of construction activities in the North Pond and Westshore Lagoon.

Reason:

The implementation of mitigation options during construction will allow the construction of the motorway to take place while avoiding, remedying or mitigating any adverse effects on the environment, particularly in the areas of wetlands.

10. (a) Notwithstanding any other conditions on this Requirement Transit New Zealand shall undertake all works in accordance with the drawings, specifications, statements of construction technique and other information supplied as part of this Notice of Requirement.

(b) Works or construction techniques that do not comply with condition 10 (a) may be carried out or used with the written approval of the Napier City Council, provided the environmental effects of those non-complying works and construction techniques are minor.

11. Transit New Zealand shall pay the actual and reasonable costs incurred by the Council in the monitoring of this designation, including the costs associated with direct compliance monitoring, inspections and auditing, interpretation and reporting on the monitoring data obtained; provided that:

(i) monitoring (including inspecting, auditing, interpretation and reporting) liability imposed upon Transit New Zealand shall be limited to:

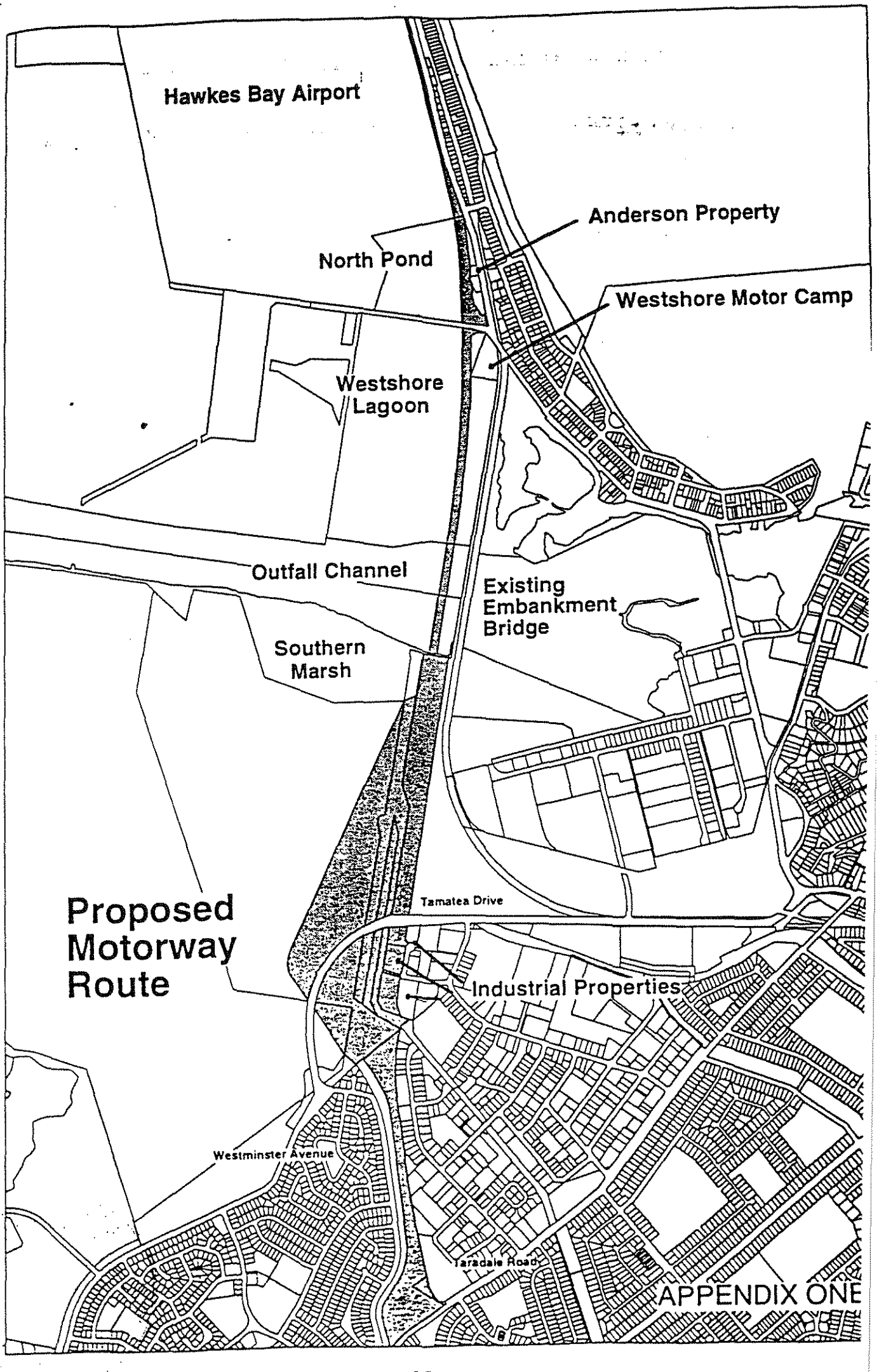
(aa) The period of construction, and
(bb) Either the maintenance period under the construction contracts or three years following completion of construction whichever is the longer;

and

(ii) Monitoring shall be limited to assessing compliance of Transit New Zealand with the foregoing conditions.

Robin Wakelin
COMMISSIONER

1st Feb 1994
DATE


Hawkes Bay Airport
Anderson Property
North Pond
Westshore Motor Camp
Westshore Lagoon
Outfall Channel
Existing Embankment Bridge
Southern Marsh
Proposed Motorway Route
Tamatea Drive
Industrial Properties
Westminster Avenue
Taradale Road
APPENDIX ONE

SCHEDULE B

RESOURCE MANAGEMENT ACT 1991

CONFIRMATION OF ALTERATION TO THE DESIGNATION OF THE NAPIER HASTINGS NORTHERN MOTORWAY EXTENSION

TRANSIT NEW ZEALAND

Pursuant to Section 172 of the Resource Manager Act 1991, Transit New Zealand accepts in part the recommendations of the Napier City Council, in relation to the proposed alteration of designation for the northern motorway extension between Hawkes Bay Airport and Taradale Road.

The requirement is hereby confirmed, subject to the following conditions:

1. The designation of the proposed motorway shall not lapse for a period of ten years, expiring on 31 December 2003.

2. (a) A Noise Management Plan, to be approved by a qualified Noise Consultant, is to be prepared by Transit New Zealand at least 12 months prior to construction of the motorway.

Modification

This condition has been modified from that recommended by the Napier City Council, which formerly required that a Noise Management Plan be prepared by no later than 31 March 1995. This modification has been made because a management plan prepared in March 1995 risks becoming out of date if prepared too far in advance of physical construction. The requirement for this management plan to be prepared twelve months prior to construction overcomes that risk.

(b) Subject to condition 2(c), Road traffic noise from the motorway extension shall not exceed the following limits:

Leq (6am to 12 midnight) 57dBA
Lmax (10pm to 6am) 72dBA

Modification

This condition has been modified from that recommended by the Napier City Council, which formerly proposed noise standards specific to two individual properties (the Anderson property and Westshore Motor Camp) - measured from the respective boundaries of those properties. The standards proposed by the recommendation were for an Leq (24 hour) level of 57dBA, and an Leq (10pm to 6am) level of 47dBA. As a contingency, the recommended condition also included reference to the later adoption of New Zealand Road Traffic Noise Standards - if these allow a lower standard.

The reference to specific properties has been deleted because there is no justification for singling out isolated properties in reference to a general noise standard. Specific mitigation measures have been adopted in respect of the Westshore Motor Camp (refer condition 2(f)).

The daytime Leq has been reduced to an 18 hour period (6am to 12 midnight), as the current approved prediction model uses an 18 hour traffic flow.

The night time Leq (as formerly recommended) is unreliable where traffic flows are low, and has therefore been changed to Lmax. The specific value adopted in this instance more accurately reflects the critical level at which sleep disturbance is likely to occur under low traffic flows.

The reference to New Zealand Road Traffic Noise Standards has been deleted, as it is a redundant condition.

(c) Where the existing road traffic noise level exceeds the night-time Lmax limit in condition 2(b), road traffic noise from the motorway extension shall not increase the existing road traffic noise level. The UK DoE model for calculation of road traffic noise (as adapted for New Zealand) shall be deemed to be acceptable as a method for predicting road traffic noise and barrier insertion loss.

Modification

This condition has been modified from that recommended by the Napier City Council. In this case, the words "the night-time Lmax limit" have replaced the words "any of the limits", which were used in the NCC recommendation, and the prediction of noise is now based on the modified DoE model, rather than on "on-site measurements".

The change to Lmax as opposed to Leq values has been made for the reason that Leq modelling is unreliable when applied to low traffic flows. The modified DoE model is the currently approved prediction model for New Zealand.

(d) Subject to the express provisions of these conditions, noise shall be measured in accordance with New Zealand Standard NZS 6801:1991 Measurement of Sound. The measurement location shall be 1 metre from the facade of any permanent dwelling and 1.2 metres above ground level. For the purposes of determining compliance with the Lmax limit, noise levels shall be calculated using a design vehicle, defined as generating 88 dBA Lmax, at a distance of 15 metres (note: the Lmax is not intended to be enforced on individual vehicles).

Modification

This condition has been modified from that recommended by the Napier City Council by changing the words "...any dwelling and 1.5 metres above ground level..." to "...any permanent dwelling and 1.2 metres above ground level...". The 1.2 metre height is a standard for the measurement of road traffic noise. The inclusion of the word "permanent" is to distinguish permanent from temporary dwellings.

The condition has also been modified by the addition of the last sentence, referring to the prediction of noise using a design vehicle. The value adopted has been based on a test vehicle driven in accordance with ISO 362 requirements.

(e) Construction noise shall meet the limits 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.

Modification

This condition has been modified by the addition of the word "measured". This addition is simply a technical criteria.

(f) Unless a lesser standard is agreed by the owner of the Westshore Motor Camp - the fence along the boundary of the Motor Camp (Lot 1 DP 6408) and the motorway shall be upgraded at Transit New Zealand's expense, and shall be battened with timber at least 15 millimetres thick, so that there are no gaps between the boards.

Modification

This is a new condition, and has been included to mitigate noise impacts on the Westshore Motor Camp.

3. (a) The section of the motorway adjacent to North Pond shall incorporate positive drainage, whereby all runoff and spills will be collected and passed, via controlled outlets, through settlement areas and appropriate vegetation before being discharged to water. When designing and selecting these areas Transit New Zealand shall have regard to the advice of the Department of Conservation and the Hawkes Bay Regional Council.

(b) The maintenance of the settling ponds shall be undertaken at the expense of Transit New Zealand.

4. (a) Transit New Zealand shall undertake an archaeological survey of the route to determine whether or not works associated with the proposed motorway will damage, disturb or modify archaeological sites. This survey is to be undertaken by a person or persons approved by the New Zealand Historic Places Trust.

(b) Transit New Zealand shall obtain an authority from the New Zealand Historic Places Trust under the Historic Places Act 1993 prior to any works being undertaken on any identified archaeological site or group of sites.

(c) Prior to construction commencing:

(i) The contractors shall be briefed by a representative of the New Zealand Historic Places Trust; and

(ii) Procedure on how to recognise archaeological sites shall be written into contract documents.

5. (a) Transit New Zealand shall provide all-weather vehicular access to the Westshore Wildlife Reserve taking a route which has the least environmental impact upon the Westshore Lagoon.

(b) All runoff from the all-weather vehicular access shall pass through a settling pond or ponds and appropriate vegetation prior to entering the Westshore Lagoon. Transit New Zealand shall have regard to the advice of the Department of Conservation in relation to the location of this site or sites and the vegetation required.

6. Where the motorway impinges upon the reeds of the North Pond to the extent of reducing the width of the reed bed to less than 5 metres, the area of impact shall be minimised by constructing the motorway using a crib wall unless it can be shown, to the satisfaction of the Council, that a batter of 2:1 slope will have a lesser adverse environmental effect, in which case batters shall be used. In either case the construction of the motorway shall not cause the reed area to become discontinuous or in the event that it does, Transit New Zealand shall undertake to reinstate a continuous reed area.

7. The drain which currently serves the North Pond shall be re-routed in order to maintain flows into that pond.

8. The recommendations of the June 1993 report prepared by Works Consultancy Services detailing mitigation options for motorway construction shall be observed - including the use of fabric curtains to minimise sediment loss into the North Pond.

9. Sediment discharges shall be minimised during construction by erecting fabric curtains at the western edge of construction areas prior to commencement of construction activities in the North Pond and Westshore Lagoon.

10. (a) Notwithstanding any other conditions on this Requirement Transit New Zealand shall undertake all works in accordance with the drawings, specifications, statements of construction technique and other information supplied as part of this Notice of Requirement.

(b) Works or construction techniques that do not comply with condition 10 (a) may be carried out or used with the written approval of the Napier City Council, provided the environmental effects of those non-complying works and construction techniques are minor.

11. Transit New Zealand shall pay the actual and reasonable costs incurred by the Council in the monitoring of this designation, including the costs associated with direct compliance monitoring, inspections and auditing, interpretation and reporting on the monitoring data obtained; provided that:

(i) monitoring (including inspecting, auditing, interpretation and reporting) liability imposed upon Transit New Zealand shall be limited to:

(aa) The period of construction, and
(bb) Either the maintenance period under the construction contracts or three years following completion of construction whichever is the longer;

and

(ii) Monitoring shall be limited to assessing compliance of Transit New Zealand with the foregoing conditions.

D.R. Rendall
REGIONAL MANAGER

Date: 22.3.94

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV 2012-425-000576
CIV 2012-425-000566
CIV 2013-425-000242
[2013] NZHC 2347

	BETWEEN	QUEENSTOWN AIRPORT CORPORATION LIMITED Appellant (in respect of CIV 2012-425-000566)
		REMARKABLES PARK LIMITED Appellant (in respect of CIV 2012-425-000566 and CIV 2013-425-000242)
	AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent
		AIR NEW ZEALAND LIMITED Interested Party

Hearing:	19-22 August 2013 (At Queenstown)
Counsel:	R J Somerville QC and R A Davidson for Remarkables Park D A Kirkpatrick and R M Wolt for Queenstown Airport Corporation JDK Gardner-Hopkins and E L Matheson for Air New Zealand Limited
Judgment:	12 September 2103

JUDGMENT OF WHATA J

INDEX

Introduction

[1] Queenstown Airport Corporation ("QAC") wants to:

> ... provide for the expansion of Queenstown airport to meet projected growth while achieving the maximum operational efficiency as far as possible.

[2] It has issued a notice of requirement ("NOR") seeking in effect an additional 19 or so hectares of land in order to achieve this objective. Remarkables Park Limited (RPL) owns property that is subject to the NOR. With this land QAC could enable, among other works, a precision instrument approach runway and a parallel taxiway. It also would be able to provide additional space for other aviation activity, including for relocation of smaller and private aviation operations and helicopters.

[3] The NOR was considered by the Environment Court.[1] The Court rejected that part of the NOR seeking to provide for a precision instrument approach runway and a parallel taxiway. As a result, the area of land subject to the NOR was reduced to 8.07 ha.

[4] Both QAC and RPL contend that the Environment Court got it wrong. QAC identifies five errors of law while RPL identifies 12 errors of law. RPL is supported in large part by Air New Zealand Limited ("ANZL").

[5] QAC says, in short, that the Environment Court exceeded its jurisdiction by revisiting the scope of the existing designation and erred in law also by imposing a limitation on the NOR based on an interpretation of civil aviation standards that might prove to be erroneous.

[6] The RPL appeal raises the following key issues:[2]

(a) Whether the Environment Court was empowered to cancel part only of the NOR;

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1 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206.

2 There are other discrete issues dealing with s 16, cost benefit analysis, QAC's inconsistent approach and a substation.

(b) Whether the Environment Court erred by not adopting a threshold test of "essential" for the proposed works and designation;

(c) Whether the Environment Court wrongly failed to consider the unfairness of the NOR to RPL; and

(d) Whether the Environment Court wrongly treated an alternative site for the works located on existing QAC land as suppositious.

Structure of the decision

[7] I propose to address the appeal in four parts, namely:

(a) Part A – The background, jurisdictional, and statutory frame;

(b) Part B – The appeal by QAC;

(c) Part C – The appeal by RPL;

(d) Part D – Outcome.

Part A

Background

[8] The background to these proceedings is usefully summarised by the Environment Court which I largely adopt.

The parties

[9] QAC manages one of the busiest airports in New Zealand. There are on average 40,000 aircraft movements and over one million scheduled and non-scheduled passenger movements through the airport every year. The airport is owned by Queenstown Lakes District Council and managed by QAC. ANZL is a major user of the airport and is the largest scheduled service provider to and from the airport. RPL owns all of the undeveloped land within an area subject to the

Remarkables Park zone. A significant parcel of RPL land is affected by the NOR issued by QAC and then confirmed by the Environment Court.

The airport and existing designations

[10] The airport, the area subject to existing designations and the proposed designation, together with the surrounding land uses is helpfully depicted on a plan produced by RPL (by consent) and attached to this judgment as Annexure A.

Proposed designation

[11] The NOR was applied for on 21 December 2010 with the objective:

> To provide for the expansion of Queenstown Airport to meet projected growth while achieving the maximum operational efficiency as far as possible.

[12] Its key elements are:

- a helicopter facility;
- a general aviation (fixed wing) facility for up to Code B aircraft;
- a private and corporate jet facility for up to Code C aircraft;
- a fixed based operator (to service jets and possibly general aviation);
- a Code D parallel taxiway adjacent to main runway;
- a Code B parallel taxiway adjacent to cross-wind runway;
- a precision approach runway with a 300 metre width runway strip;
- ancillary activities, including landscaping, car parking, and an internal road network which includes two access roads to connect with Hawthorne Drive at the western end of the designation area and the Eastern Access road (EAR) at the eastern end.

[13] Significantly, for the purpose of these proceedings, the area included in the requirement for the designation includes Part Lot 6 DP 304345 and a portion of an unformed road adjacent to the south western corner of Lot 6 DP 304345, being land owned by RPL. The airport's southern boundary and the extent of the existing aerodrome designation adjacent to Lot 6 is located 201 metres south of the main runway centre line. The requirement is for a strip of Lot 6 approximately 160 metres

in depth, lying parallel to the entire one kilometre length of the common boundary of the QAC and RPL land.[3]

The interim decision

[14] Relevant to this proceeding the Environment Court made the following key orders in its interim decision:

> A That part of the NOR required for instrument precision approach runway and Code D parallel taxiway is cancelled. The court reserves its decision on the balance of the NOR.
>
> B By 5 October 2012 QAC is to file and serve:
>
> (1) an amended Figure 1 to the NOR reducing the extent of the requirement to exclude provision for a (sic) instrument precision runway and Code D parallel taxiway and any land no longer required for carparking, circulation and landscaping.
>
> ...

[15] The judgment is then framed by reference to key legal and evaluative issues. I detail here the findings that are relevant to this appeal. I note for completeness that the final decision is not subject to appeal and it is not necessary for me to address it here.

"Requirement"

[16] The Environment Court rejected RPL's submission that the term "requirement" in s 168 Resource Management Act 1991 should be construed in light of s 40 of the Public Works Act 1981. The Court found that the matter and subject of these provisions are not, as submitted, *in pari materia*. The Court observed:

> [46] ... In this case neither the relevant term nor subject matter addressed in section 168 RMA and section 40 PWA are the same and we do not accept RPL's submission that "a requirement" has the same meaning as "required" for the reasons we gave in [45] above.

[17] At [45] the Environment Court observed that the term "requirement" is a noun that is a term given to a proposal for a designation.

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[3] *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [37].

Scope of evaluation under s 171(1)(b)

[18] The Court observed that the central issue under s 171(1)(b), dealing with the assessment of alternatives, is whether QAC gave adequate consideration to alternative sites, routes or methods. The Court then adopted the principles stated in the final report and decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project as follows:[4]

> a) the focus is on the process, not the outcome: whether the requiring authority has made sufficient investigations of alternatives to satisfy itself of the alternative proposed, rather than acting arbitrarily, or giving only cursory consideration to alternatives. Adequate consideration does not mean exhaustive or meticulous consideration.
>
> b) the question is not whether the best route, site or method has been chosen, nor whether there are more appropriate routes, sites or methods.
>
> c) that there may be routes, sites or methods which may be considered by some (including submitters) to be more suitable is irrelevant.
>
> d) the Act does not entrust to the decision-maker the policy function of deciding the most suitable site; the executive responsibility for selecting the site remains with the requiring authority.
>
> e) 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.

Scope of evaluation under s 171(1)(c)

[19] The Court also adopted the summary provided by the Board of Inquiry dealing with the Upper North Island Grid Upgrade Project for the purposes of its assessment under s 171(1)(c) dealing with whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority. Of particular relevance to this appeal, the Court adopted the following passage:[5]

> In paragraph (c), the meaning of the word 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.

---

4 *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 [117] and [186].

5 At [51].

[20] The Court added that it may consider the extent to which the work is reasonably necessary for achieving the requiring authority's objectives and may limit the extent of the designation accordingly.[6]

Section 171(1)(d) and the Public Works Act

[21] The Court agreed with submissions by QAC and QLDC that the compulsory acquisition process not having commenced s 24 PWA is not directly relevant to its determination. The Court noted:

> In particular, the three overlapping criteria in section 24(7) of fairness, soundness and the [reasonable] necessity for achieving the objective of the local authority (here QAC) are not matters we need to decide.

[22] The Court then goes on to observe:

> Even if we are wrong, and the issue of fairness (in particular) is relevant under section 171(1)(d), there is no evidence upon which we could find that QAC agreed, as submitted by RPL counsel, not to designate the land. Apart from the fact that QAC and RPL entered into contractual arrangements we have no evidence from RPL as to its reliance on the contracts or any representation made by QAC when subsequently planning to develop its land or that it held a legitimate expectation its "buffer" ie Activity Area 8, would not be reduced. (The contracts were handed up to the court as a bundle attached to counsel for RPL's opening submissions, which we were told "not to read".)

Best practicable option – s 16 of the Resource Management Act

[23] The Court held that s 16 is not to be applied as if it were an additional criterion to subs (1)(a)-(d) of s 171. The Court said in some cases adopting the best practicable option may be a useful check for the decision maker, particularly when assessing the adequacy of the alternatives under consideration, but not in every case.

Statutory plans

[24] The Court then reviewed the various statutory planning documents applicable to the region, including the Regional Policy Statement (RPS) and the Queenstown Lakes District Plan, including the structure plan dealing with Activity Area 8, where RPL's land (Lot 6) is located. Reference is made to the fact that this activity area is a

---

[6] Citing *Bungalo Holdings Limited v North Shore City Council* EnvC Auckland AO52/01, 7 June 2001.

"buffer" area and the Court observes that while "buffer" is not explained in the District Plan, there was general agreement that these policies mutually benefited the RPL and QAC.

Section 171 evaluation

[25] The Court observes that QAC has commissioned no less than eight reports since 2003 dealing with its existing land and site facilities at the airport. It observes:

> [76] The reports produced in 2005, 2006, 2007 and 2008 consider sites for a new general aviation/helicopter precinct located within the existing aerodrome designation north of the main runway. In four of the eight reports produced, consideration was given to relocating the general aviation/helicopter precinct south of the main runway. However, in each case the site of the proposed southern precinct is different from that supported by QAC in its NOR, albeit part of Lot 6 is included.

[26] The Court then deals with various master planning documents between 2005 and 2010. It notes that the 2005 Master Plan considered alternative locations within Lot 6 but they were dismissed because:[7]

> (a) these options required protracted negotiations and change of designations without guarantee of outcome;
>
> (b) there were no significant operational benefits; and finally
>
> (c) the options were highly distracting to QAC management.

[27] The Court then refers to an April 2007 South East Zone Planning Report observing that it is the only report to consider possible use of the designated land south of the main runway. The assumed planning parameters the Court said include a Code C aircraft design and a non-precision approach to the main runway. The Court observes that the report concluded:

> the northern side was a better location for future helicopter facilities

And the report also recommended:

> ... that general aviation flightseeing operations be grouped north of the main runway.

---

7 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [79].

[28] The Court then refers to the 2010 Master Plan which listed five developments that it said has a significant bearing on the NOR provision for a general or aviation/helicopter precinct on part of Lot 6. The Court noted that these are:[8]

(a) the protection of airfield runway/taxiway/object separation distances for a precision approach runway;

(b) planning for a parallel taxiway;

(c) consideration of protection for aircraft with wider wingspans;

(d) accelerated traffic growth; and

(e) the decision to consider Lot 6 as an option for the general aviation/helicopter precinct.

[29] The Court considered that (a) through (c) above were critical in determining the spatial requirements of the designation. The Court observes that the 2010 Master Report evaluated two alternative locations for a general aviation/helicopter precinct:

(a) To the north east comprising 22 ha of land owned by QAC; and

(b) 19.1 ha to the south east located on part of Lot 6. The Master Plan concluded that the north east precinct is distinctly inferior.

Adequate consideration of alternative sites?

[30] The Court describes the five alternative sites as follows:[9]

(a) locating the general aviation/helicopter precinct on land north of the main runway including on undesignated land owned by QAC and/or QLDC;

(b) locating the general aviation/helicopter precinct on land north of the main runway within the aerodrome designation;

(c) whether RPL land should have a building restriction strip placed on it for a distance of 15.5m from the common boundary to satisfy taxiway separation distance requirements for a new southern taxiway or whether CAA dispensation could be obtained for this;

(d) the relocation of some or all of the general aviation and helicopter facilities off the Airport;

---

8 At [82].
9 At [87].

(e) consideration of individual components of the work being accommodated within the existing aerodrome designation.

[31] The Court then found:

> We consider (a), (c) and (e) to be entirely suppositious for reasons that we set out next. However this is not true for (b) and (d) which we consider in more detail.

[32] Most relevant to this appeal, the Court treated option (a) as suppositious for the following reasons:

> [89] The Conceptual plans prepared by RPL for a general aviation/helicopter precinct north of the main runway included undesignated land owned by QAC within the area of PC19. Under these plans a general aviation/helicopter precinct would displace up to 4.52 hectares of industrial land within PC19. In proposing this option, RPL witnesses did not address the scarcity of industrial land within Queenstown (an important issue that PC19 *inter alia* seeks to address). There was some suggestion by the RPL planner, Mr M Foster, that aerodrome activities are industrial activities for the relevant activity areas within PC19.
>
> [90] We doubt Mr Foster's interpretation is correct and in the absence of any evidence in this proceeding or PC19 addressing the applications of an aviation precinct within PC19, particularly in relation to the urban form and function, we do not consider that PC19 land should be available as part of an alternative location. Activities relating to an aviation precinct appear to be outside those contemplated by the District Council when promulgating PC19.

[33] Before addressing the other mooted alternatives the Court makes the following initial findings of fact:

(a) there is insufficient land within the aerodrome designation to develop an instrument precision approach runway and southern parallel taxiway for Code D aircraft and to develop a general aviation/helicopter precinct; and

(b) QAC has no firm development plans for designated land north of the main runway.

[34] Dealing then relevantly with the alternative precinct on land north of the main runway within the area of the aerodrome designation the Court observed:[10]

> ... Several issues present themselves against a northern precinct, including the transportation of dust into helicopter hangars carried by the prevailing westerly winds and the stronger lower frequency southern winds, increased

[10] At [103].

> exposure to the winds from the south and west during helicopter take off and landings, increased runway occupancy by helicopters to minimise or reduce exposure to prevailing winds; the geographical constraints north of the cross wind runway and the desirability for flight paths over TALOs to be unobstructed by stacked (parked) helicopters. All these are important factors which lead to the adoption by QAC of a southern precinct.

[35] After considering the remaining alternatives, the Court then makes an overall conclusion, stating a summary of reasons as to why it considered that other alternatives had been given adequate consideration. The Court observed:

> [112] We conclude that there is an array of factors, including safety, which militate against a northern location for a helicopter facility. Of these cost (to the helicopter operator and other users of the Airport) is an important consideration, but it is not determinative. Section 171(1)(b) is satisfied as we find that adequate consideration was given to alternative location of the helicopter facility.
>
> [113] Likewise we are also satisfied that adequate consideration was given by QAC to alternative locations for corporate jets and that it is operationally efficient to locate these adjacent to the proposed Code C taxiway south of the main runway.
>
> [114] Apart from the April 2007 study, none of the studies looked at the option of splitting the various aeronautical businesses north or south of the main runway within the existing aerodrome designation. But in the absence of any contrary evidence we conclude, like corporate jets, it is operationally efficient to locate fixed wing operators adjacent to a proposed Code C taxiway.
>
> [115] We are also satisfied that under section 171(1)(c) that a general aviation/helicopter precinct south of the main runway is reasonably necessary for achieving the NOR's objective.

"Reasonably necessary"?

[36] The Court identified two key decisions made by QAC in terms of the area plan required for the designation, namely:

(a) The type of runway (whether an instrument non-precision or instrument precision runway); and

(b) The aircraft design parameters (whether a Code D aircraft would operate at the Airport).

[37] As to the first issue, the Court accepted Mr Morgan's evidence that:

> ... because of the terrain constraints inhibiting ILS approaches the final stage of an approach needs to be conducted by assuming a visual approach at 400 ft above ground level, which also means no more than a 150m runway strip width is needed.

[38] The Court also appeared to accept the evidence of ANZL and RPL and that there is no suggestion of Code C aircraft being phased out and indeed the converse appears to be the case.

[39] The Court then observed whether the works or designation, like these findings, is reasonably necessary for achieving the objective of QAC. The Court observed:

> [139] On the issue of whether the works or designation is reasonably necessary for achieving the objective of QAC the evidence is clear: within the planning horizon under negotiation there is no nexus between the NOR objective and enablement of Code D aircraft operating at Queenstown Airport. The predicted growth is able to be achieved using Code C aircraft.
>
> [140] For the same reason we find that there is no nexus between the NOR's objective and the provisioning for an instrument precision approach runway.

[40] Significantly, for the purposes of identifying the scope of the designation the Court observes:

> The consequences of the findings are this: the provision of an instrument non-precision approach runway and Code C parallel taxiway would reduce the lateral extent of the land required by 97.5m along the approximately 1,000m length of the common boundary with RPZ, being a total land area of about 9.75 hectares. Put another way, the land required for the designation would be reduced from around 160m into the RPZ to around 60m. We are not, however, required to approve the Code C parallel taxiway. Land within the existing designation is available for this purpose and it is a matter for QAC to decide whether to construct the same.

[41] And further:

> [142] Subject to what we say at [164] in all other respects we conclude that the work and designation is reasonably necessary for achieving QAC's objective. We prefer Mr Munro's assessment of the comparison of area requirements for the northern and southern precincts as it comprehensively addresses the proposed building and infrastructure. We found limited assistance in the area requirements produced by RPL's witnesses as these do not include all components of the aviation precinct or use different measurements to assess the components. ...

Effects on the environment

[42] The Court identified three categories of effects, namely noise, landscape and amenity, and traffic and transportation.

[43] As to noise, the Court was satisfied that with the resolution of PC35, the extension of the airport will not preclude opportunities for future development within the Remarkables Park Zone. The Court therefore concluded that this aspect of the NOR to locate the helicopter precinct on the southern side of the airport was not in tension with the planning instruments.[11]

[44] Other issues were said to be manageable by reference to operational plans or via an outline plan of works.

[45] Traffic management and access are not a feature of this appeal and I do not address them further. Nor do I address the Court's summaries in relation to landscape effects as they are not a matter subject to appeal.

Minister's reasons for direct referral

[46] The Court agreed with the Minister's statement that:

> Queenstown is a world renowned tourist destination and expansion of the Airport is likely to affect Queenstown, which is considered to be a place or area of national significance.

[47] The Court also observes that the NOR should be considered in the wider context of other far reaching proceedings before the Environment Court, including QAC's privately initiated PC35 and a second NOR also to amend Designation 2 and PC19.[12]

Part 2 of the Act

[48] The Court's decision focused on s 7(b), (c) and (f).

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[11] Refer to [157].
[12] Refer [207].

[49] Dealing first with s 7(b) (efficient use of resources), the Court observed that in this case the economists agreed that it was not possible to monetarise all the benefits or costs associated with the NOR. The Court observed that decisions on costs and economic viability or profitability of a project are not matters for the Court.[13] The Court then observed that a cost benefit analysis may be relevant and informative of matters in s 171(b) and s 7(b) but that does not elevate that matter to a criterion to be fulfilled. The Court then assesses the evidence produced by other parties, including that of Dr T Hazeldine, Professor of Economics at the University of Auckland, Mr Ballingall, an economist employed by the New Zealand Institute of Economic Research, and Mr Copeland.

[50] The Court observed that Professor Hazeldine's evidence was focused on whether the designation was reasonably necessary to achieve its objective, and having taken a different view found his concluding remarks of limited assistance.

[51] It then observes that the key difference between Mr Ballingall and Mr Copeland lies in the relevance of a cost benefit analysis for options which have been considered and discounted by requiring authorities. It says that Mr Copeland's approach is like an economic assessment considering the use of the aerodrome with or without Lot 6.

[52] The Court agrees with Mr Copeland that QAC is not subject to any requirement of NZ Treasury or any other government agency when presenting its NOR. It observes that a cost benefit analysis of the alternatives may be relevant and informative of the matters in s 171(1)(b), and in particular whether adequate consideration was given to alternatives in circumstances where a requiring authority either does not have an interest in the land or the work will have a significant adverse effect on the environment.[14]

[53] But as the Court did not have any cost benefit analysis the Court reached various conclusions qualitatively on operational efficiency and externality costs. The relevant conclusions were as follows:

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13 Citing *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

14 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [220].

Operational efficiency

(a) an instrument precision runway and a Code D taxiway is an *inefficient* use of part of the Lot 6 land when it is unlikely these uses will establish;

(b) a general aviation/helicopter precinct including air and landside buildings, infrastructure and landscaping is an *efficient* use of part of the Lot 6 land;

(c) it would be an *efficient* use of land to co-locate the Code C corporate jets south of the main runway in proximity to the Code C taxiway on the basis that QAC elect to build a Code C taxiway in this location;

(d) a hybrid alternative would be *inefficient* in that it would compromise the benefits which would accrue from the collocation of all operations on one site, including for example, shared support services, shared parking, shared accessways within the precinct, proximity for day to day interactions among operators and for customers, many of whom will be unfamiliar with the Airport, knowing that all flightseeing and helicopter operations are located in one precinct.

[54] As to externalities, the view is expressed that the western access imposes an unacceptably high cost on the public. It also said that:

> ... inadequate level of landscape mitigation proposed by QAC would create externality costs to the public using the airport facility and RPL in the development of its land.

[55] It concluded however that the effects are able to be adequately mitigated.

[56] As to s 7(c) and (f), the Court observed that even with conditions, the amenity values and quality of the environment within RPZ will not be fully maintained and that is an outcome to be taken into consideration when making an ultimate determination.

[57] The Court then turned to s 5, "the purpose of sustainable management" and adopted the longstanding approach recommended by the Court in *North Shore City Council v Auckland Regional Council (Okura)*,[15] namely that it is necessary to compare the conflicting considerations, their scale and degree and relative significance or proportion in arriving at the final outcome.

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[15] *North Shore City Council v Auckland Regional Council (Okura)* (1996) 2 ELRNZ 305, [1997] NZRMA 59 (EnvC).

[58] The key conclusion is then drawn:

> [231] For the reasons we have given, an insufficient nexus has been established between fulfilling the QAC's objective and making provision for an instrument precision approach runway and Code D parallel taxiway to support the use of RPL's land for these purposes. The balance of the work will be achieved at the cost to RPL of not being able to use the affected resources it owns for purposes authorized by the district plan. This is recognized and if required there is legislation to deal with any related considerations which may arise (such as compensation).

[59] The Court then concludes:

> [236] ... Overall we find the significant benefits to QAC and the wider community of developing and using the affected resources in the manner proposed, subject to the modifications and the conditions we have identified to avoid, remedy or mitigate adverse effects on the environment, to be consistent with the sustainable management purpose of the Act.

Jurisdiction on appeal

[60] Section 299 of the RMA confers a right of appeal on questions of law only. As stated in *Countdown Properties (Northland) v Dunedin City Council*:[16]

> …this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
>
> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

[61] Plainly also, I am not concerned with substantive merits of any conclusion. Rather, I must be satisfied that the conclusion has been arrived at by rational process.[17]

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[16] *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

Statutory frame

[62] In order to properly frame the appeals, it is necessary to explain the legislative scheme as it relates to NORs.

[63] This proceeding came before the Environment Court by virtue of the exercise of powers by the Minister under s 147 of the Resource Management Act, after receiving a recommendation from the Environmental Protection Authority (EPA). In reaching a decision to refer, the Minister is required to apply s 142(3) dealing with whether the matter is, or is part of a proposal of national significance. This provides a cue to the importance of the underlying proposal.

[64] Section 149U sets out the relevant gateway tests for approval or otherwise of a notice of requirement. It states:

> **149U Consideration of matter by Environment Court**
>
> (1) The Environment Court, when considering a matter referred to it under section 149T, must-
>
> (a) have regard to the Minister's reasons for making a direction in relation to the matter; and
>
> (b) consider any information provided to it by the EPA under section 149G; and
>
> (c) act in accordance with subsection (2), (3), (4), (5), (6), or (7), as the case may be.
>
> ...
>
> (4) If considering a matter that is a notice of requirement for a designation or to alter a designation, the Court—
>
> (a) must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority; and
>
> (b) may-
>
> (i) cancel the requirement; or
>
> (ii) confirm the requirement; or
>
> (iii) confirm the requirement, but modify it or impose conditions on it as the Court thinks fit; and

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[17] Refer also *Stark v Auckland Regional Council* [1994] NZRMA 337 (HC) at 340.

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

...

[65] The reference at subs (4) to s 171(1) incorporates the criteria ordinarily applicable to designation processes.

[66] The key criteria in s 171 are as follows:

> **171 Recommendation by territorial authority**
>
> (1A) When considering a requirement and any submissions received, a territorial authority must not have regard to trade competition or the effects of trade competition.
>
> (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.
>
> ...

[67] The power to cancel, confirm, or confirm but modify under s 149U(4)(b) mirrors the equivalent power enjoyed by the Environment Court under s 174(4) in respect of appeals from decisions of requiring authorities.

[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.[18] Indeed, in the event of conflict with the directions in s 171, Part 2 matters override them.[19] 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;[20] shall have regard to other matters specified at s 7 and shall take into account the principles of the Treaty of Waitangi.[21]

[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.

Part B

[71] QAC raises five separate questions of law, namely:

1. Did the Court wrongly interpret cl 3.9.9 and Table 3/1 of Civil Aviation Authority Advisory Circular AC139-6?

2. Is the minimum separation distance between a runway and a parallel

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18 See Briar Gordon and Arnold Turner (eds) Brookers Resource Management (looseleaf ed, Brookers) at 1-1470 and *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).

19 *McGuire* at 594.

20 Section 6.

21 Section 8.

taxiway for Code C aircraft (in the absence of an aeronautical study indicating that a lower separation distance would be acceptable) 93 metres or 168 metres on the true construction of AC139-6?

3. Did the Court err in failing to have regard to whether its conclusion that a parallel taxiway for Code C aircraft should be 93 metres from the runway would not be able to be implemented unless the Director of Civil Aviation found it to be acceptable after considering an aeronautical study?

4. Did the Court err in directing QAC as to the purpose for which land within the existing aerodrome designation can be used?

5. Did the Court err in holding that there needed to be a nexus between QAC's NOR objective and the provision for an instrument precision approach runway at Queenstown Airport?

The CAA standards

[72] The underlying and critical issue in relation to the first three questions is whether the Environment Court could impose conditions based on an interpretation of Civil Aviation Authority (CAA) standards for separation distances that ultimately might prove to be erroneous and thereby disenable the efficient operation of the designation. The significance of this and the separation distances is shown by an illustration produced by Mr Gardner-Hopkins. I attach this to the judgment as Annexure B.[22] It will be seen that the overall space requirement increases from 119m to 194m, depending which separation distance for Code C aircraft is adopted. If the latter separation distance applies, then a considerably larger encroachment into RPL's land might be needed. I propose to resolve this issue first.

[73] Mr Gardner-Hopkins submits that the Environment Court had no option but to assess the effect of the standards because they drove the land requirements of the

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[22] Mr Kirkpatrick disputed the subtitle references to "Non Precision" and "Precision", but otherwise consented to the production of Annexure B.

airport. Significantly QAC's counsel, having taken expert advice accepted in the Environment Court that 93m was a sufficient separation distance between the main runway and the parallel taxiway under the standards for Code C aircraft. There was therefore no other basis upon which the Environment Court could resolve the factual evaluation of QAC's land requirements. It was an evaluation of agreed fact and one that is not amenable to challenge in this Court.

[74] Mr Kirkpatrick immediately accepts that he must resile from the position he adopted in the Environment Court. He accepted the evidence of Mr Morgan that the appropriate separation distance for Code 4/C aircraft is 93m and that the Environment Court relied on that evidence (being the only evidence available to it). However he submits that immediately after the interim decision was released he advised the Court of the potential difficulties with Mr Morgan's and the Court's assessment, namely that the CAA might insist on a greater separation distance with the result that a key component of designation would be disenabled, as QAC would not have sufficient land to make a parallel taxiway. He says that the requisite separation distance could be as much as 168m. He contends that there is no bar to counsel seeking to resile from a concession where it is in the interests of justice to do so.

[75] Mr Kirkpatrick also submits that the interpretation of the standards is an assessment of law, not fact. In short, he says that the Court is engaged in an assessment of the separation distance required by law, but that the jurisdiction to make that assessment is reposed with the Director of CAA.[23]

Assessment

[76] I agree with Mr Kirkpatrick that the efficacy of the separation distance of 93m is dependent on the approval of the Director of Civil Aviation. If s/he does not approve the 93m separation distance and requires a greater separation distance, a key component of the designation works cannot then be enabled. A condition with that disenabling effect cannot be lawful unless it is the product of a thorough evaluation

[23] Civil Aviation Rule 139.51(c).

in terms of s 171, because it is, in substance, a condition derogating from the grant.[24] Regrettably, the Environment Court did not appear to turn its mind to the potentially disenabling consequences of a 93m limitation prior to the interim decision. Accordingly, the Environment Court did not discharge its duty to consider the effects of the designation in terms of s 171.

[77] In saying this there can be no criticism of the Environment Court. It logically assumed that the proper separation distance was 93m given the agreement of all parties. Ordinarily I would refuse to grant relief in circumstances where the Environment Court has proceeded to a decision on an agreed factual basis. But here the impugned spatial limitation might preclude a significant component of the designation activity and therefore render nugatory a key enabling justification for it. In the absence of the assessment of the effects of this potentially significant outcome, the decision is flawed.

[78] It is also reasonably apparent that Mr Kirkpatrick was agreeing to the evidence about separation while focused on Code D rather than Code C aircraft. Further, he sought to have the matter addressed by the Environment Court prior to the final decision, but the Court ruled that it had already decided the evidential issue. But with respect to the Court's reasoning on this, the Court had not, on the face of the decisions, assessed the significance of the disenabling effect of a negative decision from the Director of Civil Aviation. Whatever the Court's finding of fact or law about the standards, that evaluation needed to be made. Against a backdrop where we are dealing with a project of national significance, this 'error' is significant.

[79] Given the foregoing it is not necessary for me to address the interpretation of the standards and I refuse to do so. In short, there are major problems with this Court, on an appeal under the RMA, purporting to inquire into the interpretation of the standards that must still ultimately be applied by the Director of Civil Aviation. It quickly became abundantly apparent to me that the interpretation of the standards would need to be premised on a sufficient understanding of their practical effect, in

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[24] As to the principle of non derogation refer *Tram Lease Ltd v Croad* [2003] 2 NZLR 461 (CA) at [24].

context, and the interrelationship of the various standards. It appears from submission from the Bar that they are disputable matters and that the Court would be assisted by expert evidence on them. Normally on an appeal like this I would have the benefit of a detailed discussion about the key issues in the decision of the Environment Court, or in terms of my supervisory jurisdiction, an assessment from the Director. I have neither. Furthermore, whatever I say here could not bind the Director, or if it could, runs the risk of usurping the statutory function reposed in the Director and then without the benefit of the Director's assessment of those standards in context.

Existing rights

[80] Questions 4 and 5 relate to the effect of the modified designation on existing rights. Mr Kirkpatrick initially claimed that the Court incorrectly altered the scope of the existing designation by purporting to exclude the potential for instrument precision approaches. He says that the present NOR did not seek to revisit any existing grant. Therefore while the Court could refuse to enlarge the designation to enable an instrument precision approach, it could not thereby extinguish an existing right to pursue that course if QAC deems it feasible to do so in the ordinary operation of its business. He says that the Court was also wrong to resolve there was no nexus between the instrument approach and the objective of the NOR to the extent that this might preclude such an approach in the future.

[81] On closer examination Mr Kirkpatrick accepted that observations made by the Court about nexus and necessity did not translate into conditions or limitations on the internal operations of the Airport.

Assessment

[82] The decision is not purporting to limit the internal operations of the Airport in any material way beyond the existing limits of the current designation and the extent of the designation area. I was not taken to any changes to the designation that had this effect. I do not think therefore that there is anything against which to attach the points of law raised for the purpose of relief. In short, the points of law do not call for a remedy so I see no need to address them.

Part C

[83] RPL claims that the Environment Court acted outside its jurisdiction by purporting to cancel part only of the NOR. It also raises the following questions of law:

1. Should the term 'requirement' in s 168(2) of the Act be defined as meaning 'essential'?

2. Should the term 'requirement' in s 168(2) of the Act be construed in light of s 40 of the PWA?

3. Is the principle of fairness and equitable issues (estoppel) relevant under s 171(1)(d)?

4. Should the duty under s 16 of the Act have formed part of the Court's assessment of alternative locations for FATOs (Final Approach and Take Off)?

5. Did the Court fail to consider relevant alternatives under section 171(1)(b) of the Act?

6. Should the Court have given weight to the absence of any assessment by the QAC of alternatives raised by RPL and Air New Zealand Limited (ANZL) under section 171(1)(b) of the Act?

7. Would a strict application of the "reasonably necessary" test necessitate a determination of the best site for the works?

8/9. Having found that it should reject land required for works associated with a Code D taxiway and a precision approach runway, did the Court subsequently err in:[25]

[25] Items 10.8 and 10.9 of the appeal were consolidated and recast as above.

(i) Finding that the QAC had given adequate consideration to alternatives (section 171(1)(b))?; and

(ii) Finding that the remainder of the works were reasonably necessary (section 171(1)(b))?

10. Did the Court err in determining that the NOR was efficient in the absence of any cost benefit analysis?

11. Does the inconsistency between the QAC's position at the hearing that it could undertake the work and meet the NOR's objective on 8.07 ha of land and the content of its High Court appeal and Public Works Act Notice render the NOR hearing process unfair?

12. Did the Court err by including an existing substation within the land to be designated for airport purposes?

Jurisdiction and procedural fairness

[84] On the question of jurisdiction under s 149U(4) Mr Somerville QC submits:

(a) The Court decided to cancel part and to confirm part of the NOR (refer interim decision cited at [15] above);

(b) Referring to *Takamore Trustees v Kapiti Coast District Council*[26] s 149(U)(4)(b) empowered the Court to cancel or confirm or confirm with modification but it does not expressly empower the Court to mix and match these alternatives;

(c) The scale of the cancellation (a 50% reduction) logically precludes confirmation of the balance – the NOR has been altered so fundamentally that even QAC says that the balance will not achieve the stated objective of the NOR;

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[26] *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC) at [37]-[38].

(d) The Court erroneously relied on *Bungalo Holdings Limited v North Shore City Council*[27] to the effect that the Court had jurisdiction to reduce the scale of the proposed designation when that decision concerned the scope of the discretionary assessment under s 171, not the power to grant relief under s 174;

(e) Part cancellation carries the risk of procedural unfairness in that affected persons may have challenged the altered NOR and did not do so;

(f) There being no power to confirm part only of the NOR, that part of the decision may be set aside without the need to refer the decision back to the Environment Court.

Assessment

[85] I do not accept that the interim decision to cancel part only of the NOR was flawed for want of jurisdiction for the following reasons.

[86] First, the meaning of s 149U(4)(b) from its text and in light of its purpose is reasonably clear.[28] The power to "modify it or impose conditions on it as the Court thinks fit" literally and logically includes the power to modify the scale of the NOR as occurred here; and there is no obvious reason to read down those words to preclude a reduction in scale.[29] This interpretation better serves the overt scheme of the requiring provisions to enable necessary works with appropriate effects, having regard to the criteria expressed at s 171. Further, a flexible power to modify will, in my view, better enable decision makers to carry out their functions in a manner that is consistent with the broad purpose of sustainable management. Conversely, a narrow interpretation of the power may unduly inhibit the capacity of functionaries to achieve that purpose.

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27 *Bungalo Holdings Limited v North Shore City Council* EnvC Auckland A052/01, 7 June 2001.

28 Interpretation Act 1999, s 5(1).

29 Cf by analogy see *West Coast Regional Council v Royal Forest & Bird Protection Society of New Zealand* (2006) 12 ELRNZ 269, [2007] NZRMA 32 (HC) (cited by Mr Gardner-Hopkins). See also *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) – the Privy Council said in the designation context that "a full right of appeal on the merits is contemplated" and the Environment Court had "wide powers of decision" at 595.

[87] Second, no legitimate question of procedural unfairness arises in this case – the scope of works and envelope of effects is substantially reduced as a consequence of the modification. The prospect of affected parties not having submitted because a much larger proposal was notified is, in my view, highly unlikely.

[88] Third, the reliance placed on *Takamore Trustees v Kapiti Coast District Council* by RPL is misplaced. The Court in that case was confronted with a submission that part of a road route could be cancelled and redirected with the result that an altogether different proposal from that notified would have been enabled. The observation of the Court therefore that "cancellation of a significant piece of the NOR is well beyond modifying a proposal" is understandable, but altogether removed from the present facts. Unlike *Takamore*, the revised designation falls entirely within the envelope of the notified proposal.

[89] Finally, to the extent that the Court decided that the NOR was part cancelled, rather than modified, the error was not sufficiently material to warrant referral back. The difference in this context is semantic.

[90] Accordingly this ground of appeal is dismissed.

Essentiality, PWA, Best Option

[91] Questions 1, 2, 7, 8 and 9 concern the meaning of the terms "requirement" and "reasonably necessary". I deal with them together.

[92] Mr Somerville submitted:

(a) The Environment Court erred when it held that "requirement" under s 168 and the phrase "reasonably necessary" under s 171 meant something less than essential (refer [94]).

(b) Given that the NOR was a precursor to compulsory acquisition of private land, the Court should have instead adopted a narrow meaning of requirement or reasonably necessary, namely essential as this would accord with the common law approach to interpretation where

property rights might be subject to the coercive powers of the State.[30]

(c) The Environment Court further erred by refusing to interpret the meaning of "requirement" in the same way as the term require or required has been interpreted under s 40 of the PWA.[31]

(d) The requiring provisions of the RMA and the acquisition powers under the PWA touch and concern the same underlying subject matter and should be applied consistently. And, as the Court of Appeal said in *Seaton* (not overruled on this point), s 24(7) of the PWA provides an appropriate guide to the legislative policy in terms of decision making involving derogation from and the taking of property for public purposes.

(e) Furthermore, with the rejection of the requirement for a precision runway and Code D aircraft taxiway, the taking of private land is not reasonably necessary in the sense of essential.

Assessment

[93] The language of "requirement" and "reasonably necessary" in ss 168(2) and 171(1)(c) (and in s 24(7) of the PWA) are standards used in everyday language. They should require no undue elaboration. But in the present context, involving the coercive powers of public authorities for public purposes, the words "requirement" and "reasonably necessary" are statutory indicia that any proposed works must be clearly justified by reference to the objective of the NOR. This aligns with the threshold identified by the Court of Appeal in *Seaton* when dealing with the concept of "required" and given the prospect of compulsory acquisition.[32] Whether the scope of the NOR is clearly justified, in context, is of course a question for the Environment Court.

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30 Referring to *Edmonds v Attorney-General* HC Wellington CIV 2000-485-695, 3 May 2005; *Deane v Attorney-General* [1997] 2 NZLR 180 (HC).

31 Referring to *Minister for Land Information v Seaton* [2012] 2 NZLR 636 (CA).

32 *Minister for Land Information v Seaton* [2012] 2 NZLR 636 (CA) at [31]. Note the substantive decision of the Court was overturned by the Supreme Court, but these observations were not tested or criticised. See *Seaton v Minister for Land Information* [2013] NZSC 42.

[94] The Environment Court adopted what might be called the orthodox threshold test of reasonably necessary namely:[33]

> In paragraph (c), the meaning of the word 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.

[95] The inbuilt flexibility of this definition enables the Environment Court to apply a threshold assessment that is proportionate to the circumstances of the particular case. This is mandated by the broad thrust of the RMA to achieve sustainable management and the inherently polycentric nature of the assessments undertaken by the Environment Court. Provided therefore that the Environment Court was satisfied that the works were clearly justified, there was no error of law in applying this orthodoxy.

[96] I acknowledge that in *Seaton* the Court of Appeal used the concepts reasonably necessary and essential interchangeably.[34] I also accept that a NOR that will derogate from private property rights calls for closer scrutiny.[35] Further, I think that the Environment Court was mistaken when distancing the PWA from the designation powers under the RMA. Both statutes deal with the coercive powers of public authorities to derogate from private property rights. They should be interpreted in a consistent way. This suggests that the Environment Court erred by adopting a threshold test of falling between essential and desirable. But the Environment Court's rejection of RPL's submission that "requirement" and "reasonably necessary" mean "essential" must be understood in the sense that the Court was using that word. As Mr Kirkpatrick highlighted, the Court equated "essential" with the proposition that the "best" site must be selected.[36] And I agree with him that this would set the test beyond the required threshold of "reasonably" necessary. Indeed to elevate the threshold test to "best" site would depart from the everyday usage of the phrase "reasonably necessary" and significantly limit the capacity of requiring authorities to achieve the sustainable management purpose. If

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33 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [51].

34 *Minister for Land Information v* Seaton [2012] 2 NZLR 636 (CA) at 644-645.

35 *Deane v Attorney-General* [1997] 2 NZLR 180 (HC); and is to be distinguished from planning regulation simpliciter: *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC); *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112.

36 *Re Queenstown Airport Corporation Limited* [2012] EnvC 206 at [94].

that was the intention of Parliament then I would have expected express language to that effect (as it has done in relation to s 16 and the duty to use the "best" practicable option for noise mitigation).[37] I therefore discern no error in the Court's adoption of a threshold test that falls below this benchmark.

[97] If I then turn to the substance of the Court's assessment, it is evident that the Court carefully evaluated whether the works were clearly justified. In this regard, the Court was aware that NORs that affect private property must be afforded "less tolerance".[38] I also agree with Mr Kirkpatrick that the various passages of the judgment illustrate that the Court sought clear justification for the scope of the NOR.[39] And it is important to view the judgment as a whole. When this is done, very careful consideration was plainly given to whether the works were justified.

[98] Accordingly, I see no definitional flaw of substance. This ground also fails.

Fairness and substantive legitimate expectation

[99] Question 3 concerns the relevance of fairness in designation proceedings. Mr Somerville contends:

(a) The Environment Court erroneously did not consider the unfairness to RPL resulting from a NOR, deeming it to be irrelevant as a matter of law and factually (refer [54]-[55]).

(b) Fairness is a mandatory relevant consideration as a matter of common law principle, and at the very least is a relevant consideration under s 171(1)(d).

(c) The previous dealings between RPL and QAC involved land transfer and other agreements concerning the use of the land now subject to the NOR, including the following clauses:[40]

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37 Refer also to discussion in *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) at [118]-[120].

38 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [94].

39 For example at [112]-[115], [139]-[142], [226], [236].

40 Deed Settling Resource Management Issues Between Queenstown Airport Corporation Limited

> 3.3 The land transferred to RPH pursuant to clauses 3.1 and 3.2 and other RPG holdings shown on Figure 6-1R and Figure 6-3R referred to below, shall not thereafter be the subject of any claim or requirement by QAC other than Air Noise Boundary and Airport Approach and Land Use Controls and aerodrome purposes designations/requirements QAC needs to maintain for the continuing operation of Queenstown Airport in accordance with agreed present and future layout.
>
> ...
>
> 6.3 RPG shall after the land exchange, utilise the buffer land only for rural and/or recreational uses and infrastructural utilities not of a noise sensitive nature in terms of NZS6805. ... This limitation shall be the subject of a registrable restrictive covenant in favour of QAC which shall enure during the life of this airport at its present location. The term "recreational uses" expressly allows for provision of a golf course and associated facilities.

(d) In a subsequent agreement, the parties agreed:

> 15.2 ... To the extent that the QAC's aerodrome purposes designation has not already been uplifted, QAC shall modify that designation to remove it from Areas A, B, C and D and all legally vested roads along with the other parcels of land described in clauses 3.3 and 6.4 of the 1997 deed.

(e) As a minimum, these dealings gave rise to a legitimate expectation on the part of RPL that QAC (as the requiring authority) and the Environment Court (as the confirming authority) would give due consideration to alternatives that did not involve the taking of RPL's land recently acquired from QAC as part of the transfer agreement.

(f) Contrary to the findings of the Environment Court, there was direct reference of the existence of the land transfer agreements and the reliance on them by RPL. For example RPL's submission stated:[41]

> 3.21 By way of background, it is important to note that the QAC exchanged land with RPL under a series of formal contractual agreements. This raises estoppel issues. The land now owned by the QAC on the northern side of the airport that it is seeking to rezone to enable urban activities

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and Remarkables Park Limited, October 1997.

[41] Refer also to the Statement of Evidence of M Foster at 7.6, Statement of Evidence of S Sanderson at 71, and transcript at Vol. 4 p 1156, Vol. 5 at 1405 and 1415, and see the covenant attached to the notice of requirement.

> was previously owned by RPL. RPL exchanged that land for much of the land that is now the subject of the QAC;s NOR. In short, QAC seeks to keep the land it acquired from RPL through the contractual agreements and take back the land it agreed RPL should acquire.
>
> 3.22 The land swap referred to above was part of a comprehensive zoning settlement including consent orders endorsed by the Environment Court, to which the QAC and the Queenstown Lakes district council was a party. The QAC is effectively seeking to unravel those agreements and zonings, despite previously consenting and committing to them. In doing so, the QAC is undermining a sustainable and integrated zoning pattern already endorsed by the Court.

(g) The finding also that the prospective use of QAC's land in preference to RPL's land was suppositious was, in light of the historical position up to 2010, not an available conclusion on the evidence.

(h) The reference to PC19, and the scarcity of industrial land, could not justify a finding that the use of QAC land was suppositious (refer [89] and [90]) – and the Court could not properly fill the gap left by QAC's assessment of alternatives with its own supposition about future use of QAC's land.

(i) The Environment Court's approach to s 24(7) and that the question of fairness need not be decided was flawed (referring to [55]).

[100] Mr Kirkpatrick submits that the key evidence relied upon by RPL was never produced to the Court and there are no findings of fact upon which I can reasonably graft a legitimate expectation. He says that the key cl 3.3 was not referred to at the Environment Court hearing and there is no evidence that QAC bound itself to exclude RPL's land from a future designation. He also says that to the extent that there was any contractual right of the nature claimed, it could not fetter the proper exercise of a statutory discretion; though he accepted that whether there was a proper exercise of discretion depended on the circumstances.[42] He also accepted that, if QAC did contract to avoid the use of RPL's land, that this might give rise to a legitimate expectation that RPL's rights would be considered before any final

[42] Citing *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA) at 548.

decision is made and that this might require an assessment of alternatives not involving RPL's land. He said however that in any event the alternatives were thoroughly considered, either before the NOR and during the Environment Court hearing.

[101] Mr Kirkpatrick also rejects the suggestion that assessment at s 24(7), namely whether the works are "fair, sound, and reasonably necessary", should be applied in the context of s 171(1)(b). He says that the Environment Court is bound, like all Courts, to securing fair process, and that substantive fairness is an element of sustainable management. He also accepts that the language used in both sections should be interpreted consistently. But that does not mean that the criteria expressed at s 171 are overlaid by the fairness and soundness assessments contemplated at s 24(7).

[102] As to the finding that the alternatives were "suppositious", Mr Kirkpatrick says this was a finding available to the Court (and I address the substantive issue below at [115]-[126]). The Court I am told also put various questions to Mr Foster concerning the issues confronting PC19 and provided the parties with an opportunity to comment. Therefore he says, no clear procedural unfairness arises.

Assessment

[103] This ground of appeal brings into focus the fairness of a requirement affecting RPL's land in light of QAC's previous dealings with RPL. RPL's basic contention is that it held a legitimate expectation that Lot 6 would not be used for aerodrome designation purposes, or if it is used, all alternatives not using RPL land would be thoroughly explored. The Court appeared to decline to entertain this argument because fairness is not an express criterion under s 171 and in any event there was no evidence to support a legitimate expectation.[43]

[104] The resolution of this appeal point is vexing because of the way it appears it was argued in the Court below by analogy to s 24(7) of the PWA and the focus of the

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[43] *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [54]-[55].

Court in light of that argument. Nevertheless I consider that the Court erred for the following reasons.

[105] Parliament will be presumed to legislate consistently with minimum standards of fairness, especially when dealing with coercive powers of the State.[44] Moreover, the scheme of the Act dealing with designations is purpose built to secure a fair outcome having regard to the broad criteria specified at s 171 and in light of Part 2, with full rights of participation and then appeal rights on points of law. Indeed, as the Privy Council stated in *McGuire v Hastings District Council*,[45] the jurisdiction of the Environment Court under the RMA is broad, with the administrative law jurisdiction of the High Court very much a residual one. The Environment Court therefore plays the key role in providing judicial oversight in relation to the designation process. The central issue therefore is not whether fairness is a mandatory relevant criterion (as per s 24 of the PWA) but whether fairness or any alleged unfairness is relevant to the evaluation under s 171 in the circumstances of the case. The Court erred because it did not address this central issue.

[106] As to whether RPL's claimed unfairness is prima facie relevant, the doctrine of legitimate expectation is also not new to resource management law. In *Aoraki Water Trust v Meridian Energy Ltd*[46] the High Court recognised that the doctrine of legitimate expectation might be applied in the RMA context.[47] The Court in that case was dealing with the expectation of water rights holders that the regional council would not derogate from their water rights grants unless specifically empowered to do so by the RMA.[48] The application of the doctrine will however depend entirely on the facts of the particular case. But a key ingredient is whether there has been reliance on an assurance given by a public authority, made in the lawful exercise of the authority's powers. If so, the affected person may legitimately expect compliance with that assurance subject only to an express statutory duty or

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44 Refer: Lord Steyn in *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC539 (HL) at 591.
45 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [25].
46 *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZLR 268 (HC).
47 At [39]-[42].
48 At [46].

power to do otherwise.[49] In the present case, that must mean satisfaction of the criteria expressed at s 171 and in particular at subs (1)(b) and (c), having regard to any relevant legitimate expectations, properly established. Fairness would then implore an outcome which is consistent with those expectations provided that the outcome met the statutory criteria and achieved the statutory purpose. Conversely, the Court, like QAC, cannot be bound to give effect to those expectations where to do so is inconsistent with the requirements of s 171.[50] In short the Court's jurisdiction, though wide, is framed by the scheme and purpose of the RMA.[51]

[107] Unfortunately the Court's substantive fairness assessment was diverted by the approach taken to the production of the contracts relied upon by RPL. The Court appeared to assume that it did not need to consider the contracts themselves based on submission of counsel. On closer inspection of the record I accept Mr Somerville's contention that the Court was not invited to "interpret" the contracts, there being no serious dispute about the key representations, but that they remained central to the assessment of unfairness.

[108] I also accept Mr Somerville's basic contention that the contracts were themselves evidence of reliance. In short, the contracts represented the exchange of mutually enforceable promises, for valuable consideration with consequences for breach. The contracts recorded land swaps, that future airport development would accord with agreed plans and not otherwise (and I understand no agreed plan was produced showing Lot 6 would be developed for aerodrome purposes), that QAC would withdraw the aerodrome designation from Lot 6 and that Lot 6 would act as a "buffer" zone, i.e. as between airport activities and RPL's activities. Also attached to one of the contracts were plans showing "potential Helicopter Area 7 Hectares" to the north of the main runway."[52] Effect was given to these contracts by the parties, including the imposition of a covenant over Lot 6 and the withdrawal of the aerodrome designation over Lot 6. I understand that these facts were not challenged.

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49 Refer *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

50 *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA).

51 Furthermore, the Environment Court does not have jurisdiction to examine the legality of the decision to notify a NOR. Any challenge to legality of QAC's decision to notify must still be brought by way of judicial review. *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112 at [38].

52 See transcript at 1406.

It is therefore at least arguable that on the face of the agreements it was the expectation of both parties that Lot 6 would remain a buffer zone.

[109] The outcome of all of this is that the Court never correctly assessed the claim based on legitimate expectation to the extent that it might be relevant to the s 171 evaluation.

[110] I deal with the materiality of this error below at [146].

Section 16

[111] Mr Somerville claims that the Court erred by not holding that s 16 applied as if it were an additional criterion. Section 16 imposes the following duty:

> **16 Duty to avoid unreasonable noise**
>
> (1) Every occupier of land (including any premises and any coastal marine area), and every person carrying out an activity in, on, or under a water body or… the coastal marine area, shall adopt the best practicable option to ensure that the emission of noise from that land or water does not exceed a reasonable level.
>
> (2) A national environmental standard, plan, or resource consent made or granted for the purposes of any of sections 9, 12, 13, 14, 15, 15A, and 15B may prescribe noise emission standards, and is not limited in its ability to do so by subsection (1).

[112] He said that it is commonsense to adopt an approach that is consistent to the performance of this duty, that is to take a best practical option approach to the assessment of alternatives for Final Approach and Take Off (FATO) locations. He said that while s 16 was not triggered in every case, it should have been in this case. RPL claims that sites on QAC's land are more likely to meet the best practicable option (BPO) requirement than the proposed sites on Lot 6.

Assessment

[113] I reject this ground. It is necessary to record the key part of the decision:

> [58] We hold section 16 is not to be applied as if it were an additional criterion to subsection (1)(a)-(d) of section 171. In some cases adopting the best practicable option may be useful check for the decision-maker,

particularly when assessing the adequacy of the alternatives under consideration, but not in every case.

[114] The refusal to apply s 16 as an additional criterion must be read together with the observation that "in some cases adopting the best practicable option may be useful check for the decision-maker". Plainly the Court considered whether the s 16 duty and BPO was relevant to the evaluative exercise and decided that it was not. For my part this is an orthodox approach to the assessment of effects. Moreover, the s 16 duty imposes a minimum BPO requirement in circumstances where the effects of the noise are not reasonable. It is not a duty that applies where the noise effects are reasonable to their context. Whether or not noise levels can be mitigated to reasonable levels is a matter for the Court to assess, and whether BPO is required to achieve those levels is an assessment of fact, in each case, for the Court. Accordingly, the Court made no error of law by not insisting on adopting a BPO approach to the assessment of alternatives.

Assessment of Alternatives

[115] Questions 5, 6, 8 and 9 raise concerns with the assessment of alternatives.

[116] Mr Somerville submits that:

(a) The Court erroneously rejected an alternative site involving QAC owned land to the north of the existing designation on the basis that it was suppositious.

(b) The Court should have given weight to the absence of an assessment of this alternative by QAC.

(c) Further, as two of the five major reasons for the designation have been rejected, the alternative assessment by QAC proceeded from a false premise.

(d) Similarly, as the modified position was never assessed as an alternative, it could not possibly satisfy the adequacy criterion at s 171(1)(b). This is linked to the issue of jurisdiction and fairness,

and the implicit requirement that any modification must be one of the assessed alternatives.

[117] Turning to the merits, Mr Somerville says that the finding that the alternative to the north was suppositious was not available to the Court on the evidence. In fact he said that background showed that until 2010 the land was considered as appropriate for expansion. He also says that the Court placed improper reliance on PC19 and the scarcity of industrial land in Queenstown, there being no evidence or submission on the relevance or significance of these matters. He said that the Court must have relied on its own knowledge of those matters, but never afforded the parties the opportunity to comment other than through some questions from the Court to RPL's witness, Mr Foster, about the nature of the aviation activities and whether they might qualify as industrial.

[118] He points to the language of s 171(1)(b) which specifically requires the Court to consider "whether adequate consideration has been given to alternative sites". Thus, he submits, by failing to give weight to the absence of the assessment by QAC of the merits of the use of its own land, the Court has not discharged this statutory duty under s 171(1)(b).

[119] Mr Kirkpatrick responds that the Court had before it various master plans, including proposals to use QAC land to the north and outside of the existing designation. Plainly therefore QAC had previously considered various alternatives, including the one now raised by RPL. He says that there was evidence on which the Court might find that expansion to the north was suppositious.[53] He accepts that the Court did not raise with the parties the significance of the scarcity of industrial land in light of PC19, but that Mr Foster was tested on the proposition that aerodrome uses include industrial activity. In any event, he says the Court made a detailed examination of the alternatives, including on sites to the immediate north and rejected them. He specifically referred me to [112]-[115] of the decision (noted above) to demonstrate the careful assessment undertaken of alternatives by the Court. There was therefore no failure in terms of s 171(1)(b).

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[53] See submissions of Mr Kirkpatrick at [25] in reply to RPL's submissions. Mr Kirkpatrick cited evidence of P West and B Macmillan.

Assessment

[120] It is important to commence this analysis by referring to the language of s 171(1)(b) relevant to this ground of appeal. The Environment Court was required to have particular regard to:

> "whether adequate consideration has been given to alternative sites... if ... the requiring authority does not have an interest in the land sufficient for undertaking the work..."

[121] The section presupposes that where private land will be affected by a designation, adequate consideration of alternative sites not involving private land must be undertaken by the requiring authority. Furthermore, the measure of adequacy will depend on the extent of the land affected by the designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.

[122] It is beyond doubt that the extent of private land subject to the proposed designation is significant. As notified 19 ha would be affected. The modified version still encompasses 8 ha. The Court had to be satisfied that the assessment of alternative sites was adequate having regard to this impact. There is authority however that a suppositious or hypothetical alternative need not be considered.[54] But given the statutory requirement to have particular regard to the adequacy of the consideration given to alternatives, it is not sufficient to rely on the absence of a merits assessment of an alternative or on the assertion of the requiring authority. Provided there is some evidence that the alternative is not merely suppositious or hypothetical, then the Court must have particular regard to whether it was adequately considered.[55]

[123] RPL insisted that the Court was required to assess whether adequate consideration was given to locating the general aviation/helicopter precinct on land north of the main runway, including the undesignated land owned by QAC and/or QLDC. The Court responded that this option was suppositious for the following reasons (repeated here for ease of reference):

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54 *Waitakere City Council v Brunel* [2007] NZRMA 235 (HC) at [29].

55 Cf by analogy, *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC) at [36] and [37].

> [89] Conceptual plans prepared by RPL for a general aviation/helicopter precinct north of the main runway included undesignated land owned by QAC within the area of PC19. Under these plans a general aviation/helicopter precinct would displace up to 4.52 hectares of industrial land within PC19. In proposing this option, RPL witnesses did not address the scarcity of industrial land within Queenstown (an important issue that PC19 *inter alia* seeks to address). There was some suggestion by the RPL planner, Mr M Foster, that aerodrome activities are industrial activities for the relevant activity areas within PC19.
>
> [90] We doubt Mr Foster's interpretation is correct and in the absence of any evidence in this proceeding or PC19 addressing the implications of an aviation precinct within PC19, particularly in relation to the urban form and function, we do not consider that PC19 land should be available as part of an alternative location. Activities relating to an aviation precinct appear to be outside those contemplated by the District Council when promulgating PC19.

[124] There are two immediate issues with this reasoning. First the Court introduces the scarcity of industrial land as a reason for rejecting QAC's land to the north of the designation. I am told that scarcity of industrial land was not mentioned in submissions or evidence and Mr Kirkpatrick said that reference to it cannot be found anywhere in the transcript. Second, the Court appears to shift the burden of demonstrating the efficacy of the suggested alternative to RPL in light of PC19. But the task of persuading the Court as to the adequacy of the consideration of alternatives always rested with QAC for the orthodox reason that QAC is seeking to persuade the Court that all relevant alternatives were adequately considered.[56]

[125] Having said all of that, as the Canadian Supreme Court said in *Housen v Nikolaisen*:[57]

> Appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole

[126] And, it is too easy to alight on isolated passages in a judgment and to dismiss the full evaluation undertaken by the Court, based on detailed information, including expert evidence, about the assessment (and efficacy) of the various alternatives.

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[56] Cf *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 (EnvC). And see *Ngati Maru Iwi Authority v Auckland City Council* HC Auckland AP18/02, 7 June 2002.

[57] *Housen v Nikolaisen* [2002] 2 SCR 235 at 250, cited with approval by the Supreme Court of the United Kingdom in *McGraddie v McGraddie* [2013] UKSC 58.

[127] In this regard, the judgment also refers to reports produced in 2005, 2006, 2007 and 2008 considering sites for a new general aviation/helicopter precinct located within the existing aerodrome designation north of the main runway. The 2005 Master Plan expressly rejects such a precinct within Lot 6. It then records that QAC's advisor recommended in a 2007 report that general aviation flight-seeing operations be grouped north of the main runway.[58] However, in 2010, QAC's advisor changed its recommendation, concluding that a north-east precinct "is distinctively inferior".[59] While this north-east precinct appears to be located within the existing designation (and so is not synonymous with RPL's suggested alternative), it identifies problems with a northern location as distinct from a southern location and relevantly that: [60]

> ... the southern site would not require helicopters or fixed wing to cross runway 23/05 when departing to the south or east (a very common flight path), if departing north or west from the proposed northern site, it appears aircraft would still need to track south initially (crossing the main runway....

[128] The point of this observation is not to shore up an alleged deficiency in QAC's or the Court's assessment, but to illustrate with one example the detailed information before the Court and the reason why this Court must be slow to interfere with findings of fact by telescope.

[129] Problematically however, the Court identified "scarcity of industrial land" and PC19 as a key reason for treating the site to the north as suppositious. As there was no evidence about this, and no argument directly addressing its merits, the Court fell into procedural, if not substantive error. It may be that the Court treated scarcity of industrial land in Queenstown as a matter of uncontroverted fact.[61] Certainly recent decisions of the Environment Court and this Court about PC19 refer to the significant need for industrial land in Queenstown.[62] And the Court could not be criticised for referring to PC19 as it was a mandatory relevant consideration.[63] But

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58 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [76]-[81].

59 At [86].

60 Refer Assessment of Environmental Effects, 5.3.4; and Appendix T.

61 While the Environment Court is not strictly bound by rules of evidence, the capacity to take into account uncontroverted facts is allowed by s 128 of the Evidence Act 2006.

62 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817 at [25]; *Foodstuffs (South Island) Ltd v Queenstown Lakes District Council* [2012] NZEnvC 135 at [563].

63 Section 171(1)(a)(iv) and s 43AAC.

RPL should have been invited to submit on the factual issue of scarcity if it was going to be the reason for rejecting RPL's alternative site as suppositious. As a minimum, and in the absence of any party raising the issue of scarcity of industrial land, RPL was entitled to notice of the Court's conclusions about that issue before it was used as a reason to reject RPL's objection. While I would ordinarily afford the Court a significant amount of latitude for the reasons mentioned at [125]-[126], an issue of procedural justice arose when the Court resolved a substantive issue relying on its own knowledge and without notice to the parties.[64]

[130] Accordingly the appeal on this point is allowed. I deal with materiality and relief below. It must be considered in light of my findings on the question of fairness.

Cost benefit analysis

[131] Mr Somerville submits that the Court erred by determining that the NOR was efficient in the absence of a cost benefit analysis.

[132] There is nothing in the language of ss 7(b) or 171(1)(b) that imposes a legal duty on the requiring authority to prepare a cost benefit analysis or requires the Court to consider a cost benefit analysis. As the Court noted, such an analysis may be very helpful and the failure to do one may mean that the Court finds that the assessment of efficiency and/or alternatives is inadequate. But rarely will the failure of the Court to require a cost benefit analysis amount to an error of law. Indeed the full High Court in *Meridian Energy Ltd v Central Otago District Council* considered that the Environment Court erred by requiring a cost benefit analysis.[65] Moreover, it is inherently part of the evaluative function for the Environment Court to determine whether there has been adequate consideration of alternatives or whether the proposal is an efficient use of resources and whether there is a sufficient basis to draw a robust conclusion. In short, the assessment of efficiency and/or alternatives is essentially an assessment of fact, on the evidence, not readily amenable to appeal on a point of law.

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64 Cf *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 NZLR 513 (PC) at 522.

65 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) at [116].

[133] Mr Somerville's submissions sought to distinguish leading authority eschewing the requirement to assess the viability of a project. The submissions also sought to distinguish the observations of the full High Court about cost benefit analysis in *Meridian*. I readily accept the proposition that the case law dealing with viability has nothing to do with cost benefit analysis. Viability is essentially concerned with profitability and the Courts in this context have never been concerned with profitability.[66]

[134] Cost benefit analysis is however concerned with quantifying, in economic terms, whether the costs of a proposed use of a resource exceed the benefits of that use. It is therefore a recognised method for assessing efficiency and/or the relative merits of alternatives, especially in circumstances where the ordinary operation of the market to achieve allocative efficiency cannot be assumed. But, as to the requirement to undertake a cost benefit analysis, the Court in *Meridian* observed:

> [111] Parliament has not mandated that the decisions of consent authorities should be "objectified" by some kind of quantification process. Nor does it disparage, as a lesser means of decision making, the need for duly authorised decision-makers to reach decisions which are ultimately an evaluation of the merits of the proposal against relevant provisions of policy statements and plans and the criteria arrayed in Part 2. That process cannot be criticised as "subjective". It is not inferior to a cost-benefit analysis. Consent authorities, be they councillors, commissioners or the Environment Court, and upon appeal the High Court Judges, have to respect that reality and approach decision making in accordance with the process mandated by the statute. It is not a good or bad process, it simply is the statutory process.

[135] I do not think this reasoning can be readily distinguished, as it is a general statement of principle about the functioning of the RMA. To that extent, it remains apposite to this case. However, unlike s 7(b), the Court under s 171(1)(b) must decide whether "adequate" consideration has been given to alternatives. It may be that a Court might find that the assessment was inadequate without a cost benefit assessment. But whether that is so is an evaluative matter for the Court and is not a mandatory requirement in every case.

[136] I have also reviewed the reasons given by the Environment Court in relation to cost benefit analysis, and I cannot identify any obvious flaw that might warrant

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66 *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

further investigation by me or suggest a reviewable error of law. Quite the opposite, the Court assembled the information available to it, examined key considerations of operational efficiency and externalities, and formed a conclusion that was available to it on the evidence.[67] Accordingly, there being no general or specific duty at law to require a cost benefit analysis, this ground of appeal must fail.

Inconsistency of position

[137] Mr Somerville submits that QAC advised the Court that 8.07 ha was sufficient to enable it to undertake its operation, yet it has now sought to exercise powers of acquisition for 15 ha under the PWA. He says the Court relied on the QAC's representation in finally resolving that the modified position was appropriate. He therefore contends that had it known that in fact QAC needed more than 8.07 ha, the Court would have had to cancel the designation in its entirety, because it would not then have had a sound basis for the grant of a designation affecting that land.

[138] Mr Kirkpatrick responds that the PWA process was triggered to provide surety that, in the event that QAC was successful in this appeal, it could acquire the land it needed. He says there is no need to have the designation in place before commencing the PWA procedures. He also indicated that QAC would not seek to complete the PWA process without first having resolved the final scope of the designation.

Assessment

[139] I reject this ground. I do not accept that QAC represented to the Court that 8.07 ha was sufficient. I have the transcript of the relevant passage. I will not lengthen this judgment by quoting it. In short, Mr Kirkpatrick plainly indicated to the Court that compliance with Civil Aviation Authority standards might demand a greater amount of land to accommodate Code C aircraft. He simply confirmed that 8.07 ha was sufficient for general aviation and helicopter aircraft.[68] Accordingly there is no inconsistency of position.

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[67] *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [226], [235] and [236].
[68] Transcript at pp 1419 and 1420.

The substation

[140] Question 12 deals with the inclusion of a substation within the designation. RPL is concerned to ensure that the substation is not affected by the designation, presumably as it is useful infrastructure. Mr Somerville submitted that the substation was beyond the designation boundary.

[141] Mr Kirkpatrick says that it is simply efficient to include the substation within the designation because of access issues. But there is no intention to affect its usual operation.

[142] I was not taken to the original designation to understand its areal extent. But assuming the substation was not contained within the literal boundary of the notified designation, Mr Kirkpatrick advises that there was a great deal of evidence about the substation, so plainly RPL had an opportunity to deal with any prejudice to it. Mr Kirkpatrick also advises that if the substation is relocated before any works are undertaken in respect of the designation, then it may be possible to re-align the boundary of the designation.

[143] To the extent therefore that there might be an issue arising out of the areal extent of the notified designation (which is not clear to me), I do not consider that a material issue of law arises warranting relief given the representations made by Counsel for QAC in its written submissions.[69]

Part D – Outcome

[144] I have identified the following errors (in summary):

(a) The Environment Court did not have regard to the potential disenabling effect of a maximum separation distance of 93m between the main runway strip and the taxiway;

(b) The Environment Court incorrectly excluded fairness as an irrelevant consideration;

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[69] See paragraphs 65-67 of outline of submissions on behalf of QAC in reply to RPL.

(c) The Environment Court did not correctly assess RPL's claims based on legitimate expectation;

(d) The Environment Court did not provide RPL with an opportunity to address the issue of scarcity of industrial land and its relevance or otherwise to the adequacy of the assessment of alternatives under s 171(1)(b).

[145] The first error, raised by QAC, is plainly material. If the Director of Civil Aviation does not approve the 93m separation distance, there may be insufficient land subject to the designation to enable both a Code C taxiway and a general aviation precinct. A key justification for the designation and its coercive effect over Lot 6 may then not eventuate. I cannot dismiss the prospect that the Court, properly apprised of this potentially disenabling effect, might allow more land to be subject to the designation or cancel the designation altogether rather than simply confirm the interim decision.

[146] The three remaining errors, raised by RPL, are interrelated. The central concern is that the Environment Court, by rejecting the relevance of fairness and RPL's asserted legitimate expectations, did not properly frame the alternatives or reasonableness assessment. The Court proceeded on the assumption that it could treat RPL's suggested alternative as suppositious even though the contractual background envisaged that QAC's land to the north might be used for aerodrome expansion, and while RPL's land to the south would remain a buffer zone. Yet there is at least an arguable case that RPL could legitimately expect that Lot 6 would remain a buffer zone, and/or alternatives not involving RPL's land would be thoroughly explored before the decision to designate was notified or confirmed. As a minimum RPL could expect that clear justification for using Lot 6 would be established prior to confirmation.

[147] One real difficulty for RPL is that the Environment Court has closely assessed the effects of the NOR in light of the criteria at s 171 and found clear justification for it. To the extent therefore that there has been any unfairness in the process leading up to the issuance of the NOR, it could be said to have been

remedied by the subsequent Environment Court process. The tipping point however is that the Court referred to scarcity of industrial land to disregard RPL's alternative. RPL was never afforded the opportunity to address the scarcity of industrial land and whether that provided a proper basis for the Court's conclusion. This was procedurally unfair and compounded the failure to have regard to RPL's asserted expectations. I cannot foreclose the possibility that the Court might be persuaded that scarcity of industrial land is not a valid issue, or if it is, that scarcity was and is not a proper reason to foreclose consideration of RPL's alternative, especially in light of the previous contractual arrangements.

[148] I therefore allow the appeals in part, and refer the application back to the Environment Court to reconsider:

(a) Whether the requirement should be cancelled or modified after it has provided the parties with an opportunity to be heard in relation to the separation requirements for a Code C taxiway and the process for confirming those requirements.

(b) The assessment of the adequacy of alternatives and reasonable necessity under s 171(1) (b) and (c) after it has provided the parties with an opportunity to be heard in relation to RPL's legitimate expectation claims and the scarcity of industrial land.

[149] Beyond these specific directions, it will be for the Environment Court to determine how it proceeds to reconsider the above matters and any consequential relief that might follow, if any, including but not limited to further modification or cancellation of the designation.

[150] I note that none of the parties have sought to challenge the findings about the improbability of a precision runway and Code D aircraft. Nothing in this judgment or the relief granted affects those findings or the substantive reduction in areal extent of the designation based on those findings.

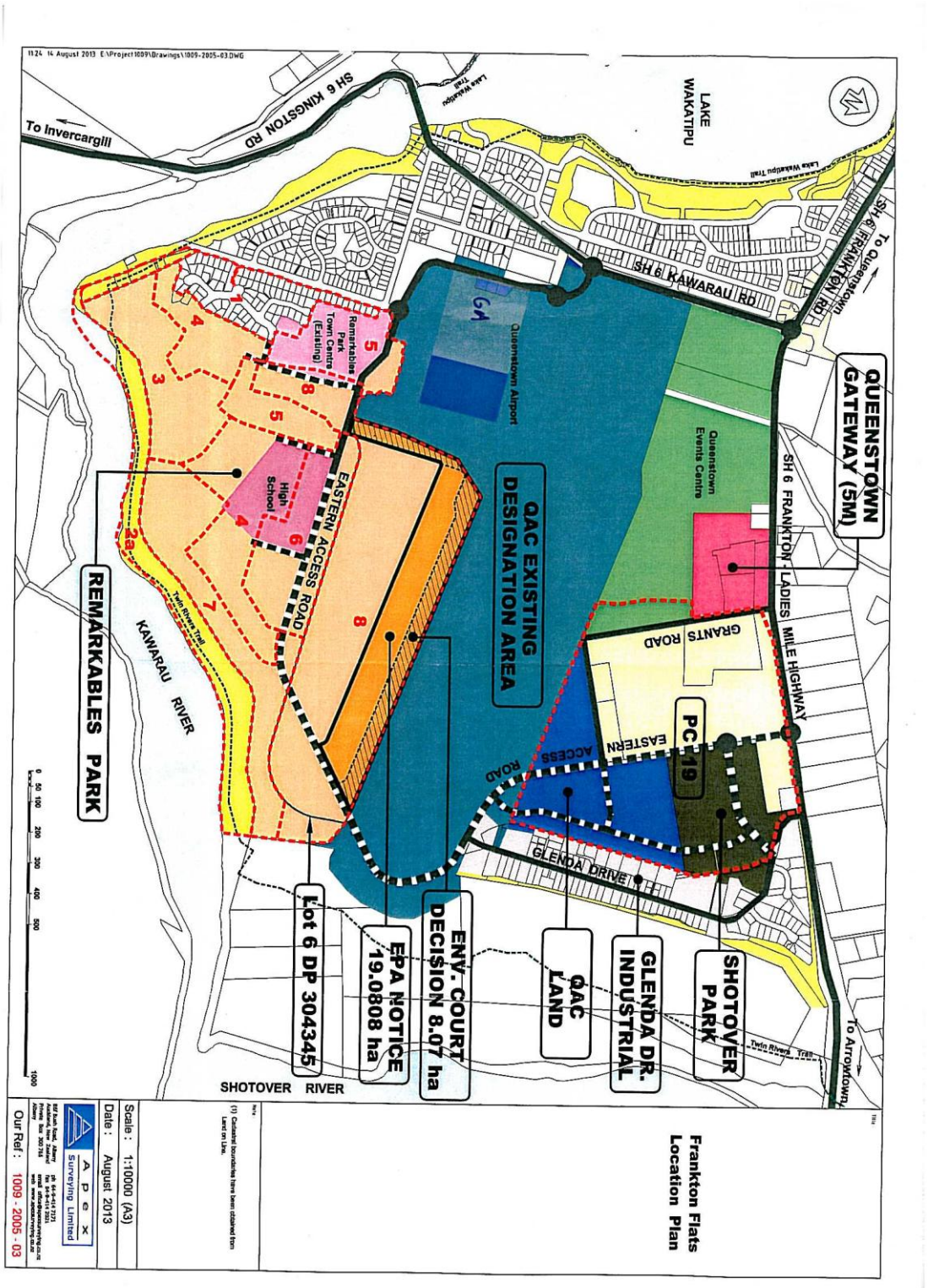
[151] Leave is granted to the parties to seek clarification of my orders if that is necessary. I will separately minute my availability in this regard.

Costs

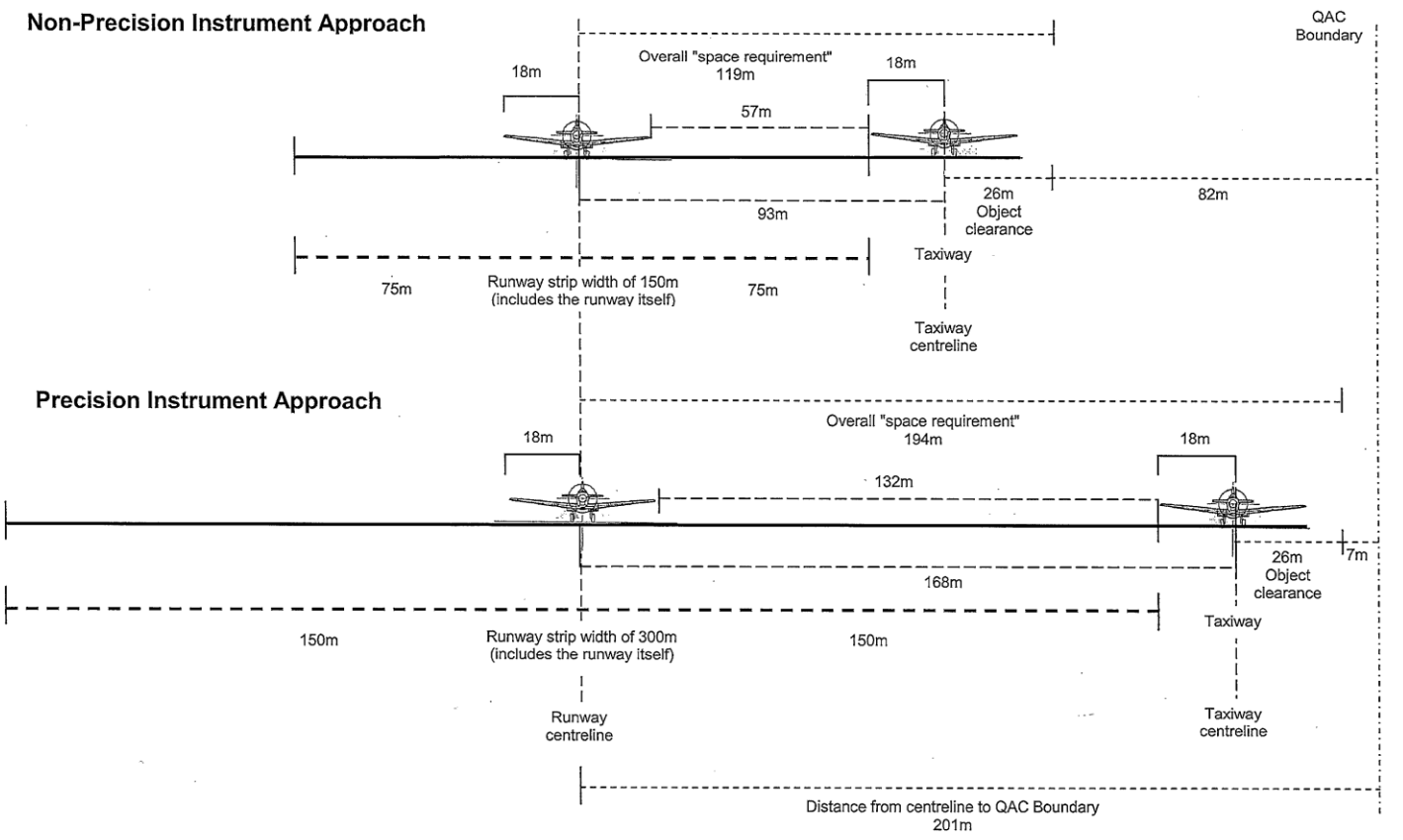
[152] Both appellants have had partial success on their appeals. I am minded therefore to let costs lie where they fall. If the parties do not agree they may file submissions, of no more than three pages in length.

Solicitors:
Brookfields, Auckland
Lane Neave, Christchurch
Russell McVeagh, Wellington

ANNEXURE A


QUEENSTOWN GATEWAY (5M)
QAC EXISTING DESIGNATION AREA
REMARKABLES PARK
SHOTOVER PARK
GLENDA DR. INDUSTRIAL
QAC LAND
ENV. COURT DECISION 8.07 ha
EPA NOTICE 19.0808 ha
Lot 6 DP 304345
PC 19
EASTERN ACCESS ROAD
GRANTS ROAD
LADIES MILE HIGHWAY
SH 6 FRANKTON RD
SH 6 KAWARAU RD
SH 6 KINGSTON RD
To Invercargill
To Queenstown
To Arrowtown
LAKE WAKATIPU
Lake Wakatipu Trail
Queenstown Airport
Queenstown Events Centre
Remarkables Park Town Centre (Existing)
High School
KAWARAU RIVER
SHOTOVER RIVER
Twin Rivers Trail
GLENDA DRIVE
Frankton Flats
Location Plan
Scale : 1:10000 (A3)
Date : August 2013
Our Ref : 1009 - 2005 - 03
Apex Surveying Limited

ANNEXURE B
SEPARATION DISTANCES FOR CODE C AIRCRAFT



2597650 v1

Queenstown Lakes District Council v Hawthorn Estate Ltd

Court of Appeal CA 45/05
14 March; 12 June 2006
William Young P, Robertson and Cooper JJ

Resource consent — Non-complying activity — Appeal on a question of law — Further appeal to Court of Appeal — Land use activity consent — Subdivision consent — Permitted baseline — Assessment of effects of proposed activity on the environment — Relevance of future environment on determination of resource consent application — Resource Management Act 1991, ss 2, 5, 6, 7, 8, 30(1), 31, 45, 56, 61, 66, 94, 104, 105, 123(b), 125, 271A, 308.

Hawthorne Estate Ltd applied to the Queenstown Lakes District Council for both subdivision and land use activity consent to subdivide and develop 33.9 ha of land in the Wakatipu Basin, near Queenstown. The council declined to grant resource consent for the non-complying activity. A key question which arose in relation to the assessment of the effects of the proposed activity on the environment was whether a consent authority should take account of the environment as it might be in the future, assuming that unimplemented resource consents would be given effect to in the future. The council argued that the assessment of effects should be limited to the environment as it existed at the time when the application was considered. On appeal the Environment Court set aside the council's decision and granted consent for the proposed activity. The decision of the Environment Court was upheld on further appeal to the High Court on a question of law. The council then obtained leave to pursue a further appeal to the Court of Appeal.

Held (dismissing the appeal)

1 The "permitted baseline" analysis was designed to isolate activities permitted by a district plan or activities which had been approved by the grant of resource consent, with the result that the effects of such activities should not be taken into account when assessing the effects of a proposed activity on the environment. The "permitted baseline" analysis was conceptually different from the question of whether the future environment should be considered when carrying out the assessment of effects on determination of a resource consent application (see paras [65], [66]).

2 There was no justification for borrowing the term "fanciful" from the "permitted baseline" cases to determine whether the future environment was relevant to determination of the resource consent application. That question could be determined in a practical way by receiving evidence about any resource consents granted by the consent authority in the past in relation to the surrounding area, and whether those consents were likely to be implemented. The possibility of "environmental creep", where successive consents were obtained in respect of the same site, did not result in such consents being disregarded from any assessment of the future environment notwithstanding the fact that later consents may have replaced earlier consents (see paras [74], [75], [77], [79]).

3 Having regard to consented activities as part of the future environment did not create a precedent for the approval of other activities, and cumulative effects arose in the context of a proposed activity not from other activities which might take place in the vicinity (see paras [80], [81], [82], [83], [84]).

Cases mentioned in judgment

Aley v North Shore City Council [1998] NZRMA 361.

Arrigato Investments Ltd v Auckland Regional Council [2001] NZRMA 481; [2002] 1 NZLR 323 (CA).

Bayley v Manukau City Council [1999] NZLR 568 (CA).

Dye v Auckland Regional Council [2001] NZRMA 513; [2002] 1 NZLR 337 (CA).

Fleetwing Farms Ltd v Marlborough District Council [1997] 3 NZLR 257.

Geotherm Group Ltd v Waikato Regional Council [2004] NZRMA 1.

O'Connell Construction Ltd v Christchurch City Council [2003] NZRMA 216.

Rodney District Council v Gould [2006] NZRMA 217.

Smith Chilcott Ltd v Auckland City Council [2001] NZRMA 503; [2001] 3 NZLR 473 (CA).

Wilson v Selwyn District Council [2005] NZRMA 76.

Appeal

This was an appeal by the Queenstown Lakes District Council from the judgment of the Environment Court setting aside a decision of the council declining a resource consent application made by Hawthorn Estate Ltd, the first respondent. The Court of Appeal gave leave to appeal on a question of law.

E D Wylie QC and *N S Marquet* for Queenstown Lakes District Council.

N H Soper and *J R Castiglione* for Hawthorn Estate Ltd.

The judgment of the Court was delivered by

COOPER J. [1] This is an appeal from a judgment of Fogarty J pursuant to leave granted by this Court under s 308 of the Resource Management Act 1991 (the Act).

[2] Fogarty J had dismissed an appeal by the Queenstown Lakes District Council and the second respondents against a decision of the Environment Court. The Environment Court had set aside a decision of the council declining a resource consent application made by the first respondent (Hawthorn).

[3] As a result of the Environment Court decision, Hawthorn was authorised to proceed to subdivide and carry out subdivision works on a property near Queenstown. Some 32 residential lots were proposed to be created.

[4] This Court gave leave for the following questions to be pursued on appeal:

1. Whether His Honour Justice Fogarty erred in law when he determined (either expressly or by implication):
   (a) that the receiving environment should be understood as including not only the environment as it exists but also the reasonably foreseeable environment;
   (b) that it was not speculation for the Environment Court to take into account approved building platforms in the triangle and on the outside of the roads that formed it;
   (c) that the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline.
2. Whether His Honour Justice Fogarty erred in law when he determined that the Environment Court had not erred in law in concluding that the landscape category it was required to consider was an "Other Rural Landscape".
3. Whether His Honour Justice Fogarty erred in law when he held that the Environment Court had not erred in law when it considered the minimum subdivision standards in the Rural Residential zone in addressing the first respondent's proposal which is in a Rural General zone.

[5] As was observed by the Court in granting leave, the questions are interrelated, and the answers to the second and third questions are in large part dependent on the answer to the constituent parts of the first. The main issue that underlies the appeal is whether a consent authority considering whether or not to grant a resource consent under the Act must restrict its consideration of effects to effects on the environment as it exists at the time of the decision, or whether it is legitimate to consider the future state of the environment.

[6] It was common ground that the three questions fall to be considered under the Act in the form in which it stood prior to the coming into force of the Resource Management Amendment Act 2003.

Background

[7] Hawthorn applied to the council for both subdivision and land use activity consent in respect of land in the Wakatipu Basin. The land comprises 33.9 ha, and is situated near the junction of Lower Shotover and Domain Roads, with frontage to both of those roads. It is part of a triangle of land bounded by them and Speargrass Flat Road, known locally as "the triangle".

[8] Hawthorn's development would subdivide the land into 32 separate lots, containing between 0.63 and 1.30 ha, together with access

lots, and a central communal lot containing 12.36 ha. The application also sought consent to the erection of a residential unit on each of the 32 residential sites, within nominated building platforms that were shown on plans submitted with the application. The proposal required consent as a non-complying activity under the operative district plan, and as a discretionary activity under the proposed district plan.

[9] There was an existing resource consent which allowed subdivision of the land into eight blocks of approximately 4 ha in each case. Those approved allotments contained identified building platforms.

[10] The Environment Court recorded that the whole of the land proposed to be subdivided is flat, apart from a small rocky outcrop. The Court observed that the triangle had been the subject of considerable development pressure over the past decade, and that within the 166 ha area so described, 24 houses had been erected, with a further 28 consented to, but not yet built. Outside of the roads that physically form the triangle were a further 35 approved building platforms. It is unclear from the Environment Court's decision whether any of those had been built on.

[11] In assessing the effects of the proposal on the environment for the purposes of s 104(1)(a) of the Act, a key question that arose was whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not yet implemented, were implemented in the future. The council had declined consent to the application and on the appeal by Hawthorn to the Environment Court argued that that Court's consideration should be limited to the environment as it existed at the time that the appeal was considered. That proposition was rejected by the Environment Court, and also by Fogarty J.

[12] Before we confront the questions that have been asked directly, we briefly summarise the reasoning in the decisions respectively of the Environment Court and the High Court.

The Environment Court decision

[13] The Environment Court held that the dwellings, and the approved building platforms yet to be developed by the erection of buildings, both within and outside the triangle, were part of the receiving environment. As to the undeveloped sites, that conclusion was founded on evidence that the Court accepted that it was "practically certain that approved building sites in the Wakatipu Basin will be built on". That conclusion, not able to be challenged on appeal, is critical to the arguments advanced in the High Court and in this Court.

[14] The Environment Court held that the eight dwellings for which resource consent had already been granted on the subject site were appropriately considered as part of the "permitted baseline", a concept explained in the decisions of this Court in *Bayley v Manukau City Council* [1999] NZLR 568, *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 and *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323. However, it rejected an argument by Hawthorn that landowners in the area could have a reasonable expectation that the council would grant consent to subdivisions that matched the intensity of

three other subdivisions in the triangle, for which the council had recently granted consent. Those subdivisions had an average area of 2 ha per allotment. Hawthorn had argued that the present development should be considered in the light of a future environment in which subdivision of that intensity would occur throughout the triangle.

[15] The Court rejected that proposition as being too speculative. Noting that all subdivision in the zone required discretionary activity consent, the Court observed that:

> [25] We have no way of knowing whether existing or future allotment holders will apply for consent to subdivide to the extent of two hectare allotments, nor whether they can replicate the conditions which led the Council to grant consent in the cases referred to by Mr Brown, nor at what point the consent authority will consider that policies requiring avoidance of over-domestication of the landscape have been breached. In general terms we do not consider that reasonable expectations of landowners can go beyond what is permitted by the relevant planning documents or existing consents.

[16] At the time that the appeal was heard before the Environment Court, there was both an operative and a proposed district plan. The Court's focus was properly on the proposed district plan, however, because the relevant provisions in it had passed the stage where they might be further modified by the submission and reference process under the Act. Under the proposed district plan (which we will call simply "the district plan", or "the plan" from this point), it was necessary for the Court to classify the landscape setting of the proposed development. The Court found that the appropriate landscape category was "other rural landscape". In doing so the Court rejected the arguments that had been put to it by the council and by parties appearing under s 271A of the Act that the proper classification was "visual amenity landscape". Both are terms used and described in the district plan.

[17] Once again, the Court's reasoning was based on what it thought would happen in the future. It held that the "central question in landscape classification" was whether the landscape "when developed to the extent permitted by existing consents" would retain the essential qualities of a visual amenity landscape. That would not be the case here, because of the extent of existing and likely future development of "lifestyle" or "estate" lots both in the triangle and outside it.

[18] The Environment Court then discussed the effects of the development on the environment. It found that the subdivision works would introduce an unnatural element to the landforms in the triangle, but that they would be largely imperceptible, and the landform was not one of the best examples of its type. In terms of visual effects, the Court concluded that, although the development could be seen from positions beyond the site, it would not intrude into significant views, nor dominate natural elements in the landscape. As to the effects on "rural amenity" the Court held that the position was "finely balanced", but after it identified and considered relevant district plan objectives and policies dealing with rural amenity, concluded that the development was marginally compatible with them.

[19] The Court also considered the proposal against relevant assessment criteria in the district plan. It found that the proposal would satisfy most of them. This part of the Court's decision required it to revisit under s 104(1)(d) of the Act matters already dealt with in the inquiry into effects on the environment under s 104(1)(a).

[20] One of the assessment criteria raised as an issue whether the proposed development would be complementary or sympathetic to the character of adjoining or surrounding visual amenity landscape. Another required consideration of whether the proposal would adversely affect the naturalness and rural quality of the landscape through inappropriate landscaping. The Court was able to repeat here conclusions that it had already arrived at earlier in its decision. In particular, it said that although the effects of the proposal on the retention of the rural qualities of the landscape were "on the cusp":

> . . . in the context of consented development on this and other sites in the vicinity the proposal is just compatible with the level of rural development likely to arise in the area.

[21] Having considered the objectives and policies of the district plan as a whole, the Court concluded that while the proposal was marginal in respect of some significant policies, it was supported by others. Consequently, it was "not contrary to the policies and objectives taken as a whole".

[22] In the balance of its decision the Court rejected an argument of the council that the decision would create an undesirable precedent. It considered the proposal against the higher-level considerations flowing from Part II of the Act, expressed a conclusion that the effects on the environment of allowing the activity would be minor, provided that there was a condition proscribing any further subdivision of the land, and then moved to the exercise of its discretion to grant consent under s 105(1)(c) of the Act. For present purposes it should be noted that the Court's conclusion that there would not be an undesirable precedent set by the grant of consent was expressly justified on the basis that the proposal had been comprehensively designed, and would provide facilities for the public that would link to other facilities in the triangle. The Court considered that it was difficult to imagine that another such comprehensive proposal could be designed for another location, given the "level of subdivision and building that has already occurred within the triangle". Further, the Court's conclusion that adverse effects on the environment would be minor was reached:

> [h]aving considered carefully the changes that will occur on the surrounding environment as a result of consents already granted and the "baseline" set by existing resource consents on the land . . . .

[23] So it can be seen that, in respect of the main issues that the Court had to decide, its reasoning in each case was predicated on the ability to assess the development against the future conditions likely to be present in the area.

The High Court decision

[24] The questions earlier set out particularise the challenged conclusions of Fogarty J. On the first issue, as to whether the receiving

environment should be understood as including not only the environment as it exists, but also the reasonably foreseeable environment, Fogarty J essentially adhered to his own reasoning in *Wilson v Selwyn District Council* [2005] NZRMA 76. He held in that case that "environment" in s 104 includes potential use and development in the receiving environment.

[25] Accordingly, the Environment Court had not erred when it took into account the approved building platforms both within and outside of the triangle. In para [74] of the judgment Fogarty J said:

> In my view the reason why the baseline analysis is abrupt is that the Court had no doubt at all that advantage would be taken of approved building platforms in this very valuable location. Mr Goldsmith's view was not challenged in cross-examination. Ms Kidson, the landscape witness for the Council, took into account that more houses would be built as a result of a number of consents.

[26] Fogarty J went on to observe that the Environment Court's approach did not involve speculation, and that the Court had rejected an argument that it should take into account the possibility of further subdivision as a result of possible future applications for discretionary activity consent. He observed that in that respect, the approach of the Environment Court was more cautious than that which he himself had taken in *Wilson v Selwyn District Council*.

[27] One of the questions that has been raised on the appeal concerns the adequacy of the Environment Court's consideration of the application of what has come to be known as the "permitted baseline". Although that expression was used by Fogarty J in para [74], we doubt that he was using the term in the sense that it is normally used, that is with reference to developments that might lawfully occur on the site subject to the resource consent application itself. Rather, Fogarty J appears to have used the expression to refer to the likely developments that would take place beyond the boundary of the subject site, utilising existing resource consents. Nothing turns on the label that the Judge used to refer to lawfully authorised environmental change beyond the subject site. However, it would be prudent to avoid the confusion that might result from using the term other than in its normal sense, addressed in *Bayley v Manukau City Council*, *Smith Chilcott Ltd v Auckland City Council* and *Arrigato Investments Ltd v Auckland Regional Council*. As we will emphasise later in this judgment the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to a resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment beyond the site.

[28] The second and third questions raised on the appeal have their genesis in particular provisions in the council's proposed district plan. Under the landscape classification employed by that plan, the Environment Court held that the receiving environment of the subject application should be regarded as an "other rural landscape". In a passage which again uses the expression "baseline" in an unusual context, Fogarty J said at para [76]:

> Mr Wylie argued that, although there was evidence before the Court on which it could conclude the landscape was Other Rural Landscape that it reached that decision after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. So he was arguing that the much earlier finding of Other Rural Landscape was affected by this same area of baseline analysis. As I do not think that there is any error of baseline analysis, this point cannot be sustained. It is, however, appropriate to comment on one detail in Mr Wylie's argument in case it be thought I have overlooked it.

[29] The Judge accepted Mr Wylie QC's argument that the Environment Court had considered their judgment regarding the effect of the proposal on rural amenity as finely balanced. Having observed that the Environment Court was an expert Court, was thoroughly familiar with the Queenstown area and skilled in the assessment of landscape values, Fogarty J said at para [79]:

> In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment *as it exists*, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on other rural landscape may be infected with an error of law, in a material way.

[30] The Judge had already decided that there was no such error of law, because it was proper for the Environment Court to consider the future state of the environment.

[31] Fogarty J also held that the Environment Court had not erred in assessing the proposed development by reference to the lot sizes permitted in the Rural Residential zone. Essentially, he held that this was a legitimate course to follow, because the site was located in an other rural landscape, which is the least sensitive of the landscape categories provided for in the district plan. Using terms that appear in the district plan itself, Fogarty J said at para [87]:

> Obviously different levels of protection of landscape value will depend on whether the proposed developments impact on romantic landscape, Arcadian landscape or other landscape. Reading the [plan] as a whole one would expect quite significant protection of romantic and Arcadian landscape. The degree of protection of other landscape, including Other Rural Landscape from any further development is less certain.

[32] He noted there were no minimum subdivisional allotment sizes for the Rural General zone. It was a zone that contemplated consents being granted for a wide range of activities provided they did not compromise the landscape and other rural amenities. The proposal had been designed to have a park-like appearance and would incorporate planting that would to some extent screen the development from neighbouring land use. He concluded at para [90]:

> Had the Court been proceeding on the basis of a classification of the landscape as Arcadian, considering Rural Residential Standards could well

> have been taking into account an irrelevant consideration. But where the Court considers that the Arcadian character of the landscape has gone and is dealing with a rural landscape already showing some kind of residential character, I do not think it can be said that an expert Court has fallen into error of law by looking at the standards in the rural living area zones, when exercising a judgment as to how to address a proposal which is a discretionary activity in the rural general zone of the [plan].

[33] Mr Wylie contends that in respect of all these determinations Fogarty J's decision was incorrect in law. We discuss the reasons that he advanced for that contention in the context of the questions that we have to answer.

Question 1(a) – the environment

[34] Mr Wylie's principal submission was that Fogarty J erred in holding that the word "environment" includes not only the environment as it exists, but also the reasonably foreseeable environment after allowing for potential use and development. The council contended that such an approach is not required by the definition of the word "environment" in s 2 of the Act, and that to read the word in that way would be inconsistent with Part II of the Act, in particular with s 7(f).

[35] Mr Wylie further submitted that a purposive approach to the relevant statutory provision would lead to a conclusion that the "environment" must be confined to the environment as it exists. He submitted that the reference to "Maintenance and enhancement of the quality of the environment" in s 7(f) of the Act was strongly suggestive that it is the environment as it exists at the date of the exercise of the relevant function or power under the Act which must be relevant. He contended that it would be difficult, perhaps impossible, to have particular regard to the maintenance and enhancement of the quality of a speculative future environment.

[36] Further, referring to the importance of district plans made under the Act and the process of submission in which members of the public may formally participate in the plan preparation process, Mr Wylie argued that when a plan becomes operative, it represents a community consensus as to how development should proceed in the council's district. Such plans, he submitted, focus on existing environments and put in place a framework for future development. But they do not, as he put it, "assume future putative environments degraded by potential use or development".

[37] In addition, Mr Wylie pointed to practical difficulties that he said would make the approach that found favour with the Environment Court and Fogarty J unworkable. There was, in addition, the potential for "environmental creep" if applicants having secured one resource consent were then able to treat the effects of implementing that consent as something which would alter the future state of the environment whilst returning to the council on successive occasions to seek further consents "starting with the most benign, but heading towards the most damaging".

[38] Mr Wylie also argued that to uphold Fogarty J's view on the meaning of the word "environment" would be to run counter to authorities which have established rules for priority between applicants, authorities

dealing with issues of precedent and cumulative effect as well as the authorities already mentioned on the "permitted baseline".

[39] Both parties have argued the matter as if the word "environment" in s 2 of the Act ought to be seen as neutral on the issue of whether it requires the future, and future conditions to be taken into account. We think that that is true only in the superficial sense that none of the words used specifically refers to the future.

[40] The definition reads as follows:

> "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.

[41] This provision must be construed on the basis prescribed by s 5(1) of the Interpretation Act 1999; the meaning of the provision is to be ascertained from its text and in the light of its purpose.

[42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe "ecosystems" in a way which focused on the state of an ecosystem at any one point in time. Apart from any other consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the inquiry should be limited to a fixed point in time when considering the economic conditions which affect people and communities, a matter referred to in para (d) of the definition. The nature of the concepts involved would make that approach artificial.

[43] These views are reinforced by consideration of the various provisions in the Act in which the word "environment" is used, or in which there is reference to the elements that are set out in the four paragraphs of its definition. The starting point should be s 5, which states and explains the fundamental purpose of the Act in the following terms:

> **5. Purpose** — (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while —
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[44] "Natural and physical resources" are, of course, part of the environment as defined in s 2. The purpose of the Act is to promote their sustainable management. The idea of management plainly connotes action that is ongoing, and will continue into the future. Further, such management is to be sustainable, that is to say, natural and physical resources are to be managed in the way explained in s 5(2). Again, it seems plain that provision by communities for their social, economic and cultural well-being, and for their health and safety, is an idea that embraces an ongoing state of affairs.

[45] Section 5(2)(a) then makes an express reference to the "reasonably foreseeable needs of future generations". What to this point has been implicit, becomes explicit in the use of this language. There is a plain direction to consider the needs of future generations. Paragraph (b)'s reference to safeguarding the life-supporting capacity of air, water, soil, and ecosystems also points not only to the present, but also the future. The idea of safeguarding capacity necessarily involves consideration of what might happen at a later time.

[46] The same approach is requisite under para (c). "Avoiding" naturally connotes an ongoing process, as do "remedying" and "mitigating". The latter two words, in addition, imply alteration to an existing state of affairs, something that can only occur in the future.

[47] Each of the components of s 5(2) is, therefore, directed both to the present and the future state of affairs. An analysis of the concepts contained in ss 6 and 7 leads inevitably to the same conclusion. That is partly because the particular directions in each section are all said to exist for the purpose of achieving the purpose of the Act. But in part also, the future is embraced by the words "protection", "maintenance" and "enhancement" that appear frequently in each section. We do not agree with Mr Wylie's argument based on s 7(f). "Maintenance" and "enhancement" are words that inevitably extend beyond the date upon which a particular application for resource consent is being considered.

[48] The requirements of ss 5, 6 and 7 must be complied with by all who exercise functions and powers under the Act. Regional authorities must do so, when carrying out their functions in relation to regional policy statements (s 61) and the purpose of the preparation, implementation and administration of regional plans is to assist regional councils to carry out their functions "in order to achieve the purpose of this Act". Further, the functions of regional councils are all conferred for the purpose of giving effect to the Act (s 30(1)). Consistently with this, s 66 obliges regional councils to prepare and change regional plans in accordance with Part II.

[49] The same obligations must be met by territorial authorities, in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act (s 31) and district plans are to be prepared and changed in accordance with the provisions of Part II. There is then a direct linkage of the powers and duties of regional and territorial authorities to the provisions of Part II with the necessary consequence that

those bodies are in fact planning for the future. The same forward-looking stance is required of central government and its delegates when exercising powers in relation to national policy statements (s 45) and New Zealand coastal policy statements (s 56). The drafting shows a consistent pattern.

[50] In the case of an application for resource consent, Part II of the Act is, again, central to the process. This follows directly from the statement of purpose in s 5 and the way in which the drafting of each of ss 6 to 8 requires their observance by all functionaries in the exercise of powers under the Act. Self-evidently, that includes the power to decide an application for resource consent under s 105 of the Act. Moreover, s 104 which sets out the matters to be considered in the case of resource consent applications, began, at the time relevant to this appeal:

> **104. Matters to be considerd** — (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to . . .

[51] The pervasiveness of part II is once again apparent. In the case of resource consent applications, reference must also be made to the list of relevant considerations spelled out in paras (a) to (i) of s 104(1). These include: "Any actual and potential effects on the environment of allowing the activity" (para (a)); the objectives, policies, rules and other provisions of the various planning instruments made under the Act (para (c) to (f)) and "Any other matters the consent authority considers relevant and reasonably necessary to determine the application" (para (i)).

[52] Each of these provisions is likely to require a consent authority, in appropriate cases, to have regard to the future environment. In so far as ss 104(1)(c) to (f) is concerned, that will be necessary where the instruments considered require that approach. If the precedent effects of granting an application are to be considered as envisaged by *Dye v Auckland Regional Council* [2002] 1 NZLR 337 then the future will need to be considered, whether under s 104(1)(d) or s 104(1)(i). As to s 104(1)(a), its reference to potential effects is sufficiently broad to include effects that may or may not occur depending on the occurrence of some future event. It must certainly embrace future events.

[53] Future potential effects cannot be considered unless there is a genuine attempt, at the same time, to envisage the environment in which such future effects, or effects arising over time, will be operating. The environment inevitably changes, and in many cases future effects will not be effects on the environment as it exists on the day that the council or the Environment Court on appeal makes its decision on the resource consent application.

[54] That must be the case when district plans permit activities to establish without resource consents, where resource consents are granted and put into effect and where existing uses continue as authorised by the Act. It is not just the erection of buildings that alters the environment: other activities by human beings, the effects of agriculture and pastoral land uses, and natural forces all have roles as agents of environmental change. It would be surprising if the Act, and in particular s 104(1)(a), were to be construed as requiring such ongoing change to be left out of

account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

[55] A further consideration based in particular on the provisions concerning applications leads to the same conclusion. When an application for resource consent is granted, the Act envisages that a period of time may elapse within which the resource consent may be implemented. At the time relevant to this appeal, the statutory period was two years or such shorter or longer period as might be provided for in the resource consent (s 125). Consequently, the effects of a resource consent might not be operative for an appreciable period after the consent had been granted. Mr Wylie's argument would prevent the consent authority considering the environment in which those effects would be felt for the first time. Rather, the consent authority would have to consider the effects on an environment which, at the time the effects are actually occurring, may well be different to the environment at the time that the application for consent was considered. That would not be sensible.

[56] Similarly, it is relevant that many resource consents are granted for an unlimited time. That is certainly the case for most land use and subdivision consents (see s 123(b)). Yet it could not be assumed that the effects of implementing the consent would be the same one year after it had been granted, as they would be in 20 years' time.

[57] In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

[58] We have not been persuaded to a different view by any of Mr Wylie's arguments based on practical considerations and conflict with other lines of authority. It was his submission that the practical difficulties arising from Fogarty J's judgment would be significant. He contended that to require those administering district plans, and applicants for resource consents, to take account of the potential or notional future environment would be unduly burdensome, and would require them to speculate about what might or might not occur in any particular receiving environment, about what future economic conditions might be, and possibly about how such future economic conditions might affect future people and communities. He submitted that this would require a degree of prescience on the part of consent authorities that was inappropriate.

[59] In support of those propositions he referred to *O'Connell Construction Ltd v Christchurch City Council* [2003] NZRMA 216, and in particular to what was said by Panckhurst J at para [73]:

> I also agree with the submission of Mr Chapman for AMI/AMP that an extension of the rule to include potential activities on sites other than the application site would place an intolerable burden on the consent authority when assessing resource consent applications.

[60] The concerns expressed by Mr Wylie about practical difficulties were overstated. It will not be every case where it is necessary to consider the future environment, or where doing so will be at all

complicated. Suppose, for example, an application for resource consent to establish a new activity in a built up area of a city. There will be rules which provide for permitted activities and in the vast majority of cases it would be likely that the foreseeable future development of surrounding sites would be similar to that which existed at the time the application was being considered. In such a case, it might be a safe assumption that the environment would, in its principal attributes, be very much like it presently is, but perhaps more intensively developed if there are district plan objectives and policies designed to secure that end. At the other end of the spectrum, if one supposed an application to carry out some new activity involving development in an area which was rural in nature and which was intended to remain so in accordance with the policy framework established by the district plan, then once again it ought not be difficult to postulate the future state of that environment.

[61] Difficulties might be encountered in areas that were undergoing significant change, or where such change was planned to occur. However, even those areas would have an applicable policy framework in the district plan that, together with the rules, would give considerable guidance as to the nature and intensity of future activities likely to be established on surrounding land. In cases such as the present, where there are a significant number of outstanding resource consents yet to be implemented, and uncontested evidence of pressure for development, the task of predicting the likely future state of the environment is not difficult.

[62] The observations made by Panckhurst J in *O'Connell v Christchurch City Council* must be read in context. He was dealing with an appeal from an Environment Court decision overturning a decision by the City Council to grant consent to establish a tyre retail outlet. AMI and AMP occupied multi-storey office premises adjoining the subject site and had appealed to the Environment Court against the council's decision. When the Environment Court set aside the council's decision, the applicant for resource consent appealed to the High Court. One of the issues raised on the appeal was a contention that the Environment Court had misapplied the "permitted baseline test" in as much as it had considered the effects of permitted activities on only the subject site and had not considered the effects of permitted activities on adjacent sites as well. At [70] Panckhurst J said:

> [70] I accept that the Court did apply the baseline test with reference only to the subject site. That is it compared the proposed activity against other hypothetical activities that could be established on this site as of right in terms of the transitional and proposed plans. Regard was not had to the impact of the establishment of hypothetical activities on a closely adjacent site. Was such an approach in error?
>
> [71] I am not persuaded that it was. This conclusion I think follows from a reading of various decisions where the permitted baseline assessment has been considered in a number of contexts . . .

[63] The Judge referred to *Bayley v Manukau City Council*, *Smith Chilcott Ltd v Auckland City Council* and *Arrigato Investments Ltd v Auckland Regional Council*, and concluded that the required comparison for purposes of "permitted baseline" analysis is one that is restricted to the

site in question. There was nothing in those cases which was consistent with the extension of the test for which the appellant had contended. We have earlier expressed our view that the "permitted baseline" has in the previous decisions of this Court been limited to a comparison of the effects of the activity which is the subject of the application for resource consent with the effects of other activities that might be permitted on the subject land, whether by way of right as a permitted activity under the district plan, or whether pursuant to the grant of a resource consent. In the latter case, it is only the effects of activities which have been the subject of resource consents already granted that may be considered, and the consent authority must decide whether or not to do so: *Arrigato Investments Ltd v Auckland Regional Council* at paras [30] and [34] - [35].

[64] We agree with Panckhurst J's observations about the limits of the "permitted baseline" concept, and we also agree with him that the decisions of this Court have not suggested that it can be applied other than in relation to the site that is the subject of the resource consent application. However, it is a far step from there to contend that *Bayley v Manukau City Council* and the decisions that followed it, dictate the answer on the principal issues to be determined in this appeal. The question whether the "environment" could embrace the future state of the environment was not directly addressed in those cases, nor was an argument in those terms apparently put to Panckhurst J.

[65] It is as well to remember what the "permitted baseline" concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application. As Tipping J said in *Arrigato* at para [29]:

> Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 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.

[66] Where it applies, therefore, the "permitted baseline" analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the subject site) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.

[67] We do not overlook what was said in *Bayley v Manukau City Council* at p 577, where the Court referred to what Salmon J had said in *Aley v North Shore City Council* [1998] NZRMA 361 at p 377:

> On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists.

The Court said that it would add to that sentence the words:

> . . . or as it would exist if the land were used in a manner permitted as of right by the plan.

[68] However, it must be remembered first, that *Bayley* was the case in which the "permitted baseline" concept was formally recognised, and as we have explained did not deal with the issue which has to be decided in this case. Secondly, it was a case about notification of resource consent applications. The issue that arose concerned the proper application of s 94 of the Act, and the provisions it contained allowing non-notification in cases where the adverse effect on the environment of the activity for which consent was sought would be minor. In that context there could be no need to consider the future environment, because if the effects on the existing environment were not able to be described as minor, there would be no need to look any further.

[69] Mr Wylie referred to other practical difficulties which he illustrated by reference to Fogarty J's decision in *Wilson v Selwyn District Council*. In that case, as in this, Fogarty J held that the term "environment" could include the future environment where the word is used in s 104(1)(a) of the Act. He held further that, to ascertain the future state of the environment it was appropriate to ask, amongst other things, whether it was "not fanciful" that surrounding land should be developed, and to have regard in that connection to what was permitted in a proposed district plan. Because the district plan contemplated the subdivision of neighbouring land as a controlled activity, His Honour held that it was plain that the district council did not regard it as fanciful that the land in the locality might be subdivided down into smaller sites with increased dwellings. Mr Wylie pointed out that although subdivision was a controlled activity under the proposed plan relevant in that case, and there were no submissions challenging that, there were, however, submissions challenging the right to erect dwellings, as Fogarty J himself had recorded in para [38] of the judgment. Mr Wylie criticised the decision on the basis that it had effectively "pre-empted" the submission process in relation to the district plan. It would also, in his submission, lead to considerable uncertainty.

[70] Mr Wylie further argued that in the present case, some of the remarks made by Fogarty J suggested that the possibility of development pursuant to resource consents for discretionary or even non-complying activities should be taken into account to ascertain the future state of the environment, in advance of such consents being granted.

[71] That is an inference which can arise from what the Judge said at para [79]:

> In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment *as it exists*, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on Other Rural Landscape may be infected with an error of law, in a material way.

[72] Fogarty J noted that the decision of the Environment Court in the present case had rejected an argument that it should take into account the likelihood of future successful applications for discretionary activity consent. At para [74] he said:

> As noted, the Court did go on to reject taking into account the further subdivision and thus even more houses resulting from successful applications for discretionary activities. It may be noted that that is a more cautious approach than I took in *Wilson and Rickerby*, see [62] and [81].

[73] The reference here to *Wilson and Rickerby* was a reference to the case now reported as *Wilson v Selwyn District Council*.

[74] These observations by the Judge express too broadly the ambit of a consent authority's ability to consider future events. There is no justification for borrowing the "fanciful" criterion from the "permitted baseline" cases and applying it in this different context. The word "fanciful" first appeared in *Smith Chilcott Ltd v Auckland City Council* at para [26], where it was used to rule out of consideration, for the purposes of the "permitted baseline" test, activities that the plan would permit on a subject site because although permitted it would be "fanciful" to suppose that they might in fact take place. In that context, when the "fanciful" criterion is applied, it will be in the setting of known or ascertainable information about the development site (its area, topography, orientation and so on). Such an approach would be a much less certain guide when consideration is being given to whether or not future resource consent applications might be made, and if so granted, in a particular area. It would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future environment as if those resource consents had already been implemented.

[75] It was not necessary to cast the net so widely in the present case. The Environment Court took into account the fact that there were numerous resource consents that had been granted in and near the triangle. It accepted Mr Goldsmith's evidence that those consents were likely to be implemented. There was ample justification for the Court to conclude that the future environment would be altered by the implementation of those consents and the erection of dwellings in the surrounding area.

[76] Limited in this way, the approach taken to ascertain the future state of the environment is not so uncertain as to be unworkable or unduly speculative, as Mr Wylie contended.

[77] Another concern that was raised by Mr Wylie was the possibility of "environmental creep". This is the possibility that someone who has obtained one resource consent might seek a further resource consent in respect of the same site, but for a more intensive activity. It would be argued that the deemed adverse effects of the first application should be discounted from those of the second when the latter was considered under s 104(1)(a). Mr Wylie submitted that if s 104(1)(a) requires that consideration be given to potential use and development, there would be nothing to stop developers from making a number of applications for resource consent, starting with the most benign, and heading towards the most damaging. On each successive application, they would be able to argue that the receiving environment had already been

notionally degraded by its potential development under the unimplemented consents.

[78] This fear can be given the same answer as was given in *Arrigato* where the Court had to determine whether unimplemented resource consents should be included within the "permitted baseline". At para [35] the Court said:

> [35] Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.

[79] The Environment Court dealt with the implications of the existing resource consents in the present case in a manner that was consistent with that approach. It will always be a question of fact as to whether or not an existing resource consent is going to be implemented. If it appeared that a developer was simply seeking successively more intensive resource consents for the same site there would inevitably come a point when a particular proposal was properly to be viewed as replacing previous proposals. That would have the consequence that all of the adverse effects of the later proposal should be taken into account, with no "discount" given for consents previously granted. We are not persuaded that the prospect of "creep" should lead to the conclusion that the consequences of the subsequent implementation of existing resource consents cannot be considered as part of the future environment.

[80] Three other issues, raised by Mr Wylie in support of his argument that "environment" should be confined to what exists at the time the resource consent application is considered by the consent authority, can be briefly mentioned. First, he suggested that the contrary approach would have the effect of negating the result of cases that have decided that priority as between applicants should be established in accordance with the time when applications are made to a consent authority (*Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 and *Geotherm Group Ltd v Waikato Regional Council* [2004] NZRMA 1). That argument would only be legitimate if we were to endorse Fogarty J's decision that resource consent applications not yet made but which conceivably might be made, could be taken into account. That is not our view.

[81] Secondly, Mr Wylie contended that to hold that the word "environment" included potential use or development would undermine the decision of this Court in *Dye v Auckland Regional Council* where it

had been decided that the grant of a resource consent had no precedent effect in the "strict sense". It is apparent from para [32] of that decision, that what was meant by use of the expression "the strict sense" was that one consent authority is not bound by its own decisions or those of any other consent authority. We do not agree that a decision that the "environment" can include the future state of the environment has any implications for what was decided in *Dye.*

[82] Finally, Mr Wylie contended that if unimplemented resource consents are taken into account, then consent applications will fall to be decided on the basis of the environment as potentially affected by other consents. He submitted that this was to all intents and purposes "precedent by another route". We do not agree. To grant consent to an application for the reason that some other application has been granted consent is one thing. To decide to grant a resource consent application on the basis that resource consents already granted will alter the existing environment when implemented, and that those consents are likely to be implemented is quite a different matter.

[83] There is nothing in the High Court's decision in *Rodney District Council v Gould* [2006] NZRMA 217 on the question of cumulative effects which has any implications for the current issue. That decision simply explained what was already apparent from what this Court had decided in relation to cumulative effects in *Dye v Auckland Regional Council* — that is, that the cumulative effects of a particular application are effects which arise from that application, and not from others.

[84] In summary, we have not found, in any of the difficulties Mr Wylie has referred to, any reason to depart from the conclusion which we have reached by considering the meaning of the words used in s 104(1)(a) in their context. In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach. Subject to that reservation, we would answer question 1(a) in the negative.

Question 1(b) – speculation

[85] The foregoing discussion means this and the subsequent questions can be answered more briefly. The issue raised by this question is whether taking into account the approved building platforms in and near the triangle, was speculative. The process adopted by the Environment Court cannot properly be characterised as having involved speculation. The Court accepted Mr Goldsmith's evidence that it was "practically certain" that the approved building sites in and near the triangle would be

built on. Mr Wylie confirmed that there was no issue with the Environment Court's finding of fact on the likelihood of future houses being erected.

[86] However, Mr Wylie argued that the environment against which the application fell to be assessed comprised only the existing environment. If that assertion were correct, he submitted that it followed that the potential effects of unimplemented resource consents were irrelevant.

[87] We have already rejected his contention that the relevant environment was confined to the existing environment. It follows that there is no basis upon which we could find error of law in relation to question 1(b).

Question 1(c) – consideration of the permitted baseline

[88] The issue raised by this question is whether the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline. Mr Wylie's argument on this issue proceeded as if the Environment Court had been making a decision about the permitted baseline when it allowed itself to be influenced by its conclusion that the building sites in and around the triangle would be developed. For reasons that we have already given, we do not consider that the receiving environment was properly to be approached on the basis of a "permitted baseline" analysis, as that term has normally been used.

[89] Whatever label is put upon the exercise, Mr Wylie's main contention in this part of his argument was that there was nothing in the Environment Court's decision to show that it had a discretion of the kind that had been explained by this Court in the decision in *Arrigato Investments Ltd v Auckland Regional Council*, in particular the passage at para [35] that we have earlier set out. Mr Wylie submitted that, properly understood, the decision in *Arrigato* meant that there was a discretion when it came to the consideration of unimplemented resource consents. Mr Wylie also contended that it was not obvious from the Environment Court's judgment that it was aware that it had that discretion, let alone that it had exercised it.

[90] We do not consider that it is appropriate to describe what is simply an evaluative factual assessment as the exercise of a discretion. Further, we agree with Mr Castiglione that the council's argument wrongly conflates the "permitted baseline" and the essentially factual exercise of ascertaining the likely state of the future environment. We have previously stated our reasons for limiting the permitted baseline to the effects of developments on the site that is the subject of a resource consent application. On the relevant issue of fact, the Environment Court relied on the evidence of Mr Goldsmith about the virtual certainty of development occurring on the approved building platforms in and around the triangle. There was no error in that approach.

[91] In reality the present question simply raises, in a different guise, the central complaint that the council makes about the acceptance by both the Environment Court and the High Court that the receiving environment can include the future environment. That issue is not to be approached by invoking the permitted baseline, so the question posed does not strictly

arise. We simply answer the question by saying that the issues raised by the council in this part of the appeal do not establish any error of law by the Environment Court, nor by Fogarty J.

Question 2 – landscape category

[92] The council argued that the Environment Court had wrongly concluded that the landscape category it was required to consider was an "other rural landscape" under the district plan. It was contended that Fogarty J had erred by approving the Environment Court's approach.

[93] The district plan defines and classifies landscapes into three broad categories, "outstanding natural landscapes and features", "visual amenity landscapes" and "other rural". The classification of a particular landscape can be important to the consideration of resource consent applications, because different policies, objectives and assessment criteria apply to land within the different categories.

[94] Landscapes in the "outstanding" category are described in the district plan as "romantic landscapes — the mountains and the lakes — landscapes to which s 6 of the Act applies". The important resource management issues are identified as being the protection of these landscapes from inappropriate subdivision, use and development, particularly where activity might threaten the openness and naturalness of the landscape. With respect to "visual amenity landscapes", the district plan describes them in the following way:

> They are landscapes which wear a cloak of human activity much more obviously – pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the district's downlands, flats and terraces.

The district plan seeks to enhance their natural character and enable alternative forms of development where there are direct environmental benefits of doing so. This leaves a residual category of "other rural landscapes", to which the district plan assigns "lesser landscape values (but not necessarily insignificant ones).

[95] There was a contest in the Environment Court as to whether the landscape to be considered in the present case was properly categorised as "visual amenity" or "other rural". In making its assessment as to which classification should apply, the Environment Court plainly had regard to what the landscape would be like when resource consents already granted were utilised. At para [32], it said:

> We consider that the landscape architects called by the Council and the section 271A parties have been too concerned with the Court's discussion of the scale of landscapes and have not sufficiently addressed the central question in landscape classification, namely whether the landscape, when developed to the extent permitted by existing consents, will retain the essential qualities of a VAL, which are pastoral or Arcadian characteristics. We noted (in paragraph 3) that development of "lifestyle" or "estate" lots for rural-residential living is not confined to the triangle itself.

[96] It then made reference to existing developments in the area finding some to be highly visible and detracting significantly from any

"Arcadian" qualities of the wider setting. It concluded that the landscape category was other rural.

[97] We accept, as Mr Wylie submitted, that in large part that conclusion of the Environment Court was apparently based on the view that it had formed about what the landscape would be like when modified by the implementation of as yet unimplemented resource consents.

[98] In the High Court, Fogarty J recorded the submission that had been made to him by Mr Wylie that, although there was evidence before that Court on which it could have concluded that the landscape was "other rural", nevertheless it had reached that conclusion after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. Fogarty J held first that this was in effect a repetition of the arguments previously made about faulty baseline analysis. As he did not consider that the Environment Court had made any error in that respect, Mr Wylie's argument could not be sustained. A little later in the judgment, Fogarty J confirmed his view that a landscape categorisation decision could only be criticised if the Court was obliged to ignore future potential developments in the area (para [79] of his decision, set out in para [29] above).

[99] Mr Wylie repeated in this context his argument that the Court had been obliged to consider the environment as it existed at the time that it made its decision. That argument must fail for the reasons that we have already given. However, in this Court Mr Wylie developed another argument based not on the relevant statutory provisions, but on provisions of the district plan itself. Mr Wylie's argument was based on rule 5.4.2.1 of the district plan.

[100] Rule 5.4.2 contains "assessment matters" which are to be considered when the council decides whether or not to grant consent to, or impose conditions on, resource consent applications made in respect of land in the rural zones. As we have previously noted those assessment criteria vary according to the categorisation of the landscape. Before the actual assessment matters are stated, however, rule 5.4.2.1 sets out a three-step process to be followed in applying the assessment criteria. It provides as follows:

> 5.4.2.1 **Landscape Assessment Criteria – Process**
>
> **There are three steps in applying these assessment criteria.** First, the analysis of the site and surrounding landscape; secondly determination of the appropriate landscape category; thirdly the application of the assessment matters. For the purpose of these assessment criteria, the term "proposed development" includes any subdivision, identification of building platforms, any building and associated activities such as roading, earthworks, landscaping, planting and boundaries.
>
> **Step 1 – Analysis of the Site and Surrounding Landscape**
>
> An analysis of the site and surrounding landscape is necessary for two reasons. Firstly it will provide the necessary information for determining a sites ability to absorb development including the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape. Secondly it is an important step in the determination

of a landscape category – ie whether the proposed site falls within an outstanding natural, visual amenity or other rural landscape.
An analysis of the site must include a description of those existing qualities and characteristics (both negative and positive), such as vegetation, topography, aspect, visibility, natural features, relevant ecological systems and land use.
An analysis of the surrounding landscape must include natural science factors (the geological, topographical, ecological and dynamic components in [sic] of the landscape), aesthetic values (including memorability and naturalness), expressiveness and legibility (how obviously the landscape demonstrates the formative processes leading to it), transient values (such as the occasional presence of wildlife; or its values at certain times of the day or of the year), value of the landscape to Tangata Whenua and its historical associations.
Step 2 – Determination of Landscape Category
This step is important as it determines which district wide objectives, policies, definitions and assessment matters are given weight in making a decision on a resource consent application.
The Council shall consider the matters referred to in Step 1 above, and any other relevant matter, in the context of the broad description of the three landscape categories in part 4.2.4. of this Plan, and shall determine what category of landscape applies to the site subject to the application.
In making this determination the Council, shall consider:

(a) to the extent appropriate under the circumstances, both the land subject to the consent application and the wider landscape within which that land is situated; and
(b) the landscape maps in Appendix 8.

Step 3 – Application of the Assessment Matters
Once the Council has determined which landscape category the proposed development falls within, each resource consent application will then be considered:
First, with respect to the prescribed assessment criteria set out in r 5.4.2.2 of this section;
Secondly, recognising and providing for the reasons for making the activity discretionary (see para 1.5.3(iii) of the plan [p 1/3]) and a general assessment of the frequency with which appropriate sites for development will be found in the locality.

[101] Mr Wylie argued, that even if his argument confining "environment" to the current environment failed, nevertheless in accordance with these district plan provisions it could not be relevant to consider the future environment other than at step 3. He submitted that for the purposes of step 1 and step 2, attention should be focused solely on the current state of the environment.
[102] Mr Castiglione argued to the contrary, suggesting that the words used in step 1, ". . . the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape", were apt to refer to proposed development generally within the landscape. We reject that submission. In context, the reference to "the proposed development" must be the development which is the subject of a particular application for resource consent.
[103] But the wording of steps 1 and 2 does not exclude a consideration of the environment as it would be after the implementation

of existing resource consents. Although the second paragraph in step 1 refers to "existing qualities and characteristics", the words used are inclusive, and there is nothing to suggest that they are exhaustive. The same applies in respect to the last paragraph in step 1. We do not read the words in either paragraph as ruling out consideration of the future environment. Even if that conclusion were wrong it would be legitimate for the council to consider the future environment as part of "any other relevant matter", the words used in the second paragraph within step 2. Further, the second part of step 2 authorises a broadly based inquiry when it requires the council to "consider . . . the wider landscape" within which a development site is situated. There is no reason to read into these words, or any of the other language in step 2, a limitation of the consideration to the present state of the landscape.

[104] It follows that the future state of the environment can properly be considered at steps 1 and 2, before the landscape classification decision is made. Neither the Environment Court nor Fogarty J erred and question 2 should be answered No.

Question 3 – reliance on minimum subdivision standards in the Rural Residential zone

[105] In the High Court, the council had argued that the Environment Court had misconstrued the relevant district plan provisions, and taken into account an irrelevant consideration by referring to the subdivision standards contained in the district plan for the Rural Residential zone. The subject site is zoned Rural General.

[106] Mr Wylie pointed to three separate paragraphs in the Environment Court's decision where there had been references to the Rural Residential provisions of the plan. In para [74] of its decision the Environment Court had discussed evidence that had been given about the desire of the developer to create a "park-like" environment. A landscape architect whose evidence had been called by the council expressed the opinion that although the proposal would not introduce urban densities, it was not rural in nature. The Court referred to the fact that in the rural-residential zone a minimum lot size of 4000 m^2 and an associated building platform was permitted. It will be remembered that the subject development would comprise allotments varying in size between 0.6 and 1.3 ha. No doubt with that comparison in mind, the Environment Court expressed the view that the development would provide more than the level of "ruralness" of Rural Residential amenity.

[107] The next reference to the Rural Residential rules was in para [78]. The Environment Court was there dealing with the issue of whether the development would result in the "over-domestication" of the landscape. The Court expressed its view that the proposal could coexist with policies seeking to retain rural amenity and that while it would add to the level of domestication of the environment, the result would not reach the point of overdomestication. That was so, because the site was in an "other rural landscape", and the district plan considered that Rural Residential allotments down to 4000 m^2 retained an appropriate amenity for rural living.

[108] Finally, Mr Wylie referred to the fact that at para [92], where the Environment Court was dealing with a proposition that the proposal would be contrary to the district plan's overall settlement strategy, the Court made a reference to the reluctance that it had expressed in a previous decision to set minimum allotment sizes in the rural-residential zone. Mr Castiglione suggested that the Environment Court had made a mistake, and that it had meant to refer to the rural general zone in that paragraph, not the Rural Residential zone. We do not need to decide whether or not that was the case.

[109] Having reviewed the various references to the Rural Residential zone in context, Fogarty J held that the Environment Court had not considered an irrelevant matter or committed any error of law in its references to the Rural Residential zone. We cannot see any basis to disturb that conclusion. In this Court Mr Wylie contended that Fogarty J's reasoning had been based on the fact that the Environment Court had considered that any "Arcadian" character of the landscape had gone. He then repeated the point that that conclusion had turned on the fact that the Court had considered the likely future environment as opposed to confining its consideration to the existing environment. He submitted that the decision was wrong for that reason. We have already rejected that argument.

[110] We do not consider that there was any error of law in the approach of either the Environment Court or the High Court on this issue. Question 3 should also be answered No.

Result

[111] For the reasons that we have given, each of the questions raised on the appeal is answered in the negative. That answer in respect of question 1(c) must be read in the context that the Environment Court's analysis of the relevant environment was not a "permitted baseline" analysis.

[112] The respondent is entitled to costs in this Court of $6000 plus disbursements, including the reasonable travel and accommodation expenses of both counsel to be fixed, if necessary, by the Registrar.

BEFORE THE ENVIRONMENT COURT

Decision No. 2013 NZEnvC 59

IN THE MATTER of resource consent applications directly referred to the Court under Section 87C(1) of the Resource Management Act 1991

BY MERIDIAN ENERGY LIMITED
(ENV-2011-CHC-000090)
Applicant

Hearing dates: 27, 28 August, 2012;
3 – 7, 10 – 14, 24 – 28 September, 2012;
1 – 5, 15 – 17, 23 October, 2012.
Site visits: 29 August, 19 September (Te Uku), 14 & 24 October, 2012

Court: Judge M Harland
Commissioner MP Oliver
Deputy Commissioner B Gollop

Date: 15 April 2013

INTERIM DECISION

A. The applications for resource consent are granted subject to amended conditions.

B. We record for the avoidance of doubt, that this decision is final in respect of the confirmation of the grant of the resource consents (on amended conditions) but is interim in respect of the precise wording of the conditions, and in particular the details relating to the Community Fund condition(s).

C. We direct the Hurunui District Council and the Canterbury Regional Council to submit to the Court amended conditions of consent giving effect to this decision by 17 May 2013. In preparing the amended conditions the Councils are to consult with the other parties, particularly in relation to the condition(s) relating to the Community Fund.

D. If any party wishes to make submissions in relation to the Community Fund conditions, these are to be filed by 17 May 2013.

E. Costs are reserved.

Hurunui District Council	Respondent
Canterbury Regional Council	Respondent

Appearances:

Mr A Beatson, Ms N Garvan and Ms E Taffs for Meridian Energy Ltd
Mr K Smith and Ms J Silcock for the Hurunui District Council
Ms M Dysart for the Canterbury Regional Council
Mr E Pyle for Wind Energy Association
Mr H Turnbull for himself
Mr M Wallace for Glenmark Community Against Wind Turbines Incorporated
Mr M Archbold for himself
Mr A Baxter
Mr J Carr for Tipapa Limited
Mr G Higginson for himself
Mrs K Fitzimmons for herself
Mrs A Marr for herself
Mrs K McLauchlan for herself
Mr G and Mrs M McLean for themselves
Ms B Meares for herself
Mr D Meares for himself and Mrs V Meares
Mrs E Messervy for herself
Mr M Messervy for himself
Mrs H Pankhurst for herself
Mrs J Symonds for herself
Mr G Thomas for himself
Ms P Vincent for herself

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INTRODUCTION

[1] Centre Hill and its surrounding ridgelines in the Hurunui District in North Canterbury are landmarks of some significance to those who live locally, particularly at Glenmark, Greta Valley, Omihi and Scargill. They also attract a world-class wind resource, which makes the area attractive for wind energy generation, a form of electricity generation favoured by national policy because it is renewable. Recognising this, and after a number of years of investigation, Meridian Energy Limited ("**Meridian**") has applied to construct, operate and maintain a 33 turbine wind farm in the area near to the recently consented (but not yet constructed) Mt Cass wind farm, but to do so, it requires a number of resource consents from the Hurunui District Council ("**the HDC**") and the Canterbury Regional Council ("**the CRC**"). Meridian successfully applied to directly refer the applications for resource consent to the Environment Court for hearing.[1] Accordingly there were no first instance hearings before the HDC and CRC. As a result, there was a high level of direct local community and resident involvement at this hearing. Many of the parties were self-represented, and many issues were raised.

[2] The local opposition to Meridian's proposal was largely coordinated through the Glenmark Community Against Wind Turbines Incorporated ("**the Society**"). A number of the members of the Society, however, also appeared as individual submitters during the hearing to advance matters specific to their individual interests. The other main opposition came from Tipapa Limited ("**Tipapa**"), represented by Mr John Carr, its director and shareholder. As well as owning land which is grazed, Tipapa's renovated homestead, gardens and woolshed at Greta Valley operate as a high-end tourist destination and functions centre, and it is increasingly popular as a wedding venue. All of those in opposition asked the Court to decline Meridian's applications for resource consent.

[3] It was common ground that Meridian's proposal should be assessed as a discretionary activity under s104 of the Resource Management Act 1991 ("**the RMA**"). Broadly speaking, we are required to consider any actual and potential effects on the environment of allowing the activity and any relevant provisions of a number of listed statutory planning documents. Overall we must assess whether the proposal will meet the purpose of the Act, which is to promote the sustainable management of natural and physical resources.

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[1] pursuant to s87C (1)of the Resource Management Act 1991

[4] Those opposed to the wind farm referred to it as an industrial activity that did not fit within the local rural environment, which they described as tranquil, peaceful and quiet. They were concerned that their amenity values would be adversely affected and their property values diminished should the wind farm proceed. Specifically, they were concerned that the wind farm would generate adverse effects relating to landscape and visual amenity, noise, health, traffic and ecological values. Tipapa was concerned that its business activities would be adversely affected and others were concerned that recreation and tourism activities nearby would also be adversely affected. The cumulative effect of having two wind farms (Hurunui and Mt Cass) nearby was a particular focus for some. It was contended that these potentially adverse effects would all be unable to be avoided, remedied or properly mitigated.

[5] Meridian highlighted the positive benefits to the local, regional and national economies arising from the proposal, including the fact that the energy sought to be generated is from a renewable source. Whilst acknowledging there might be some adverse effects, Meridian contended they could all be satisfactorily avoided, remedied or mitigated. The Councils agreed.

[6] We heard and read a large volume of submissions and evidence. Many of the witnesses were cross-examined at some length. A list of the submitters who did not appear is included as Appendix 1. Because of the large volume of material, it is just not possible to refer to all that was said and presented. We have taken all of the evidence and submissions into account in coming to our decision.

[7] We signal at the outset that, for the reasons outlined in this decision, we have decided to grant the applications for resource consent subject to conditions.

[8] The structure of this decision will be to first outline the proposal and then the statutory and regulatory framework that applies to it. We will then evaluate the actual and potential effects on the environment that will or could arise from the proposal.

THE PROPOSAL

What is proposed?

[9] Meridian is New Zealand's single largest generator of renewable energy, with assets predominantly in New Zealand, but also Antarctica and South Australia. Its asset

base includes hydro[2] and wind generation facilities. It operates a number of wind-generation facilities[3] with one under construction[4] and holds resource consent for two North Island projects.[5] Since 2004 Meridian has committed to only developing new generation from renewable resources.[6] Meridian's position is that wind and hydro generation are an ideal combination which, when run in tandem, can ensure reliable electricity supply.

[10] The proposal, referred to by Meridian as "*Project Hurunui Wind*", is to construct, operate and maintain up to 33 wind turbines and associated facilities. The potential combined generation capacity for the project is 75.9MW. The principal components of the wind farm proposal include:

- Up to 33 wind turbine generators configured around a turbine envelope that is designed for a rotor diameter of up to 101 metres and a rotor hub height up to 80 metres. This means that the maximum height from the ground to the top of the rotor arc would be no greater than 130.5 metres. Each turbine is to be located within a 100 metre radius of the positions indicated on the construction plans. The average annual production from the wind farm (approximately 270 GWh per year) will supply the annual electricity requirements of around 34,000 average homes.
- Individual transformers at the base of each wind turbine.
- An internal road network of approximately 22 kilometres in length.
- Electrical works including a transmission and internal network (either 22kV or 33kV) of underground cables; a site substation; and overhead 66kV transmission line connecting the substation to an existing MainPower transmission line located alongside the site.
- An operations and maintenance building.

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2 The Waitaki power scheme except Tekapo A and B (upper Waitaki catchment); the Manapouri power scheme (Fiordland)

3 The Brooklyn wind turbine (Wellington), the Te Apiti wind farm (Manawatu), the White Hill wind farm (northern Southland), three turbines on Ross Island (Antarctica), project West Wind (Wellington), the Te Uku wind farm in partnership with WEL Networks Limited (Raglan), Mt Millar (South Australia)

4 Project Mill Creek (Wellington)

5 Central Wind and Hawkes Bay Wind farm

6 Mr Muldoon, evidence-in-chief, paragraph [12]

- Two permanent wind meteorological monitoring towers up to 80 metres high.

[11] Access to the site is to be from Motunau Beach Road, a local road situated approximately 3.2km from the SH1 ("**SH1**") and Motunau Beach Road intersection.

[12] The construction timeframe is estimated at between 18 and 24 months.

[13] A consent lapse period of 10 years is sought for all consents.

[14] Proposed conditions of consent were presented and as is usual in these cases several iterations of the conditions occurred during the hearing. By the end of the hearing Meridian and the two Councils had reached agreement on all of the proposed conditions, with the Society, Tipapa and others submitting conditions which they thought acceptable should the Court decide to grant consent.

Where is the wind farm to be situated?

The site and its surrounding environment

[15] The wind farm site comprises parts of properties owned by six landowners used primarily to graze sheep and cattle. Collectively these six landowners manage 3,400 hectares, but the turbine development footprint will use up to 63.3 hectares. The site is on one of a series of hills aligned approximately northeast-southwest in North Canterbury and is centred on an existing 80 metre high wind monitoring mast located close to the site's highest point known as Centre Hill.

[16] The properties immediately surrounding the site are also used for pastoral farming, mainly sheep, cattle and deer, and are relatively sparsely populated with farm/lifestyle dwellings.

[17] The site is located southeast of, and roughly parallel to, SH1, approximately 66km north of Christchurch between the Waipara and Hurunui Rivers. It is within the Hurunui District, between the local Greta Valley and Omihi settlements, which are located close to the SH1. Both of these settlements include primary schools and a number of small businesses and tourist and recreation activities including Tipapa at Greta

Valley. Motunau Beach Road provides access to the coastal settlement and holiday area of Motunau Beach.

[18] The Waipara winegrowing area is to the south, with vineyards now occupying much of the valley floor and lower slopes either side of SH1. Waipara is the southernmost tip of the Alpine Pacific Triangle Touring Route Map,[7] which includes the tourist destinations of Kaikoura to the north and Hanmer Springs to the west.

The Mt Cass consent – to what extent should we take it into account?

[19] The proposed Mt Cass wind farm site is just over 4km to the southwest. The substantive decision approving the Mt Cass wind farm was issued on 12 December 2011,[8] with the final decision following on 7 February 2012.[9] Consent was approved authorising one of three different turbine layouts as follows:

Layout	Maximum height from ground level (m)	Maximum number of turbines	Maximum installed capacity (MW)
R33	55	67	34
R60	95	26	78
R90	120	26	78

[20] The Hurunui turbine layout proposed is similar to the R90 layout option contained in the Mt Cass decision. A number of the submitters were concerned about the cumulative effect of two wind farms in such close proximity. As a matter of law, we are able to take into account the effects of any unimplemented consents provided that they are likely to be implemented.[10] We did not receive any evidence about what is to happen with the Mt Cass consent, but Meridian did not contend that it is unlikely to be implemented. Accordingly we have decided to take it into account in our assessment where relevant.

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[7] An official New Zealand Transport Agency approved touring route with road signage throughout the route. Mr Pearson, evidence-in-chief, paragraph [9]

[8] ***Mainpower NZ Limited v Hurunui District Council*** [2011] NZEnvC 384

[9] [2012] NZEnvC 021

[10] ***Queenstown-Lakes District Council v Hawthorne Estates Limited,*** [2006] NZRMA 424

What is the extent of opposition to the proposal?

[21] Meridian undertook a large amount of public consultation prior to the proposal being publicly notified. In response, Project Hurunui was amended to that first consulted on. In particular, in response to the comprehensive consultation with Mr Carr, two turbines (A12 and D15) were removed, and turbines A10 and A11 were shifted. [11] Mr Rough advised that another turbine (A13) was also deleted as it was considered too dominant.[12]

[22] The applications were publicly notified on 9 April 2011, with submissions closing 30 days later on 24 May 2011. Of the 132 submissions received, 78 opposed the proposal, 50 were in support and 4 were neither in support nor opposition.

[23] We were told that there was considerable opposition to Meridian's proposal from "*the community*". Who exactly "*the community*" is and who was authorised to speak for it became an issue.

Who is the community?

[24] Although "*the community*" was spoken about very generically at the outset, we accept that the local community comprises Greta Valley, Omihi, Glenmark, Scargill and to a lesser extent Motunau Beach and Waipara. The regional community comprises the rest of the Hurunui District and the wider Canterbury Region. The opposition to the proposal was almost without exception from those within the local community.

Who is authorised to speak for the community?

[25] The Society, as its name suggests, was specifically formed to oppose Meridian's proposal. It comprises a number of members and addressed matters of collective concern. There were also members of the Society who in their personal capacities addressed matters of individual concern, but Mr Carr for Tipapa also took it upon himself to speak for "*the community*" from time to time.

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11 See evidence-in-chief of Mr McKinney
12 Mr Rough, evidence-in-chief, paragraph [364]

[26] Mr Carr has chosen to live in New Zealand, having emigrated here several years ago. He bought Tipapa about eight years ago and has extensively renovated and rejuvenated it. His interest in the history of Tipapa and the surrounding area is extensive and it was very clear that this is the place where his heart resides. He spoke of Tipapa as representing his "*mauri ora*"; it is his place of peace and rest. He has spent money on Tipapa and his business there is emerging. Mr Carr is passionately fierce about protecting what he has worked to achieve. He is convinced that Meridian's proposal will destroy his home, his business and his future.

[27] Mr Carr is also a very articulate, engaging and charismatic man. He has embraced the Greta Valley community, employs local people at Tipapa, and has been generous in providing Tipapa's premises as a venue for meetings about Meridian's proposal. However, at times the way Mr Carr has spoken about Meridian, the HDC, and their consultants, his tenacious approach and his colourful use of superlatives has been less than helpful. He has been inclined to rush into action, when a more measured and considered approach was advisable. This has helped contribute to a polarisation of views within the community, which in the calm of the hearing had the opportunity to become more measured, reasoned and reasonable.

[28] We acknowledge that Mr Carr has had many important things to say and issues to raise, so that where appropriate we have separated these from the manner in which they were presented, but we note that when Mr Carr had the opportunity to reflect on some of his past approaches and benefit from hindsight, he did not resile from any position he had taken.[13]

[29] We do not agree that Mr Carr speaks for the community. Mr Carr speaks for Tipapa and himself. The Society represents its members' collective concerns relating to landscape, amenity, noise, health, traffic and avifauna, and those individuals who presented speak for themselves on the various issues of specific interest to them.

Community opposition

[30] Mr Carr's actions are, however, important because they create a backdrop to the community opposition. This is because Mr Carr was instrumental early on in providing the local community with information about wind farms and their purportedly adverse

[13] Transcript cross-examination of Mr Carr by Mr Beatson commencing at p2645

effects. There are three examples which we have decided to mention; the meeting held at Tipapa woolshed on 17 June 2010, Mr Carr's survey of those purportedly against the proposal, and the letters he sent to hosting landowners.

[31] Initially Mr Carr was neutral about the proposal, but as he researched matters on the internet, and saw photo montages of how some of the proposed turbines might appear from Tipapa, he became concerned. Mr Carr's considerable energy became devoted to opposing the proposal.

[32] Tipapa hosted a public meeting[14] on 17 June 2010 ("**the woolshed meeting**") at which Professor Dickinson and Mr Rapley spoke. Both are opponents of wind farm developments and neither gave evidence in this case. The meeting was attended by about 125 members of the local community.[15] There was a suggestion that Meridian representatives were invited but told not to comment.[16]

[33] At this point, Mr Carr's opposition to the proposal was entrenched. He decided to survey the local community about their views. Two survey forms were sent out under cover of two separate letters dated 1 and 8 July 2010 respectively by Mr Carr.[17] Both letters contained emotive language and referred negatively to Meridian's proposal, at times in an exaggerated and incorrect way. The first letter named the hosting landowners.

[34] The results of the survey indicated a large amount of opposition to the proposal.[18] Early on in the hearing Mr Carr presented a pin map[19] he had prepared showing the results of the survey, and he contended that this showed that the whole community, not just a group of malcontents, significantly opposed the proposal.[20]

[35] Mr Carr sent a number of letters to the six hosting landowners.[21] Most were sent after the survey was undertaken. These letters when viewed as a whole can be said

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[14] Meridian Exhibit 16
[15] Transcript p2652 lines 21-24, Mr Carr
[16] Transcript p2652 lines 21-24- p2653 lines 1-10, Mr Carr
[17] Meridian Exhibit 17(a) and (b)
[18] Meridian Exhibit 17 (c)
[19] Tipapa Exhibit 4
[20] Mr Carr Opening Statement
[21] Meridian Ex 18 (a)-(d)

to be unpleasant and at times contained threatening overtones. Mr Turnbull, one of the recipients of these letters, regarded the letter of 9 July 2010 as "*almost... blackmail.*"[22]

[36] Hosting landowners received anonymous, abusive notes in their letterboxes, and some similar emails.[23] The tyres of a Meridian vehicle were anonymously slashed at an open day.[24] At one open day those present were vocally hostile to Meridian staff and their consultants.[25] It is, however, not difficult to see how, in this climate, those in support or neutral about the proposal might be tentative about making their views known to others in the community.

[37] We give the survey little weight, but in the end that matters little. The best that can be said is that a number of local people oppose the proposal. Most, but not all, of these people have formed a Society to present their views to this Court. The Society represents its members' views. Individuals who oppose (including Mr Carr for Tipapa) have appeared to represent their views. There are other views and not all are in opposition.

[22] Transcript, p 2316, lines 9-14
[23] Transcript p2314, lines 1-6
[24] Transcript p2314, lines 18-19
[25] Transcript p2500, lines 21-25

LEGAL FRAMEWORK

Consents sought

[38] The proposal requires the following consents under the relevant regional and district documents:

A. Canterbury Regional Council – the Transitional Regional Plan ("**the TRP**"); the operative Canterbury Natural Resources Regional Plan ("**the CNRRP**") and the recently notified (11 August 2012) proposed Canterbury Land and Water Regional Plan ("**the PCLWRP**"). At the regional level there are four consents[26] sought relating to discharges to air associated with concrete batching, discharges to land (stormwater/contaminants), and the storage of diesel. Earthworks are a component of these applications.

B. Hurunui District Council – the operative District Plan ("**the District Plan**"). At the district level, land use consent is required in relation to the height, scale and visibility of the proposed turbines, transmission and monitoring mast structures, construction duration, earthworks, building scale and location, signage, screening of buildings, and vehicle numbers (during construction).

[39] The consents sought under the District Plan, the TRP and the CNRRP are either restricted discretionary or discretionary activities. Under the new PCLWRP the applicable rule relating to the discharge of stormwater (Rule 5.72) has a non-complying activity status. Section 88A of the Act provides that an application continues to be processed and decided as an application for the type of activity that it was at the time it was lodged, even if a proposed plan is subsequently notified and alters the type of activity that would apply.

[26] The Regional Council referenced the applications as: CRC111342 - to discharge contaminants to air from a concrete batching plant; CRC111343 – to discharge stormwater onto land where it may enter a river, lake or artificial watercourse (This includes stormwater from roads and turbine platforms; and sediment laden water from the construction phase of the development); CRC111344 – to use land to store a hazardous substance in an above ground storage tank; and CRC111354 – to discharge contaminants onto land from a concrete batching plant

[40] It was agreed that the overall status of the proposal remains as a discretionary activity.

The RMA and relevant statutory instruments

[41] The relevant statutory considerations for a discretionary activity are set out in section 104 of the RMA, with section 104B providing for the exercise of overall discretion to grant or refuse the application. Further specific matters relating to discharges are set out under sections 105 and 107. Where consent is to be granted, then conditions may be imposed under sections 107 and 108. Of particular relevance is section 104(1) which states:

> **s104 Consideration of applications**
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[42] The RMA has a single purpose (section 5) which is as follows:

> **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 well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[43] Under section 5 we are required to make a broad overall judgment as to whether or not a proposal promotes the sustainable management of natural and physical resources. In making that judgement we are to be informed and assisted by the other sections in Part 2: being sections 6 - 8. In this case the relevant provisions are: s7(b) - the efficient use and development of natural and physical resources; s7(c) - maintenance and enhancement of amenity values; s7(f) - maintenance and enhancement of the quality of the environment; and s7(j) - the benefits to be derived from the use and development of renewable energy. Under the RMA these are all matters to which we are required to have particular regard.

[44] There are also a number of relevant statutory planning instruments to which we must have regard under s104(1)(b) of the RMA. They include the National Policy Statement for Renewable Electricity Generation 2011 ("**the NPS – Renewable Electricity**"), the National Policy Statement – Electricity Transmission 2008 and the National Policy Statement – Freshwater Management 2011[27], the operative Natural Resources Regional Plan ("**the NRRP**") and the proposed Land and Water Regional Plan ("**the proposed LWRP**"), the operative and proposed Regional Policy Statements ("**the RPS**") and the Hurunui District Plan ("**the District Plan**").

[45] It is necessary at the outset of this decision to provide an overview of the regional and district planning instruments to provide a context to the factual issues we need to consider.

Canterbury Regional Documents

Regional Policy Statements

[46] The **operative RPS** (June 1998), as to be expected of such a high level document, provides a regional overview of resource management issues. Relevant provisions:

[27] The National Environmental Standard for Sources of Human Drinking Water and the National Environmental Standard for Assessing and Managing Contaminated Soil for the Protection of Human Health are also relevant

- Provide for the relationship of Tangata Whenua with resources (Chapter 6);
- Safeguard the life-supporting capacity of soils, seek to prevent induced soil erosion and minimise the irreversible effects of land use activities on land comprising versatile soils (Chapter 7);
- Protect or enhance: natural features and landscapes that contribute to Canterbury's distinctive character and sense of identity; indigenous biodiversity (including the survival of threatened species, communities or habitats, and those unusual in, or characteristic of ,Canterbury) (Chapter 8);
- Enable the benefits from the use of water and water bodies (quality and quantity) whilst safeguarding the values and life-supporting capacity of the water (Chapter 9);
- Enable provision of network utilities while avoiding, remedying or mitigating adverse effects on the environment (Chapter 12);
- Avoid, remedy or mitigate the adverse effects of discharges of contaminants into the air (Chapter 13);
- Seek to reduce Canterbury's dependence on non-sustainable energy sources (Chapter 14);
- Enable a safe, efficient and cost-effective transport system and avoid, remedy or mitigate the adverse effects on the environment of transport (Chapter 15);
- Prevent or mitigate the adverse effects of hazardous substances (Chapter 17).

[47] The decisions on the **proposed RPS** were notified on 21 July 2012. Those decisions take effect from that date; however, in accordance with section 66 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, appeals could be made to the High Court on points of law up until 10 August 2012. Four appeals were lodged. On the last day of this hearing Ms Dysart for the CRC advised the Court that all of the appeals had been settled and settlement documents had been filed with the High Court.

[48] A number of the objectives and policies of the PRPS broadly seek the same outcomes as the corresponding provisions in the operative document. In the proposed

RPS there are more specific provisions relating to natural character values of waterways and the management of freshwater generally. There is also more direction given to identifying and protecting significant natural areas, providing for ecological enhancement and restoration, and managing biodiversity offsets. There are specific provisions seeking the identification and protection of outstanding natural features and landscapes. There are new provisions relating to the identification and management of other important landscapes (other than outstanding natural landscapes), having regard to natural character, amenity, historic and cultural heritage.[28] Chapter 16 relates to the resource management issues associated with energy. Policy 16.3.5 enables new electricity generation with a particular emphasis on renewable energy, however this is to be done while avoiding adverse effects on significant natural and physical resources, or where that is not practical, mitigated.

The operative Natural Resources Regional Plan and the proposed Land and Water Regional Plan

[49] The NRRP covers all regional planning provisions. Key objectives and policies applicable to this proposal are contained in Chapter 3 "Air Quality", Chapter 4 "Water Quality" and Chapter 5 "Water Quantity".

[50] As the proposed LWRP period for submissions closed on 5 October 2012, limited weight can given to it at this early stage. The objectives and policies are focussed on the management of water quality and quantity and seek to protect water resources. The provisions of the proposed LWRP are similar to those contained in the operative NRRP, with most of the rules setting the same environmental standards, and the objectives and policy framework seeks the same or similar outcomes for protecting the environment.

The District Plan

[51] The District Plan was initially made operative in August 2003 and was last amended in June 2012. The site is within the General Rural Management Area. There are no other planning notations affecting the site. In this regard it is relevant that the site is not identified in the District Plan as an Outstanding Landscape, nor are there any identified Significant or Potentially Significant Natural Areas within the site. The site is

[28] Proposed RPS Objective 12. 2. 2 and associated policies.

outside the identified Coastal Environment Management Area. No notable trees, heritage features or archaeological sites are identified on land that is subject to the applications. SH1 and the main trunk rail line are both designated alongside the site. SH1 is classified as a Strategic Arterial Road and Motunau Beach Road is classified as a Collector Road.

[52] Relevant provisions in the District Plan include general provisions (under Objectives 1, 2 and 3) relating to safeguarding soils, ecosystems, natural resources and the quality of the environment. Provisions under Objective 4 relate to protecting and enhancing freshwater resources, including managing the adverse effects of land use activities on water quality and quantity (Policy 4.1). Of particular relevance to this proposed wind farm are the provisions relating to Important Landscapes under Objective 7, and Environmental Amenity under Objective 10.

[53] Provisions under Objectives 11, 12 and 15 relate to Energy Production and Use, Infrastructure, and Hazardous Substances. These sections are consistent with the corresponding provisions in the regional documents. They seek to promote opportunities for the use of renewable energy resources, and the efficient production and use of energy, whilst also managing the adverse effects. Policy 12.10 seeks to promote the safe and efficient use and development of the transportation network. The management of hazardous substances is recognised as a shared-agency responsibility.

[54] Only the district wide rules in Section A of the District Plan apply to this proposal.

[55] We will refer in detail to the relevant statutory and planning provisions as they arise during our decision in the context of the issue to which they relate.

Other relevant legal principles

Burden and standard of proof

[56] Traditionally the Environment Court adopts a civil burden of proof, but in a slightly different way than might be applied in the civil courts. It has been said that there is no burden on any party, but an evidentiary burden rests on a party who makes an allegation to present evidence tending to support that allegation.[29] We agree that how the

[29] ***McIntyre & Bellsouth v Christchurch City Council*** **(1996) 2 ELRNZ 84**

Environment Court should approach the burden and standard of proof was best expressed by Judge Jackson in ***Shirley Primary School v Christchurch City Council***,[30] where he said at paragraph [136]:

> To summarise on the issues of onus and burden of proof under the Act:
>
> (1) In all applications for a resource consent there is necessarily a legal persuasive burden of proof on the applicant. The weight of the burden depends on what aspects of Part 2 of the Act apply.
>
> (2) There is a swinging evidential burden on each issue that needs to be determined by the Court as a matter of evaluation.
>
> (3) There is no one standard of proof: if that phrase is of any use under the Act. The Court can simply evaluate all the matters to be taken into account under section 104 on the evidence before it in a rational way, based on the evidence and its experience; and give its reasons for exercising its judgment the way it does.
>
> (4) The ultimate issue under section 105(1) is a question of evaluation, to which the concept of a standard of proof does not apply[31].

What about the precautionary principle?

[57] There was some discussion during the hearing by submitters about the approach that the Court should take when predicting future environmental risk, particularly in relation to the topics of noise, health[32], avifauna[33] and tourism.[34] "*The precautionary principle*" was referred to, but within the context of the RMA, we prefer to describe it as "*a precautionary approach*". Certainly in ***Shirley Primary School v Christchurch City Council*** the RMA itself was described by Judge Jackson as "*preventive, precautionary and proactive,*"[35] a statement with which we agree.

[58] The definition of "*effect*" in s3 of the RMA supports this view:

> In this Act, unless the context otherwise requires, the term *effect* includes—
> (a) any positive or adverse effect; and

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[30] [1999] NZRMA 66

[31] s105 was substituted on 1 August 2003 by s44 RMA. The relevant section now is s104B RMA

[32] Ms Meares, Final submission, 15 October 2012, paragraphs [12]-[15]; Glenmark, Transcript, page 1319, lines 23-28; Mrs McLachlan, Transcript, page 1352, lines 2-4; and Mrs Messervy, Transcript, page 159, line 5

[33] Ms Meares, Transcript, page 1848, lines 1-15

[34] Mr Pearson, Transcript, page 2140, lines 18-23

[35] [1999] NZRMA 66, page 51, paragraph [114]

(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.

[59] The assessment we are required to undertake under the RMA requires us to consider:

(a) how likely it is that there will be an effect (positive or adverse); and

(b) if an effect is likely, what the nature and impact of that effect will be.

In the overall analysis, the weight that will be given to the evidence will depend in part on the nature and impact of the effect.

What weight should be afforded to expert and lay witnesses?

[60] Under s276 of the RMA, the Environment Court may receive any evidence it considers appropriate, but that does not mean that "anything goes". A considerable amount of latitude was permitted to the submitters representing themselves to admit otherwise inadmissible evidence on the basis that the Court would be able to effectively sift the wheat from the chaff and determine what weight should be given to the evidence in contention on a particular topic.

[61] In this case, as is typical of many cases in this field, there was a significant amount of expert evidence. There was also a considerable amount of lay evidence. Bearing in mind that a large number of those who read this decision will be lay people, it is important to set out briefly the well-known principle now enshrined in the Evidence Act 2006 that a statement of opinion is not admissible in a proceeding unless it comes within the exceptions provided for in ss24 and 25 of the Evidence Act.[36] Section s25 is most relevant to this case and provides[37] that an opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain

[36] s23 Evidence Act 2006
[37] s25(1) Evidence Act 2006

substantial help from the opinion in understanding other evidence in the proceeding, or ascertaining any fact that is of consequence to the determination of the proceedings.[38]

[62] In the Evidence Act, an "*expert*" is defined as a person who has specialist knowledge or skill based on training or experience in a particular field of endeavour or study, and "*expert evidence*" means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion. An "*opinion*" in relation to a statement offered in evidence, means a statement of opinion that tends to prove or disprove a fact.[39]

[63] We accept that s276 in the RMA allows wider scope than the Evidence Act for the admission of evidence. However, we see no reason why the provisions regarding expert evidence, and in particular the definition we have referred to, should not apply

[64] Some of the parties (not represented by the Society) sought to minimise aspects of the opinions of the experts on the basis that they were theoretical, and not practical or experiential. As already outlined, many of the matters with which the Environment Court must grapple (and this case is no exception), are those that are helped by expert opinion evidence. Over the years a great number of rules have developed to ensure that the opinions expressed have a factual basis, and are not speculative, but are reasoned and sound, and can therefore be relied upon even though they are expressions of opinion.

[65] Some of these submitters also sought to present to the Court their own opinions or the opinions of others expressed in articles they had obtained off the internet, on the contested topics. There seemed to be a view that providing these articles were sourced and a copy provided, that constituted "*evidence*". The weight that should be attached to these documents is, however, a question for the Court. Many of them were arguably inadmissible in a strict sense, because they were simply expressions of a particular perspective (e.g. newspaper articles), the factual source of which was certainly able to be challenged.

[66] In ***Rangitaiki Gardens Society Ltd v Manawatu-Wanganui Regional Council,***[40] Judge Dwyer said the following in the context of that case:

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[38] s25(1) Evidence Act 2006
[39] s4(1) Evidence Act 2006
[40] 2010 NZEnvC 14 at paragraph [11]