

**BEFORE THE BOARD OF INQUIRY  
FOR THE WATERVIEW CONNECTION PROPOSAL**

**IN THE MATTER** of the Resource  
Management Act 1991

**AND**

**IN THE MATTER** of a Board of Inquiry  
appointed under s 149J of  
the Resource Management  
Act 1991 to decide notices  
of requirement and  
resource consent  
applications by the New  
Zealand Transport Agency  
for the Waterview  
Connection Proposal

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**OPENING LEGAL SUBMISSIONS FOR AUCKLAND COUNCIL AND  
AUCKLAND TRANSPORT**

**28 FEBRUARY 2011**

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## MAY IT PLEASE THE BOARD

### 1. INTRODUCTION

1.1 As the Board is aware, this hearing concerns the merits of the proposed Waterview Connection project (**the Project**). A broad overview of the Project was provided by counsel for the New Zealand Transport Agency (**NZTA**) in opening legal submissions<sup>1</sup>.

1.2 The Council and Auckland Transport support the Project in principle, subject to the effects of the Project being more appropriately or more fully mitigated. This is consistent with the Council and the Auckland Transport submissions<sup>2</sup>.

### 2. OVERVIEW OF THE ISSUES

2.1 The vast majority of the issues raised in the Council and Auckland Transport submissions have been resolved through discussions between the parties and through the expert witness caucusing prior to the hearing. These legal submissions address the key outstanding issues at this stage.

2.2 The submission by the Auckland Council and Auckland Transport also sought an upgrade to the SH16 St Lukes Interchange. This is discussed in some detail in the evidence of Mr Ian Clark on behalf of the Council and Auckland Transport. We note that this issue is no longer being pursued by the Council and Auckland Transport through the Board of Inquiry process. This is on the basis of commitments from the NZTA to advance the St Lukes Interchange as a separate project, which will include Auckland Transport involvement<sup>3</sup>.

2.3 The remaining unresolved issues are:

- (a) The provision of open space mitigation;
- (b) The connection of the State Highway 16 (**SH16**) and State Highway 20 (**SH20**) cycleways;

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<sup>1</sup> Opening Legal Submissions on behalf of the New Zealand Transport Agency, 7 February 2011, para 8-10.

<sup>2</sup> Auckland Council's submission is an amalgam of the separate submissions of the Auckland Regional Council, Waitakere City Council and Auckland City Council. Auckland Transport's submission comprises the Auckland Regional Transport Authority submission and those elements of the Auckland City Council submission that relate to its functions and powers, relating to the Auckland Transport System.

<sup>3</sup> See paragraphs 51 and 52 of Statement of Rebuttal evidence of Tommy Parker, dated 3 February 2011.

- (c) The lack of certainty in proposed condition OT.1(a) regarding the provision of bus lanes along Great North Road;
- (d) The location of the Southern Portal building;
- (e) Air quality conditions relating to emissions from the portals;
- (f) Landscape and planting maintenance period;
- (g) Mitigation in relation to Traherne Island; and
- (h) Certainty of conditions.

**2.4** Each of these issues will be discussed in further detail in the course of these submissions.

**2.5** We note that the parties are actively discussing a mitigation package relating to items 2.3(a) and (b) above (open space and cycleway mitigation), and the Council officers have arranged to place this before Councillors as an urgent matter on Tuesday, 1 March 2011. Accordingly, it is possible that the Council and Auckland Transport's position on these matters may change.

### **3. STATUTORY FRAMEWORK**

**3.1** The statutory framework overview is set out in paragraphs 86 to 104 of the NZTA's opening submissions, with the parts of section 149P of the RMA that are relevant to the Board in this hearing, set out at paragraph 88 of those submissions. It is not our intention to repeat those sections.

**3.2** However, in relation to Notices of Requirement, the NZTA submissions refer to sections 171(1)(a), (b), (c) and (d), although it is only the former three subsections that are then discussed in detail. There appears to be no elaboration on section 171(1)(d) of the RMA which requires the Board, subject to Part 2, to have particular regard to:

*any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.*

**3.3** In our submission, other matters that are relevant to the Project, include the Council's strategy and policy documents, including:

- (a) The former Auckland City Council's Open Space Framework 'Our Collective Taonga: Places for People, Places For Nature', and associated action plans;
- (b) The former Auckland City Council's Parks Plan and the Urban Forest Plan; and
- (c) The former Waitakere City Council's Waitakere Parks and Open Space Strategic Plan 2009<sup>4</sup>.

#### **4. REQUIREMENT FOR FURTHER OR DIFFERENT MITIGATION**

**4.1** As discussed in our previous memorandum of 18 February 2011, a key inquiry, when considering a notice of requirement is whether the "measures" to avoid, remedy or mitigate adverse effects are "sufficient" in the circumstances of the case. This inquiry must be made in the context of Part 2 of the RMA and, in particular, relevant section 6 and 7 matters<sup>5</sup>. This is the approach that was taken by the Environment Court in its decision *Auckland Volcanic Cones Society Inc v Transit New Zealand Ltd*<sup>6</sup>.

**4.2** As also discussed in our previous memorandum, if the Board is not satisfied that the proposed measures to address the adverse effects of the Waterview Connection Proposal are sufficient, it has the power to impose conditions or "modify" the notices of requirement under section 149P(4) of the RMA.

**4.3** Ultimately, the Board will need to weigh the adverse and positive effects of the project to determine whether it achieves the sustainable management purpose of the RMA. In this regard, at paragraph 29 of his rebuttal evidence, Mr Michael Foster stated that:

*"no major roading project has less than minor effects. The challenge has been and always will be to reasonably minimise any adverse effects in the knowledge that some adverse effects are always unavoidable"*<sup>7</sup>.

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<sup>4</sup> Discussed in section 4 of the evidence of Mr Andrew Beer on behalf of the Auckland Council, dated 17 December 2010.

<sup>5</sup> Memorandum of counsel for Auckland Council and Auckland Transport responding to the Board of Inquiry's Minute of 14 February 2011, 18 February 2011, para 7. We note that both Mr Allan and Ms Devine in their legal submissions support this.

<sup>6</sup> *Auckland Volcanic Cones Society Inc v Transit New Zealand Ltd* [2003] NZRMA 54.

<sup>7</sup> Rebuttal evidence, Mr Michael Foster, 3 February 2011, page 8.

**4.4** This may be so. But the view of the Auckland Council and Auckland Transport is that the effects have not been adequately 'minimised' in this case. Moreover, where adverse effects are "unavoidable" it may be necessary to enhance the overall benefits of the project in order to tip the balance in favour of granting consent or confirming the notices of requirement. This is particularly the case here where the directly affected communities benefit little from the Project's transport benefits.

**4.5** In our submission, further measures are required to ensure that the adverse effects of the Project, including the adverse effects on open space and on the amenity of the directly affected communities, are sufficiently avoided, remedied or mitigated.

*The NZTA's general approach to mitigation*

**4.6** The NZTA has determined its proposed mitigation on the basis of only needing to mitigate the "direct" effects of the Project. For instance, at paragraph 36 of his rebuttal evidence, Mr David Little accepts that the Phyllis Reserve bridge "*would undoubtedly provide improved connectivity for the open space network*" but goes on to say that "*the critical question is whether it provides direct mitigation for the effects of the project*"<sup>8</sup>.

**4.7** Associated with this approach is a view that the tunnel option is mitigation in itself. It is accepted that tunnelling a section of the project avoids a range of effects that would otherwise be created by a surface motorway option. However, the Board is required to consider the NZTA's current proposal (which includes a tunnel) and consider its effects on the environment, and not compare this to some other option. The tunnel is not mitigation, but instead is part of the proposed works and the adverse effects of the entire project need to be assessed and managed.

**4.8** Moreover, the evidence indicates that the NZTA's proposed mitigation measures have been significantly influenced by the monetary costs that may be involved. For example, Mr Parker discusses the costs of undergrounding the Southern Ventilation Building at paragraphs 59-61, and the costs of relocating the stack and

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<sup>8</sup> See also the Expert Caucusing Joint Report to the Board of Inquiry – Topic Open Space, dated 4 February 2011, paras 35-37. Similarly, the report states at paragraph 27 that the NZTA experts Ms Amelia Linzey and Mr David Little, consider that the SH16/20 cycleway link "*is not necessary to mitigate the open space effects of the Project because there is no existing full link affected by the project*".

further undergrounding the Northern Ventilation Building at paragraph 64, of his rebuttal evidence as follows:

*59. Mr Walter explains in his rebuttal evidence, the engineering issues associated with undergrounding the Southern Ventilation building and **estimates that the additional Project costs of doing so would be within the range of \$10 to \$25 million.***

*60. While this **may appear to be a small amount in comparison to the total project budget**, it is important to understand that the National Land Transport Fund (NLTF) is constrained. In other words, across New Zealand there are more projects awaiting funding than can be provided for within the NLTF. As such, the NZTA aims to work within its approved Project budget of up to \$2 billion for the Western Ring Route completion. This is because **any additional funds spent on this Project for additional mitigation would need to be viewed in the context that other projects around New Zealand which may need to be delayed or cancelled.***

*61. Given the implications of these extra costs on the NLTF, **the NZTA must ensure that any increased expenditure provides value for money.** In the case of undergrounding the Southern Ventilation building, the NZTA does not consider that the additional cost incurred are warranted when viewed in the context of a constrained budget, **the significant amount already being spent on mitigation by tunnelling Sector 8, and the works proposed to mitigate this aspect of the Project.***

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*64 As discussed by Mr Walter his rebuttal, the alternatives put forward by submitters would cost an additional \$18 to \$22 million to relocate the ventilation stack and in excess of \$20 million to further underground the Northern Ventilation building. **The NZTA does not consider that this will provide value for money or be able to be managed within the Project budget**<sup>9</sup>. (our emphasis)*

**4.9** Similarly, in answer to questions during cross examination in light of Ms Linzey's supplementary rebuttal evidence whether the option 3 proposal for the Southern Ventilation Building is an appropriate and preferable solution to that proposed by the NZTA, Mr Foster appeared to be of the view that the relevant question is whether the cost of the option delivers the most benefits to the Project.<sup>10</sup>

**4.10** As a result, it is submitted that the NZTA's approach to determining mitigation is too narrow. The Project will have significant adverse effects on the Waterview, Mt Albert, Owairaka and New Windsor areas in particular. In the context of a project of this magnitude it is accepted that it may not be possible to fully mitigate the effects within the Project boundaries. The fact that there are unmitigated effects associated with the Project are acknowledged by the expert witnesses. For

<sup>9</sup> Statement of Rebuttal evidence of Tommy Parker, dated 3 February 2011, pages 14-15.

<sup>10</sup> New Zealand Transport Agency Waterview Connection Proposal Transcript, 11 February 2011, pages 146-147.

example, in relation to open space, the experts agreed that the quality of passive open space is not fully mitigated<sup>11</sup> and there will be unmitigated impacts on open space in Alan Wood Reserve during construction.<sup>12</sup> Another example is where Mr Stephen Brown's rebuttal evidence acknowledges that there will be significant effects associated with the Southern Portal Buildings in the Project.<sup>13</sup>

**4.11** Therefore, in our submission, in light of the unmitigated effects of the Project including on open space and the permanent change to the landscape, a more flexible approach needs to be adopted to ensure that the Project achieves the purpose of the RMA. This may include providing additional mitigation, including in relation to open space, outside the designation boundaries where this option is reasonably available. The Council's proposals for open space and cycleway mitigation are discussed in the next section of these submissions.

## **5. OPEN SPACE**

**5.1** In their evidence Mr Andrew Beer and Mr Michael Gallagher discuss the Council's concerns with the open space mitigation package proposed by the NZTA. It is the Council's submission that the works and alternative forms of mitigation suggested in Mr Beer and Mr Gallagher's evidence would more comprehensively mitigate the effects of the Project on open space and represent a more efficient use of resources than the mitigation proposed by the NZTA.

**5.2** By way of a brief summary, the *key* components of the mitigation package that the Council now seeks as a result of the evidence expert witness caucusing are:

- (a) Upgrading of the Phyllis Street Reserve instead of NZTA's proposed sports field at Waterview Reserve and the temporary fields at Alan Wood Reserve;
- (b) Expansion of the Valonia Street Reserve, instead of the NZTA's proposed sports fields at Alan Wood Reserve; and
- (c) Construction of the Phyllis Reserve and Soljak bridges.

**5.3** In addition to the above mitigation, the Council also seeks that Construction Yard 1 at Harbourview–Orangihina Park be rotated approximately 90 degrees clockwise, into the 'rotated' Construction Yard 1 configuration shown on the plan

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<sup>11</sup> Expert Caucusing Joint Report to the Board of Inquiry – Topic Open Space, dated 4 February 2011, para 78.

<sup>12</sup> Expert Caucusing Joint Report to the Board of Inquiry – Topic Open Space, dated 4 February 2011, para 76.

<sup>13</sup> Statement of Rebuttal evidence of Stephen Brown (Visual and Landscape) on behalf of the NZ Transport Agency, dated 3 February 2011, para 44.

attached to Mr Beer's evidence as Appendix B, to reduce the impacts on the Te Atatu Pony Club<sup>14</sup>. In the Council's submission, this should occur by way of an alteration to the existing designation. In this regard, Mr Owen Burn confirmed during cross examination that it would be more appropriate to alter the designation boundaries, rather than rely on a resource consent to rotate the construction yard<sup>15</sup>. In his rebuttal evidence he also expresses the view that extending the designation boundary in this manner, would not adversely affect any parties<sup>16</sup>.

**5.4** In terms of active open space, the package of mitigation sought by the Council is consistent with its express preference for<sup>17</sup>:

- (a) Replacement sports fields to be configured with a minimum of two senior soccer fields side-by-side and located within council owned land;
- (b) Locating replacements sports fields at or adjacent to Phyllis Reserve and also near Stoddard town centre growth area.

**5.5** The mitigation package sought by the Council also mitigates some of the Project's adverse effects on passive open space. As discussed above, the experts have agreed that the effects on passive open space is not fully mitigated<sup>18</sup>.

**5.6** In addition, as agreed by the experts at witness caucusing, the Council proposal for the Phyllis Reserve bridge would enhance access (significantly improving safety) to Phyllis reserve and would contribute to a north-south cycleway<sup>19</sup>. Similarly, as agreed by the experts, the Soljak Bridge would enhance access to the Council's passive open spaces and Phyllis Reserve, and help facilitate a continuous north-south cycleway<sup>20</sup>.

**5.7** By contrast, the NZTA has developed an open space mitigation package, the makeup of which has been influenced by a "like for like" or "local replacement" approach, as opposed to a "network approach". This package fails to recognise that while the Council did support a 'local replacement' approach for open space generally, it specifically sought a network approach for formal sports fields. With respect to sports fields, Mr Little has acknowledged under cross-examination the

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<sup>14</sup> Statement of evidence of Mr Andrew Beer on behalf of the Auckland Council, dated 17 December 2010, para 6.16.

<sup>15</sup> New Zealand Transport Agency Waterview Connection Proposal Transcript, 18 February 2011, page 484

<sup>16</sup> Rebuttal evidence of Mr Cedric Owen Burn (Resource Consents) on behalf of the NZ Transport Agency, dated 3 February 2011, para 20.

<sup>17</sup> Minutes of the meeting of the Auckland City Transport Committee of 6 May 2010, referred to the statement of evidence of David Little (Open Space) on behalf of the NZ Transport Agency, dated 12 November 2010, at footnote 15.

<sup>18</sup> Expert Caucusing Joint Report to the Board of Inquiry – Topic Open Space, dated 4 February 2011, para 78.

<sup>19</sup> Expert Caucusing Joint Report to the Board of Inquiry – Topic Open Space, dated 4 February 2011, para 35.



advantages in the network approach and accepted that this approach was not progressed because of an understanding that the community preferred a local replacement approach<sup>21</sup>.

**5.8** Contrary to the suggestion in the NZTA evidence and submissions, there is no evidence of any significant division within the community in relation to the open space mitigation proposed by the Council. As we understand it, both the Local Board and Mr Allan's clients support the Council's proposed open space package.

**5.9** In addition, the current NZTA mitigation package envisages new/modified open space that will be vested in, controlled and maintained by the Council. Accordingly, it is submitted that the Council's preference and current network approach for managing these resources is highly relevant. We note that in this regard the Open Space caucusing states that:

*All agree that because sportsfields are a regional resource, we could mitigate the loss of one location with provision in another area.*<sup>22</sup>

*All accept that co-locating fields at Phyllis Reserve and Valonia is desirable from a Council operation perspective.*<sup>23</sup>

**5.10** Therefore, overall there appears to be general consensus about the desirability of the Council's mitigation proposal.

## **6. CYCLEWAY**

**6.1** The Council and Auckland Transport's expert, Mr Ian Clark, considered that the additional measure of the completion of a cycleway along SH20, connecting to the SH16 cycleway should be included as part of the Project<sup>24</sup>.

**6.2** The proposed NZTA mitigation package does not include a connection between the existing State Highway 16 and 20 cycleways, which was also expressly sought in the Auckland Council / Auckland Transport submissions. The NZTA view is that the cycleway connection is not required as mitigation because the project does not interfere with any of the existing cycleway.

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<sup>20</sup> Expert Caucusing Joint Report to the Board of Inquiry – Topic Open Space, dated 4 February 2011, para 38

<sup>21</sup> New Zealand Transport Agency Waterview Connection Proposal Transcript, 18 February 2011, pages 511-512.

<sup>22</sup> Expert Caucusing Joint Report to the Board of Inquiry – Topic Open Space, dated 4 February 2011, para 53.

<sup>23</sup> Expert Caucusing Joint Report to the Board of Inquiry – Topic Open Space, dated 4 February 2011, para 54.

<sup>24</sup> Statement of Evidence of Ian David Clark on behalf of the Auckland Council and Auckland Transport, dated 17 December 2010, paragraphs 8.1-8.17.

- 6.3** The experts that attended the Open Space caucusing, on 4 February 2011, agreed in relation to connectivity, that the completed cycleway would be beneficial in providing the missing link between SH20 and SH16 and provide access to a number of open spaces<sup>25</sup>. They agreed that there would be open space benefits if the cycleway could be constructed as early as possible through Sectors 7 and 9 subject to consideration of user safety and construction sequencing<sup>26</sup>.
- 6.4** At the Transport caucusing on 3 February 2011, the expert witnesses agreed that while the Waterview Project does not create an adverse transport effect that requires a cycle link as a mitigation measure, such a cycleway would advance some of the Project objectives<sup>27</sup>.
- 6.5** Similarly, during cross examination, Mr Parker acknowledged that the provision of a cycleway in sector 8 could have transport and open space connection benefits<sup>28</sup>. Also, subject to the design of the cycleway, Mr Andrew Murray acknowledged during cross examination that one of the benefits of providing a cycleway was that it was likely to provide a safer environment for cyclists than the road, and completion of the link between the existing State Highway 16 and 20 cycleways was likely to attract more people to the cycleway<sup>29</sup>.
- 6.6** Overall it is submitted that there appears to be general consensus between the parties' witnesses about the benefits of the cycleway connection. Where the parties disagree, is in relation to whether the cycleway should be provided for as part of the mitigation for this Project. In our submission the cycleway connection should be included as part of the Project as it will create connections that go some way towards mitigating the impacts on open space and on the local community generally.
- 6.7** If the Board agrees with the Council and Auckland Transport's view that the cycleway connection should be provided as part of an offset mitigation package, it is further submitted that any issues as to the proposed route for the cycleway can be resolved via an appropriate condition of consent. As will be discussed in the next section of these submissions, it is possible to include a condition of consent that addresses landowner consent and any applications for resource consents that may be necessary to facilitate the cycleway connection.

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<sup>25</sup> Expert Caucusing Joint Report to the Board of Inquiry – Topic Open Space, dated 4 February 2011, para 24.

<sup>26</sup> Expert Caucusing Joint Report to the Board of Inquiry – Topic Open Space, dated 4 February 2011, para 26.

<sup>27</sup> Expert Caucusing Joint Report to the Board of Inquiry – Topic Transport, dated 3 February 2011, page 6.

<sup>28</sup> New Zealand Transport Agency Waterview Connection Proposal Transcript, 11 February 2011, page 159.

## 7. REQUESTED RELIEF FOR OPEN SPACE/CYCLEWAYS

7.1 In relation to the open space and cycleway mitigation discussed above, the Council seeks additional conditions that will provide for the following:

- (a) **Waterview Park.** Developing Waterview Park as a passive/informal recreation area in general accordance with Appendix D of Mr Beer's evidence.
- (b) **Phyllis Street Reserve.** Upgrading of the Phyllis Street Reserve in general accordance with Annexure C of Mr Gallagher's evidence.
- (c) **Valonia Reserve.** Expanding and developing Valonia Reserve in general accordance with Annexure A to Mr Gallagher's evidence.
- (d) **Cycleway connection.** Completion of a cycleway in Sector 8 connecting the SH20 and SH16 cycleways.

7.2 The open space mitigation sought by the Council is in lieu of the NZTA's proposals for Waterview Park and the sports fields at Alan Wood Reserve.

7.3 The NZTA suggests that the mitigation sought by the Council and Auckland Transport may not be able to be provided. It is acknowledged that some of the relief sought by the Council and Auckland Transport would require works to be undertaken outside of the proposed designation boundaries. However, the Council does not agree that the mitigation cannot be provided due to NZTA not owning/controlling the land involved and/or potentially because further resource consents are required.

7.4 Such a position appears to be contrary to the case law. For instance, in *Westfield (NZ) Limited v Hamilton City Council* 10 ELRNZ 254, at paragraph 56, the Court made the following observation:

*"On the other hand, a condition precedent which defers the opportunity for the Applicant to embark on the activity until a third party carries out some independent activity is not invalid. There is nothing objectionable, for example, in granting planning permission subject to a condition that*

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<sup>29</sup> New Zealand Transport Agency Waterview Connection Proposal Transcript, 11 February 2011, page 68.

*the development is not to proceed until a particular highway has been closed, even though the closing of the highway may not lie within in the powers of the developer".*

**7.5** In our submission, it is possible for conditions to be imposed that require mitigation measures outside of the designations' boundaries. If required, such conditions could be drafted so as to be conditional upon landowner consent and/or obtaining of any necessary resource consents. In this case, we are instructed that the Council as the existing and future landowner of Waterview Park, Phyllis Street Reserve and the Valonia Reserve is prepared to consent to any necessary works. It is also prepared to assist in the obtaining of any necessary resource consents and land.

**7.6** In our submission, this formulation is no different in principle to the NZTA's approach to the conditions concerning Saxon Reserve and Howlett Reserve where:

- (a) In both cases the NZTA does not own the land involved.
- (b) In the case of Saxon Reserve, further resource consents are required.
- (c) The conditions sought by the NZTA in these cases only apply "where practicable" i.e. allowing for circumstances where implementation of the condition is not practicably possible.

**7.7** In the alternative, conditions of consent could require the payment of funds to the Council so that it can undertake the works at the Valonia Street and Phyllis Street Reserves itself.

**7.8** Under section 149P(4)(b)(iii) of the RMA the Board has the power to "impose conditions...as the board thinks fit". In our submission, the key requirement is that any conditions of consent or designation imposed should meet the following tests of being:

- (a) "logically connected" to the project<sup>30</sup>;
- (b) for a resource management purpose<sup>31</sup>;

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<sup>30</sup> *Waitakere CC v Estate Homes Ltd* [2007] NZRMA 137, para 66.

<sup>31</sup> *Newbury DC v Secretary of State for the Environment* [1981] AC 578, [1980] 1 All ER 731.

- (c) not so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it<sup>32</sup>.

**7.9** In relation to the requirement for conditions to be 'logically connected' to a project, the Supreme Court has held that:

*"...the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development."<sup>33</sup>*

**7.10** In the circumstances of that case, the Court went on to state:

*"This limit on the scope of the broadly expressed discretion to impose conditions under section 108 is simply that the council must ensure that conditions it imposes are not unrelated to the subdivision. They must not, for example, relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision. Such a relationship of causal connection may, of course, be required by the statute conferring the power to impose conditions, but s 108(2) does not do so<sup>34</sup>."*

**7.11** In light of these tests, we submit that any appropriately drafted conditions requiring the mitigation measures sought by the Council and Auckland Transport would be valid because:

- (a) The conditions would be "logically connected" to the NZTA Project as they seek to address the effects of the Project on both active and passive open space, by replacing lost facilities and providing connections between the remaining open spaces.
- (b) The conditions would be for a resource management purpose in that they are intended to address the effects of the Project. Such conditions would also be a more efficient use of resources, and would enhance the amenity of the environment in accordance with section 7 of the RMA.
- (c) The conditions are not so unreasonable that the Board could not approve them, in light of the evidence about their desirability and

<sup>32</sup> *Newbury DC v Secretary of State for the Environment* [1981] AC 578, [1980] 1 All ER 731.

<sup>33</sup> *Waitakere CC v Estate Homes Ltd* [2007] NZRMA 137, para 66.

benefits and they would provide offset mitigation for the acknowledged unmitigated effects.

**7.12** In our submission, there is no jurisdictional impediment to the Board imposing the conditions sought by the Council and Auckland Transport.

## **8. BUS LANES**

**8.1** As outlined in the evidence of Mr Clark, the submission by the former Auckland City Council sought the provision of a new northbound bus lane on Great North Road, between Oakley Avenue and the Waterview Interchange. Mr Clark discusses the proposed bus lane in paragraphs 7.1-7.9<sup>35</sup> of his evidence, concluding that he supports the inclusion of a northbound bus lane on Great North Road, approaching the SH16 Waterview Interchange (including a shared pedestrian/cycle path)<sup>36</sup>.

**8.2** We understand from the rebuttal evidence of Mr Tommy Parker and the letter to Mr Peter Clark of 17 December 2010 attached as Annexure C to his evidence, that the NZTA agrees to implement bus lane markings along any portions of Great North Road that will require reinstatement as part of the project<sup>37</sup>. In addition, during cross-examination, Mr Parker confirmed that it is NZTA's intention to provide bus lanes where possible<sup>38</sup>.

**8.3** However, proposed condition OT.1(a) simply requires the NZTA to prepare (in collaboration with Auckland Transport) a "Network Integration Plan" that will "consider and identify opportunities to progress bus priority measures...on Great North Road between Oakley Avenue and the Great North Road Interchange (northbound)....". In our submission, this condition provides no certainty that bus lanes will be implemented along Great North Road.

**8.4** The NZTA's commitment to the provision of bus lanes along Great North Road should, in our submission, be clearly reflected in the conditions applying to the designation. For instance, condition OT.1 could be amended to state that the

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<sup>34</sup> *Waitakere CC v Estate Homes Ltd* [2007] NZRMA 137, para 66.

<sup>35</sup> Statement of Evidence of Ian David Clark on behalf of Auckland Council and Auckland Transport, dated 17 December 2010, paras 7.1-7.9.

<sup>36</sup> Statement of Evidence of Ian David Clark on behalf of Auckland Council and Auckland Transport, dated 17 December 2010, paras 7.1-7.9.

<sup>37</sup> Rebuttal evidence of Tommy Parker (Statement Highway Manager) on behalf of the NZ Transport Agency, dated 3 February 2011, para 49.

<sup>38</sup> New Zealand Transport Agency Waterview Connection Proposal Transcript, 11 February 2011, page 67.

Network Integration Plan will include the provision by the NZTA of bus lanes on those sections of Great North Road that require reinstatement.

## **9. LOCATION OF SOUTHERN PORTAL BUILDING**

**9.1** As the Board is aware, the effects arising from the location of the Southern Portal building were considered during caucusing in relation to landscape and visual design matters.

**9.2** Subsequent to the filing of the submitters' evidence and discussions at caucusing, Mr Andre Walter in his rebuttal evidence refers to three additional options for the Southern Portal building. The options set out in his evidence are:

- (a) Option 1 – Southern Ventilation building within a deep cut with surface access ramps;
- (b) Option 2 – Southern Ventilation building placed partially underground; and
- (c) Option 3 – Southern Ventilation building within a deep cut and within surface access and gantry buildings<sup>39</sup>.

**9.3** In light of the supplementary rebuttal evidence of Ms Amelia Linzey, that Option 3 provides the greatest opportunity for environment benefits compared with the 'base option'<sup>40</sup>, the Council and Auckland Transport consider that it would be appropriate for this option to be implemented as it better mitigates the effects of the Project. This option is consistent with the view expressed by the Council's witness, Mr Dennis Scott at caucusing that without access to the roof, the movement of the building and stack 80m to the southeast would create better connectivity between the open spaces of Alan Wood Reserve and would reduce the impacts on the pinch point around the Avondale Motor Camp and cycleway<sup>41</sup>.

## **10. AIR QUALITY**

**10.1** A high level of agreement has now been reached between the air quality experts, as outlined in their caucusing statement dated 28 January 2011<sup>42</sup>. The key

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<sup>39</sup> Rebuttal evidence of Andre Walter (Construction) on behalf of the NZ Transport Agency, dated 3 February 2011, para 45.

<sup>40</sup> Supplementary Rebuttal evidence of Amelia Linzey on behalf of the NZ Transport Agency, dated 9 February 2011, para 16.

<sup>41</sup> Joint Caucusing Report of landscape and visual design expert witnesses, 4 February 2011, page 7.

<sup>42</sup> Expert Caucusing Joint Report to the Board of Inquiry – Topic Air Quality, 28 January 2011.

unresolved issues relate to the proposed conditions dealing with emissions from the portals (when the tunnel ventilation system is turned off).

**10.2** In his rebuttal evidence, Mr Gavin Fisher now suggests condition OA.7 which establishes an air quality performance standard<sup>43</sup>. While she supports condition OA.7, it is Ms Petersen's view that it requires continuous monitoring to ensure that it is not breached and that remedial actions (e.g. turning the tunnel ventilation system on) are triggered. Further, Ms Petersen considers that a performance standard should be set for PM<sub>2.5</sub>.

**10.3** As the Board is aware, Ms Petersen lodged a supplementary brief of evidence on 24 February 2011, and subsequently in response to directions from the Board, prepared the following proposed conditions.

*OA.7. The tunnel ventilation system shall be designed and operated to ensure that any air emitted from the tunnel portals:*

- (a) does not cause the concentration of nitrogen dioxide (NO<sub>2</sub>) in ambient air to exceed 200 µg m<sup>-3</sup>, expressed as a rolling 1 hour average; and*
- (b) does not cause the concentration of PM<sub>2.5</sub> in ambient air to exceed 25 µg m<sup>-3</sup>, expressed as a 24 hour average,*

*at any point beyond the designation boundary that borders an air pollution sensitive land use.*

*OA.8. In addition to the two ambient monitoring sites required by condition OA2, the NZTA shall establish an ambient air quality monitoring site to demonstrate compliance with condition with OA.7. The location, operation and maintenance schedules of the monitors shall, as far as practicable, comply with the requirements of AS/NZ 3580.1.1:2007 Method for Sampling and Analysis of Ambient Air – Guide to Siting Air Monitoring Equipment, and with methods specified in the National Environment Standards. This monitoring shall continue indefinitely, unless the NZTA can provide evidence to the satisfaction of the Auckland Council that this is no longer necessary.*

**10.4** In the Council's submission the additional conditions proposed by Ms Petersen are necessary to ensure that air quality of emissions when the tunnel ventilation system is turned off is adequately maintained.

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<sup>43</sup> Rebuttal evidence of Gavin Fisher (Air Quality) on behalf of the NZ Transport Agency, dated 3 February 2011, para 52.



## **11. LANDSCAPE AND PLANTING MAINTENANCE PERIOD**

### *Condition LV.4*

**11.1** At the expert caucusing in relation to landscape and visual design matters, the experts all agreed that

*(a) The maintenance period set out in Condition LV5 should be increased from 2 years to 10 years (Note: this aligns with the DCMO contract timeframe);*

*(b) It is important to ensure the management plan approach, as promoted in the conditions of consent, is rigorous in order to ensure "best practice" implementation;*

*(c) A commitment to the community and Auckland Council involvement in the future decision making and design and management plan formulation is addressed in Condition SO12. This condition should be amended to limit input in accordance with the mitigation shown in the UDL Plans.<sup>44</sup>*

**11.2** We understand that the NZTA has rejected this and instead decided that the condition should only require 5 years of maintenance<sup>45</sup>. No reasons have been given as to why the experts' view has been rejected. Accordingly, in the absence of any expert evidence to the contrary, we submit that condition LV.4 should refer to a 10 year timeframe as agreed between the experts at witness caucusing.

## **12. TRAHERNE ISLAND**

**12.1** Based on the evidence of the Council's ecology expert, Dr Andrea Julian, the Council remains concerned that the loss of eco-tones (sequences) of vegetation from Traherne Island is not being fully mitigated by the proposed replacement planting at Eric Armishaw Park,

**12.2** Accordingly, the Council seeks that further mitigation of the adverse effects on Traherne Island is undertaken<sup>46</sup>.

## **13. CERTAINTY OF CONDITIONS**

**13.1** Aspects of the conditions currently proposed by the NZTA are, in our submission, too uncertain. These concerns are discussed in Ms Richmond's planning evidence<sup>47</sup>.

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<sup>44</sup> Joint Caucusing Report of landscape and visual design expert witnesses, 4 February 2011, page 11.

<sup>45</sup> New Zealand Transport Agency Waterview Connection Proposal Transcript, 15 February 2011, page 224.

<sup>46</sup> Statement of Evidence of Dr Andrea Julian on behalf of the Auckland Council, dated 17 December 2010, paras 3.5 and 6.1.

**13.2** The first key issue is that there is significant reliance on the future approval by the Council of various "*management plans*". This is driven by the NZTA's desire for flexibility over the final design and construction of the Project. The need for flexibility is understood. However it is submitted that the environmental outcomes (to be implemented through the management plans) need to be described in the conditions. This means that the Board can be confident that the effects of the project are known and that, when 'certifying' or 'approving' the management plans, the Council will not be authorising something materially different. As the Court said in *Wood v West Coast Regional Council*<sup>48</sup>.

*"... a management plan can be required to be prepared pursuant to s 108(3) of the Act, but its purpose should be to provide the consent authority and anyone else who might be interested, with **information about the way in which the consent holder intends to comply with the more specific controls or parameters laid down by the other conditions of consent.** So, for example, in the case of noise, specific noise control limits can be laid down by the way in which these are to be complied with is for the consent holder who can be required to provide a management plan containing information about the method of compliance. However, because technology might change over time the consent holder should have the ability to change the management plan without having to go through the process of seeking a change to the conditions of consent."*<sup>49</sup> (emphasis added)

**13.3** A second issue of concern, is that a number of the conditions are subject to the qualifier "*where practicable*". This terminology is used to provide an "out" when full or strict compliance with the condition is not practicably possible. In some cases the terminology is acceptable e.g. where strict compliance to meet a height or distance restriction may not be possible or where the condition provides an alternative where compliance is not practicable. However, in this case the terminology used creates a range of issues. For instance:

- (a) Does compliance with a condition become impracticable because it is too costly for the requiring authority?
- (b) How hard does the requiring authority have to try to comply with the condition?

**13.4** In our submission, it is likely that these issues can be addressed by:

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<sup>47</sup> Statement of Evidence of Tania Evelyn Richmond on behalf of the Auckland Council, dated 21 December 2010, paras 6.8, 6.10 and 6.11.

<sup>48</sup> *Wood v West Coast Regional Council* [2000] NZRMA 193.

<sup>49</sup> *Wood v West Coast Regional Council* [2000] NZRMA 193, at 197, para 19.

- (a) Further caucusing of the relevant experts to refine the scope of any further management plan approvals and/or to develop condition wording to reduce the need for references to "where practicable"; or
- (b) More application of the outline plan process.

#### **14. AUCKLAND COUNCIL AND AUCKLAND TRANSPORT WITNESSES**

**14.1** The Council and Auckland Transport propose to call 14 witnesses. The witnesses to be called are:

- (a) Ian Clark (Transport):
- (b) Nevil Hegley (Noise):
- (c) Andrew Stiles (Groundwater and Settlement):
- (d) Anthony Cussins (Contamination):
- (e) Dominic McCarthy (Coastal):
- (f) Hayden Easton (Stormwater):
- (g) Janet Petersen (Air Quality):
- (h) Dennis Scott (Landscape):
- (i) Andrew Beer (Open Space):
- (j) Michael Gallagher (Open Space):
- (k) Marion Stuteley (Heritage):
- (l) Andrea Julian (Ecology):
- (m) Peter Anderson (Herpetofauna):
- (n) Tania Richmond (Planning):

#### **15. CONCLUSION**

**15.1** In our submission, the Council and Auckland Transport's evidence establishes that further mitigation measures and changes to the proposed conditions are necessary to sufficiently address the adverse effects of the Project. Subject to the further mitigation sought by the Council and Auckland Transport and changes to conditions being provided as discussed above, the Council and Auckland Transport supports the confirmation of the notices of requirement and granting the resource consents necessary for the Project.

**DATED** this            day of                                2011

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Counsel for Auckland Council and Auckland  
Transport