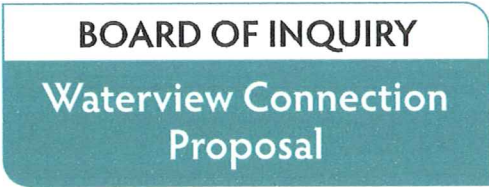


**BOARD OF INQUIRY
WATERVIEW CONNECTION PROPOSAL**



IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a Board of Inquiry appointed under s149J of the Resource Management Act 1991 to consider applications by New Zealand Transport Authority for resource consents and notices of requirement for the Waterview Connection Proposal.

Board of Inquiry members presiding:

- Judge Laurie Newhook
- Member Sue Jackson
- Member Alan dormer
- Member Ross Dunlop
- Member Sandra Hardie

**MINUTE TO THE PARTIES CONCERNING PRELIMINARY LEGAL ISSUE,
14 February 2011**

[1] As indicated to parties who were present in Court last Friday, 11 February, the Board wishes to receive submissions at an early time from any parties interested in a particular legal point.

[2] Those lodging submissions on the point are to do so by 9.30am this Friday 18 February 2011.

[3] A number of submissions concerning the proposal, seek decisions from the Board that either require directions to NZTA to undertake mitigation beyond the outside boundary or footprint of the proposed designations, or require directions to NZTA to undertake mitigation beyond that footprint. A legal issue would appear to arise in that regard.

[4] A succinct reference to the relevant issues may be found in the decision of the Environment Court in *Auckland Volcanic Cones Society Inc v Transit NZ Limited*¹, in particular

¹ [2003] NZRMA 54

at paragraphs [50], [51], and [126]. Even more particularly we note the second to last sentence in paragraph [50]:

Lastly, we have no power or authority to decide upon an alternative, our powers being merely to ascertain whether adequate consideration has been given to such alternatives.

[5] Ironically, but of no importance to the thrust of the legal issue, that decision concerns consents for the stretch of SH20 stretching up to Maioro Street, the southern point of the applications now before us.

[6] There are other decisions of the Courts on the issues.

[7] The sections of the RMA under consideration in the cases were s171 and s172.

[8] On the issues of the extent to which a consent authority may “modify” a requirement, and consider the extent to which alternatives have been considered, we hold the tentative view that the law has changed little in the last seven years, despite the reasonably significant wording changes to s171 in 2003.

[9] We have also, in preliminary fashion, considered the wording of s149P, noting, amongst other things, its cross referencing to s171. On the issue of the power to modify, we note the wording of s149P(b)(iii) “*confirm the requirement, but modify it or impose conditions on it as the Board thinks fit;*”. We have compared that latter aspect with the provisions of s172(2), and while the relevant wording in s149P appears semantically a little less constrained, we presently consider that there is no substantive difference. We tentatively hold the view that the Board is in the same position as the territorial authority in s172 concerning the extent of any modification. This is considered to be underpinned by an issue of natural justice, and that it is relevant to ask whether others than those who became submitters, might have wished to lodge a submission and become involved; that is, the effects might be different, for instance, greater on someone or on some particular aspect of the environment.

[10] By way of one simple example, if the designation boundary (footprint edge) were to be pushed out in some location pursuant to Board decision, a new row of houses could be needed to be taken. That might be to produce new effects not only on that row of houses, but also construction and operational effects being pushed towards people who were previously buffered by that row of houses.

[11] In such a scenario, however, there might remain an issue before the Board, of the extent to which NZTA might not have adequately considered alternatives, which could have its own impact on the ultimate decision-making.

[12] It occurs to us that if there is some reasonable consensus amongst parties about these aspects of law, our inquiry into certain suggested concepts and changes, might reasonably be limited or curtailed.

For the Board:



Judge L Newhook
Chairman - Waterview Connection Proposal Board of Inquiry
27 January 2011