

**BEFORE THE BOARD OF INQUIRY  
WATERVIEW CONNECTION PROJECT**

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

**AND**

**IN THE MATTER** a Board of Inquiry appointed under s149J of the Resource Management Act 1991 to decide notices of requirement and resource consents applications by the NZ Transport Agency in relation to the Waterview Connection Project

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**MEMORANDUM OF COUNSEL ON BEHALF OF  
ALBERT EDEN LOCAL BOARD  
IN RESPONSE TO MINUTE FROM THE BOARD CONCERNING A  
PRELIMINARY LEGAL ISSUE**

**DATED 18 FEBRUARY 2011**

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**LAWYERS**

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## **Memorandum of Counsel in response to Minute of the Board of Inquiry**

### **1. Introduction**

1.1 The Board of Inquiry has directed that parties interested in the legal point raised in the Board's minute dated 14 February 2011 are to lodge responses by 9.30am on 18 February 2011. Counsel for Albert Eden Local Board provides the following response to that minute.

### **2. Jurisdiction to consider alternative sites, routes, or methods**

2.1 In respect of the New Zealand Transport Agency's Notices of Requirement (**requirements**) counsel acknowledges that the Board, as the relevant authority, is bound by the same jurisdictional constraints as the Environment Court was in *Auckland Volcanic Cones Society Incorporated v Transit New Zealand Limited*,<sup>1</sup> referred to in the Board's minute and upheld by the High Court.<sup>2</sup>

2.2 In accordance with those decisions the Board has jurisdiction to consider whether adequate consideration has been given to alternative sites, routes, or methods. It cannot recommend alternative sites or routes. In the *Volcanic Cones* case, the High Court found that the Environment Court had undertaken this exercise and had found that none of the alternatives were reasonably acceptable.<sup>3</sup>

### **3. The ability to modify or impose conditions on requirements**

3.1 The Board also has clear jurisdiction to modify a requirement.<sup>4</sup>

3.2 In light of *Volcanic Cones* a question may therefore arise as to whether a proposed change is due to the promotion of an alternative or a modification arising from consideration of all matters set out in section 171(1) of the Resource Management Act 1991 (**RMA**).<sup>5</sup> There is jurisdiction for the latter but not the former.

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<sup>1</sup> [2003] NZRMA 54.

<sup>2</sup> *Auckland Volcanic Cones Soc Inc v Transit NZ* [2003] NZRMA 316 (HC).

<sup>3</sup> Paragraph [56].

<sup>4</sup> Section 149P(4)(b)(iii) of the RMA provides that the Board may modify the requirement or impose conditions on the requirement.

<sup>5</sup> A Board of Inquiry is required, under s149P(4)(a) of the RMA to have regard to the matters in s171(1) as if it were the territorial authority.

- 3.3 It is submitted that it would be incorrect to interpret “modify” in section 149P(4)(b)(iii) to exclude modifications to a requirement arising from consideration of section 171(1) matters. That would make the word nugatory.
- 3.4 The Environment Court considered what is meant by the term “modify” in *Quay Property Management Ltd v Transit NZ*.<sup>6</sup> The Court applied a dictionary definition of modification, being “an act of making changes to something without altering its essential nature or character”.<sup>7</sup> It found that an entirely new alignment did not accord with the definition; it was considered to be an alteration.
- 3.5 This definition was again applied by the Environment Court in *Alan Hope t/a Victoria Lodge v Rotorua District Council*.<sup>8</sup> The Environment Court noted that its power to modify a requirement does not have any explicit limitations.<sup>9</sup> It held that if the changes sought are minor, there is a lessening of environmental impact, and the affected landowners remain unchanged, then it could make a modification to an alignment.<sup>10</sup> In that case, the modification contemplated related to 15% of the route alignment.
- 3.6 An approach which allows for decisions regarding modifications but not alternatives is supported by the logical order of the different assessments undertaken within sections 149P and 171. The assessment as to whether adequate consideration has been given to alternatives is undertaken when considering the effects of the requirement on the environment. If the Board considers that there are adverse effects which have not been adequately avoided, remedied or mitigated it can then decide to cancel the requirement, modify it or impose any conditions “that the Board thinks fit”.<sup>11</sup> Its decision will follow from the Board’s conclusions on the effects of the proposal.
- 3.7 In conclusion, it is submitted that, provided any modifications made by the Board do not alter the essential nature or character of the proposed works, then the Board has jurisdiction to require them.

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<sup>6</sup> *Quay Property Management Ltd v Transit NZ* EnvC W28/2000 (Judge Kenderdine).

<sup>7</sup> Paragraph [167].

<sup>8</sup> [2010] NZEnvC 7 at paragraph [40].

<sup>9</sup> Paragraph [40].

<sup>10</sup> Paragraph [41].

4. **Proposed mitigation measures beyond the outside boundary of the proposed designations**

4.1 It is respectfully submitted that it is not relevant whether the proposed mitigation measures are within the boundary of the requirements, only that they are for a proper purpose and accord with the *Newbury* principles. These principles have been accepted as being applicable to conditions imposed on designations.<sup>12</sup>

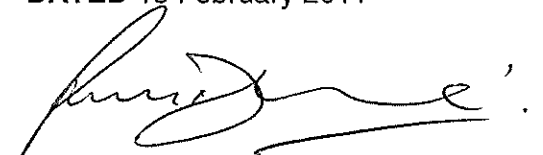
4.2 It is also noted that the Agency has itself proposed, and sought to rely upon mitigation measures outside the boundary of the requirements in order to mitigate effects of the proposal.<sup>13</sup>

5. **Affected persons**

5.1 The Board has also expressed concern about the extent to which it can impose mitigation measures which may impact on different persons than those affected by the original proposal.<sup>14</sup>

5.2 The approach of the Board of Inquiry,<sup>15</sup> to ensure its actions are underpinned by principles of natural justice, is appropriate. That is, if a modification is proposed that would either create new adverse effects that are more than minor, or would increase the proposed adverse effects, then the question should be whether others than those who became submitters, might have wished to lodge a submission and become involved if they had been aware of the effects. This approach is also consistent with the approach of Judge Smith in the *Alan Hope* case, where the affected landowners remained the same.

**DATED** 18 February 2011



R M Devine  
Counsel for the Albert Eden Local Board

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<sup>11</sup> Section 149P(4)(b).

<sup>12</sup> *Wymondley Against the Motor Way Action Group v Transit New Zealand* (ENC, 24/02/03) at paragraph [10].

<sup>13</sup> These mitigation measures include enlarging the open space at Saxon and Howlett Reserves.

<sup>14</sup> Paragraph [9] of the minute.

<sup>15</sup> Paragraph [9] of the minute.