

BEFORE INDEPENDENT HEARINGS COMMISSIONERS

UNDER the Resource Management Act
1991 (**RMA**)

IN THE MATTER of notices of requirement under
section 168 of the RMA for the
construction, operation,
maintenance and improvement
of approximately 11.5km of new
State Highway between Ashhurst
and Woodville

BY **NZ TRANSPORT AGENCY**
Requiring Authority

**LEGAL SUBMISSIONS ON BEHALF OF PALMERSTON NORTH CITY COUNCIL IN ITS
CAPACITY AS A SUBMITTER**

28 MARCH 2019

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May it please the Hearings Panel:

Introduction

1. These submissions are made on behalf of Palmerston North City Council (**Council**) in its capacity as a submitter on the NZ Transport Agency's (**NZTA**) notices of requirement (**NOR**) under section 168 of the Resource Management Act 1991 (**RMA**) for the construction, operation, maintenance and improvement of approximately 11.5km of new State Highway between Ashhurst and Woodville (**the Project**).
2. The Council made a submission on the NOR acknowledging the importance of the Project for the region, and seeking provision of a walkway/cycleway (or "shared path") as part of the Project.
3. In particular, the Council's submission on the project was driven by:
 - 3.1 the strong policy directives encouraging provision for alternative modes of transport, and in particular cyclists and pedestrians;
 - 3.2 safety concerns relating to the use of the Project alignment by alternative modes.
4. The Council has also raised the issue that not providing for walking and cycling means that the Project is not fully realising its potential benefits, and does not maximise cost efficiencies from building a shared path at the same time as the main alignment is constructed. As discussed in the Council's evidence, the benefits to walking and cycling through provision of a shared path are likely to be significant, however those potential benefits are only part of the justification for a shared path.
5. The Council's position on the NOR remains the same as it was in its submission, namely that it supports the confirmation of the NOR subject to appropriate conditions that provide for a walkway/cycleway. The additional conditions the Council seeks are reproduced in the **Appendix** to these submissions.¹
6. In considering the NOR and making its recommendation on the Project, the Hearings Panel is required to address the matters set out in section 171 of the RMA. These

¹ In particular the Council records its support for proposed conditions 26B, 26C and 26D, which were recommended by Mr Percy and Ms Coppelstone in their section 42A Planning Report.

submissions address the parts of section 171 that are relevant to the Council's submission on the Project; namely:

- 6.1 assessment of effects and relevance of Part 2 (section 171(1));
- 6.2 relevance of various policy and planning documents (section 171(1)(a) and 171(1)(d));
- 6.3 adequacy of consideration of alternatives (section 171(1)(b));
- 6.4 Project objectives (section 171(1)(c));
- 6.5 the Panel's ability to recommend modifications to the requirement and impose conditions (section 171(2)).

Assessment of effects and relevance of Part 2

- 7. In considering the NOR, the Hearings Panel is required "*subject to Part 2, [to] consider the effects on the environment of allowing the requirement*".²
- 8. These submissions focus on effects relating to the potential effects on vulnerable road users (in particular cyclists) rather than commenting on effects more generally.
- 9. The NZTA has not yet undertaken detailed design of the Project, and has not sought an outline plan waiver. There is no requirement to have done so at this stage of the Project, but a practical consequence of not having a detailed design is to limit the Panel's ability to assess some of the effects of the Project and to heighten the need for comprehensive conditions that clearly set out what the NZTA is to achieve through its detailed design process.
- 10. Although there are some details of the Project that are yet to be finalised, the Council submits that there is sufficient information to make findings about the actual and potential adverse effects of the lack of provision for road users other than vehicles. To that extent, the Council submits that the NZTA has oversimplified the approach to transport effects at paragraph [85] of its legal submissions.
- 11. In considering the effects of the Project it is highly relevant to consider the safety effects resulting from use of the road, and to seek to avoid, remedy or mitigate those effects.

2 Section 171(1), RMA.

12. The Panel’s inquiry is “subject to Part 2” of the RMA and section 5 defines sustainable management as:

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.

[Emphasis added]

13. The well-being and health and safety of people and communities are therefore at the heart of what the RMA is seeking to achieve, as is the appropriate management of adverse effects. The Environment Court has confirmed that the RMA’s purpose requires the regulation or management of the public’s health and safety, as opposed to simply *enabling* people to look after their safety. The obligation under section 5 to consider health and safety exists regardless of whether there is other legislation that regulates health and safety.³

14. *Skyline Enterprises Ltd v Queenstown Lakes District Council* is an example of the Environment Court’s approach to health and safety issues under section 5.⁴ Skyline Enterprises Ltd applied for resource consent to redevelop its gondola facilities, and the application was directly referred to the Environment Court. The Court expressed concern about the potential for fire risk, its consequences and whether there would be appropriate response management.

15. The Court accepted that the proper management of fire risk was a health and safety issue under section 5 of the RMA.⁵ This meant that unless it was satisfied that the fire risk could be properly managed, the Court could not be satisfied that granting resource consent would promote the RMA’s sustainable management purpose.⁶ In addition, the

3 *Yachting New Zealand v Tasman District Council* [2004] NZRMA 373 (EnvC) at 34; and *Dart River Safaris Ltd v Kemp*, [2001] NZRMA 433 (HC) at 54.

4 *Skyline Enterprises Ltd v Queenstown Lakes District Council* [2017] NZEnvC 124.

5 At 47.

6 At 47.

Court commented that the duties under the Health and Safety at Work Act 2015 were overarching and provided an *additional* measure of management of the fire risk, rather than negating RMA duties.⁷

16. Subsequent to the Supreme Court decision in *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd*,⁸ the High Court has found that the import of part 2 into the consideration of effects on the environment under s 171(1) has not been altered. This is because the requirements of section 171(1) are different from the section 67(3) obligation for a plan to give effect to the New Zealand Coastal Policy Statement. Further, within section 171(1), the relocation of the phrase “subject to Part 2” did not have the purpose or effect of making any material change to the meaning or application of the section.⁹
17. As discussed by **Mr Read**, the Project alignment with its provision of sealed shoulders is likely to be an appealing cycle route as compared with the Saddle Road or Pahiatua Track.¹⁰ Cyclists are legitimate users of that route and the safety of cyclists using the Project alignment is therefore a relevant effect that must be considered when assessing the effects of the Project.
18. **Mr Read’s** evidence identifies and discusses potential safety issues arising from the Project.¹¹ In particular, Mr Read discusses the Road Safety Audit undertaken by WSP Opus. That Audit recommended consideration of an off-road path or broader shoulders; identifying the risks that crashes relating to cyclists are likely to be “occasional” with a severity rating of death or serious injury as being “very high”.¹² Furthermore, in considering the design guidelines **Mr Read** identified that a facility meeting the Safe System approach has not been provided for.¹³
19. In conferencing, the transport experts agreed that sealed shoulders provide different outcomes to a separated path, and that a separated facility is safer than the use of the shoulder for vulnerable road users.¹⁴ Given the likely use of the Project alignment by cyclists, the Council considers provision of a separated facility is necessary and appropriate to mitigate the potential adverse effects of the Project.

7 At 74.

8 [2014] NZSC 38, [2014] 1 NZLR 593.

9 *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991.

10 Paragraphs [4.10]-[4.14], Mr Read’s evidence. Also refer to the Joint Statement of Transport and Social Experts, 21 March 2019, refer to page 27.

11 Refer to Section 5, in particular 5.13 – 5.17.

12 Manawatu Gorge Realignment Safety Audit, prepared by WSP Opus 2018, pages 16-17.

13 Para [3.5], and section 6 of Mr Read’s evidence.

14 Refer to page 22, Joint Statement of Transport Experts.

Relevance of policy and planning documents

20. In considering the NOR, section 171(1)(a) of the RMA requires the Panel to have particular regard to the relevant provisions of a national policy statement, regional policy statement or proposed regional policy statement, and a plan or proposed plan. Section 171(1)(d) also enables the Panel to consider any other matter necessary to make a recommendation on the requirement. This could include policy documents that are not prepared under the RMA.
21. In Part 5 of his planning evidence, **Mr Murphy** has identified a number of relevant policy statements and plans for the Panel to consider when assessing the safety effects in relation to the Project. As outlined in his evidence, those documents contain strong policy directives that encourage and support the use of alternative modes of transport (including walking and cycling) through the provision of appropriate facilities.
22. The NZTA has suggested that the driver for the provision of a cycleway is to make use of an opportunity in Te Apiti rather than adverse effects. While that is not the main or only driver, it is correct that the project presents an opportunity, and the potential benefits of such a facility are potentially significant as discussed by **Mr Vuletich** in his evidence. Furthermore, the opportunities in Te Apiti have been identified and signalled in numerous strategies and documents that are relevant under section 171(1)(d) given they relate to the governance of, and strategy in relation to, Te Apiti and its surrounds. For that reason the Council submits that the following documents are relevant to the Panel's consideration of the Project:
- 22.1 the PNCC 2018 Long Term Plan and Spatial Plan;
 - 22.2 Our Plan, The Government's Priorities for New Zealand;
 - 22.3 the Manawatu River Framework; and
 - 22.4 Accelerate 25 Regional Economic Development Programme.
23. The Planners' Joint Conferencing statement notes agreement between the planning witnesses that the following documents are relevant to the consideration of the NOR in accordance with section 171(1)(d):
- 23.1 the Government Policy Statement on Land Transport 2018 (**GPS**);
 - 23.2 the Regional Land Transport Plan (**RLTP**); and
 - 23.3 the National Land Transport Plan (**NLTP**).

24. In particular, the planning witnesses also agreed that the GPS, NLTP and RLTP are relevant to provision for walking and cycling.¹⁵ Again these documents support the development of cycling facilities, and emphasise the importance of safety.
25. The Privy Council in *McGuire v Hastings District Council* confirmed that “have regard to” requires the relevant matter to be considered separately and specifically from other relevant considerations. That is, it conveys a stronger direction than “to take into account”. As already discussed, the policy directions in the policy and planning documents encouraging provision of cycling facilities and recognition of the importance of alternative modes, and emphasising safety within the transport network, are relevant to the Panel’s recommendation on the NOR. In particular, the Council submits that the provisions of the documents identified by **Mr Murphy** in his evidence and identified in the planners’ conferencing statement should be taken into account in the design of the Project including the conditions that will attach to the designation sought.

Consideration of alternatives

26. The Council has not taken issue with the process generally followed in relation to the NZTA’s consideration of alternatives in accordance with section 171(1)(b). However, the Council does have concerns about the approach taken by the NZTA in relation to consideration of alternatives, primarily in relation to inadequacies in consideration of cycling facilities in the design of the Project¹⁶.
27. The Council agrees with the NZTA’s position that the purpose of the alternatives assessment is to inform the project for which a notice of requirement is lodged, and that any such assessment should be undertaken prior to lodgement of the NOR. However, given the limited consideration that was given to ways of providing for cyclists and walkers, the Council supports an approach that would provide a practical solution for these road users. In particular, the Council seeks a Panel recommendation that proposed condition 26D be attached to the designation, rather than asking the Panel to recommend the decline of the NOR on the basis that the alternatives assessment was not adequate.

Relationship between the Project objectives and provision of a Shared Path

28. As discussed in the NZTA’s legal submissions under section 171(1)(c) the hearing Panel is required to have particular regard to “*whether the work and designation are reasonably*

15 Refer pages 8 and 9 of the Joint Statement of Planning and Conditions Experts, 21 March 2019.

16 Refer to paras [6.1] – [6.4] of Mr Murphy’s evidence.

necessary for achieving the objectives of the requiring authority for which the designation is sought.”

29. The NZTA’s objectives for the project are:

To reconnect the currently closed Manawatu Gorge State Highway 3 with a more resilient connection.

To reconnect the currently closed Manawatu Gorge State Highway 3 connection with a safer connection than the Saddle Road and Pahiatua Track.

To reconnect the currently closed Manawatu Gorge State Highway 3 with a more efficient connection than the Saddle Road and Pahiatua Track.

30. The Council submits that a shared pathway is required for the NZTA to achieve the second objective it has set for the Project. In particular, this is because the Council submits that the proposed alignment and design of the new road would not be safe for all road users (and in particular for vulnerable users such as cyclists). In making this submission, the Council notes that the NZTA has not limited its objectives to motorised vehicles only; instead the objectives are framed in a way that makes all modes of transport relevant.

31. The second project objective specifies that there be a connection that is safer than the Saddle Road and Pahiatua Track. In relation to cyclists, the Council does not consider that this objective has been met unless a specific separated path (as required by proposed condition 26D) is provided for as part of the project. The NZTA considers that cyclists will be encouraged to use either the Saddle Road or Pahiatua Track, but as discussed by **Mr Read**,¹⁷ the continued use of those routes will still be unsafe for cyclists. In particular, this is because of the steep gradient of those roads, which have numerous corners, limited visibility and no safe shoulder to ride on.¹⁸

32. Furthermore, given the proposed layout of the project as discussed by **Mr Read**,¹⁹ the Project route is likely to be appealing for use by cyclists as compared with either the Saddle Road or Pahiatua Track, which **Mr Kennett** identified as being suitable for “fit and experienced cyclists and are mainly used by sport road cyclists and cycle tourists/bikepackers”.²⁰ As discussed by **Mr Vuletich** and **Mr Smith** in their evidence

17 Para 4.9.

18 Refer to paragraph 4.14 of **Mr Read’s** evidence.

19 Paragraphs 4.10 – 4.14.

20 Refer to paragraph [39] of **Mr Kennett’s** evidence.

there are significant plans for recreational development in Te Apiti.²¹ These projects have the potential to encourage more recreational users to use the Project alignment.

33. The project objective uses the word “safer” rather than “safe”, but it is submitted that the intention cannot have been to deliver a Project that remained unsafe for some road users even if it is technically safer than the present connection. The Council submits that if the Project still remains unsafe for vulnerable road users, the safety objective will not be achieved.

The Panel can recommend modification of the proposed designation and/or the imposition of conditions

Modification of the proposed designation boundary

34. The Hearings Panel has sought clarification as to whether it is able to alter the proposed designation boundaries. The Council agrees with the analysis set out in the NZTA’s legal submissions – namely that although the Panel may recommend modification to the proposed designation boundary, its powers to do so are constrained.²²
35. Under section 172(2) a requiring authority may modify a requirement if that modification is recommended by the territorial authority under section 171.
36. In *Takamore Trustees v Kapiti Coast District Council* the Environment Court said that “*The cancellation of a significant piece of the NOR is well beyond modifying a proposal*” in relation to the Environment Court’s powers in section 174. A territorial authority’s power to modify a designation will likely mirror that of the Environment Court due to the similarity of the relevant provisions in the RMA.²³
37. In *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* it was argued that the RMA allowed the Court to cancel or confirm a requirement, but not a mix of both. A 50% reduction in the scale of the development (or 50% cancellation) was also argued to have altered the Notice of Requirement so much that the balance that remained

21 Refer to Part 6 of his evidence. Mr Smith will discuss the Council’s commitment to completing the Manawatu River shared path that will deliver a range of cyclists to the base of the project via a separated facility to further explore the Te Apiti recreational area.

22 Refer to the Fourth Minute of the Panel.

23 [2003] 3 NZLR 496 at 37.

no longer achieved the objective of the Notice of Requirement. The High Court distinguished *Takamore Trustees Ltd*, and additionally said:

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.

38. Proposed condition 26D, i.e. the condition the Council seeks to be imposed on the designation which requires provision of a shared path, does not require the NZTA to locate walking/cycling facilities in a particular location. Rather, it specifies that a shared path is to be provided along the project route. The proposed condition leaves the detailed design of a shared path to be developed by the NZTA when it undertakes detailed design of the road alignment.
39. As there is currently no design or location of a shared path, at this stage the Council does not consider that it would be necessary for the Panel to recommend modification of the proposed designation boundary to fit this facility (if in fact that is what the Panel was considering when the question was posed to the section 42A report writers). The condition could be imposed and then the NZTA could be left, through detailed design, to determine whether modifications to the designation boundary are required or not (either as a result of provision of the shared path, provision of other mitigation and/or the alignment of the road itself).
40. As discussed in the NZTA’s legal submissions at paragraphs [66]-[69], the NZTA has not sought outline plan waiver in relation to this project. In accordance with section 176A, the NZTA will submit outline plans detailing the specific design of the project to the relevant councils for approval. The design of a shared path could be developed alongside the detailed design of the road, and the plans could then be provided to the relevant councils in accordance with the outline plan process.

Ability to recommend conditions

41. Section 171(2)(c) enables the Panel to recommend that conditions be imposed on a designation. The Panel is able to recommend proposed condition 26D requiring a walking and cycling facility, and such a condition would not be inconsistent with the requirement as notified under section 171. Case law indicates that there is a broad ability to impose a range of conditions that can change the designation, significantly in some cases.

42. As noted by counsel for the NZTA, the principles that apply to conditions on resource consents also apply to designations, namely that the conditions must:²⁴
- 42.1 be for a resource management purpose, not an ulterior one;
 - 42.2 fairly and reasonably relate to the project or work that would be authorised by the designation (in the *Estate Homes* sense of logical connection); and
 - 42.3 not be so unreasonable that no reasonable consent authority, duly appreciating its statutory duties, could have approved it.
43. The Council submits that proposed condition 26D meets the above criteria. The provision of a separated shared path as required by that condition will address the potential adverse safety effects resulting from the Project, which as discussed earlier in these submissions is clearly an RMA effect as it goes to the sustainable management purpose of the RMA. As outlined in the evidence of **Mr Read** for the Council, a separated cycle path would reduce or completely remove the chance of a high-speed collision with a vehicle.²⁵ The condition is also in accordance with the policy direction set out in the RMA planning documents identified in **Mr Murphy's** evidence.
44. A walking and cycling facility fairly and reasonably relates to the project. The Project's objectives as previously discussed are to provide a safer, resilient and efficient connection to replace the previous connection through the Manawatu Gorge. The objectives' focus is on a "connection", which includes a connection for all road users.
45. The provision of a walking and cycling facility as part of this Project is not unreasonable. The GPS and RLTP both encourage and support the use of cycleways as part of transport projects. There is clear guidance in those documents that consideration of alternative transport modes is to be encouraged where possible. Furthermore, in this case there are safety concerns that are required to be mitigated and, as agreed by the transport witnesses, provision of a separated facility is considered safer than use of the road shoulder for vulnerable users.²⁶

24 *Handley v South Taranaki District Council* [2018] NZEnvC 97

25 At 5.5.

26 Joint Statement of Transport witnesses, page 22.

Evidence in support of the Council's submission

- 46.** The Council has provided the following evidence in support of its submission:
- 46.1** Mr Shane Vuletich – economics;
 - 46.2** Mr Mark Read – transport engineering;
 - 46.3** Mr David Murphy – planning; and
 - 46.4** Mr Grant Smith – Mayor of Palmerston North City.
- 47.** For the reasons set out in these submissions, and in the evidence of the Council's witnesses, the Council requests that the Panel recommend confirmation of the NOR, subject to appropriate conditions that require:
- 47.1** provision of a separated pedestrian and cyclist facility on the Ashhurst Bridge on State Highway 3 (i.e. condition 26B proposed by the section 42A reporting planners or a condition to like effect);
 - 47.2** provision of a safe, separated contraflow shared path along the northern side of SH3 from the intersection of Cambridge Avenue to the Manawatu Gorge Scenic Reserve Car Park (i.e. condition 26C proposed by the section 42A reporting planners or a condition to like effect); and
 - 47.3** provision of a sealed contraflow cycleway and walkway along the entire length of the new road (i.e. condition 26D proposed by the section 42A reporting planners or a condition to like effect).
- 48.** The three conditions referred to above are set out in the **Appendix** to these legal submissions for ease of reference.

M G Conway / K E Viskovic

Counsel for Palmerston North City Council

28 March 2019

Appendix – section 42A report’s recommended conditions 26B, 26C and 26D

- 26B Prior to the opening of the new road, the Ashhurst Bridge on State Highway 3 must be improved to provide a separated pedestrian and cyclist facility.
- 26C Prior to the opening of the new road, a safe, separated contraflow shared path must be constructed along the northern side of SH3 from the intersection of Cambridge Avenue to the Manawatu Gorge Scenic Reserve Car Park.
- 26D No later than the opening of the new road, a sealed contraflow cycleway and walkway (“shared path”) must be in place along the entire length of the new road. The shared path must:
- a) be separated from the carriageway of the new road by, at minimum, a wire barrier.
 - b) be designed and constructed in accordance with Austroads Guide to Road Design Part 6A Appendix A Figure A1: Bicycle Path Operation Scenario C;
 - c) have a minimum sealed width of at least 3.0 metres for the entire length of the road;
 - d) in addition to c) provide a minimum width of 0.2m clearance from any barrier.